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COLORADO, MONTANA, ARIZONA, NEVADA, IDAHO, WYOMING
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WITH TABLE OF PACIFIC CASES IN WHICH REHEARINGS
HAVE BEEN DENIED

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⁵ Became Chief Justice January 1, 1911.

⁶ Retired January 9, 1911.

⁷ Elected November, 1910.

⁸ Ceased to be Chief Justice January 2, 1911.

⁹ Became Chief Justice January 2, 1911.

¹⁰ Ceased to be Chief Justice January 10, 1911.

¹¹ Became Chief Justice January 10, 1911.

¹² Elected Judge January 9, 1911.

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(xv)†

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LIVESLEY et al. v. KREBS HOP CO.

(Supreme Court of Oregon. Dec. 13, 1910.)

1. SALES (§ 418*)—BREACH OF CONTRACT—REMEDIES.

Where a seller refused to acquiesce in the buyer's attempt to cancel the contract of sale before any payment was made thereon, and recovered judgment for advance payments overdue, the buyer, refusing to recognize the contract as binding, could not compel an accounting after a resale of the goods by the seller on the theory that he could recover on the basis of the value of the goods on the date fixed for delivery, so that he could not enjoin enforcement of the judgment against him. (Affirmed by equally divided court.)

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1174, 1195; Dec. Dig. § 418.*]

2. APPEAL AND ERROR (§ 1123*)—EQUAL DIVISION OF COURT—EFFECT.

Where the Supreme Court is equally divided, the decree of the trial court is affirmed.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1123.*]

Eakin and McBride, JJ., dissenting.

On rehearing. Former decision affirmed.
For former opinion, see 107 Pac. 460.

KING, J. After a careful re-examination into the merits of this cause on rehearing, we are unable to recede from our views as expressed in our former opinion. If there is any error in the proceedings, it is the sustaining of the judgment entered in the first instance. The writer is inclined to the view that plaintiff in that proceeding should have been required to sue in tort and not on contract, as was done in the subsequent action, in which the judgment was sustained on appeal. See *Krebs Hop Co. v. Livesley*, 104 Pac. 3. But this remedy, the court held, was not insisted upon in the trial court; hence waived. *Krebs Hop Co. v. Livesley*, 51 Or. 527, 92 Pac. 1084. Whatever may now be our view upon this question of practice is unimportant, for the rule there announced, as held in the case first cited, has become the law of this case, to avoid which no remedy is available. To sustain the contention that defendant, at the date for delivery mentioned in the contract, was obliged to offer to deliver the

hops, would amount to an overruling of all the previous decisions of this court cited in our former opinion herein, to the effect that an offer after its refusal is unnecessary, as well as to disregard the rules announced in the two decisions above cited. That this should not be done is elementary. The rules by which the duty of a seller toward a buyer repudiating a contract of the class giving rise to this controversy is determined is clearly and concisely stated by Mr. Justice Martin, who in the case of *Moore v. Potter*, 155 N. Y. 481, 50 N. E. 271, 63 Am. St. Rep. 692, in speaking for the court, says: "It is well established by the decisions of this court that a vendor of personal property, when the vendee has declined to take the property and pay for it, ordinarily has the choice of any of three methods to indemnify himself against loss: (1) He may store or retain the property for the vendee and sue him for the entire purchase price. (2) He may sell the property and recover the difference between the contract price and the price obtained upon a resale. Or (3) he may keep the property as his own, and recover the difference between the market value at the time and place of delivery and the contract price." Had defendant, after awaiting the actual sale of the hops (which sale, under the circumstances, was made within a reasonable time), brought an action for damages against plaintiffs, then plaintiffs might have availed themselves of the defense that the market price on the date of contemplated delivery was adequate to offset the claim, and thereby have constituted a defense thereto, but that is not the situation here. Should we assume, as contended by plaintiffs, that the property was not retained by defendant for plaintiffs, then, as indicated in the action in which this judgment was procured, the remedy should be an action for damages. Under all the adjudications between the parties, this court has held the contract severable and plaintiffs liable in a separate action on each breach thereof. Suppose that defendant had followed the proper course by bringing an action for damages only, and had obtained a judgment, it

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

would hardly be argued that the judgment thus procured must be canceled on the grounds and in the manner asserted in this proceeding. Had the question been raised at the trial in the first instance, defendant would have been required to sue for damages, and a judgment would have been procured therefor, but, this feature being waived, the judgment involved, serving the same purpose, was secured. It is difficult, therefore, to conceive on what theory, or under what rule of practice or law, a judgment in tort, which would not have been canceled, must be annulled when the same result by judicial decision has been recognized as being properly secured on contract.

Again, there is nothing in the pleadings to indicate that plaintiffs were either ready or willing to receive the hops at the date fixed by the contract for their delivery, or that, in lieu thereof, they would have accepted the money received therefor had the hops been sold. The injury complained of is a result of plaintiffs' default. Then, in the absence of fraud or wrongful intent, shall defendant be held bound to cancel a judgment legally acquired by reason of the fact that on October 15th it did not choose to become the agent of plaintiffs, and sell the property which plaintiffs at all times insisted did not belong to them? To recognize the rule contended for by plaintiffs would be to permit the party most in fault to take advantage of his own mistake, to the prejudice of the one least in fault, and whose fault, if any, consisted in an error of judgment as to the best or most profitable time to dispose of the property. Had defendant sold the hops on the 15th day of October at the then market price of 14 cents per pound, and had hops of that class on the date of the final determination of the suit been worth 50 cents per pound, plaintiffs would have been in equally as good standing in a court of equity to demand an accounting against defendant, as now to insist that, after placing defendant where it could not deliver to plaintiffs, it must be held bound to cancel a judgment, the validity of which is unquestioned, merely because plaintiffs might have found a purchaser at the market price on October 15th. It will thus be seen that defendant as a result of plaintiffs' course was at best placed in a perplexing position, and, in the absence of fraud, should not in equity be required to suffer a loss, as a result of giving faith to the declarations of plaintiffs' agents, merely because such agents subsequently changed their minds. Saying that plaintiffs have received nothing, or will receive nothing for the \$4,000 for which the judgment has been secured, is of no avail, for, admitting this contention, it must also be conceded that defendant after receiving this sum will still be the loser on the contract as a result of plaintiffs' rescission thereof.

The authorities relied upon by plaintiffs are cases where the complainants were prevented

by fraud or accident, unmixed with any fraud or negligence in themselves or their agents from procuring the relief desired, under which circumstances courts of equity are authorized to enjoin an adverse party from enforcing a judgment. But these conditions are wanting here, and the cases relied on are accordingly not in point. The complaint recites that defendant neither delivered the hops nor accounted for the proceeds. As shown, the question of delivery is out of the case. If plaintiffs can recover at all, it must be on the basis of an accounting for the proceeds received from the sale, which, as before indicated, on account of the sale being at a loss, would avail plaintiffs nothing. At the oral argument it was admitted, and we think properly, that plaintiffs under the showing made are not entitled to recover anything on that basis, and "have no enforceable claim against the defendant"; it being urged that, on account of the market price of the hops equaling the contract price on the date of intended delivery, the judgment should in equity be canceled. But we are not conscious of any system of reasoning by which it can be held that a valid and subsisting judgment may in equity be canceled by a nonenforceable claim. There is no doubt as to the soundness of the contention that defendant had the right to hold the hops until the agreed date of delivery, and then resell them and hold the purchaser for the loss occasioned thereby, but it does not follow, nor do the authorities go to the extent of holding, that defendant under the facts was bound to pursue this course. It was only one of defendant's privileges, and not a necessary course, especially in view of the fact that the purchasers, through their failure to comply with the contract, placed the seller in the embarrassing position of determining upon the safest course to pursue in order to escape loss.

Considered from any standpoint, defendant is least in fault, and the misfortune, if any, must fall to the lot of those to whose acts the conditions complained of are directly traceable—the plaintiffs. Under the most favorable view possible to plaintiffs, more cannot be said than that as between them and defendant, their equities are equal, and, being so, the law must prevail. The law gives to defendant the judgment, and under the issues and showing made a court of equity is powerless to annul it.

MOORE, C. J., concurs in the foregoing opinion, and EAKIN and McBRIDE, JJ., dissent. SLATER, J., being of counsel in the court below, did not sit. The court being equally divided, the decree of the trial court is affirmed.

EAKIN, J. (dissenting). I examined this case upon the record and briefs at the time the opinion was written and fully concurred therein, but, upon further examination of the

case, I have determined that the conclusion of the opinion is wrong.

It appears that the plaintiffs sought to cancel the contract before any payment by them was made thereon. Defendant, however, refused to acquiesce therein, or permit plaintiffs to rescind. For the purpose of enforcing the contract, defendant brought an action in the circuit court to recover the two advance payments overdue, and recovered judgment, which, in effect, adjudged that plaintiffs could not repudiate the contract, but must perform it. Thus the effect of the judgment of the court and defendant's conduct was that the contract continued in full force. Therefore plaintiffs were also bound to fulfill it. By reason thereof defendant has waived plaintiffs' default in payment as constituting a forfeiture, and has insisted upon performance, notwithstanding the default. When the judgment was rendered against these plaintiffs for such payments, they stood in the same position as if they had made the payment long after maturity; the delay having been waived by defendant. In other words, the effect of the judgment was not a recovery upon a forfeiture, but was a determination that plaintiffs, so far as these two payments were concerned, were entitled and required to proceed with the contract, and therefore defendant also was bound to perform. If, upon the abandonment of the contract by these plaintiffs, defendant had treated it as a breach and had sought only indemnity therefor, it would not have been necessary for defendant to make a tender of the hops, or otherwise proceed with performance of the contract. But as defendant refused to permit plaintiffs to abandon the contract, demanded performance, and secured the judgment aiding them to enforce it, it was its duty also to perform. It could not while enforcing the contract against plaintiffs treat it as forfeited or abandoned by them or ignore it itself. To avoid default on its own part, therefore, it was necessary to make a tender of the hops as a step in its further enforcement against plaintiffs.

In *Lake Shore & M. S. R. Co. v. Richards*, 152 Ill. 59, 38 N. E. 773, 30 L. R. A. 33, the court in discussing the rights of the parties in case of a breach by one say: "It is well settled that where one party repudiates the contract, and refuses longer to be bound by it, the injured party has an election to pursue either of three remedies: (1) He may treat the contract as rescinded, and recover upon quantum meruit, so far as he has performed; or (2) he may keep the contract alive for the benefit of both parties, being at all times himself ready and able to perform, and at the end of the time specified for performance sue and recover under the contract; or (3) he may treat the repudiation as putting an end to the contract for all purposes of performance, and sue for the profits he would have realized if he had not been prevented from performing." This defendant has elect-

ed to rely upon the second remedy above mentioned, to keep the contract alive for the benefit of both parties, and at the time for the delivery of the hops it must have tendered them. In *Kadish v. Young*, 108 Ill. 170, 43 Am. Rep. 548, a contract was made for the future delivery of grain, and the next day the purchasers gave notice that they would not be bound by the contract, and the question was whether such notice created a breach of the contract, or whether, notwithstanding the notice, the seller had the legal right to wait until the day for delivery under the contract and then resell and charge the purchaser with the difference, and it was held that the seller was not bound to act upon the notice, but was entitled on the day for delivery fixed by the contract to tender, resell, and charge the purchaser with the difference. It is said in *Johnstone v. Milling*, L. R. 16 Q. B. Div. 460, that the real operation of a renunciation of the contract gives the other party the right of electing, either to treat the declaration as *brutum fulmen* and holding fast to the contract, to wait till the time for its performance has arrived, or to act upon it and treat it as a final termination of the contract. In the latter case he may recover upon the breach at once. In *Frost v. Knight*, L. R. 7 Exch. 111, it is said that the promisee may, if he pleases, treat the notice of intention as inoperative and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of nonperformance, "but in that case he keeps the contract alive for the benefit of the other party as well as his own. He remains subject to all his obligations and liabilities under it, and enables the other party not only to complete the contract, * * * but also to take advantage of any supervening circumstance which would justify him in declining to complete it," such as the default of the other party.

In this case defendant was required either to act upon the renunciation by plaintiffs as final and recover upon it as a breach, or, as it attempted to do, ignore it and keep the contract alive for the benefit of both parties by fulfilling the contract on its part; but it failed to perfect this remedy, not having tendered the hops on the day for delivery, and thereafter having sold them at plaintiffs' risk. Defendant could not hold the hops more than a reasonable time beyond the date for delivery before selling them. If it held them, awaiting a rise in price, it did so at its own risk, and not that of the plaintiffs. *Sutherland on Damages* (3d Ed.) § 647, says, that on the failure of the vendee to receive the property the measure of the vendor's damage is the difference between the contract price and the market value at the time and place of the breach, and that this market value may be ascertained and fixed by a resale within a reasonable time, which means the earliest practicable period after the time for delivery. And, if there is a market value

for the property, he cannot keep it for a rise in price at the vendee's risk. *Sutherland on Damages* (3d Ed.) § 570; *Jochams v. Ong*, 45 La. Ann. 1289, 14 South. 247; *Gehl v. Milwaukee Produce Company*, 116 Wis. 263, 5 N. W. 26.

Plaintiffs have received nothing for the \$4,000 for which defendant has obtained judgment. The liability upon which the judgment was based was the contract for money to be advanced upon the hops, and, plaintiffs having been held bound to fulfill the contract, equity will require defendant also to fulfill it by accounting for the hops, according to the rules above stated; and now, because plaintiffs have received nothing for the \$4,000 for which judgment was rendered, equity will see that they are only required to pay such sum upon the judgment as will compensate defendant for all damages suffered by reason of plaintiffs' refusal in the first place to perform. If defendant were seeking to recover on the contract, plaintiffs' repudiation of it would have excused defendant from the necessity of a tender; but defendant is not acting upon plaintiffs' repudiation. It has insisted upon performance and the court has decided that plaintiffs must perform. Therefore the situation is changed. Not only may plaintiffs have desired to proceed with the contract, but it is already determined for them, both by defendant and the court, that they must do so, and the writer of this opinion deems that a tender of the hops was necessary; but, even if unnecessary, as held in the opinion, that is all that is waived. Defendant must sell within a reasonable time or hold the hops at its own risk. The measure of its damage is the difference in value between the contract price and the market value at the time for the delivery and the collection of the judgment beyond that amount should be perpetually enjoined. It appears from the record that at the time for delivery the hops were worth the contract price. Therefore the decree should be reversed and one rendered here, requiring plaintiffs to pay to defendant all costs and disbursements incurred by it in the law action as specified in their written tender, and that the judgment be canceled.

McBRIDE, J., concurs in this opinion.

(57 Or. 347)

SHIELDS v. SOUTHERN PAC. CO. et al.
(Supreme Court of Oregon. Dec. 13, 1910.)

1. RAILROADS (§ 369*)—OPERATION—INJURIES TO PERSONS ON TRACKS—LICENSEES—DUTY TO WARN.

A railroad company owes licensees who cross its tracks no duty to warn them of passing trains; the track itself being a sufficient warning.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1259-1262; Dec. Dig. § 369.*]

2. APPEAL AND ERROR (§ 1067*)—PREJUDICIAL ERROR—INSTRUCTIONS—FAILURE TO GIVE.

Where a jury, in an action against a railroad company for an injury received by a licensee on the track, requests an instruction as to whether or not it was negligence for the railroad to permit persons to cross its track without signals of warning, the failure of the court to instruct them that it is not negligence is reversible error.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4229; Dec. Dig. § 1067.*]

Appeal from Circuit Court, Multnomah County; Thomas O'Day, Judge.

Action by Richard Shields against the Southern Pacific Company and another. From a judgment for plaintiff, the Southern Pacific Company appeals. Reversed and remanded.

This is an action for damages sustained by plaintiff on account of an injury, occasioned by being struck by a railway engine of the Southern Pacific Company near the depot in the city of Portland. A railway bridge, which crosses the Willamette river near the depot, has an upper deck for the accommodation of public travel, while the lower deck is used exclusively by the railroad companies for the passage of their trains. This bridge is owned by the Oregon Railway & Navigation Company, but is used also by the Southern Pacific Company under some arrangement, the details of which do not appear in the evidence. There is a stairway upon the north side of the bridge and near its westerly end, leading from its upper deck to the ground, just east of the east line of Front street, where the upper deck of the bridge passes over the street, which was built by the Oregon Railway & Navigation Company. By the side of the stairway, and alongside of the railway track crossing the bridge, are two large piers several feet in diameter, which support the upper deck of the bridge. The railroad track crossing the bridge begins to curve a short distance east of the point where it passes the bridge piers. There is evidence tending to show that a person passing down the steps to the ground would be unable to see along the lower deck of the bridge or to see a train crossing the bridge from the east, until it emerged from between the piers or about 70 feet from where a person descending the stairway on his way to Front street usually crossed the railway track leading from the bridge to the Union Depot. The evidence tends to show that a large number of persons used these steps and crossed the track daily, on their way to Front street, without objection by the railway company; and that no signs, forbidding such use of the stairway, were in existence. An ordinance of the city prohibits trains from running faster than 6 miles per hour within the city limits. There is some testimony, on plaintiff's part, tending to show that, at the time of the accident, the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

train was running at a speed of from 12 to 20 miles per hour; but this is strongly contradicted by the evidence of defendant. Plaintiff walked across the bridge, toward his place of business, went down the stairway, and was proceeding across the track, in order to reach Front street, when he was struck by a locomotive, attached to a passenger train, and was injured.

Plaintiff testified that, owing to there being a number of tracks at the west end of the bridge, it was impossible for him to tell at a glance upon which of them the train was coming in, and was unable, by using his best endeavor, to escape injury; that he stopped, looked, and listened, before starting to cross the track, and did not hear any bell or noise indicating an approaching train; that he stopped just before he reached the first track and waited a few minutes to make sure there was no train coming, and no danger, then started across, and first saw the train as it emerged from the bridge, when it was about 70 or 80 feet distant; that, being confused as to which track it was on, he attempted to escape by taking the shortest way across the track.

The jury were permitted to view the locality where the accident occurred. Before the cause was submitted, plaintiff took a voluntary nonsuit as to the terminal company, leaving the Southern Pacific Company the sole defendant. After the jury had retired for deliberation, they returned into court and propounded the following question: "Is it unlawful or even a presumption of negligence for a railroad company to permit the use of a path or steps leading to its property on which trains are operated, without giving the public warning of danger?" In answer to this question, the court used the following language: "Gentlemen, this question which you have submitted to me is a combination of law and fact. It is one that I cannot answer directly, because if I did that would be trespassing upon your right to pass upon the facts. I will say, however, that probably I can answer the proposition as to the law without trespassing upon your province to pass upon the facts. And I will premise that by saying that if you find that these steps, where they landed, were on private property, of course it goes without saying that a person who owns private property can prevent others from going thereon. What I desire to say, and what the law is, is this: If the public are permitted to use it, and that use has extended for such a time that the company might have reasonably expected to have notice of its use, they would have to use such ordinary property subject to this use of the public. That is, they would have to use such ordinary care as an ordinarily prudent person would use to prevent injury. It would be akin to the use of a street, and it would be their duty to use such reasonable ordinary care in regard thereto as it would be to use ordinary care

where they cross a street." The defendant excepted to the giving of this instruction and the failure of the court to answer the question propounded by the jury, and requested the court to instruct as follows: "I will ask your honor to instruct the jury that it will not be the duty of the company—that is, I mean, it would not be affirmatively the duty of the company—to warn the public, and that that question should be answered in the negative as a matter of law." This request was refused by the court and an exception allowed. Thereafter the jury returned a verdict for the plaintiff in the sum of \$4,850. Defendant appeals.

Wm. D. Fenton and Ben C. Dey, for appellant. H. H. Riddell and Jay H. Upton, for respondent.

McBRIDE, J. (after stating the facts as above). The congested condition of the docket of this court precludes us from any extended discussion of the facts upon which counsel for defendant predicates the contention that a nonsuit should have been granted by the court below. We have carefully considered the evidence and do not agree with counsel in their contention that the physical facts so contradict the testimony of witnesses that the latter should be rejected as a matter of law. Much of this testimony related to the speed of the train, the opportunity that plaintiff had of observing its approach and protecting himself from danger by the exercise of ordinary care. Upon all these matters we think the plaintiff introduced sufficient testimony to make a case for a jury, and that the court properly refused a nonsuit.

We find one material error, however, which compels us to reverse this case, and that was the refusal to answer the question propounded by the jury. This action was predicated upon the alleged negligence of defendant in two particulars: (1) Running at an unusual and unlawful rate of speed; (2) failing to give warning by ringing the bell or blowing the whistle. No question of posting notices or warnings at or about the steps was involved, and as a matter of law none were necessary. The track itself is a sufficient warning of danger. When the jury came in and asked whether it was unlawful or a presumption of negligence for a railroad company to permit the use by the public of a path or steps leading to its track without giving public warning of danger, they should have been told that, so far as the case at bar was concerned, it was not unlawful and did not in itself create a presumption of negligence. The testimony in regard to defendant's negligence in other respects was contradictory, and, considering the nature of the question propounded by the jury, this court cannot say whether the finding of negligence, upon which the verdict was predicated, was within the issues made by the

pleadings or upon a failure to post notices upon the stairway warning the public to beware of locomotives. The instruction actually given practically left the minds of the jurors in the same condition that they were in before the question was asked, and did not tend in any way to dissipate any erroneous impression which they may have had, and which some of them evidently did have, that a recovery could be had because of the failure of the company to give public warning of danger.

For the reasons above given, the judgment will be reversed, and a new trial ordered.

(57 Or. 541)

SNYDER v. HARRINGTON et al.

(Supreme Court of Oregon. Dec. 6, 1910.)

1. PARTNERSHIP (§ 258*)—DEATH OF PARTNER—FRAUD OF SURVIVOR—EVIDENCE.

Circumstantial evidence in a suit by one, as executrix of a deceased partner and as administratrix of the partnership estate, against H., the surviving partner, and E., to recover the partnership estate, held sufficient to overcome the testimony of defendants, and to prove fraudulent conspiracy between defendants in the transfer to E. of property, which the partnership estate held under a conditional sale in the form of a lease to the partnership.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 580; Dec. Dig. § 258.*]

2. PARTNERSHIP (§ 249*)—ACTS OF SURVIVING PARTNER—BENEFITS INURING TO ESTATE.

Every advantage or waiver which the surviving partner secures by his exercise of control de son tort over the partnership estate inures to the benefit of the estate, and not to him personally.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 533; Dec. Dig. § 249.*]

Appeal from Circuit Court, Jackson County; H. K. Hanna, Judge.

Suit by Frances M. Snyder, as executrix of Victor E. Snyder and administratrix of the partnership estate of Snyder & Co., against John Harrington, surviving partner of said partnership estate, and J. Ehwegen. Judgment for defendants. Plaintiff appeals. Reversed.

On May 15, 1905, defendant Harrington and Victor E. Snyder, plaintiff's testator, became partners in the saloon business, which was carried on in a building known as the "Office Café," in Medford, Or., under the firm name of Snyder & Harrington. Snyder was an active partner in the business until February 5, 1907, when he was attacked with an illness of which he died on the 17th of the same month. Plaintiff was appointed executrix of his estate and became administratrix of the partnership estate of Snyder & Harrington. After her appointment she demanded possession of the partnership estate, for the purpose of administration, and, upon Harrington's refusal to surrender the same, obtained an order from the probate court directing him to surrender possession. Upon being served with this order, Harring-

ton brought suit against the executrix to enjoin her from interfering with his possession, alleging that the estate owned only an interest in the profits of the business, and praying for an accounting for profits. Issue was joined and a trial had on July 1, 1907, and was decided on November 30, 1907. In the meantime, Harrington held possession of the property and carried on the business. The court found that Snyder, at his death, was an equal partner, and that since that time his estate has been a half owner in the saloon, fixtures, and business. The court also vacated the injunction order, leaving the matter in the same condition that it was when the order of the probate court was made, nearly two years before. Harrington was again served with the order of the county court, requiring him to turn over the property to the executor. He declined to do so and was committed to jail for contempt, where he remained for about 30 days, until discharged upon habeas corpus proceedings. On February 1, 1909, Harrington notified the executrix that he would surrender possession of the partnership property; but, when an attempt was made on that date to take possession, one E. W. Carver, the barkeeper of Harrington, notified the agent of the executrix that he held possession of the fixtures as agent of Ehwegen, while Harrington falsely claimed that the lease under which Snyder & Harrington had held the building had expired, and that he held possession under a new lease to himself, and ordered that what he admitted to be partnership property should be forthwith removed. Ehwegen's claim of title to the bar and fixtures is based upon the following state of facts: The bar and fixtures were originally procured from the Brunswick-Balke-Collender Company, upon a conditional sale or lease contract, whereby the Brunswick-Balke-Collender Company, in consideration of the payment to them of \$500 cash, and the further agreement by the purchasers to pay them the sum of \$1,500, in monthly cash payments of \$100 each, and a final payment of \$40, the whole to be paid within 16 months from April 10, 1905, leased the property to the purchasers, retaining title in itself, with the right to demand and take possession of the same upon default of any of the payments or at any time when it should deem necessary to do so, in order to protect itself against loss. The company further agreed that, upon payment of the sums above mentioned, according to the agreement, it would sell the property to the lessees for the sum of \$61. Thereafter, on January 2, 1907, the contract was assigned to the Northern Brewing Company, with whom Snyder & Company were doing business, by the Brunswick-Balke-Collender Company. At the request of Snyder & Company the brewing company advanced the sum of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

\$401, being the amount yet unpaid on the agreement, which was charged against Snyder & Company on the books of the Brewing Company, and there referred to in the account of "Bills Receivable," as a note of Snyder & Company. On August 15, 1907, at the request of Harrington and upon the payment by him of \$401, the amount due on the agreement, and \$200 of an overdue bill for beer, the brewing company made an assignment of the agreement in the following words: "Portland, Ore., Aug. 15, 1907. Rec'd from John Harrington, four hundred and one dollars in consideration of which within lease is hereby transferred. The Northern Brewing Co." This assignment, not being satisfactory to Ehwegen, who claims to have advanced the money, was returned to the brewery company, who interlined it so that it now reads as follows: "Rec'd from John Harrington, for J. Ehwegen, four hundred and one dollars, in consideration whereof within lease is hereby transferred to said Ehwegen." Ehwegen and Harrington testified, in substance, that the latter, finding himself unable to use the beer of the brewery company profitably in his business, and the payments on the lease being overdue, as well as a balance of \$200, owing to the brewery company, for beer, applied to Ehwegen to take up this lease, which the brewing company would not assign until the arrearage of \$200 was also paid; that thereupon Ehwegen advanced the \$600 necessary to secure the transfer, charging himself with the amount and agreeing that Harrington should have the use of the bar without rent so long as he continued to purchase the beer of Ehwegen. The circuit court found for the defendant and dismissed the suit. Plaintiff appeals. Other facts will be stated in the opinion.

W. E. Phipps, W. I. Vawter, and Porter J. Neff, for appellant. Robert G. Smith, E. E. Kelly, H. K. Hanna, Jr., and Colvig & Reames, for respondents.

McBRIDE, J. (after stating the facts as above). The testimony in this case indicates a determined and systematic attempt on the part of defendant Harrington to defraud and rob his deceased partner's estate. The venerable judge of the court below used this language in his findings of fact: "There are some circumstances attending the transfer of the above-described property to the defendant Ehwegen that tend to support the averments of conspiracy and fraud set out in plaintiff's complaint, but not sufficient to overcome the positive and sworn evidence of both the defendants, and no conspiracy of fraud is found." We are of the opinion that there is sufficient circumstantial evidence to overcome the sworn testimony of the defendants, and, therefore that fraud and conspiracy is proved.

As to Harrington, his denial of the part-

nership, refusal to account, under the pretext that his books had been stolen, and his whole conduct, satisfy us that he is utterly unworthy of credit. It seems absolutely improbable that he would enter into a contract to convey, entirely, property worth \$3,200 for the sum of \$600. Upon its face the transaction is unreasonable. The assertion that he was without money to meet the payments and went to Ehwegen on that account does not comport with a previous affidavit made by him, that the profits of the business were probably \$10 per day; and his story about the loss or theft of his books, and his consequent inability to give an accurate account of the condition of his business, does not impress the court with its truth. Whether Ehwegen advanced the \$600 or not, we are convinced that he took the assignment in trust for Harrington. The \$600, which he claims to have advanced, was not paid to the Northern Brewing Company but to Harrington, and by him to the brewery company. The original assignment made no mention of Ehwegen, as assignee, which indicates that nothing of the kind was contemplated by Harrington when he paid the money, and that the subsequent interlineation of Ehwegen's name was probably an afterthought. The bar remained in Harrington's possession and control, and, indeed, there was no legal way for Ehwegen to get control of it, except to seize it under the provision of his lease, which he waived by agreeing that Harrington should use it so long as he purchased Ehwegen's beer. Harrington, being a mere intruder upon the partnership estate and premises, could make no contract giving Ehwegen title or right of possession, and every advantage or waiver secured by him, by his exercise of control over the estate de son tort, inured to the benefit of the estate and not to him. We cannot, in view of these and other circumstances indicating fraudulent collusion between Harrington and Ehwegen, permit the estate or the widow of the defendant to be juggled out of this entire property. We go far enough when we permit Ehwegen to have a lien upon it for the \$600, which he says he advanced, and which possibly may have preserved the property from legitimate seizure, though technically only \$401 and interest were actually due.

In addition to this, as to Harrington, we think the evidence indicates that he has consumed a large amount of the firm's assets and profits of the business, but, the amount being indefinite, we fix it at a minimum of \$700, and require him to pay that sum to the executrix. The lease having expired since this suit was begun, we make no order as to that, except that plaintiff be allowed free access to the premises for 20 days for the purpose of removing the bar and fixtures.

Judgment reversed.

(57 Or. 338)

LONGFELLOW v. HUFFMAN et al.

(Supreme Court of Oregon. Dec. 6, 1910.)

1. APPEAL AND ERROR (§ 1029*)—HARMLESS ERROR—ADMISSION OF EVIDENCE—PARTY NOT ENTITLED TO SUCCEED.

If the jury could not have properly rendered any other verdict in any event, error in the admission of evidence, or in instructions, was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4035, 4036; Dec. Dig. § 1029.*]

2. CONTRACTS (§ 164*)—CONSTRUCTION—CONSTRUING INSTRUMENTS TOGETHER.

Where a note, secured by a chattel mortgage, and a contract thereafter executed relating to the same subject-matter are to be construed together, the recitals in each should be explained by reference to the other instruments, as if they were parts of one instrument, so as to effectuate the intent of the parties.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 746; Dec. Dig. § 164.*]

3. BILLS AND NOTES (§ 432*)—PAYMENT—PAYMENT IN PROPERTY.

If a contract by defendant to deliver to plaintiff all the lambs of a flock sold defendant for the next two years at a stipulated price, the amount to be credited on the note which was executed by defendant for the purchase price when the sheep were sold a month prior thereto, was intended to provide a manner for paying the note in lambs instead of money and not as a contract of sale, it was optional with defendant to pay the note either in money or lambs.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 1259; Dec. Dig. § 432.*]

4. SALES (§ 71*)—CONTRACTS—CONSTRUCTION.

Plaintiff sold defendant a flock of sheep, taking a note, payable on or before two years, secured by a chattel mortgage on the flock and its increase, which, though in terms an absolute sale, contained a defeasance clause. A month later, defendant agreed in writing to deliver to plaintiff all the lambs from the flock during the next two years at a certain price, the amount to be credited on the note. Held that, the contract was to deliver all the increase of the flock, whether it was more or less than sufficient to discharge the note, being an absolute contract to sell and deliver the increase of the sheep.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 189, 192; Dec. Dig. § 71.*]

5. SALES (§ 3*)—EXECUTORY CONTRACT.

The contract was not intended as additional security for payment of the note, since it was executory, and could not add anything to the security already afforded by the chattel mortgage.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 6; Dec. Dig. § 3.*]

Appeal from Circuit Court, Wallowa County; J. W. Knowles, Judge.

Action by N. C. Longfellow, against John W. Huffman and another, partners under the style of Huffman & Son. From a judgment for plaintiff, defendants appeal. Affirmed.

See, also, 104 Pac. 961.

This is an action to recover damages for an alleged breach of a contract, made by defendants to sell and deliver to plaintiff some lambs, the product for the years 1905 and 1906, of a certain flock of sheep owned by

defendants. Plaintiff secured a judgment for a failure to deliver in 1906, and defendants have appealed. The principal facts, and the pleadings upon which this trial was had, are substantially the same as those in a former trial of the same case, and, as they were fully stated in the opinion of this court rendered on the second appeal, they need not be restated here. See Longfellow v. Huffman, 104 Pac. 961.

T. H. Crawford, for appellants. D. W. Sheahan, for respondent.

SLATER, J. (after stating the facts as above). This is the third time this case has been, in some form, before this court. In the first case the action was based upon the refusal of defendants to deliver the lambs for 1905, but as plaintiff's evidence failed to show that defendants offered to credit the price upon his note, or that he had the note at the time, or was able to credit the purchase price thereon, the trial court granted a judgment of nonsuit, which was affirmed on appeal (49 Or. 486, 90 Pac. 907). In the second case the action was upon the entire contract. Damages were demanded for failure to deliver lambs, the increase of 1905 and 1906, and the trial court directed a verdict for defendants. Upon appeal from this judgment this court sustained the action of that court, in so far as the damages claimed for failure to deliver lambs for 1905 were concerned, for substantially the same reasons as stated in the first opinion. We held, however, that the contract being severable, plaintiff, if the facts stated in the complaint were found to be true, might recover for defendants' failure to deliver in 1906; and because of the trial court's refusal to submit to the jury the issues presented by the answer, whether the contract alleged and the note and chattel mortgage were executed at the same time as one transaction, and whether the contract was entered into for the purpose of further security for payment of the debt evidenced by the note.

Upon a retrial of the case the evidence was undisputed and conclusive that the note and mortgage, although dated October 1, 1904, were not delivered by the makers thereof until November 2d following, and concurrently with the execution and delivery of the contract upon which this action is based, and that the subject-matter thereof was included in the terms of chattel mortgage. Upon this state of the record, although there had been offered by each of the parties, and received in evidence, conflicting, extrinsic parol testimony of the acts and declarations of the respective parties, tending to show their intent as to whether the contract was on the one hand an independent contract to sell, or, on the other, a further security for the payment of the note, defendants request—

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ed of the court a directed verdict in their favor, based upon the ground that, as the testimony conclusively establishes that the several instruments were executed by the same parties at the same time, and include the same subject-matter, and are not ambiguous or conflicting in terms, it was the duty of the court to construe them as one contract, and as intended to secure the payment of the debt. As an alternative, defendants requested an instruction to the effect that if the several instruments were delivered at the same time, were between the same parties, and concerned the same subject-matter, they must find for the defendants. These and other similar instructions were denied, and defendants saved exceptions.

The court instructed the jury, in substance, that where several instruments are executed and delivered at or about the same time, are between the same parties, and concerning the same subject, all are to be construed as one and the same contract; that if the jury found it was the intention of the parties that the contract should be a part of the chattel mortgage, as additional security for the payment of the note, then the verdict should be for defendants, but if not so intended, but intended as evidence of a sale, then the verdict should be for plaintiff; and that in determining the intent of the parties the jury might take into consideration the extrinsic evidence, showing the previous dealings of the parties, with reference to the band of sheep originally sold by plaintiff to defendants, a previous similar contract existing between the parties in relation thereto, and the acts and declarations of the parties in relation thereto.

Defendants' contention is based upon this assumption, that where there are two contemporaneously written agreements between the same parties, relating to the same subject-matter, they must be construed together as one contract. Some decided cases have thus announced the rule, and among them is an early case of this court, *Dean v. Lawham*, 7 Or. 423, but in a dissenting opinion in that case Mr. Justice Bolse points out that the duty to construe as one contract two apparently separate and distinct agreements does not arise simply because of the concurrence of the three elements named, but that it must appear that they are parts of one and the same transaction. In *Cornell v. Todd*, 2 Denio (N. Y.) 132, the court says: "It is not necessary that the instruments should in terms refer to each other, if in point of fact they are parts of a single transaction. But until it appears they are such, either from the writings themselves, or by extrinsic evidence, the case is not brought within the rule. * * * It may very well be that the same parties should have several transactions in one day, and of the same general nature; and yet that each one should be

distinct from and wholly independent of the other."

In the later case of *Blagen v. Thompson*, 23 Or. 239, 246, 31 Pac. 647, 650, 18 L. R. A. 315, Mr. Justice Bean states the rule with more caution as follows: "When two written contracts are entered into between the same parties, concerning the same subject-matter, whether made simultaneously or on different days, they may, under some circumstances, be regarded as one contract and interpreted together." What circumstances would be necessary to make such agreements one transaction was not essential to the discussion of that case, but the citation to *Bishop on Contracts*, § 165, made in that connection, may be significant. That author there says that separate instruments, executed under the circumstances mentioned, "may be regarded as one contract, when this view of them is just, and accords with the intent of the parties; and, whether so or not, all should be interpreted together. Yet, as a foundation for suing, what thus appears to be one contract may in law constitute more contracts than one; this will depend upon the words, the subject, and the other facts or the justice of the case." Other authors exercise the same caution in stating the rule; thus, 2 *Page on Contracts*, § 1116: "They may be construed together as a part of the same contract, at least in the absence of evidence to the contrary"—citing *Weber v. Rothchild*, 15 Or. 385, 15 Pac. 650, 3 Am. St. Rep. 162. See, also, 9 *Cyc.* 580, 581.

But, assuming that defendants' primary contention is correct, that it was the duty of the court to have construed these several instruments as one, and that as the contracts are not indefinite, uncertain, or ambiguous in their terms, such construction is to be made without the aid of extrinsic evidence as to their intent and meaning, still we find ourselves unable to come to any other result than that derived by the jury in this case. And if the jury could have arrived at no other conclusion, any alleged error of the court in receiving, over defendants' objection, extrinsic parol testimony to ascertain the intent, or in giving instructions relative thereto, such error would be harmless, and would not justify a reversal of the judgment.

Construing these instruments together as one contract, every part thereof must, if possible, be given effect, and "the court will read them in such order of time and priority as will carry into effect the intention of the parties, as the same may be gathered from all the instruments taken together. And the recitals in each may be explained or corrected by a reference to any other, in the same way as if they were only several parts of one instrument." 2 *Parsons on Contracts* (9th Ed.) 503.

In *Thorp v. Mindeman*, 123 Wis. 149, 101 N. W. 417, 68 L. R. A. 146, 107 Am. St. Rep.

1003, which was an action by an indorsee to recover upon an ordinary, negotiable promissory note, the defense was made that there was no consideration for the note, and that a mortgage was given with the note to secure its payment, and contained covenants that, if imported into the note, would destroy its negotiability. The defendant's argument was that the note and mortgage, though separately executed, comprised one instrument; the note being that instrument. Answering this the court says: "Construing together simply means that, if there be any provisions in one instrument limiting, explaining, or otherwise affecting the provisions of another, they will be given effect as between the parties themselves and all persons charged with notice, so that the intent of the parties may be carried out, and that the whole agreement actually made may be effectuated. This does not mean that the provisions of one instrument are imported bodily into another, contrary to the intent of the parties. They may be intended to be separate instruments, and to provide entirely different things, as in the very case before us. The note is given as evidence of the debt, and to fix the terms and time of payment. It is usually complete in itself—a single, absolute obligation. The purpose of the mortgage is simply to pledge certain property as security for the payment of the note."

This action is for breach of the terms of the contract, and the question is, Do the terms of the note, and the mortgage given to secure it, so limit and modify the contract as to prevent a recovery only to the extent of the amount due on the note? If this contract is to be construed, as contended for in one branch of their argument by defendants, as intended only to provide a way and manner of paying off the note in lambs, rather than in money, and not intended to evidence a contract to sell chattels, then plaintiff could not complain, so long as he got payment in one or the other of these methods. If this is the correct construction of the several instruments, the inevitable conclusion must be that it was wholly optional with defendants to pay in either money or lambs (*Heywood v. Heywood*, 42 Me. 229, 66 Am. Dec. 277), because under that view payment of the note is the principal thing, and payment in money would satisfy the demand as well as payment in lambs. If then, when plaintiff demanded, in October, 1905, the delivery of lambs, he had with him the note, and offered to credit the price thereon, but defendants refused to make delivery, and tendered payment in money, plaintiff must have accepted the money, and would have no cause for claim of damages. The contract, however, imposes an absolute obligation upon the defendants to sell and deliver to plaintiff, at a specified price, all the lambs, the increase of certain ewes, during the years 1905 and 1906, and a concurrent obligation rests upon plaintiff to take and pay for them. Suppose, again, that

the increase of the sheep was more than sufficient to liquidate the amount due on the note, would defendants be under no obligation to deliver the excess after having delivered sufficient to pay the note? We do not see how they could avoid the obligation to deliver all the lambs.

Whether instruments of the same general character, but much more indefinite as to the intent than the ones now under consideration, are to be treated as contracts for the payment of a specific sum of money, but in which a privilege is reserved to the payor to pay the same in specific articles at the price agreed, or whether they shall be treated as contracts for the delivery of specific articles at an agreed price, and at a specified time and place, the authorities are by no means uniform. "If a note or written promise," says Mr. Parsons in his work on Contracts, vol. 2 (9th Ed.) p. 215, "be to pay so much money, but in goods specified, and at a certain rate, and the promise is broken, it is not quite settled whether the law will regard this as a promise to pay money or to deliver goods." In discussing this question that learned author suggests that, "the true question is, whether it was intended that the promisor might elect to pay the money or deliver the articles; or in other words, whether it was intended that the promisor might elect to pay the money or deliver the articles; or in other words, whether it was agreed only that he owed so much money and might pay it either in cash or goods as he saw fit. There might be something in the form of the promise, in the *res gestæ*, or in the circumstances of the case, which, by showing the intention of the parties, would decide the general question; but, in the absence of such a guide, and supposing the question to be presented merely on the note itself, as above stated, we should say that the more reasonable construction would be, that it was an agreement for the delivery of goods in such a quantity as named, and of such a quality as that price then indicated. And on a breach of this contract, the promisor should be held to pay, as damages, the value of so much of such goods at their increased or diminished price. But if the promise be only to pay one thousand dollars at a certain time, in flour, then this sum is to be paid either in flour or in money, at the election of the payor."

For the opposite view, see *Heywood v. Heywood*, 42 Me. 229, 66 Am. Dec. 277, and the dissenting opinion therein of Mr. Justice Rice, where the cases are cited and discussed. But in all these cases the promise upon which the action was based was of this character: "For value received I promise to pay John Pinney seventy-nine dollars and fifty cents * * * in salt at 14 shillings per barrel," as in *Pinney v. Gleason*, 5 Wend. (N. Y.) 394, 21 Am. Dec. 223. We have no such contract here. The form of the promise creates no doubt as to the intent. It is not a promise

to deliver lambs at a fixed price to the amount of the debt, but it is to deliver all the increase of a certain flock of sheep, whether the number is greater or less than sufficient to liquidate the debt. The subsequent clause of the contract, requiring the price to be credited on the note, is simply an agreement of the parties as to the appropriation of the proceeds, and does not qualify the previously expressed intention to sell and deliver personal property.

Nor are we able to discover an intent that this contract was to be additional security, as argued by defendants. A chattel mortgage of the usual form was given upon the original stock and its increase, to secure the note. The mortgage recites, in terms, an absolute sale, but is followed by a defeasance. The legal effect thereof is to create a specific lien. The contract, however, is not, in terms, a present sale, but is a personal obligation to sell in the future. It is wholly executory. It creates in the prospective purchaser no interest in or lien upon the subject-matter of the contract, but imposes only personal obligations and confers personal rights. As the obligee had, in the chattel mortgage, all the security upon the lambs for the payment of the note that it was possible for him to obtain, it would be repugnant to sound reasoning to say that this executory contract to sell was intended as additional security.

For these reasons we are bound to say that the verdict of the jury is the only legal result obtainable by a construction of the several instruments as representing one transaction.

The judgment is therefore affirmed.

(4 Okl. Cr. 436)

WOOD v. STATE.

(Criminal Court of Appeals of Oklahoma.
Dec. 7, 1910.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§§ 1031, 1144*)—OBJECTIONS—TIME FOR TAKING—FAILURE TO ARRAIGN — APPEAL—PRESUMPTION—ARRAIGNMENT OR WAIVER THEREOF.

(a) Where the record is silent as to whether or not the defendant has been arraigned, but shows that the defendant appeared by counsel and announced ready for trial, participated in the selection of the jury and the examination of the witnesses, and further shows that the issues in the case were properly made up and submitted to the jury, it is too late after conviction for the defendant to object upon the ground that he was not arraigned. (b) Where the record is silent as to whether the defendant had been arraigned, but affirmatively shows that the defendant was accorded all the rights and privileges which the statute secures him by arraignment, this court will presume that the defendant was either arraigned or that he waived arraignment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2754-3019; Dec. Dig. §§ 1031, 1144.*]

2. CRIMINAL LAW (§ 1130*)—APPEAL—NECESSITY FOR BRIEF.

Objections to testimony made in the lower court will only be considered by this court where the precise error complained of is clearly pointed out in the brief of counsel, with a statement of the testimony objected to, so as to enable this court to understand the questions presented. The brief must also contain a statement of the page of the record on which the matter complained of can be found, and it must also clearly state the argument of counsel and contain the authorities relied upon to sustain the objections made in the lower court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2965-2970; Dec. Dig. § 1130.*]

3. HOMICIDE (§ 255*) — MANSLAUGHTER IN FIRST DEGREE—SUFFICIENCY OF EVIDENCE.

For evidence held to be sufficient to sustain a conviction for manslaughter in the first degree, see opinion.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 539-541; Dec. Dig. § 255.*]

4. CRIMINAL LAW (§ 1130*)—APPEAL—REVIEW—INSTRUCTIONS.

Exceptions reserved to the instructions of the trial court will not be considered by this court, unless the brief clearly points out the alleged defect in said instructions, or unless said instructions are fundamentally wrong.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2965-2970; Dec. Dig. § 1130.*]

5. CRIMINAL LAW (§ 1144*)—APPEAL—REVIEW—PRESUMPTION—PRESENCE OF ACCUSED AT TRIAL.

Where the record is silent as to the presence of the defendant upon one day of his trial, but shows affirmatively that he was present and announced ready for trial when the trial began, and also that he was present when the verdict of the jury was returned, the entire record may be considered and may be sufficient to justify the presumption that the defendant was present on the day on which the record was silent as to his presence. See facts and conclusions in the opinion justifying this presumption.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2766; Dec. Dig. § 1144.*]

6. CRIMINAL LAW (§ 726*)—APPEAL—REVIEW—IMPROPER REMARKS BY PROSECUTING ATTORNEY.

Where improper remarks made by a prosecuting attorney to a jury have been provoked by and are in reply to remarks made by defendant's counsel, such remarks of the county attorney are not ordinarily ground for new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1681; Dec. Dig. § 726.*]

7. CRIMINAL LAW (§§ 992, 1188*)—DISTRICT AND PROSECUTING ATTORNEYS (§ 8*)—JUDGMENT AND SENTENCE—CONFORMITY WITH VERDICT—APPEAL—VARIANCE BETWEEN VERDICT AND SENTENCE—DUTY OF COUNTY ATTORNEY TO PREPARE ORDERS AND JUDGMENT.

(a) All judgments and sentences of the court must follow and be based upon the verdict of the jury. (b) Where there is a variance between the verdict of the jury and the sentence of the court, it must appear from the record that such variance cannot be corrected without depriving the defendant of a substantial right, before the conviction will be set aside, but the cause will be remanded to the lower court for resentencing. (c) It is the duty of the county attorneys of the state to prepare all orders and judgments in criminal cases, and when an appeal is taken it is also their duty to carefully read over the case-made and transcript

of the record and see that the orders and judgments of the court are correctly copied therein.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2519, 3222-3224; Dec. Dig. §§ 992, 1188;* District and Prosecuting Attorneys, Dec. Dig. § 8.*]

Appeal from District Court, Pittsburg County; Malcom E. Rosser, Judge.

Sam Wood was convicted of manslaughter on a charge of murder, and he appeals. Affirmed, with directions.

Lester & Hammond and Arnote & Monk, for appellant. Smith C. Matson, Asst. Atty. Gen., for the State.

FURMAN, P. J. First. Counsel for appellant insist that this conviction should be reversed because the record fails to show that the defendant had been arraigned. In the early days of the common law, when the defendant had no right to be represented by counsel or to testify in his own behalf, and when the punishment for felonies was extremely severe, if not cruel, great weight was accorded to the forms and modes of criminal procedure, which were looked upon as a bulwark of defense against improper convictions. An arraignment was a matter of great form and ceremony. The prisoner was placed in a box or dock and the indictment was read to him by an officer designated for that purpose. He was required to hold up his right hand to identify himself as the person being arraigned. The judge before whom a trial took place was regarded as counsel for the defendant. The indictment was read to the defendant to inform him of the particular offense with which he was charged and to obtain his plea thereto, and thereby enable the court to determine whether it was necessary to have witnesses summoned for the prosecution. If he pleaded not guilty, the clerk of the court would then demand how he would be tried. The common answer was, "By God and the country." The clerk then entered on the record, "The defendant pleads not guilty, and demands to be tried by God and the country." The clerk then said, "I pray Thee, O, God, to send to this defendant a good deliverance." The defendant was given an opportunity to state to the court what witnesses he desired to have summoned in his defense. The conditions surrounding an arraignment in olden times have long since passed away, but in many states there is a strong disposition to regard the old forms of the common law as sacred things, when, as a matter of fact, many of them are as lifeless as the mummies of Egypt. As late as 1806, in the state of Massachusetts, the defendant was required to be arraigned in the presence of three judges, and a capital conviction was reversed because it appeared from the record that, without objection on the part of the defendant, only one judge was present when the defendant was ar-

raigned. See *Commonwealth v. Hardy*, 2 Mass. 303. We must confess to a want of sympathy with precedents of this character. They have no more application to the law and to conditions existing in Oklahoma than would the provisions of the Code of Hammurabi, the first King of Babylon, said to have been a contemporary of Abraham, which code was discovered in 1901 at Susa in Persia by a party of French excavationists. This code is claimed to be the oldest known code of laws. Therefore if there is to be no progress and development in the law, the code of Hammurabi, by all means, should be cited and followed by courts of modern times.

Our statutes provide for an arraignment, and specifically direct what should be done upon arraignment, and thereby show why an arraignment is required. They provide that if the defendant be without counsel, he must be informed by the court that it is his right to have counsel before being arraigned, and he must be asked if he desires the aid of counsel. If he desires and is unable to employ counsel, the court is required to assign counsel to defend him. He must also be asked when he is arraigned if the name by which he is indicted is his true name. He must then declare his true name, or be proceeded against in the name of the indictment. If, on arraignment, the defendant requires it, he must be allowed until the next day, or such further time may be allowed him as the court may deem reasonable, to answer the arraignment. In answering the arraignment the defendant may either move the court to set aside the indictment or may demur or plead thereto. See *Snyder's Comp. Laws of Oklahoma 1909*, §§ 6731, 6733, 6736, 6737. It is seen from this that the object and purpose of an arraignment is to obtain issues either of fact or of law for trial and to inform the defendant of his right to be represented by counsel, either of his own choice or under appointment from the court; and also to inform him of the precise offense charged against him, in order that he may be able to prepare for trial, and to enable the defendant to obtain such time as will be necessary to make such preparation. These are the purposes for which a defendant is arraigned and are the substantial rights which an arraignment is intended to secure to a defendant.

The record in this case shows that the defendant was not deprived of any of these rights, but that he exercised each of them. Therefore, under our statute, which requires this court to give judgment without regard to technical errors or defects, or to exceptions which do not affect the substantial rights of a defendant, this conviction cannot be set aside because the record fails to show that the defendant was arraigned, when it does show that all of the rights secured

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

by an arraignment were exercised by him. Where there is no injury the law allows no remedy. While the record in this case is silent as to whether or not the defendant was actually arraigned, yet it does appear from the record that upon his trial the defendant was represented by counsel and that he announced ready for trial and participated in the selection of the jury, and that testimony was offered in his behalf and the instructions of the court to the jury, which are made a part of the record by our statutes, state that the defendant had pleaded, "not guilty." The record also shows that a motion for a new trial and a motion in arrest of judgment were made and no objection was presented upon the ground that the defendant had not been arraigned. When called to the bar of the court to have the sentence of the law pronounced against him, he was asked what he had to say, why sentence should not be pronounced, and he interposed no objection whatsoever. He presents the alleged want of arraignment for the first time in this court.

We are of the opinion that when the record shows that a defendant appeared in court, represented by counsel, and voluntarily announced ready for trial and participated in the selection of the jury, and offered evidence in his behalf, and that the issues were made up and properly submitted to the jury, it is too late for him, after conviction, to claim that he was not arraigned. In the light of the record in this case, a reversal of this conviction simply because the record fails to show that the defendant was arraigned would be to juggle with justice and permit the defendant to play with loaded dice. It would prove that this court attaches more weight to shadow than to substance, to form than to justice. The *Ency. of Plead. & Prac.* vol. 2, p. 791, par. 3, is as follows: "By proceeding to trial without objection the defendant precludes himself from taking advantage of a failure of the record to show an arraignment or plea."

The case of *State v. Cassady*, 12 Kan. 561, is directly in point. Justice Brewer, then a member of the state Supreme Court and afterwards a member of the Supreme Court of the United States, said: "The record fails to show that defendant was arraigned or pleaded to the information. It shows that he appeared in person and by counsel, and that both parties being ready for trial on the information filed, a jury was called and the case tried. An affidavit appears in the transcript to the effect that as a matter of fact the defendant was not arraigned, and did not plead; but by what right such affidavit appears in the transcript we cannot tell. It was not made a part of the bill of exceptions, nor does it appear to have been used upon any of the motions in the case. Assuming it, however, to be proven, that the defendant was not arraigned, and did not enter a formal plea, but being present in per-

son and by counsel, and announcing himself ready for trial upon the information, went to trial before a jury regularly impaneled and sworn, and submitted the question of guilt to their determination, will the omission of the arraignment, or formal plea, avail the defendant thereafter, either on a motion for new trial, or in arrest of judgment? It may be conceded that in common law it would. [See the authorities cited by defendant in his brief.] But under our statutes we think a different rule must obtain. By paragraph 161 of the Criminal Code (Gen. St. 1908, § 846), it is declared that when a person shall be arraigned 'it shall not be necessary to ask him how he will be tried; and if he deny the charge in any form, or require a trial, or if he refuse to plead or answer, and in all cases when he does not confess the indictment or information to be true, a plea of not guilty shall be entered, and the same proceedings shall be had in all respects as if he had formally pleaded not guilty.' And by paragraph 293 it is provided that, 'on an appeal the court must give judgment without regard to technical errors or defects, or to exceptions which do not affect the substantial rights of the parties.' It seems to us that under those sections the omission did not and could not affect the substantial rights of the defendant, and therefore is not ground for disturbing the judgment. *State v. Lewis*, 10 Kan. 157."

In the case of *United States v. Molloy* (C. C.) 31 Fed. 19, Judge Brewer, then a member of the Supreme Court of the United States, again said: "In the first place, it is well to consider that the purpose and necessity of an arraignment is. It is said down in the old law books that three objects are to be subserved: (1) The identification of the defendant; (2) giving him information of the particular offense charged against him for which he is to be tried; and (3) to receive from him the plea which he makes to that charge. Now in the case, as tried, it is perfectly evident that the defendant knew exactly the offense charged against him; that he was identified; and that he denied the charge and went to trial upon that denial. Indeed, he went on the witness stand himself, and there denied it. It may seem something of an anomaly to say that proceedings may be such that in the trial court there is no evidence of prejudicial error when the record transferred to an appellate court may disclose such error. And yet, this matter of arraignment presents very much of a case. Where a record taken to the Supreme Court shows simply an indictment, a trial, and a conviction, there is nothing affirmatively appearing upon the face of the record from which that court can say that the defendant knew, prior to the impaneling of the jury, and prior to the trial, the exact nature of the charge against him. Non constat, but that he went to trial supposing that the charge was one thing, and, after the testi-

mony was introduced, discovered for the first time that he was being tried for another and different offense. And so, pursuing that thought, that court might say that the record disclosed error, because it failed to show, as one of the guaranties of his protection, that he knew, prior to the time his case was presented to the jury, the exact offense charged against him. But the trial court may have had, as my Brother Thayer had in this trial, the most abundant evidence that the defendant knew exactly the offense which was charged against him, and was prepared to go to trial upon it; and if he did, all that the arraignment subserves was accomplished; and to say that he should be entitled to a new trial for that omission would seem to be, as Chief Justice Henry well says, 'like trifling with justice.' But further than that, we have the federal statute, which provides (section 1025 [U. S. Comp. St. 1901, p. 720]) that 'no indictment found and presented by a grand jury,' etc., * * * 'nor shall the trial, judgment, or other proceedings thereon, be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant.' I am aware that, putting a narrow construction on that section, it might be said that it refers only to a defect in the form of the indictment; and yet it is obvious to my mind, from the whole tenor of the federal statutes, that it has, or was intended to have, a broader significance, and to declare that no more irregularity or defect in the form of the proceedings which did not tend to the prejudice of the defendant should be ground for a new trial."

The Court of Criminal Appeals of Texas, in the case of *Plasters v. State*, 1 Tex. App. 685, said: "If the record shows that a defendant has pleaded not guilty in any case, but fails to show that an arraignment has taken place, a judgment of conviction would not be reversed by this court simply because the record was silent on the subject of an arraignment. We would consider that the arraignment had been waived."

The same court said in *Wilson v. State*, 17 Tex. App. 526: "If the record, in a capital case, on appeal, shows that the defendant pleaded 'not guilty,' but is silent respecting the arraignment of the defendant, this court will presume that an arraignment was waived."

In the case of *Steagald v. State*, 22 Tex. App. 464, 3 S. W. 771, the same court said: "If in a capital case the record on appeal shows that the defendant pleaded 'not guilty,' but is silent respecting his arraignment, this court, presuming that an arraignment was waived, will not reverse the judgment of conviction for want of an arraignment."

In the case of *State v. William Grate*, 68 Mo. 27, the Supreme Court of that state said: "Although there was no formal arraignment of the defendant, yet the record shows that

he pleaded not guilty to the indictment, and this answers the objection on that score. *State v. Braunschweig*, 36 Mo. 397; *State v. Saunders*, 53 Mo. 234."

In the case of *State v. Winstrand*, 37 Iowa, 110, the Supreme Court of that state said: "If the record is silent as to the arraignment, it will be presumed that the defendant was properly arraigned and failed to give his true name, or that he waived the arraignment."

In the case of *Paris v. State*, 36 Ala. 232, the Supreme Court of that state said: "When the record in a criminal case shows that the prisoner, being brought to the bar in custody, pleaded not guilty, without raising any objection to the preliminary proceedings, and was thereupon tried and convicted, the appellate court will not reverse the judgment of conviction, because the record does not affirmatively show that he was formally arraigned, and served with a copy of the indictment and a list of the jury."

In the case of *Bassett v. State*, 44 Fla. 12, 33 South. 263, the Supreme Court of that state said: "Where there is sufficient in the record to show the presence of the accused in court during the proceedings, the omission of a formal arraignment is waived by pleading to the indictment."

In the case of *State v. Grove*, 61 W. Va. 697, 57 S. E. 296, the Supreme Court of that state said: "An order in a criminal case, reciting the entry of a plea of not guilty, by the prisoner, and then saying 'and the attorney for the state doth the like and issue is joined thereon,' shows that the issue was made up and will sustain a judgment."

In the case of *Prouit v. People*, 5 Neb. 377, the Supreme Court of that state said: "The statute directing the entry of the prisoner's plea on the back of the indictment is not mandatory, but directory merely, and the failure to so enter it is no ground for a reversal of the judgment, when the plea is contained in another part of the record."

In the case of *Moore v. State*, 51 Ark. 132, 10 S. W. 23, the Supreme Court of that state said: "But it is said the judgment should be reversed because the record fails to disclose that a plea was entered by the defendant. It is not essential that a defendant should enter a plea to the indictment—a plea of not guilty may be entered by the court for him if he declines to plead. And if the court treats the cause as at issue without a formal entry of the plea, and he acquiesces in the court's action by availing himself of every privilege that could be accorded him under the plea, no substantial right has been affected; but only an irregularity of the most technical character has been countenanced. Where the objection is technical and the thing complained of might have been obviated by the mere mention at the time the irregularity occurred, and it has been productive of no injury, it would be inconsistent with the intelligence that ought to govern the whole course of judicial pro-

ceedings, to arrest the judgment on account of it. Indeed, we are commanded by the statute, which regulates the practice on appeal in misdemeanors, to reverse no judgment except for errors apparent on the record to the prejudice of the appellant. Mansfield's Dig. § 2468. No prejudice has resulted from a failure to enter a formal plea in this case. The appellant voluntarily submitted to the trial, and precisely the same proceedings were had as if he had formally entered a plea of not guilty. The cause was treated by both parties as though the issue was made on the plea of not guilty. The formal plea was thereby waived."

In the case of *Spicer v. People*, 11 Ill. App. 294, that court said: "But if this were the only point in the case, we should be inclined to hold up the fact as shown by this record, that defendant announced himself ready for trial, he in effect entered a plea, and that the failure of the record to contain a formal statement on that point would be a mere irregularity for which, no other reasons appearing, the judgment would not be set aside."

In the case of *Commonwealth v. McKenna*, 125 Mass. 397, the Supreme Court of that state held that, where the record did not show a formal entry of arraignment, but did show that the defendant had pleaded not guilty, that the failure of the record to show the arraignment was, at most, an informality that was waived by going to trial without objection.

In the case of *Hack v. State*, 141 Wis. 351, 124 N. W. 493, the Supreme Court of Wisconsin, discussing this question at length, said: "The ancient doctrine that the accused could waive nothing was unquestionably forced upon the anxiety of the courts to see that no innocent man should be convicted. It arose in those days when the accused could not testify in his own behalf, was not furnished counsel, and was punished, if convicted, by the death penalty, or some other grievous punishment out of all proportion to the gravity of his crime. Under such circumstances it was well, perhaps, that such a rule should exist, and well that every technical requirement should be insisted on, when the state demanded its need of blood. Such a course raised up a sort of barrier which the court could utilize when a prosecution was successful which ought not to have been successful, or when a man without money, without counsel, without ability to summon witnesses, and not permitted to tell his own story, had been unjustly convicted, but yet, under the ordinary principles of waiver, as applied to civil matters, had waived every defect in the proceedings. Thanks to the humane policy of the modern criminal law, we have changed all these conditions. The man now charged with crime is furnished the most complete opportunity for making his defense. He may testify in his own behalf; if he be poor, he may have

counsel furnished him by the state, and may have his witnesses summoned and paid for by the state; nor infrequently he is thus furnished counsel more able than the attorney for the state; in short, the modern law has taken as great pains to surround the accused person with the means to effectively make his defense as the ancient law took pains to prevent that consummation. The reasons which in some sense justified the former attitude of the courts have therefore disappeared, save perhaps in capital cases, and the question is, Shall we adhere to the principle based upon conditions no longer existing? No sound reason occurs to us why a person accused of a lesser crime or misdemeanor, who comes into court with his attorney, fully advised of all his rights, and furnished with every means of making his defense, should not be held to waive a right or privilege for which he does not ask, just as a party to a civil action waives such a right by not asking for it. Surely the defendant should have every one of his constitutional rights and privileges, but should he be permitted to juggle with them? Should he be silent when he ought to ask for some minor right which the court would at once give him, and then when he has had his trial, and the issue has gone against him, should he be heard to say there is error because he was not given his right? Should he be allowed to play his game with loaded dice? Should justice travel with leaden heel because the defendant has secretly stored up some technical error, not affecting the merits, and thus secured a new trial because forsooth he can waive nothing? We think not. We think that sound reason, good sense, and the interests of the public demand that the ancient strict rule, framed originally for other conditions, be laid aside, at least so far as all prosecutions for offenses less than capital are concerned. We believe it has been laid aside in fact [save for the single exception that trial by a jury of 12 cannot be waived, unless authorized by a specific law] by the former decisions of this court. It is believed that this court has uniformly attempted to disregard mere formal errors and technical objections, not affecting any substantial right, and to adhere to the spirit of the law which giveth life rather than to the letter which killeth. It may not always have succeeded; it is intensely human, but since the writer has been here he knows that the attempt has been honestly made."

See, also, the able argument of Judges Peckham, Brewer and White in their dissenting opinion in the case of *Crain v. United States*, 162 U. S. 646, 16 Sup. Ct. 952, 40 L. Ed. 1097, in which they hold that it would be trifling with justice to reverse a conviction in a criminal case, because the record was silent as to whether or not the defendant has been arraigned.

As this is the first time that we have been called upon to pass upon this question, and

as it is one of great importance, we have thought it best to go into the matter fully, so that it will not be necessary to discuss it or cite authorities in support of our views again.

We believe the world should be ruled by the living and not by the dead, and that it is our duty in construing the laws of Oklahoma to give them a common-sense construction, so as to secure justice and thereby accomplish the purpose for which they were enacted. We think the forms of the common law are only to be followed when they are based upon reason and justice, and applicable to the conditions existing in this state; thus far will we follow them, and no further. In fact, we are required to take this position by the express terms of our statute.

Section 6487, Snyder's Comp. Laws Okl., in chapter 89, under title of Criminal Procedure, is as follows: "The rule of common law that penal statutes are to be strictly construed, has no application to this chapter. This chapter establishes the law of this state respecting the subjects to which it relates, and its provisions and all proceedings under it are to be liberally construed, with a view to promote its objects, and in furtherance of justice."

Section 6957, Snyder's Comp. Laws Okl. 1909, is as follows: "On an appeal the court must give judgment without regard to technical errors or defects, or to exceptions which do not affect the substantial rights of the parties."

The record in this case shows that every object to be accomplished by an arraignment, and every right which an arraignment gives to an accused, was secured to the defendant in this case. When the record shows that this has been done, it is utterly immaterial as to whether or not the defendant was arraigned.

Second. Defendant's brief contains a number of pages in which the testimony of witnesses is copied, and from which it appears that the defendant objected to the introduction of such evidence and saved exceptions to the ruling of the court admitting the case. But the brief fails to make any argument or cite any authorities in support of the general objection made during the trial, that the evidence was irrelevant, incompetent, and immaterial. While, by statute, this general objection is sufficient during the trial, in the absence of a request from the trial court that the objections should be made more specific, yet when it comes to this court such objections are altogether insufficient. In fact, to simply copy the evidence introduced into the lower court, and the objections thereto, is not briefing the case. Upon appeal the brief must state the precise error complained of and enough of the record to enable this court to understand the questions presented, and also state the page of the record upon which the matter complained of can be found. And it must also state clearly the argument and

the authorities relied upon by the attorneys to sustain the objections made in the lower court. See *Cox v. State*, 3 Okl. Cr. 129, 104 Pac. 1074.

As the objections to the evidence in this case have never been briefed, they are not properly before us, and will be treated as waived. We will state, however, that we have read the entire evidence in the case and fail to see where the trial court committed any error either in the reception or rejection of testimony. Where objections to evidence are not properly presented in the brief they will only be considered by this court, when such evidence would not have been admissible for any purpose whatever, and where it clearly appears to the court that its reception was injurious to the defendant.

Third. The defendant complains that the evidence is not sufficient to sustain the verdict. The rule in such cases is that when there is evidence in the record from which the jury could legitimately arrive at the conclusion of the defendant's guilt, the verdict will not be disturbed upon the ground that it is not sustained by the evidence, unless the record shows that the jury was influenced by improper considerations in convicting the defendant. There is abundant testimony in the record, which, if believed by the jury, would have required them to acquit the defendant. On the other hand, the state proved by a number of witnesses that on the night before the killing, the defendant, speaking of the deceased, called him a scab son of a bitch, and said that he, the defendant, was not going to work any more until he killed the deceased, and further said that Pete Mullens (who was jointly charged with the defendant for killing the deceased) was on the trail of the deceased at that time. It was also proven that the defendant and his co-defendant, Pete Mullens, had had previous trouble with the deceased, and that just after he was shot deceased had stated, "They have killed me; Pete Mullens shot me." A few minutes after the shooting the defendant was arrested by the constable of the precinct in which the killing occurred, and he had in his possession a rifle, which, upon examination, proved to have been recently discharged. It was proven that deceased was wounded by two bullets of different caliber. The record is quite lengthy, but contains many circumstances which tend to prove that Pete Mullens and Sam Wood were acting together, and that one or the other of them had killed the deceased. The evidence for the defense was to the effect that the fatal shot was fired by Pete Mullens and that while the defendant was present, he did not take any part in the difficulty which resulted in the death of Barnes. The jury had the issues in the case fairly and clearly submitted to them by the instructions of the court. They heard the testimony of the witnesses and saw their demeanor while upon the witness stand, and were in a far better condition to determine

as to who should be believed than are the members of this court. This case was tried before a judge of exceptional ability, impartiality, fairness, and courage. He saw and heard the witnesses and he approved the verdict of guilty. This court can only inspect the cold record, while the judge and jury who tried the case saw and heard the living witnesses. In the absence of anything in the record indicating bias or prejudice upon the part of the judge or jury who tried the case, or that they were influenced by improper considerations, we cannot disturb the verdict upon the ground that it is not supported by the testimony.

Fourth. The jury were fully instructed by the trial court upon all the issues presented by the evidence. Counsel for the defendant excepted to instructions Nos. 7, 18, and 21, but they have not in their brief attempted to point out any defect in said instructions, and from an examination of the instructions excepted to we cannot see in what respect they are defective.

Fifth. Counsel for the defendant contend that this conviction should be reversed because the record of the second day's trial fails to show that the defendant was present.

Section 6775, Snyder's Comp. Laws Okl. 1909, is as follows: "If the indictment is for a felony, the defendant must be personally present at the trial, but if, for a misdemeanor not punishable by imprisonment, the trial may be had in the absence of the defendant; if, however, his presence is necessary for the purpose of identification, the court may, upon application of the county attorney, by an order or warrant, require the personal attendance of the defendant at the trial."

The record entries with reference to the trial are as follows:

"Public proclamation of the opening of court having been announced, proceedings were had, among others, as follows, to wit:

"State of Oklahoma v. Pete Mullens, Tom McElwain, Sam Wood, J. A. McQueen. No. 548. (Murder.)

"Now on this day comes the defendants herein, and requests severance in this cause, which severance is by the Court granted, whereupon the State elects to try the defendant Sam Wood first, and thereupon the defendant Sam Wood is put on trial.

"State of Oklahoma v. Sam Wood. No. 548. (Murder.)

"Now on this day this cause comes on for trial, the State being represented by T. R. Dean, County Attorney, and the defendant being present in his own proper person in charge of the Sheriff, and represented by his counsel, Lester and Hammond and Arnote and Monk, and both the State and defendant announce ready, whereupon comes a Jury for the trial of this case as follows, to wit: A. Wheeler, T. L. Shaw, Wiley Adams, A. B. Ringland, A. Hower, T. H. Kenneaster, Rube

Chapman, William Farris, H. Boone, Chas. Burkhardt, Zack Boone, and Ike Yoes, twelve good and lawful men duly selected, empanelled and sworn for the trial of this cause, and are accepted by both the State and defendant, and now the State makes statement, and the Jury after hearing part of the evidence, the hour of adjournment having arrived, were given in charge of L. J. Hefley, Court Bailiff, to be turned into open court to-morrow morning at 8:30 March 31st, 1909.

"Ninth Judicial Day, March, 1909, Term. Date 8—31—09.

"State of Oklahoma v. Sam Wood. No. 548. (Murder.)

"Now on this day comes the Jury, heretofore empanelled and sworn for the trial of this cause and take their seats in the jury box and the trial of this case is resumed, and the Jury, after hearing balance of evidence, charge of the Court and part of argument of counsel, the hour of adjournment having arrived, the Jury was given in charge of L. J. Hefley, Court Bailiff, until to-morrow morning at 8:30 o'clock A. M., April 1st, 1909.

"Tenth Judicial Day, March, 1909, Term. Date 4—1—09.

"And now Court convened on Thursday, April 1st, 1909, pursuant to adjournment. Present the Honorable Malcolm E. Rosser, Judge; W. B. Riley, Clerk; T. R. Dean, County Attorney; John A. Harrison, Sheriff, by L. J. Hefley, Bailiff, and Henry S. Cabell, Stenographer.

"Public proclamation of the opening of court having been announced, proceedings were had, among others, as follows, to wit:

"State of Oklahoma v. Sam Wood. No. 548. (Murder.)

"Now on this day the trial of this cause is resumed, the State being present by T. R. Dean, County Attorney, and the defendant being present in his own proper person in charge of the Sheriff and represented by his counsel, Lester & Hammond and Arnote and Monk, whereupon comes the Jury heretofore empanelled and sworn for the trial of this cause and take their seats in the Jury Box, and the trial of this case is resumed, and after hearing balance of argument of counsel the Jury retires in charge of a sworn bailiff to consider of their verdict, and thereupon returned into open court, with the following verdict, to wit:

"We the Jury duly empanelled and sworn in the above styled cause do find upon our oaths the defendant Sam Wood GUILTY of Manslaughter in the FIRST Degree as charged in the Information in this case, and assess his punishment at Imprisonment for the period of (20) Twenty Years.

"Ike Yoes, Foreman."

"Whereupon the Jury was discharged from further consideration of this case, and the

defendant Sam Wood remanded to the custody of the Sheriff to await sentence."

It affirmatively appears from the record that the defendant was in charge of the sheriff during the entire trial; that he was present when the trial began and announced ready for trial, and through his counsel participated in the selection of the jury and the examination of the witnesses. It is true that the record of the second day's trial does not directly assert the presence of the judge who presided at the trial or of the defendant, but enough is stated to make it judicially appear that the judge and the defendant were present. The record entry is that, "the trial of this case is resumed." This court will take judicial notice of the fact that the trial could not have been lawfully resumed in the absence of the judge who presided and of the defendant. In the case-made it appears that the defendant testified as a witness in his own behalf. The entry of the second day's trial, after stating that the trial of the case was resumed, proceeds, "And the jury, after hearing the balance of the evidence, charge of the court and argument of counsel, the hour of adjournment having arrived, the jury were given in charge of L. J. Hefley until to-morrow morning at 8:30 o'clock a. m." This strengthens the presumption that the defendant was not only present on the second day of the trial, but also that he testified as a witness in his own behalf during said second day, for he was among the last witnesses who testified on that day. The record of the third day's trial affirmatively shows the defendant's presence.

The defendant filed a motion for a new trial, but this motion does not complain that the defendant was absent at any time during said trial. If, as a matter of fact, the defendant had been absent at any time during the trial, it was the duty of his counsel to have presented this matter to the judge, who would doubtless have granted him a new trial or would at least have made such absence a matter of record. After the defendant's motion for a new trial was overruled and before sentence was pronounced upon him, he was asked what, if anything, he had to say why he should be sentenced according to the verdict of the jury. The defendant remained silent. There is no showing in the case-made or in the record that the defendant was absent at any time during the trial. This question is presented for the first time by brief of counsel for the defendant in this court, and this claim is based alone upon the recitals contained in the transcript of the record of the second day of the trial. Under these conditions it is our duty to construe the recitals contained in the transcript of the record most strongly against the defendant, and from these recitals as hereinbefore stated, and from the further fact that this motion was not presented in the trial court when the record could have been corrected,

if erroneous, this court is authorized to presume that the defendant was present during his entire trial. No presumption can be indulged in against the express declaration of the record, but where one part of the record is silent as to a given matter the other parts of the record may be considered and may be sufficient to justify the presumption that that which should have been done was done. We feel that it would be trifling with justice to grant this defendant a new trial upon this question in the face of the record.

We are sustained in these views by the following authorities:

"The only remaining assignment of error is that it does not appear on the record, that the prisoner was present in the court after the first day of the trial, until its close the trial having been continued from day to day for several days). The record shows his presence on the first day, and when the jury were impaneled and sworn; and at its close when the judgment was rendered; and that at the latter period, being asked whether he had anything to say why judgment should not be pronounced against him, he alleged no reason to the contrary. During all the intermediate days of the trial, the record merely shows the entry of continuances in the usual form, without referring to the presence or absence of the prisoner. We concur entirely with the New York Court of Appeals in *Stephens v. People*, 19 N. Y. 549, that this condition of the record is no ground of error; that the allegation of continuances indicates that it was with the incidents before described, of which the presence of the prisoner was one—this is all which is usually stated in such cases. But it is quite apparent that there is no ground for suspecting the prisoner's absence during any part of the trial in this case. A motion was made for a new trial upon four distinct grounds, of which the absence of the prisoner is not mentioned as one—an omission not likely to have occurred had he been absent during any part of the trial." *Grimm v. People*, 14 Mich. 300.

"It is said the court below erred in pronouncing sentence upon the defendant during his absence. No such question was made in the court below, and there is nothing in the record to indicate his absence, except the mere failure of the entry to affirmatively show that he was present. This is not sufficient to support the conclusion. This court will presume that the circuit judge did his duty in such matter, in the absence of an affirmative showing to the contrary." *Griffin v. People*, 109 Tenn. 34, 70 S. W. 65.

"According to the rule governing appellate procedure, the duly authenticated record and minutes of the trial cannot be contradicted in this court, and every material recital in a judgment of conviction imports absolute verity. *Wright v. Sherman*, 3 S. D. 367, 53 N. W. 425; 2 Cyc. 859; *Morgan v. State*, 51 Neb. 672, 71 N. W. 788; *Gray v. State*, 63 Ala. 66; *Taylor v. Commonwealth*, 44 Pa. 131;

People v. Roselle [78 Cal. 84] 20 Pac. 36; *Reynolds v. State* [34 Fla. 175] 16 South. 78; *Anderson v. Commonwealth*, 100 Va. 860, 42 S. E. 865. The record affirmatively shows that the accused, when called upon to answer the information, was present in court, and personally entered a plea of not guilty; that the cause was brought on regularly for trial upon the issue thus raised, and he was sworn and testified on his own behalf; that the jury, after hearing all the evidence, and in the presence of the accused, returned into court and delivered its verdict. The presumption that the defendant was personally present at all times required by statute is therefore entertainable. In *Folden v. State*, 13 Neb. 328, 14 N. W. 412, Justice Lake, in speaking for the court, uses the following language: "Where the record once shows the presence of the prisoner at his trial, it will be presumed to have continued to the end, unless the contrary is affirmatively shown." *State v. Pearce*, 19 S. D. 78, 102 N. W. 223.

"The question here, however, is not whether the prisoner was entitled to be so present, but whether it sufficiently appears on the record that he was present. The record does not set forth, with that fullness it might have done and such as is usual, what did occur on the trial. But 'it is sufficient, if it be certain, to a certain intent, in general; it is not necessary that it should be certain, to a certain extent in every particular, so as absolutely to exclude every possible conclusion, all arguments, presumption, or inference against it.' This is the language of the court in *Christmas' Case*, 20 N. C. 545. The record in this case shows, in language sufficiently intelligible, that the prisoner was present at the conclusion of the trial. It states the names of the jurors who were sworn and charged to try the case; it then proceeds, 'who find John Collins, the prisoner at the bar, guilty,' etc. It is answered on the part of the prisoner that this does not ascertain with sufficient certainty his presence during the trial. Under the rule laid down in the case of *Christmas* we think it does; and that we are bound, from it, to believe that he was present during the trial. *Craton's Case* is an authority on this point. The language of the court in that case is: 'But although it is the more correct that the presence of the accused should be expressly affirmed, yet we conceive, it is sufficient, if it appear by a necessary or reasonable implication. 28 N. C. 169. In this case the accused is called by the jury, in their verdict, the prisoner at the bar, and the clerk, in recording it, calls him 'the prisoner at the bar.' It would be too violent a supposition, that he had been brought to the bar simply to hear the verdict pronounced, when his right to be present the whole time is secured to him by the fundamental law of the country; and when such is the uniform practice. If not a necessary, it is a reasonable, implication, that such was the fact, and

we so understand it. It has, however, been argued before us that the expression, the prisoner at the bar, is satisfied, by his being in the custody of the sheriff. The prisoner, it is true, is in the custody of the sheriff after his arrest, until duly discharged, unless he escape, but the term of 'the prisoner at the bar,' is used to designate where he is in his custody, to wit, at the bar, in the presence of the court and jury," *State v. Collins*, 30 N. C. 414.

"It is also urged, in the prisoner's behalf, that it does not appear that he was present during the trial. The return states that he appeared in his own proper person, and was in due form of law tried and convicted. As it is nowhere stated that he left the court after he so appeared, the presumption is that he did remain and was present during the whole of the trial; certainly, no presumption to the contrary can be entertained, as long as nothing appears to support such an inference." *Hilderbrand v. People*, 1 Hun (N. Y.) 19.

"It is urged that it does not affirmatively appear, from the record of the judgment, that the defendant was in court at the time the jury returned their verdict and it was received by the court. The record is substantially like that involved in *Schirmer v. People*, 33 Ill. 276. There the arraignment and trial were upon one day, and upon the following day the jury returned their verdict and the judgment was rendered. It was there said: 'That he [defendant] was personally present was shown by his arraignment, for that involves his personal appearance. No interval appears between the arraignment, trial, verdict, and judgment, and the presumption, therefore, must be, the prisoner remained in court the whole time. The whole proceedings seem to have been very expeditious, and in the consecutive and continuous order in which they are stated in the record they necessarily imply his personal presence during the whole time, including the moment when sentence was passed by the court. * * * The fact of the prisoner's presence can, by fair intendment, be collected from the record, and that is sufficient.' Besides this, it is affirmatively stated in the bill of exceptions, and thereby made a part of the record, that 'thereupon the jury rendered the following verdict against the defendant; he being then present in open court.' Our conclusion is, that there is no just ground for claiming that the record does not show that the defendant was in court when the verdict was returned and received." *Padfield v. People*, 146 Ill. 664, 35 N. E. 470.

"The trial commenced on the 6th day of October, the evidence and arguments of counsel were completed and the jury were instructed and retired on the 7th, and returned their verdict into court and were discharged on the 8th. It is assigned as error that the record fails to show affirmatively

that the defendants were present in court during the progress of the trial on the 7th day of October, or at the time when the jury returned their verdict into court, on the 8th. It is a well-settled rule of the common law that a prisoner accused of a felony must be present in person throughout the trial, and that the record should show such fact. *Harlis v. People*, 130 Ill. 457 [22 N. E. 826]. If the presence of the prisoner in court can by fair intendment be collected from the entire record, that is sufficient. *Schirmer v. People*, 33 Ill. 276; *Padfield v. People*, 146 Ill. 660 [35 N. E. 469]; *Bolen v. People*, 184 Ill. 338 [56 N. E. 508]. The right to be present, however, may be waived by the defendant. *Sahlinger v. People*, 102 Ill. 241. The record shows that the defendants were all personally present at the time the trial commenced, on the 6th; that during the trial each of the defendants testified as a witness for the defense; that there was no interval between the commencement of the trial and the verdict; that the whole proceedings were completed within three days and were carried on in a consecutive and continuous order, and that a motion for a new trial was made upon the receipt of the verdict upon five distinct grounds, of which the absence of the defendants is not mentioned as one. In the case of *Schirmer v. People*, supra, which was an indictment for murder, the record showed no interval between the arraignment of the prisoner, the trial, verdict, and judgment. The whole proceeding appeared to have been completed within two successive days and in continuous order. It was held, upon such record, that the presence of the defendant during the whole proceeding, down to the moment sentence was passed upon him, was a matter which might fairly be implied. This case was approved and reaffirmed in *Padfield v. People*, supra. The doctrine seems to be well settled that where the record shows that the accused was present at the commencement of the trial, the whole proceeding appearing to have taken place in consecutive and continuous order and nothing to the contrary appearing therefrom, it will be presumed that he was present at every subsequent stage of the proceeding down to the return and receipt of the verdict. *Dodge v. People*, 4 Neb. 220; *Stephens v. People*, 19 N. Y. 549; *Rhodes v. State*, 23 Ind. 24; *Brown v. State*, 13 Ark. 96; *Smith v. State*, 60 Ga. 430; *Harriman v. State*, 2 G. Greene (Iowa) 270; *Holmes v. Commonwealth*, 25 Pa. 221; *Grimm v. People*, 14 Mich. 300; *State v. Craton*, 28 N. C. 164." *Sewell et al. v. People*, 189 Ill. 174, 59 N. E. 583.

"As recited in the transcript, the case was originally set for trial Monday, September 2, 1901. The defendant had previously been properly arraigned and pleaded not guilty. The record is silent in reference to the presence or absence of the defendant or his counsel at the time it was so set. The presump-

tion is in favor of the regularity of the proceedings in the trial court and that they were present. The 2d of September being a holiday, however, the court had the case set for trial for the 3d of September, at which time, it is recited in the transcript, the defendant was in jail and not in court." *People v. Rader*, 136 Cal. 253, 68 Pac. 707.

"It is further assigned, as error, that the record does not show that the defendant was present at the trial, or at the rendition of the verdict. Such presence is required by the Revision, §§ 4706, 4826. The record does show, that on the 4th day of April, 1864, the cause coming on for hearing, the defendant was called, and failing to appear, a default was entered against him and his sureties on his bail bond. That, on the 5th day of April, the defendant appearing in open court, the default was set aside and a jury trial had, and verdict rendered on the 6th, that, on the 7th, a motion for a new trial was made and overruled, and on the 9th, 'the defendant' being in open court, was called within the bar and sentenced. Being thus shown to be present at the commencement and conclusion of his trial, this court will presume the defendant present all the time, unless the contrary is shown. *Harriman v. State*, 2 G. Greene, 270. In other words, the error, if any was committed, must be shown affirmatively by the party complaining of it." *State v. Wood*, 17 Iowa, 18.

"So far as shown by the record, neither of the plaintiffs in error was absent when the instruction was given. It does appear that they were present on that date, and the presumption is, in the absence of anything to the contrary, that they were present at every stage of the proceeding. *Schirmer v. People*, 33 Ill. 276. Plaintiffs in error attempt to show the contrary by affidavits filed in support of their motion for a new trial, but such affidavits cannot be taken as evidence of what occurred at that particular time. *Dreyer v. People*, 188 Ill. 40 [58 N. E. 620, 59 N. E. 424, 58 L. R. A. 869]; *Mayes v. People*, 106 Ill. 306 [46 Am. Rep. 698]; *Scott v. People*, 141 Ill. 195 [30 N. E. 329]; *Peyton v. Village of Morgan Park*, 172 Ill. 102 [49 N. E. 1003]. If plaintiffs in error were absent from the room, as alleged in these affidavits, they cannot take advantage of such absence, for the reason that they voluntarily absented themselves. *Sahlinger v. People*, 102 Ill. 241." *Gallagher v. People*, 211 Ill. 158, 71 N. E. 842.

"Notwithstanding it is established by the pleadings in this proceeding that the appellant was in fact present during the trial which resulted in his conviction, it is contended that the judgment under which he is imprisoned is a nullity because the record of conviction does not disclose his presence 'at any' time during which the trial proceeded.' Assuming that the presence or absence of the accused during the trial of a felony can be ascertained alone from the record of

the court wherein he was convicted, and that an inquiry touching the question is proper in a habeas corpus proceeding, we will proceed to determine what this record of conviction discloses, and what the law requires regarding personal presence in criminal cases. It appears on the face of the record that the indictment was returned on June 4, 1901; that the appellant was personally present and arraigned on the same day; that he was personally present and entered the plea of not guilty on June 5th; that the jury was selected and sworn on June 6th; that on the same day certain witnesses were sworn and examined on behalf of the state, and certain others, among whom was Frank Kotilnic, on behalf of the defendant; that on June 8th the court charged the jury; that on the same day the verdict was returned, and judgment pronounced in the personal presence of the appellant. Thus it appears affirmatively that the proceedings from the return of the indictment to the rendition of judgment took place on four days; that the appellant was personally present for arraignment, to plead, to receive the verdict, and to receive sentence; and that he was personally present on three of the four days in which any action appears to have been taken in his case. If the indictment is for a felony, the statute requires the defendant to be personally present at the trial. Rev. Code Cr. Proc. § 301. The trial begins when the jury has been impaneled and sworn. It ends when the judge has concluded his charge. Id. § 350. Where a felony is charged, the defendant is also required to be personally present at the time of arraignment, when the verdict is received, and when judgment is pronounced. Id. §§ 244, 398, 437, 444. His personal presence is not necessary at times other than those prescribed by the statute. *Territory v. Gay*, 2 Dak. 125, 2 N. W. 477. Can we conclude that appellant was personally present at the trial? Concerning the determination of this question the authorities are conflicting. In California it was held that, unless the contrary appears from the record, it will be presumed that the accused was present at a time required by the statute. *People v. Sing Lum*, 61 Cal. 538. On the other hand, it was held in Wisconsin that no presumption will be indulged to supply the record in a criminal case, where it does not show the necessary fact of the defendant's presence. *French v. State* [85 Wis. 400] 55 N. W. 566, 21 L. R. A. 402, 39 Am. St. Rep. 855. Between these two extremes are numerous decisions to the effect that it is sufficient if the fact of the defendant's presence can, by fair intendment, be collected from the entire record. *Schirmer v. People*, 33 Ill. 276; *Stephens v. People*, 19 N. Y. 550; *Brown v. State* [29 Fla. 543] 10 South. 736; *Folden v. State*, 13 Neb. 328, 14 N. W. 412; *Jeffries v. Commonwealth*, 12 Allen [Mass.] 145; *State v. Cartwright*, 10 Or. 193; *Territory v. Yarberry*, 2 N. M. 391. In *Brown*

v. State, supra, this language is used: 'In felonies it is necessary that the accused be personally present during the progress of the trial, including the judgment or sentence of the court imposing the penalty of the law. But, while it is best always to have the record show directly and affirmatively that the accused was personally present at each and every stage of the trial, yet it will be sufficient if it appear therefrom by necessary and reasonable implication that he was present.' In *Jeffries v. Commonwealth*, supra, the rule is thus stated: 'Nor is it necessary that the record should in direct terms state that the party was personally present at the time of the rendition of the verdict, and during all the previous proceedings of the trial. However necessary it may be that such should have been the fact, it is not necessary to recite it in the record. The record shows that he was present at the arraignment, and present to receive his sentence.' Mr. Chief Justice Lake, speaking for the court in *Folden v. State*, supra, says: 'And, lastly, it is urged that the record fails to show affirmatively that the prisoner was present in court when the jury brought in their verdict.' This point was not made in the motion for a new trial, and therefore, even if it could otherwise be regarded as fatal to the judgment, it is too late to raise it now. *Dodge v. People*, 4 Neb. 220. The record, however, does show that the prisoner was duly arraigned, and pleaded to the indictment; that he was present at the impaneling of the jury who tried him, and gave his own testimony as a witness before them. With these facts, it would be altogether unreasonable to presume from the mere silence of the record on that point that he was absent when the verdict was received by the court. Where the record once shows the presence of the prisoner at his trial, it will be presumed to have continued to the end, unless the contrary is affirmatively shown. The presumption is, rather, that the trial court did its duty than that it did not.' Supported by the foregoing authorities, and others that might be cited, we have no hesitancy in concluding, from the facts appearing on the face of the record, that the appellant was personally present during the trial which resulted in his conviction." *State v. Swenson*, 18 S. D. 196, 99 N. W. 1114.

"It is claimed that the record does not show that the prisoner was present in court during the trial, nor at the time sentence was pronounced. It appears from the record, that the prisoner was duly arraigned and plead not guilty, that he was present during the time the jury were being impaneled, that after the evidence was closed he filed instructions with the clerk and excepted to the instructions given by the court on its own motion, but the record is silent as to whether the prisoner was present in court or not, at the time the jury returned their verdict. The rule is well established

that in all cases of felony the prisoner must be present in court during the trial, and at the time the verdict is received, and no valid judgment can be predicated on a verdict received in the absence of the prisoner. At common law, the finding of the jury of the guilt of the accused was conclusive of that fact, and the court possessed no power to set the verdict aside and grant a new trial on the merits, on the motion of the accused, even where the verdict was clearly against the weight of the evidence. Hilliard on New Trials, 114. *Queen v. Bertrand*, 1 F. C. 520. *The King v. Fowler*, 4 Bar. & Ald. 275. 1 Ch. C. L. 653. Neither was counsel allowed a prisoner upon his trial on the general issue, in any capital crime, unless some point of law arose proper to be discussed. 4 Blackstone, Com. 355. To guard against this provision of the common law, the Constitution of the United States provides that in all criminal prosecutions the accused shall have the assistance of counsel for his defense. Nor must it be forgotten, that among the variety of actions that men are liable to commit, 160 were declared to be felonies without benefit to clergy, the punishment of which was death. 4 Blackstone, 19. Therefore the utmost caution was required in capital trials, in favor of life, and if an irregularity materially affecting the trial occurred to the injury of the accused, the court usually represented such matter to the crown, and a pardon was granted. *Commonwealth v. Green*, 17 Mass. 534. Now, however, in the Court of Queen's Bench, when the record is before that court and it appears that evidence has been improperly admitted, or the jury have been misdirected, a new trial may be granted in cases of felony. *Rex v. Scalfie*, 2 Don. C. C. 281, 17 Q. B. 238; and a person accused of crime is allowed the assistance of counsel to conduct his defense. In this country the almost uniform practice has been to extend to criminal cases, so far as the revision of verdicts is concerned, substantially the same principles which have been established in civil cases; and by statute in this state, after a verdict of guilty, a defendant may move for a new trial, on any of all of the grounds therein set forth. And it is his duty, in such a case, to bring before the court, by his motion, all the reasons which are known to exist for setting aside the verdict and granting a new trial. There is no reason why the same rule in that respect should not apply in criminal as in civil cases. In this case, in the 23 grounds assigned in the motion for a new trial, there is no allegation that the prisoner was not present in court; the only irregularity complained of in the proceedings of the court is in overruling the motion of the prisoner to quash the indictment. The presumption is that the court performed its duty, and that the prisoner was in court at the time the verdict of the jury was received. In the case of *Beale v. Commonwealth*, 25 Pa.

18, the court held: 'We are not to expect too much from the records of judicial proceedings. They are memorials of the judgments and decrees of the judges, and contain a general but not a particular detail of all that occurs before them. If we must insist on finding every fact fully recorded before a citizen can be punished for an offense against the laws, we should destroy public justice, and give unbridled license to crime. Much must be left to intendment and presumption, for it is often less difficult to do things correctly than to describe them correctly.' And in *Rhodes v. State*, 23 Ind. 24, the court held: 'In this case the prisoner is shown by the record to have been present in court at the commencement of the trial. The record is silent as to where he was at the return of the verdict. We presume he was in court.' See, also, *Brown v. State*, 13 Ark. 100." *Dodge v. People*, 4 Neb. 220.

"A motion is also submitted in arrest of judgment. The reason assigned is insufficient. From the record it appears that the prisoner was at the bar during the selection of the jury; for it shows at the commencement of the trial, that the prisoner being brought to the bar in the 'custody of the sheriff,' etc.; after this is the drawing of the jury; and the jury in their verdict say that they find the prisoner at the bar, etc., and after it is this entry: 'The prisoner is thereupon remanded to jail.' It thus manifestly appears that the prisoner was present at the bar when the jury was drawn, and during the whole time of the trial. The entry, after he was brought into court, 'It is therefore ordered that he be again committed to his custody'—that is, the custody of the sheriff,—cannot alter the record as to his actual presence. Such an order was right and proper, to make the sheriff responsible for his person, so as to prevent an escape, and supersede the necessity for a fresh order to that effect every time the court should take a recess, which often occurs on the trial of a capital case. It is true the prisoner was in the custody of the law, and the court had a right to so order as that he should be forthcoming to hear his verdict and the judgment." *State v. Langford*, 44 N. C. 436.

As this is a new question in Oklahoma we have copied the above authorities for the purpose of showing that our views are sustained by authority as well as by justice and reason.

Sixth. In his closing argument to the jury the county attorney used the following language: "The reason I asked Peto Mullen if Ed. Thompson hadn't had to hold him to keep him from shooting Wash Barnes on one occasion in Savanna, was because I had been informed that he had said that by what I regard as reliable parties." The defendant objected to the remarks of the county attorney and moved the court to exclude them from the jury. This motion was overruled by the court, to which the defendant

excepted. The case-made shows that these remarks of the county attorney were made in reply to remarks made by one of the counsel for the defendant. Counsel for the defendant, in the course of his argument, had stated that the county attorney had tried to get matters before the jury he could not prove and had insinuated the existence of certain facts of which there was no evidence, and gave as an instance the question asked Mullens by the county attorney, and then challenged the county attorney to say why he did not put Thompson on the stand. It was in reply to this challenge that the statement objected to was made, and the county attorney further stated at the time that the reason why he had not put Thompson on the stand to testify was because he had found out that Thompson's evidence would not sustain the information which he had received. It is thus seen that the statement made by the county attorney was in reply to an accusation of unfairness, which had been brought against him by counsel for the defendant, and also explained why he had not placed Thompson on the stand. The defendant's counsel, having provoked this controversy and having challenged the county attorney to make the explanation to the jury, the defendant is in no condition to complain at the remarks made by the county attorney. The trial court therefore did not err in refusing to withdraw the remarks of the county attorney from the jury. Where remarks of a prosecuting attorney have been provoked and are in reply to defendant's counsel, such remarks are not ordinarily ground for a new trial. See *Buck v. Terr.*, 1 Okl. Cr. 517, 98 Pac. 1017.

Seventh. The jury found the defendant guilty of manslaughter in the first degree and assessed his punishment at imprisonment in the penitentiary for a period of 20 years, but the judgment of the court recited that the defendant had been convicted for the crime of murder and the court sentenced the defendant to 20 years' imprisonment in the state penitentiary for said offense of murder. Counsel for the defendant insist that a new trial should be granted the defendant on account of the variance between the verdict and sentence of the court. It goes without the saying that the verdict is the basis of the judgment. Therefore the judgment and sentence must follow the verdict. Here we have a defendant convicted for one offense and sentenced for another. Upon the face of the sentence it appears that error was committed, because under our statutes it would be impossible to sentence a defendant to 20 years' imprisonment in the penitentiary for the crime of murder. The punishment for the crime of murder is either death or imprisonment in the penitentiary for life. So upon its face, without reference to the verdict, the judgment and sentence in this case is erroneous. We do

not feel, however, that we should grant the defendant a new trial on this account. The supreme purpose of this court is to decide every case on its actual merits and according to the truth and justice of the questions involved. We cannot reverse a case on account of any technical error or defect which did not deprive the defendant of some substantial right. We find that up to and including the rendition of the verdict in this case that the defendant was not deprived of any such right. He was tried by a fair and impartial jury. The evidence amply sustains the verdict. The variance between the judgment and the verdict was in all probability the result of a clerical error. We do not believe a new trial should be granted in such a case, because the error can be corrected without injury to the rights of the defendant.

In this connection we desire to say to the county attorneys of the state that it is their duty to prepare all orders and judgments in criminal cases. A failure to do this on the part of some of the county attorneys of the state has given this court a great deal of trouble, and has greatly hindered us in the determination of cases. It is also the duty of county attorneys, when an appeal is taken, to carefully read over the case-made and transcript of the record and see that the orders and judgments of the court are correctly copied therein. It is a matter of constant repetition in this court to have motions filed to correct defective records. This all comes from the heedlessness, carelessness, or incompetence of some of the county attorneys of the state. It not only results in great delay in the administration of justice, but it also adds materially to the expenses incurred in the business of the court and frequently forces this court to reverse convictions which would have been affirmed, had it not been for neglect on the part of the county attorneys as hereinbefore pointed out. We suggest to the trial judges of the state that, except in instances where they have clerks of experience and approved ability, they require the county attorneys to attend to these duties. We trust that we will not have occasion to call attention to this matter again.

It is ordered by the court that all of the proceedings had in the trial court in this case up to and including the verdict of the jury are approved and affirmed, and that the judgment and sentence of the trial court be set aside upon the ground of the variance between the verdict of the jury, and that this cause be remanded to the district court of Pittsburg county, with directions to the judge of said court to resentence the defendant in conformity to the verdict of the jury. When the defendant has been resented in accordance with the verdict of the jury, the sheriff of Pittsburg county will forthwith deliver the defendant to the warden of the

penitentiary at McAlester, in order that the sentence of the court may be executed without further delay.

DOYLE and RICHARDSON, JJ., concur.

(4 Okl. Cr. 326)

FIFE v. STATE

(Criminal Court of Appeals of Oklahoma. Nov. 23, 1910.)

(Syllabus by the Court.)

1. STATES (§ 9*)—JURISDICTION—OFFENSES PRIOR TO STATEHOOD.

The courts of the state of Oklahoma have jurisdiction of offenses committed prior to statehood.

[Ed. Note.—For other cases, see States, Cent. Dig. § 4; Dec. Dig. § 9.*]

(Additional Syllabus by Editorial Staff.)

2. CRIMINAL LAW (§ 1144*)—APPEAL—REVIEW—PRESUMPTION—REGULARITY OF VERDICT.

Where the record on appeal shows that the verdict of a petit jury was signed by the foreman, and there is nothing in the record to show that the court instructed the jury that less than the twelve jurors could return a verdict, and nothing to show that less than the twelve concurred in the verdict returned, it will be presumed that the verdict was regular and unanimous.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2747, 3018; Dec. Dig. § 1144.*]

Appeal from District Court, Okmulgee County; John Caruthers, Judge.

Sam Fife was convicted of assault with intent to kill, and he appeals. Affirmed, with directions.

M. A. Holcomb and J. H. Clapp, for plaintiff in error. Smith C. Matson, Asst. Atty. Gen., for the State.

FURMAN, P. J. The brief for the state correctly states the alleged errors relied upon and the law governing such questions as follows: "The errors alleged and argued as causes for reversal are two, namely: '(1) That defendant was indicted by a grand jury composed of only 12 men, any nine of whom concurring could return an indictment, when under the laws in force at the time of the commission of said crime, if any, a lawful grand jury composed of 16 men, any 12 of whom could return an indictment, and that the grand jury had no jurisdiction to return this indictment. (2) That the accused had the right to be tried by a petit jury of 12 men who had no right to return other than an unanimous verdict.' The questions herein presented have already been decided by the Supreme Court of this state and also by your honorable court adversely to the contentions of counsel for defendant, and it is only necessary to cite those cases in this brief. As to the jurisdiction of the district court of Okmulgee

county, we cite *Higgins v. Brown*, Judge, 1 Okl. Cr. R. 33, 94 Pac. 703, and other cases there cited. As to the question of the sufficiency and legality of an indictment returned by a grand jury only of 12 men for crimes committed prior to statehood in the old Indian Territory, we cite *John Hopkins v. State* (not yet officially reported) 108 Pac. 420; *Canard v. State*, 2 Okl. Cr. 505, 103 Pac. 737. The indictment in this case is indorsed, 'True bill. H. S. Brown, Foreman.' (See Record.) As to the second contention, the record shows that the verdict of the petit jury is signed by the foreman, and the presumption is in favor of its regularity and that it is an unanimous verdict. There is nothing in this record to show that the court instructed the jury that less than the entire twelve could return a verdict, and there is nothing to show that less than the twelve concurred in the verdict returned. This record does not disclose that the defendant was deprived of the number of peremptory challenges to which he would have been entitled prior to statehood or of any other right that this court has held to be a substantial right."

Counsel for appellant then contends that the verdict is contrary to the evidence. An examination of the record will show that the testimony offered on behalf of the state tended to establish an unprovoked attempt at assassination on the part of the defendant. The evidence for the defendant tends to show that he acted only in self-defense. The witnesses were before the jury, and they were in a much better position to determine as to which testimony was creditable than are the members of this court.

The judgment of the trial court is affirmed, with directions that it be amended so as to provide for the confinement of the defendant in the state penitentiary at McAlester.

DOYLE and RICHARDSON, JJ., concur.

(4 Okl. Cr. 547)

GARNSEY v. STATE

(Criminal Court of Appeals of Oklahoma. Dec. 1, 1910.)

(Syllabus by the Court.)

1. INDICTMENT AND INFORMATION (§ 1*)—RIGHT TO TRIAL ON PRESENTMENT OR INDICTMENT—CONSTITUTIONAL PROVISIONS.

Article 5 of the amendments to the Constitution of the United States, providing that "no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury," guarantees to a defendant charged with the commission of a felony in Oklahoma Territory, prior to statehood, an unalterable right to be accused by indictment only.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 5; Dec. Dig. § 1.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

2. INDICTMENT AND INFORMATION (§ 2*)—NECESSITY FOR INDICTMENT—CONSTITUTIONAL PROVISIONS.

In such cases the indictment is a necessary requisite to give the court jurisdiction, and without indictment the court has no jurisdiction to try.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 5; Dec. Dig. § 2.*]

3. INDICTMENT AND INFORMATION (§ 3*)—NECESSITY FOR INDICTMENT — "INFAMOUS CRIME."

A crime punishable by imprisonment for a term of years at hard labor is an "infamous crime," within the provision of the fifth amendment of the Constitution of the United States.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 10; Dec. Dig. § 3.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3573-3577.]

4. CONSTITUTIONAL LAW (§ 197*)—EX POST FACTO LAWS.

The constitutional guaranty constitutes a substantial right under the laws of Congress and the laws of Oklahoma Territory, and any state law which operates as a denial of this right alters the situation of the accused to his disadvantage, and is therefore ex post facto as to such offense.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 550; Dec. Dig. § 197.*]

Appeal from District Court, Beaver County: R. H. Loofbourrow, Judge.

W. L. Garnsey was convicted of rape, and he appeals. Reversed and remanded.

Harris & Wilson and Claude Nowlin, for plaintiff in error. Chas. West, Atty. Gen., and Smith C. Matson, Asst. Atty. Gen., for the State.

DOYLE, J. W. L. Garnsey (hereinafter designated defendant) was prosecuted for the crime of rape, alleged to have been committed in Beaver county, territory of Oklahoma on the 20th day of April, 1907. On May 4, 1907, an information charging the crime of rape was filed before a justice of the peace. Defendant was arrested, waived examination, and was bound over to await the action of the district court. On February 29, 1908, no grand jury action having been taken thereon, the county attorney filed a duly verified information in the district court of Beaver county, charging defendant with the crime of rape. Defendant filed a general demurrer to said information, which demurrer was overruled and exception allowed. On this information defendant was tried and found guilty of the crime of rape, and on the 20th day of March, 1909, was by the court sentenced to imprisonment for five years at hard labor in the state penitentiary. From this judgment and sentence defendant perfected an appeal by filing with the clerk of this court on May 4, 1909, his petition in error with a duly certified transcript of the record attached thereto, together with proof of service of notices of appeal.

Counsel for defendant contend that: "The

district court of Beaver county, state of Oklahoma, erred in permitting the prosecution of the plaintiff in error upon the charge of having committed a felony in the territory of Oklahoma, prior to the adoption of the Constitution of the state of Oklahoma, upon information of any kind, and without an indictment duly returned by the grand jury of said county." On June 8, 1910, on the part of the state, there was filed a confession of error, which concludes as follows: "The Attorney General concurs with the contention of counsel for defendant that the district court of Beaver county was without jurisdiction to proceed to the trial of defendant for the crime charged by information, and therefore in view of the decisions of this honorable court in the cases above cited (Reed v. State, 2 Okl. Cr. 589, 103 Pac. 1042; Hayes v. State, 3 Okl. Cr. 1, 103 Pac. 1061), confesses that this cause should be reversed and the same remanded to the district court of Beaver county, there to be proceeded with in accordance to law."

The only question which the record presents is: Can the state proceed by information against a person charged with the commission of a felony before statehood, or must the proceedings in such cases be by indictment? Otherwise stated: Is the provision of the state Constitution, which provides for the prosecution of felonies by information, ex post facto, as to offenses committed prior to statehood? This question has not been directly passed upon by this court. As it is involved in several pending causes, we will here state our views.

The offense is alleged to have been committed prior to statehood, in that part of the territory of Oklahoma which was formerly a part of the republic of Texas; however, a greater portion of the area now constituting the state of Oklahoma was included within the province of Louisiana.

Article 3 of the treaty ceding Louisiana to the United States provided that: "The inhabitants of the ceded territory shall be incorporated in the union of the United States, and admitted as soon as possible, according to the principles of the federal Constitution, to the enjoyment of all the rights, advantages, and immunities of citizens of the United States." 8 Stat. 200.

The fifth article of the amendments to the Constitution of the United States provides that: "No person shall be held to answer for a capital, or otherwise, infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger."

The federal and state courts, without diversity of opinion, have uniformly held that the provisions of the Constitution of the United States do not apply to criminal

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

prosecutions under state laws, except in cases where the states are named. The authorities have been reviewed by this court in the case of *In re McNaught*, 1 Okl. Cr. 528, 99 Pac. 241, and need no further discussion here.

The Constitution of Oklahoma, by the enabling act, as well as by its own provisions, did not become operative until the President's proclamation of November 16, 1907. This was more than six months later than the time alleged in the information of the commission of the crime charged. It has been uniformly held by federal courts, that the provisions of the Constitution of the United States apply to all criminal prosecutions in the organized territories.

In the case of *Rasmussen v. United States*, 197 U. S. 516, 25 Sup. Ct. 514, 49 L. Ed. 862, Mr. Justice White, who delivered the opinion of the court, fully reviewing the authorities, in part said: "This brings us to the second proposition, which is * * * 2. That even if Alaska was incorporated into the United States, as it was not an organized territory, therefore, the provisions of the sixth amendment were not controlling on Congress when legislating for Alaska. We do not stop to demonstrate from original considerations the unsoundness of this contention and its irreconcilable conflict with the essential principles upon which our constitutional system of government rests. Nor do we think it is required to point out the inconsistency which would arise between various provisions of the Constitution if the proposition was admitted or the extreme extension, on the one hand, and the undue limitation on the other, of the powers of Congress which would be occasioned by conceding it. This is said, because, in our opinion, the unsoundness of the proposition is conclusively established by a long line of decisions. *Webster v. Reid*, 11 How. 437, 13 L. Ed. 761; *Reynolds v. United States*, 98 U. S. 145, 25 L. Ed. 244; *Callan v. Wilson*, 127 U. S. 540, 8 Sup. Ct. 1301, 32 L. Ed. 223; *American Publishing Co. v. Fisher*, 166 U. S. 464, 17 Sup. Ct. 618, 41 L. Ed. 1079; *Springville v. Thomas*, 166 U. S. 707, 17 Sup. Ct. 717, 41 L. Ed. 1172; *Thompson v. Utah*, 170 U. S. 343, 18 Sup. Ct. 620, 42 L. Ed. 1061; *Capital Traction Co. v. Hof*, 174 U. S. 1, 19 Sup. Ct. 580, 43 L. Ed. 873; *Black v. Jackson*, 177 U. S. 349, 20 Sup. Ct. 648, 44 L. Ed. 801. The argument by which the decisive force of the cases just cited is sought to be escaped is that as when the cases were decided there was legislation of Congress extending the Constitution to the District of Columbia or to the particular territory to which a case may have related; therefore, the decisions must be taken to have proceeded alone upon the statutes, and not upon the inherent application of the provisions of the fifth, sixth, and seventh amendments to the District of Columbia or to an incorporated territory. And, upon the assumption that the cases are distinguishable from the pres-

ent one upon the basis just stated, the argument proceeds to insist that the sixth amendment does not apply to the territory of Alaska, because section 1891 of the Revised Statutes only extends the Constitution to the organized territories, in which, it is urged, Alaska is not embraced. Whilst the premise as to the existence of legislation declaring the extension of the Constitution to the territories with which the cases were respectively concerned is well founded, the conclusion drawn from that fact is not justified. Without attempting to examine in detail the opinions in the various cases, in our judgment it clearly results from them that they substantially rested upon the proposition that where territory was a part of the United States the inhabitants thereof were entitled to the guaranties of the fifth, sixth and seventh amendments, and that the act or acts of Congress purporting to extend the Constitution were considered as declaratory merely of a result which existed independently by the inherent operation of the Constitution. It is true that in some of the opinions both the application of the Constitution and the statutory provisions declaring such application were referred to, but in others no reference to such statutes was made, and the cases proceeded upon a line of reasoning leaving room for no other view than that the conclusion of the court was rested upon the self-operative application of the Constitution. *Springville v. Thomas*, 166 U. S. 707, 17 Sup. Ct. 717, 41 L. Ed. 1172; *Thompson v. Utah*, 170 U. S. 343, 18 Sup. Ct. 620, 42 L. Ed. 1061; *Capital Traction Co. v. Hof*, 174 U. S. 1, 19 Sup. Ct. 580, 43 L. Ed. 873; *Black v. Jackson*, 177 U. S. 349, 20 Sup. Ct. 648, 44 L. Ed. 801. And this result of the cases will be made clear by a brief reference to some of the opinions. In *Thompson v. Utah*, considering a law of the state of Utah, which provided that a jury in a criminal cause should consist of only eight persons, the statute was held to be ex post facto and void in its application to felonies committed before the territory became a state, 'because, in respect of such crimes, the Constitution of the United States gave the accused, at the time of the commission of his offense, the right to be tried by a jury of 12 persons, and made it impossible to deprive him of his liberty except by the unanimous verdict of such a jury.' In *Springville v. Thomas*, it was contended that the territorial Legislature of Utah was empowered by Congress, in the organic act of the territory, to dispense with unanimity of the jurors in rendering a verdict in a civil case. The court said (at page 708 of 166 U. S., at page 718 of 17 Sup. Ct. [41 L. Ed. 1172]): 'In our opinion the seventh amendment secured unanimity in finding a verdict as an essential feature of trial by jury in common-law cases, and the act of Congress could not impart the power to change the constitutional rule, and could not be treated as attempting to do so.' Again,

in *Capital Traction Co. v. Hof*, 174 U. S. 1, 5, 19 Sup. Ct. 580, 582 [43 L. Ed. 873], no reference whatever being made to the statute of February 21, 1871, extending the provisions of the Constitution to the District of Columbia (chapter 62, 16 Stat. 419), it was declared: 'It is beyond doubt, at the present day, that the provisions of the Constitution of the United States securing the right of trial by jury, whether in civil or criminal cases, are applicable to the District of Columbia.' And in *Black v. Jackson*, 177 U. S. 349, 363, 20 Sup. Ct. 648, 653 [44 L. Ed. 801] speaking of a law of the Territory of Oklahoma, it was said: 'And it also fails to recognize the provisions of the seventh amendment securing the right of trial by jury in "suits at common law," where the value in controversy exceeds \$20. That amendment, so far as it secures the right of trial by jury, applies to judicial proceedings in the territories of the United States. *Webster v. Reid*, 11 How. 437, 460 [13 L. Ed. 761]; *American Publishing Co. v. Fisher*, 166 U. S. 464, 466 [17 Sup. Ct. 618, 41 L. Ed. 1079]; *Springville v. Thomas*, 166 U. S. 707 [17 Sup. Ct. 717, 41 L. Ed. 1172]. So that a court of a territory authorized, as Oklahoma was, to pass laws not inconsistent with the Constitution of the United States (Act May 2, 1890, 26 Stat. 81, 84, c. 182, § 6), could not proceed in a "common-law" action as if it were a suit in equity and determine by mandatory injunction rights for the protection or enforcement of which there was a plain and adequate remedy at law, according to the established distinctions between law and equity' As it conclusively results from the foregoing considerations that the sixth amendment to the Constitution was applicable to Alaska, and, as of course being applicable, it was controlling upon Congress in legislating for Alaska, it follows that the provision of the act of Congress under consideration, depriving persons accused of a misdemeanor in Alaska of a right to trial by a common-law jury, was repugnant to the Constitution and void."

Mr. Justice Harlan, concurring, in part said: "No tribunal or person can exercise authority involving life or liberty, in any territory of the United States, organized or unorganized, except in harmony with the Constitution. Congress cannot suspend the operation of the Constitution in any territory after it has come under the sovereign authority of the United States, nor, by any affirmative enactment, or by mere nonaction, can Congress prevent the Constitution from being the supreme law for any peoples subject to the jurisdiction of the United States. The power conferred upon Congress to make needful rules and regulations respecting the territories of the United States does not authorize Congress to make any rule or regulation inconsistent with the Constitution or violative of any right secured by that instrument. The proposition that a people sub-

ject to the full authority of the United States for purposes of government, may, under any circumstances, or for any period of time, long or short, be governed, as Congress pleases to ordain, without regard to the Constitution, is, in my judgment, inconsistent with the whole theory of our institutions. If the Constitution does not become the supreme law in a territory acquired by treaty, and whose inhabitants are under the dominion of the United States, until Congress, in some distinct form, shall have expressed its will to that effect, it would necessarily follow that, by positive enactment, or simply by nonaction, Congress, under the theory of 'incorporation,' and although a mere creature of the Constitution, could forever withhold from the inhabitants of such territory the benefit of the guaranties of life, liberty, and property as set forth in the Constitution. I cannot assent to any such doctrine. I cannot agree that the supremacy of the Constitution depends upon the will of Congress. As these are my views upon the underlying questions presented by the record, I cannot concur in all the reasoning in the opinion of the court. But I entirely concur in the judgment holding the act of Congress in question to be void. I do so, not upon the ground that Alaska had been previously 'incorporated' into the United States by the legislation of Congress, but upon the ground that the right of the accused to a trial by the jury of the Constitution became complete immediately upon the acquisition of Alaska by treaty, and before any legislation upon the subject by Congress—indeed, without any power in Congress to add to or impair or destroy that right."

Mr. Justice Brown, concurring, in part said: "I am disposed to concur in the conclusion of the court upon the ground that, by the treaty of cession with Russia, it was provided that 'the inhabitants of the ceded territory shall be admitted to enjoy all the rights, advantages, and immunities of citizens of the United States.'"

As the statute authorized, the court pronounced a sentence of five years' confinement at hard labor in the state penitentiary. There can be no question but what defendant was charged with an infamous crime. *Ex parte Wilson*, 114 U. S. 426, 5 Sup. Ct. 935, 29 L. Ed. 89; *Mackin v. United States*, 117 U. S. 352, 6 Sup. Ct. 777, 29 L. Ed. 909; *U. S. v. De Walt*, 128 U. S. 393, 9 Sup. Ct. 111, 32 L. Ed. 485.

In *Ex parte Wilson*, supra, Mr. Justice Gray, after reviewing the history of the proposal and adoption of this provision of the Constitution, used this language: "The question is whether the crime is one for which the statutes authorize the court to award an infamous punishment; not whether the punishment ultimately awarded is an infamous one. When the accused is in danger of being subjected to an infamous punishment, if convicted, he has the right to in-

sist that he shall not be put upon his trial except on the accusation of a grand jury. Nor can we accede to the proposition which has been sometimes maintained, that no crime is infamous, within the meaning of the fifth amendment, that has not been so declared by Congress. * * * For more than a century imprisonment at hard labor in the state prison or penitentiary, or other similar institution, has been considered an infamous punishment in England and America."

The laws of Oklahoma Territory provided (chapter 68, art. 6, par. 168 [section 5304] Wilson's Rev. & Ann. St. 1903) that: "Every felony must be prosecuted by indictment in the district court." The enabling act (Act June 16, 1906, c. 3335, 34 Stat. 277) provides: "Section 21. * * * All laws in force in the territory of Oklahoma at the time of the admission of said state into the Union shall be in force throughout said state, except as modified or changed by this act or by the Constitution of the state. * * *" Section 20, as amended March 4, 1907 (Act March 4, 1907, c. 2911, § 3, 34 Stat. 1287): " * * * All criminal cases pending in the United States courts in the Indian Territory, not transferred to the United States circuit or district courts in the state of Oklahoma, shall be prosecuted to a final determination in the state courts of Oklahoma under the laws now in force in that territory." Section 1 of the schedule of the Constitution provides: "No existing rights, actions, suits, proceedings, contracts or claims shall be affected by the change in the form of government, but all shall continue as if no change in the form of government had taken place." These provisions of the enabling act and the schedule preserve the rights of persons who are charged with the commission of offenses prior to the admission of the state, and render them liable to punishment under the law.

For this reason we are clearly of opinion that the constitutional provision providing for the prosecution of felonies by information was not intended to be retrospective or retroactive in its operation, and has reference only to prosecutions for crimes committed after statehood. However, it is immaterial whether the enabling act permitted, or the framers of our Constitution intended to provide, a new method for the prosecution of crimes committed before statehood, because in respect to such crimes the Constitution of the United States gave to the accused an unalterable right to be accused by indictment only, and this provision of our state Constitution is *ex post facto* in its application to felonies committed before Oklahoma was admitted as a state. The Constitution of the United States (section 9, pars. 3 and 10 of art. 1) prohibits the passing of *ex post facto* laws.

The courts of several states have held that under the particular provisions of their state

Constitutions the right to substitute prosecutions by information in place of prosecutions by indictment was within the limits of the legislative control over legal procedure and did not thereby disparage any substantial right or constitutional guaranty. *State v. Kyle*, 166 Mo. 287, 85 S. W. 763, 56 L. R. A. 115; *Lybarger v. State*, 2 Wash. St. 552, 27 Pac. 449, 1029; *In re Wright*, 3 Wyo. 478, 27 Pac. 565, 13 L. R. A. 748, 31 Am. St. Rep. 94, and cases there cited. Those cases are clearly distinguished from cases where the crime was committed before the admission of the state into the Union.

The distinction between legislative changes from time to time in methods of procedure and *ex post facto* laws is distinctly recognized in text-books and decisions.

In the case of *Thompson v. State of Utah*, 170 U. S. 343, 18 Sup. Ct. 620, 42 L. Ed. 1061, Mr. Justice Harlan, delivering the opinion of the court, used this language: "It is not necessary to review the numerous cases in which the courts have determined whether particular statutes come within the constitutional prohibition of *ex post facto* laws. It is sufficient now to say that a statute belongs to that class which by its necessary operation and 'in its relation to the offense, or its consequences, alters the situation of the accused to his disadvantage.' U. S. v. Hall, 2 Wash. C. C. 366, Fed. Cas. No. 15,285; *Kring v. Missouri*, 107 U. S. 221, 228, 2 Sup. Ct. 443 [27 L. Ed. 506]; *In re Medley*, 134 U. S. 160, 171, 10 Sup. Ct. 384 [33 L. Ed. 835]. Of course, a statute is not of that class unless it materially impairs the right of the accused to have the question of his guilt determined according to the law as it was when the offense was committed. And, therefore, it is well settled that the accused is not entitled of right to be tried in the exact mode, in all respects, that may be prescribed for the trial of criminal cases at the time of the commission of the offense charged against him. Cooley, in his treatise on Constitutional Limitations, after referring to some of the adjudged cases relating to *ex post facto* laws, says: 'But, so far as mere modes of procedure are concerned, a party has no more right in a criminal than in a civil action to insist that his case shall be disposed of under the law in force when the act to be investigated is charged to have taken place. Remedies must always be under the control of the Legislature, and it would create endless confusion in legal proceedings if every case was to be conducted only in accordance with the rules of practice and heard only by the courts in existence when its facts arose. The Legislature may abolish courts and create new ones, and it may prescribe altogether different modes of procedure in its discretion, though it cannot lawfully, we think, in so doing, dispense with any of those substantial protections with which the existing law surrounds the person accused of crime.' Chapter 9, *272. And

this view was substantially approved by this court in *Kring v. Missouri*, above cited. So, in *Hopt v. Utah*, 110 U. S. 574, 590, 4 Sup. Ct. 202 [28 L. Ed. 262], it was said that no one had a vested right in mere modes of procedure, and that it was for the state, upon grounds of public policy, to regulate procedure at its pleasure. This court, in *Duncan v. Missouri*, 152 U. S. 378, 382, 14 Sup. Ct. 570 [38 L. Ed. 485], said that statutes regulating procedure, if they leave untouched all the substantial protections with which existing law surrounds the person accused of crime, are not within the constitutional inhibition of *ex post facto* laws. But it was held in *Hopt v. Utah*, above cited, that a statute that takes from the accused a substantial right given to him by the law in force at the time to which his guilt relates would be *ex post facto* in its nature and operation, and that legislation of that kind cannot be sustained simply because, in a general sense, it may be said to regulate procedure. The difficulty is not so much as to the soundness of the general rule that an accused has no vested right in particular modes of procedure as in determining whether particular statutes by their operation take from an accused any right that was regarded, at the time of the adoption of the Constitution, as vital for the protection of life and liberty, and which he enjoyed at the time of the commission of the offense charged against him. Now Thompson's crime, when committed, was punishable by the territory of Utah proceeding in all its legislation under the sanction of and in subordination to the authority of the United States. The court below substituted, as a basis of judgment and sentence to imprisonment in the penitentiary, the unanimous verdict of 8 jurors in place of a unanimous verdict of 12. It cannot, therefore, be said that the Constitution of Utah, when applied to Thompson's case, did not deprive him of a substantial right involved in his liberty, and did not materially alter the situation to his disadvantage. If, in respect to felonies committed in Utah while it was a territory, it was competent for the state to prescribe a jury of eight persons, it could just as well have prescribed a jury of four or two, and, perhaps, have dispensed altogether with a jury, and provided for a trial before a single judge."

That the right to be exempt from prosecution for an infamous crime, except upon presentment by a grand jury, is of the same nature as the right to a trial by a petit jury of the number fixed by the common law, has been held by the Supreme Court of the United States, in the case of *Maxwell v. Dow*, 176 U. S. 582, 20 Sup. Ct. 448, 494, 44 L. Ed. 597. Mr. Justice Peckham who delivered the opinion of the court used this language: "In our opinion the right to be exempt from prosecution for an infamous crime, except upon a presentment by a grand jury, is of

the same nature as the right to a petit jury of the number fixed by the common law. * * * The right to be proceeded against only by indictment, and the right to a trial by 12 jurors, are of the same nature, and are subject to the same judgment, and the people in the several states have the same right to provide by their organic law for the change of both or either."

In *Ex parte Bain*, 121 U. S. 1, 7 Sup. Ct. 781, 30 L. Ed. 849, Mr. Justice Miller reviews the fifth amendment to the Constitution of the United States, and considers the nature and value of the institution of the grand jury: "The importance of the part played by the grand jury in England cannot be better illustrated than by the language of Justice Field, in a Charge to a Grand Jury, reported in 2 Sawy. (U. S.) 667 [Fed. Cas. No. 18,255]: 'The institution of the grand jury,' he says, 'is of very ancient order in the history of England—it goes back many centuries. For a long period its powers were not clearly defined; and it would seem from the accounts of commentators on the laws of that country, that it was first a body which not only accused, but which also tried, public offenders. However this may have been in its origin, it was, at the time of the settlement of this country, an informing and accusing tribunal only, without whose previous action no person charged with a felony could, except in certain special cases, be put upon his trial. And in the struggles which at times arose in England between the powers of the king and the rights of the subject, it often stood as a barrier against prosecution in his name; until, at length, it came to be regarded as an institution by which the subject was rendered secure against oppression from unfounded prosecutions of the crown. In this country, from the popular character of our institutions, there has seldom been any contest between the government and the citizen which required the existence of the grand jury as a protection against oppressive action of the government. Yet the institution was adopted in this country, and is continued from considerations similar to those which give to it its chief value in England, and is designed as a means, not only of bringing to trial persons accused of public offenses upon just grounds, but also as a means of protecting the citizen against unfounded accusation, whether it comes from government, or be prompted by partisan passion or private enmity. No person shall be required, according to the fundamental law of the country, except in the cases mentioned, to answer for any of the higher crimes unless this body, consisting of not less than 16 nor more than 23 good and lawful men, selected from the body of the district, shall declare upon careful deliberation, under the solemnity of an oath, that there is good reason for his accusation and trial.' The case of *Hurtado v. People*, 110 U. S. 516, 4 Sup. Ct. 111 [292, 28 L. Ed. 232], was a writ of

error to the Supreme Court of that state (California) by a party who had been convicted of the crime of murder, in the state court, upon an information instead of an indictment. The writ of error from this court was founded on the proposition that the provision of the fourteenth amendment to the Constitution of the United States, that no state shall 'deprive any person of life, liberty, or property without due process of law,' required an indictment as necessary to due process of law. This court held otherwise, and that it was within the power of the states to provide punishment of all manner of crimes without indictment by a grand jury. The nature and value of a grand jury, both in this country and in the English system of law, were much discussed in that case, with reference to Coke, Magna Charta, and to other sources of information on that subject, both in the opinion of the court and in an exhaustive review of that question by Mr. Justice Harlan in a dissenting opinion. It has been said that since there is no danger to the citizen from the oppressions of a monarch, or of any form of executive power, there is no longer need of a grand jury. But, whatever force may be given to this argument, it remains true that the grand jury is as valuable as ever in securing, in the language of Chief Justice Shaw in the case of *Jones v. Robbins*, 8 Gray (Mass.) 329, 'individual citizens from an open and public accusation of crime, and from the trouble, expense, and anxiety of a public trial, before a probable cause is established by the presentment and indictment of such a jury; and in case of high offenses it is justly regarded as one of the securities to the innocent against hasty, malicious, and oppressive public prosecutors.' It is never to be forgotten that in the construction of the language of the Constitution here relied on, as, indeed, in all other instances where construction becomes necessary, we are to place ourselves as nearly as possible in the condition of the men who framed that instrument. Undoubtedly the framers of this article had for a long time been absorbed in considering the arbitrary encroachments of the crown on the liberty of the subject, and were imbued with the common-law estimate of the value of the grand jury as part of its system of criminal jurisprudence. They therefore must be understood to have used the language which they did in declaring that no person should be called to answer for any capital or otherwise infamous crime, except upon an indictment or presentment of a grand jury, in the full sense of its necessity and of its value. We are of the opinion that an indictment found by a grand jury was indispensable to the power of the court to try the petitioner for the crime with which he was charged. The sentence of the court was that he should be imprisoned in the penitentiary at Albany. The case of *Ex parte Wilson*, 114 U. S. 418, 5 Sup. Ct. 935 [29 L. Ed. 89], and the later

one of *Mackin v. United States*, 117 U. S. 348, 6 Sup. Ct. 777 [29 L. Ed. 909], establish the proposition that this prosecution was for an infamous crime within the meaning of the constitutional provision. It only remains to consider whether this change in the indictment deprived the court of the power of proceeding to try the petitioner and sentence him to the imprisonment provided for in the statute. We have no difficulty in holding that the indictment on which he was tried was no indictment of a grand jury. The decisions which we have already referred to, as well as sound principle, require us to hold that after the indictment was changed it was no longer the indictment of the grand jury who presented it. Any other doctrine would place the rights of the citizen, which were intended to be protected by the constitutional provision, at the mercy or control of the court or prosecuting attorney; for, if it be once held that changes can be made by the consent or the order of the court in the body of the indictment as presented by the grand jury, and the prisoner can be called upon to answer to the indictment as thus changed, the restriction which the Constitution places upon the power of the court, in regard to the prerequisite to an indictment in reality no longer exists. It is of no avail, under such circumstances, to say that the court has jurisdiction of the person and of the crime, for, though it has possession of the person, and would have jurisdiction of the crime if it were properly presented by indictment, the jurisdiction of the offense is gone, and the court has no right to proceed any further in the progress of the case for want of an indictment. If there is nothing before the court which the prisoner, in the language of the Constitution, can be 'held to answer,' he is then entitled to be discharged so far as the offense originally presented to the court by the indictment is concerned. The power of the court to proceed to try the prisoner is as much arrested as if an indictment had been dismissed or a nolle prosequi had been entered. There was nothing before the court on which it could hear evidence or pronounce sentence."

The Supreme court of Utah, after the decision of the Supreme Court of the United States in *Thompson v. Utah*, supra, held, in the case of *State v. Rock*, 20 Utah, 38, 57 Pac. 532, that: "As to all offenses committed against the laws of Utah prior to its admission as a state, section 4688, Rev. St. 1898, alters the situation of a party charged with an offense committed prior to statehood to his disadvantage, and is an ex post facto law. A person charged with having committed an offense prior to statehood had a constitutional right, under the laws of Congress and the territorial laws then in effect, to be prosecuted only upon indictment presented by a grand jury, and he may not be prosecuted by way of information." Justice Miner, delivering the opinion of the

court, used this language: "To hold that a state could deprive the accused of his liberty by examination before a magistrate, and by the filing of an information by the prosecuting attorney, without the presentment of an indictment found by a grand jury, for an offense committed while Utah was a territory, and under the laws of Congress, would be to recognize in a state power to do that which Congress could not do by legislation, and the right to take from the accused a constitutional right which belonged to him when the offense was committed. * * * Under the decision of *Thompson v. Utah*, supra, it must follow that the prosecuting attorney had no authority to file the information against the respondent for the offense committed prior to the admission of the state into the Union. The grand jury is the proper tribunal before whom the accused should be brought."

In *McCarty v. State*, 1 Wash. St. 377, 25 Pac. 299, 22 Am. St. Rep. 152, it was held: "One charged with a larceny in Washington Territory, prior to its admission as a state, is entitled under the Constitution of the United States to a presentment by a grand jury, and cannot be prosecuted by information under the authority of the Constitution of Washington and the act of January 29, 1890, in pursuance thereof, since the substitution of prosecution by information for that by indictment was not a mere change of procedure, but affected a substantial right, which could not be taken away by retroactive legislation." See, also, *State v. Kingsly*, 10 Mont. 537, 28 Pac. 1066; *State v. Ardoin*, 51 La. Ann. 169, 24 South. 802, 72 Am. St. Rep. 454.

In *Miller v. State*, 3 Okl. Cr. 457, 106 Pac. 810, this court held that: "In determining questions of federal cognizance, this court is bound to enforce the protection of the federal Constitution and to adopt and be governed by the rule of decision adjudicated in the Supreme Court of the United States."

Applying the principles of the foregoing authorities to the question presented, we believe they establish our conclusion, that the state cannot proceed by information against a person charged with the commission of a felony in the territory of Oklahoma before statehood. It may be that in a popular government the grand jury is not as important as it is when used to protect the citizen from the tyranny and oppression of kings, and that it is no longer considered one of the "greatest bulwarks of liberty." That a preliminary examination gives to the accused all the protection, and even more than he would have had from a grand jury, is a plausible argument that

meets popular favor. Nevertheless, experience has shown that even in popular governments the rights and privileges of the citizen may be ruthlessly invaded, as shown by the conditions that led to the adoption of the fifth article of the amendments to the Constitution of the United States. The framers of our state Constitution provided that: "The Legislature may make the calling of a grand jury compulsory." Section 18, Bill of Rights. It may be, in the interest of good government, that the trial of offenses by indictment should be dispensed with; however, whether or not it is wise so to do is a question which is addressed to the people, and not to the courts.

The courts of this state, in exercising the jurisdiction conferred upon them by the enabling act and the state Constitution over crimes committed in Oklahoma Territory, cannot deprive the accused of substantial rights secured to him by the Constitution of the United States, such as depriving him of the right to be accused by indictment for an infamous crime, or the right to be tried by a common-law jury. The constitutional guaranty is a substantial right given by the law in force at the time the crime charged is alleged to have been committed, and any law which operates as a denial of this right alters the situation of the accused to his disadvantage, and is therefore *ex post facto* as to such crime.

Adopting the language of Judge Denio, in *Hartung v. People*, 22 N. Y. 95: "No one can be criminally punished in this country except according to law prescribed for his government by the sovereign authority before the imputed offense was committed, and which existed as a law at the time." A formal accusation is essential to every trial for crime. And, where the law requires a particular form of accusation, that form of accusation is essential. Without it the court acquires no jurisdiction to proceed. In the language of the Supreme Court of Massachusetts: "Though it is desirable that all offenders against our penal laws should be punished, yet it is better that one should occasionally escape than that the fundamental principles of the criminal law should be violated." *Com. v. McDonough*, 13 Allen, 581.

We are of opinion, that the district court of Beaver county did not, upon the case shown by the record, have jurisdiction to try, convict, and sentence defendant for a crime charged to have been committed in Oklahoma Territory.

The judgment is reversed, and the cause remanded.

FURMAN, P. J., and RICHARDSON, J., concur.

(4 Okl. Cr. 645)

BUCHANAN v. STATE.

(Criminal Court of Appeals of Oklahoma. Nov. 30, 1910.)

*(Syllabus by the Court.)***1. CRIMINAL LAW (§ 59*)—“PRINCIPALS”—WHO ARE.**

All persons who take part, participate, or engage in an offense are guilty as principals. It is immaterial as to whether they have any interest in or receive any financial gain from the commission of such crime.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 71-74, 76-81; Dec. Dig. § 59.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5552-5557; vol. 8, p. 7763.]

2. CRIMINAL LAW (§ 58*)—DEFENSES—AGENCY.

The law of agency as applied in civil cases has no application in criminal cases, and no man can escape punishment when he participates in the commission of a crime upon the ground that he simply acted as agent for any party.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 40, 41; Dec. Dig. § 58.*]

3. INTOXICATING LIQUORS (§ 169*)—ILLEGAL SALE—PURCHASE BY AGENT.

Any person who acts as a messenger or agent of the buyer in going after, purchasing, and bringing back prohibited liquors is thereby aiding and assisting in the sale of such liquors, and may be prosecuted and convicted for such sale. *Reed v. State*, 3 Okl. Cr. 17, 103 Pac. 1070, 24 L. R. A. (N. S.) 268, overruled.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 187, 188; Dec. Dig. § 169.*]

Appeal from Carter County Court; I. R. Mason, Judge.

W. A. Buchanan was found guilty of violating the prohibitory law, and appeals. Affirmed.

Champion & Champion and Harreld & Ward, for appellant. Fred S. Caldwell, for the State.

FURMAN, P. J. The defendant resided at Durwood, in Carter county, Okl. At the time of the trial of this case he was a notary public and clerk of the township in which he resided. He maintained an office in Durwood, in which he kept some books and stationery and such other things as are used in notaries' or township clerks' offices.

Lee York, a witness for the state, testified: That some time in November or December, 1908, one evening he met the defendant and asked him if he knew where the witness could get some whisky. The defendant replied that he did not know for certain, but that he would go and see. The witness handed the defendant 50 cents. This occurred in front of the defendant's building in the town of Durwood. The defendant went into his house and was gone three or four minutes. Soon afterwards some one came around from the back end of the building and handed the witness a one-half pint bottle of whisky. In about an hour after this the

witness went to see the defendant again to get some more whisky. He gave the defendant \$2, and the defendant went off after the whisky. That the witness waited as before. In three or four minutes some one came and handed two bottles of whisky to the witness. Chas. Vernon testified, on behalf of the state, that some time during November, 1908, the witness was at Durwood painting a schoolhouse; that one night he was with the witness York when some one whom he did not know and whom he did not recognize came and handed York and himself two bottles of whisky; that the arrangements to get the whisky had been made by York; that they received the whisky at the door of the defendant's place of business. Defendant testified: That York asked him if he knew where he (York) could get some whisky; that he replied that he did not know where; but that he (defendant) might be able to get it for him. The witness York then gave the defendant 50 cents. That defendant went out and met a man who was in the habit of handling whisky and gave him the money and took the whisky and laid it on the counter of his (defendant's) store, and defendant did not know whether York received the whisky or not. The defendant denied absolutely that he had gotten any more whisky for York that night, as was testified to by the witness York. The defendant then requested the following instruction to be given the jury: "The court instructs the jury that if they believe from the testimony that the defendant was only assisting the buyer of the whisky in procuring the liquor, and acted only as the messenger and agent of the buyer in going and bringing back the liquor, and they further believe that the defendant had no interest in the liquor or in the price paid, and that he was in no way the agent or intermediary of the seller, then in that case he is not guilty, and your verdict should find him not guilty." The court refused to give this instruction, and the defendant excepted.

So far as numbers are concerned, the overwhelming majority of the adjudicated cases sustain the position taken by counsel for the appellant. In fact, so great is the unanimity among the appellate courts of the states to this effect that, when this question was first presented to us, we adopted the view that where the evidence shows that a defendant charged with the sale of liquor had no interest in the liquor sold or the money paid for it, but acted as a friend or agent of the person purchasing the liquor, he was not guilty under our statutes for selling intoxicating liquor. See *Reed v. State*, 3 Okl. Cr. 17, 103 Pac. 1070, 24 L. R. A. (N. S.) 268. Upon more mature reflection we have become satisfied that this court erred in the doctrine contained in *Reed's Case*. Section 2027, Snyder's Comp. Laws Okl., is as follows: "The

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

rule of common law that penal statutes are to be strictly construed, has no application to this code. All its provisions are to be construed according to the fair import of their terms, with a view to effect its objects and to promote justice." Under this provision of our statutes it is the paramount duty of the courts of Oklahoma to so construe the penal laws of the state as will most effectively secure their enforcement, where this can be done consistently with reason and justice. Section 4180, Snyder's Comp. Laws Okl., makes it unlawful for any person to sell, barter, give away, or furnish intoxicating liquor, except as provided for in said act. Section 2045, Snyder's Comp. Laws Okl., classifying parties to crimes, is as follows: "All persons concerned in the commission of crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, though not present, are principals."

Under the plain import of this statute all persons who aid and abet in the commission of a crime, or who in any manner are concerned in its commission, are principals, and may be prosecuted and convicted as such. Any person who is concerned in the commission of a crime, or who aids or abets in its commission, should not be permitted to screen himself from the penalties of the law upon the ground that he had acted as agent for another. If this were permitted, the law would become practically a dead letter, and it would be almost impossible to protect society against the devices and subterfuges of the "bootlegger," because each "bootlegger" could have first one and then another "go-between" who could successfully defend himself upon the theory that he was acting for the purchaser and not the seller. It is no answer to this to say that in such cases the question could be submitted to the jury that, if they found that this was simply a subterfuge, they could convict the defendant, because when this defense is made the jury could not arbitrarily pronounce it to be a subterfuge. The burden of proving beyond a reasonable doubt that it was a subterfuge would rest upon the state, and the cases would be few indeed in which such evidence could be obtained. It is therefore seen that to hold that a party charged with the sale of liquor can escape upon the ground that he was an agent of the purchaser would tend to defeat the law, rather than to secure its enforcement. Our law makes the sale of prohibited liquor illegal in the state of Oklahoma, except for certain specific purposes and in a certain clearly specified manner. It does not, however, affix any penalty to the purchaser at an illegal sale, and confines its penalties to the seller. When a person acts as the agent for another in purchasing prohibited liquor in Oklahoma, while such purchase is illegal, he does not thereby render himself liable to the penalties of the

law; but when he goes further and aids and abets the seller by delivering or assisting to deliver such liquor, under section 2045, above quoted, he thereby assists in the commission of a crime and renders himself just as amenable to the law as the person who actually made the sale, upon the ground that he has aided and abetted in the commission of a crime. It is true that he may not himself have made a sale of liquor to the purchaser, but he has made himself a principal offender by participating in and having a guilty connection with the commission of the offense.

We are sustained in this by the Supreme Court of Mississippi in the case of Wortham v. State, 80 Miss. 212, 32 South. 50, in which that court said: "The appellant was indicted in the circuit court of Harrison county for the unlawful sale of whisky, and convicted. The facts were agreed to be that 'Charles Thames met the defendant in McHenry, in Harrison county, and asked him if he could get him a pint of whisky, and defendant told him that he could, and thereupon took 50 cents and went off and bought a pint of whisky from another person, not authorized by law to sell same, paying therefor the 50 cents given him by Thames, and that said liquor, so bought and delivered to Thames, was not the property of defendant, who was not interested therein, but was the sole property of the person from whom defendant bought same.' This instruction was given to the jury on the part of the state: 'The court instructs the jury that, if they believe the facts set out in the agreed statement, beyond a reasonable doubt, they will find defendant guilty.' This conviction is assailed upon the grounds: (1) Because the evidence, it is said, will not support a conviction; (2) the instruction is said to be erroneous. 1. The case here made by the agreed statement of facts is substantially the same as Wiley v. State, 74 Miss. 727 (21 South. 797). In every case there is a seller as well as a buyer, and a delivery of the whisky sold is an essential and necessary act of the seller to constitute criminality. The seller here, whoever he was, took the hand of Wortham to make a delivery of the whisky to Thames, and Wortham, whatever his intention was, and however his connection with the matter arose, became a participant with the owner of the whisky in the sale of it to Thames. The essential fact of delivery was the sole act of Wortham. And as in misdemeanors all persons who participate in doing any of the acts constituting elements of crime are, in law, guilty as principals, Wortham may not deny responsibility for his part in this transaction. Wortham was not the agent of Thames in the purchase of the whisky. There are no agents in the violation of law. Whatever acts, being the elements of crime, are done by any one, are done by such one as principal, and not as agent. No one of the participants in crime is guilty because of a relation of agency to any of the other per-

sons, but each is guilty because his act is a necessary part of the whole crime. Wortham was not the agent of Thames, because agency is not predicable of crime; but his act, in respect to both the seller and Thames, is that of a principal actor. In respect to what was done at the instance of Thames, there is no culpability; but, in respect to the delivery of the whisky for the seller to Thames, the act was that of Wortham as a principal."

We regard the argument of the Supreme Court of Arkansas, in the case of *Foster v. State*, 45 Ark. 364, as unanswerable upon this question. The opinion is by Chief Justice Cockrill, and is as follows:

"The appellant was indicted for selling liquor to a minor and was convicted. The proof was that the minor, not wishing to involve the whisky seller in trouble by making a purchase directly from one of them, gave the appellant, whom he met on the street in the town of Malvern, 50 cents and requested him to go and purchase the whisky for him. He took the money, purchased the liquor for the minor with it at a saloon in which he was not employed or interested, returned, and delivered it to the minor. The appellant was an old acquaintance of the minor, and was himself an employé in a saloon. The court refused to charge the jury as follows: 'If the jury believe from the evidence that Ward, the minor, gave the defendant 50 cents and requested him to buy its worth of whisky, and that defendant took the money and went to Taylor & Peyton's saloon, it not being the saloon at which the defendant was a salesman, and purchased the whisky and gave it to Ward, it is not such a sale as is contemplated by the statute, and the jury will find for defendant.'

"It is apparent that the real seller of the liquor in this case was the dealer of whom the whisky was bought. The minor was the purchaser, and the appellant was his agent to make the purchase. The appellant was not the actor in making the sale to the minor, and to this extent he is not within the words of the statute, which inhibits the sale of liquor to minors. Mansf. Rev. St. § 1878; *Young v. State*, 58 Ala. 358. The statute makes no mention of persons who aid, abet, or procure the sale of liquor to minors, but the rule of construction requires that the common law be taken into account in ascertaining the meaning of the act. *State v. Pierson*, 44 Ark. 265. The rule of the common law is that all persons concerned in the commission of a crime, less than a felony, if guilty at all, are principals. 4 Black. Com., 36; *Hubbard v. State*, 10 Ark. 378; *Sanders v. State*, 18 Ark. 198; *Freel v. State*, 21 Ark. 219. *Hubbard v. State*, supra, was a case of an indictment against one for trespass on the sixteenth section lands, a statutory offense. There was no evidence that the person indicted had ever been upon the lands; but the acts of his slave, done under such circumstances as warranted the in-

ference that they were done by his command or procurement, were held to be sufficient to establish his guilt. In *Sanders' Case*, supra, a conviction was upheld upon proof that a public highway had been obstructed, not by the defendant in person, but by another who was not indicted; the court, through English, C. J., saying: 'It was not necessary for the defendant to have felled the timber across the road himself, or for it to have been done by his immediate direction, to make him responsible for the offense. In misdemeanors all persons, who procure, participate in, or assent to the commission of a crime, are regarded as principals, and are indicted as such.' This was the rule applicable to statutory offenses, prior to the enactment of the prohibitory liquor law, and one may incur the guilt of a principal in this, as in other misdemeanors, by aiding in or procuring the violation of the law. *Walton v. State*, 62 Ala. 197; *State v. Munson*, 25 Ohio St. 381; *State v. Rand*, 51 N. H. 361 [12 Am. Rep. 127]; *Johnson v. People*, 83 Ill. 431; Bish. St. Cr. § 1029. The buyer of liquor, however, is guilty of no offense under this act, although he aids in and procures the making of the sale. The statute has marked the seller as the only criminal. 'In cases of mala prohibita, the fact that the penalty is imposed on only one of two parties whose concurrence is requisite to the commission of the offense, and that the statute was made for the protection of the other party, who is generally regarded as the less culpable of the two, has repeatedly been considered good ground for giving the statute a construction exempting the party not named for criminal liability.' *State v. Rand*, supra. See, too, 1 Bish. Cr. Law, § 657, and note 4; *Harney v. State*, 8 Lea (Tenn.) 113.

"As the minor was guilty of no offense, the appellant cannot be punished for his complicity in the minor's act of purchase. If he had done nothing more than counsel and advise the minor in getting the whisky, he would not have violated the terms of the statute and could not be held to criminal responsibility. One cannot be punished for violating only the spirit of a penal law. But he has done more. He aided and abetted the liquor seller, and procured him to make the sale to the minor. This is the offense the statute is aimed at. The essence of the offense is a sale to a minor. If the transaction showed a sale of liquor to the appellant and a subsequent gift of it by him to the minor, no offense would have been committed, because there would have been no sale to the minor, and giving liquor to a minor is not inhibited by the statute. That was the case in *Ward v. State* [45 Ark. 351], ante, where it was held that a dealer, who sold liquor to one treating a minor, could not be convicted of selling to a minor. But the court is careful to say in that case that there was nothing to indicate that the person, who treated the minor, acted as his

agent in the transaction. If he had acted as the minor's agent, and the liquor dealer had been apprised of that fact, the latter would have been guilty of selling to the minor. *Young v. State*, 58 Ala. 379, supra, *Siegel v. People*, 106 Ill. 89; and the agent would have been guilty as an aider and procurer of the sale.

"The fact that the minor was absent when the sale was effected cannot alter the case. One may buy through an agent, and when there is no question of agency, although the dealing is with and the delivery to the agent, in legal effect the sale is to the principal. It is true that when the agency is undisclosed the seller may treat the transaction as a sale to the agent, and the agent will be estopped from showing for his benefit a state of facts different from what he has made to appear in the transaction. The principal, in such case, is still bound as such, however, if the agent acted within his authority, and, as between agent and principal, the principal is always the contractor and purchaser. *Siegel v. People*, 106 Ill. 89, supra; *Wharton, Agency*, 496, 431; 2 *Kent's Com.* 631; *Winchester v. Howard*, 97 Mass. 303 [93 Am. Dec. 93]; *Caldwell v. Mesherd*, 44 Ark. 564. That the state, in a criminal prosecution, can select to treat it as a sale to the principal, instead of a sale to the agent who actually procured the liquor, is sustained by adjudicated cases. See *Com. v. McGuire*, 11 Gray [Mass.] 460; *Com. v. Very*, 12 Gray [Mass.] 124; *Com. v. Lattinville*, 120 Mass. 385. Taylor & Peyton's guilt is immaterial. The guilt or innocence of the act or principal in the first degree, even in felonies, does not affect the guilt of the principals in the second degree, to make use of a common-law term. *Mansf. Rev. St.* § 1511, and it is immaterial whether the person who was the chief actor in making the sale might or might not have been convicted. 'However men combine, each one is criminally responsible for what he personally does, * * * for the whole of what he assists others in doing, and for all that the others do through his procurement.' *Bish. St. Cr.* § 1024. The appellant had the evil design of procuring a sale of liquor to a minor, and his act directly and immediately led to the commission of the offense. This made him a principal in the offense. The instruction asked by the appellant would have authorized his acquittal, if he did not sell, although he may have aided and abetted and procured the sale to be made, and was properly refused.

"The court's charge to the jury was not inconsistent with the views here expressed, and the judgment is affirmed."

We could cite additional authorities to the same effect, but regard these as sufficient. We think that precedents should be weighed and not counted. In the language of Chief Justice Cockrill: "The appellant

had the evil design of procuring a sale of liquor, and his act directly and immediately led to the commission of the offense. This made him a principal in the offense. The instruction asked by the appellant would have authorized his acquittal, if he did not sell, although he may have aided and abetted and procured the sale to be made, and was properly refused."

Even if the sale of the whisky in this case was not made to York, but was made to the defendant, and the defendant was simply acting as the agent of York in making such purchase, the state can elect to treat the sale as having been made to York; and, as the defendant assisted in the delivery of the whisky, he thereby aided in the commission of the offense and is guilty as a principal.

The judgment of the lower court is therefore affirmed, and the sheriff of Carter county is directed to proceed with the execution of the judgment.

DOYLE and RICHARDSON, JJ., concur.

(4 Okl. Cr. 489)

SIMMONS v. STATE.

(Criminal Court of Appeals of Oklahoma. Dec. 7, 1910.)

(*Syllabus by the Court.*)

CRIMINAL LAW (§ 1182*)—APPEAL—FAILURE TO PROSECUTE.

Counsel have no right to appeal simply for the purpose of delay, nor unless they believe there is some ground for reversal, and if there is any reason for appealing, even though doubtful and inconclusive, it should be presented to the court for consideration.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 3207; Dec. Dig. § 1182.*]

Appeal from District Court, Carter County; S. H. Russell, District Judge.

Knox Simmons was convicted of grand larceny, and appeals. Affirmed.

Chas. West, Atty. Gen., and Smith C. Matson, Asst. Atty. Gen., for the State.

DOYLE, J. Knox Simmons, plaintiff in error was charged by indictment in the district court of Carter county with the crime of grand larceny. Upon a trial had in said court the jury returned a verdict finding the defendant guilty as charged, and assessed his punishment at imprisonment in the penitentiary for a period of four years. The judgment and sentence was entered on December 28, 1908. From which judgment an appeal was properly perfected by filing in this court on July 25, 1909, a petition in error with case-made attached, and proof of service of notices of appeal.

The plaintiff in error has not been represented by counsel upon his appeal, although he was ably represented and well defended upon the trial in the court below. No briefs

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

have been filed, nor argument made in this court.

On May 14, 1910, the Attorney General filed a motion to affirm the judgment for want of prosecution.

It is apparent that this appeal was taken merely for the purpose of delay. Counsel have no right to appeal simply for the purpose of delay, nor unless they believe there is some ground for reversal, and if there is any reason for appealing, even though doubtful and inconclusive, it should be presented to the court for consideration, or some sufficient reason given for the failure so to do.

From a careful examination of the record it is clear that a fair and impartial trial was had.

Wherefore, the judgment of the district court of Carter county is in all things affirmed.

FURMAN, P. J., and RICHARDSON, J.,
concur.

(4 Okl. Cr. 398)

Ex parte TALLEY.

(Criminal Court of Appeals of Oklahoma. Dec. 1, 1910.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 211*)—VERIFICATION OF INFORMATION—SUFFICIENCY.

Under the Constitution and laws of this state, an information charging a defendant with the commission of a misdemeanor is required to be verified in positive terms; and an unverified information and one verified only on information and belief are equally defective.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 422; Dec. Dig. § 211.*]

2. CRIMINAL LAW (§ 211*)—VERIFICATION OF INFORMATION.

The requirement that an information charging a misdemeanor shall be verified in positive terms before a warrant of arrest may issue thereon is intended for the preservation of the personal security and liberty of the individual, by forbidding the issuance of a warrant for his arrest except upon probable cause shown under oath, and by preventing the institution of baseless and unfounded prosecutions.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 422; Dec. Dig. § 211.*]

3. CRIMINAL LAW (§ 211*)—VERIFICATION OF INFORMATION.

The requirement that an information for a misdemeanor be verified before a warrant of arrest may issue thereon does not purport to deal with the essentials of an information as a mere accusation, but only with the manner and means of obtaining the custody and jurisdiction of the defendant's person.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 422; Dec. Dig. § 211.*]

4. CRIMINAL LAW (§ 211*)—FAILURE TO VERIFY INFORMATION—EFFECT.

The verification is no part of the information itself; and an unverified information properly charging a misdemeanor, signed by the county attorney, and filed in a court having jurisdiction of the offense, though insufficient to authorize the issuance of a warrant of arrest,

is nevertheless sufficient for all other purposes, if not properly challenged.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 422; Dec. Dig. § 211.*]

5. INDICTMENT AND INFORMATION (§ 196*)—FAILURE TO VERIFY—WAIVER OF DEFECT.

The requirement that an information for a misdemeanor be verified being intended for the personal benefit of the defendant, he may waive the same; and he does so by pleading to the information without moving to quash or set it aside.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 628-635; Dec. Dig. § 196.*]

6. CRIMINAL LAW (§ 1033*)—APPEAL—JURISDICTION.

Jurisdictional matters may be raised for the first time in the appellate court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2629, 2630; Dec. Dig. § 1033.*]

7. INDICTMENT AND INFORMATION (§ 137*)—UNVERIFIED INFORMATION—JURISDICTION.

It is error for a court to overrule a motion to quash an unverified information charging a misdemeanor, but the matter is not jurisdictional.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 480-487; Dec. Dig. § 137.*]

8. HABEAS CORPUS (§§ 4, 30*)—SUBSTITUTION FOR AN APPEAL.

The writ of habeas corpus is not intended for the correction of errors or mere irregularities, and cannot be substituted for an appeal or writ of error.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 4, 25; Dec. Dig. §§ 4, 30.*]

9. HABEAS CORPUS (§ 30*)—ERRORS IN CRIMINAL PROCEEDING—REVIEW.

Where a petitioner is imprisoned under a judgment of conviction for crime, unless the court was without jurisdiction to render the particular judgment, and the judgment is void and not merely voidable, relief cannot be had by habeas corpus, however numerous and gross may have been the errors committed during the trial or in the proceedings preliminary thereto.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 25; Dec. Dig. § 30.*]

10. INDICTMENT AND INFORMATION (§ 52*)—VERIFICATION OF INDICTMENT.

There is no requirement in this state that an information charging a felony, filed in the district court, be verified.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 163-168; Dec. Dig. § 52.*]

Application of Tom Talley for writ of habeas corpus. Writ discharged, and petitioner remanded to custody.

W. A. Huser and W. T. Banks, for petitioner. Fred S. Caldwell and J. C. Wright, for respondent.

RICHARDSON, J. Tom Talley, the petitioner, was convicted in the county court of Okfuskee county of selling intoxicating liquor, and was sentenced to pay a fine of \$300 and to be imprisoned in the county jail for a term of four months. He undertook to appeal from this sentence, but failed to serve the statutory notices of appeal, and for

that reason his purported appeal was dismissed by this court for want of jurisdiction. He was then committed to jail in accordance with the sentence pronounced upon him. He now contends that his imprisonment is illegal, and by an application for a writ of habeas corpus he asks this court to inquire into and determine its legality. The illegality of his imprisonment is alleged to consist in the fact that the court was without jurisdiction to try him on the information exhibited against him, and that the sentence pronounced upon him thereunder was void, for the reason that said information was not verified as required by law. The petition for the writ and the return thereto show that the information was signed by the county attorney and properly charged the offense, but it was not verified in any manner. Does that entitle the petitioner to be discharged?

The writ of habeas corpus is not designed for the correction of errors or mere irregularities, and cannot be substituted for an appeal or writ of error. And where a petitioner is imprisoned under a judgment of conviction for crime, unless the court was without jurisdiction to render the particular judgment, and the judgment is void and not merely voidable, relief cannot be had by habeas corpus, however numerous and gross may have been the errors committed during the trial or in the proceedings preliminary thereto. In *re Bonner* (C. C.) 57 Fed. 184; *Ex parte Lehmkuhl*, 72 Cal. 53, 13 Pac. 148; *In re Sennott*, 146 Mass. 489, 16 N. E. 448, 4 Am. St. Rep. 344; *In re Ellis*, 79 Mich. 322, 44 N. W. 616; *Ex parte Shaw*, 7 Ohio St. 81, 70 Am. Dec. 55; *Ex parte Harlan*, 1 Okl. 48, 27 Pac. 920; *Ex parte Murphy*, 1 Okl. 288, 29 Pac. 652; *Ex parte Bond*, 9 S. C. 80, 30 Am. Rep. 20; *In re Rafferty*, 1 Wash. St. 382, 25 Pac. 465; *Ex parte Gibson*, 31 Cal. 619, 91 Am. Dec. 546; *In re Wilson*, 140 U. S. 575, 11 Sup. Ct. 870, 35 L. Ed. 513; *In re Graham*, 74 Wis. 450, 43 N. W. 148, 17 Am. St. Rep. 174; *State v. Barnes*, 3 N. D. 131, 54 N. W. 541; *Ex parte Patman*, 1 Okl. Cr. 141, 95 Pac. 622; *In re McNaught*, 1 Okl. Cr. 528, 99 Pac. 241. This case therefore presents the sole question: Is the want of a verification a jurisdictional defect in an information? If it is, then the petitioner should be discharged; otherwise, he should not.

The law in this state bearing upon this question is found in section 30, art. 2, of our Constitution, and sections 6577 and 6644, Snyder's Comp. Laws. The constitutional provision is as follows: "The right of the people to be secure in their persons * * * against unreasonable * * * seizures shall not be violated; and no warrant shall issue but upon probable cause supported by oath or affirmation describing as particularly as may be * * * the person * * * to be seized." Section 6577, Snyder's Comp. Laws, reads: "When an information, verified by oath or affirmation, is laid before a magis-

trate, of the commission of a public offense, he must, if satisfied therefrom that the offense complained of has been committed, and that there is reasonable cause to believe that the defendant has committed it, issue a warrant of arrest." And section 6644, Snyder's Comp. Laws, provides that: "All informations shall be verified by the oath of the prosecuting attorney, complainant or some other person." This section was enacted at a time when felonies could be prosecuted only by indictment, and it therefore relates solely to misdemeanors, as is conclusively shown by a consideration of the two sections immediately preceding and of sections 6485 and 6486, Snyder's Comp. Laws.

The several provisions quoted above are in pari materia and are to be construed together; the statutory provisions supplementing the constitutional one. In our opinion they are intended for the preservation of the personal security and liberty of the individual, by forbidding the issuance of a warrant for his arrest except upon probable cause shown under oath, and by preventing as far as possible the institution of baseless and unfounded prosecutions. They do not purport to deal with the essentials of an information as a mere accusation, but only with the manner and means of obtaining the custody and jurisdiction of the accused's person. The verification is no part of the information itself; and an unverified information charging an offense in proper and intelligible language, signed by the county attorney and filed in a court having jurisdiction of the offense charged, though insufficient to authorize the issuance of a warrant of arrest, if not properly challenged is sufficient for all other purposes. The requirement that the information be verified being for the personal benefit of the defendant, we see no reason why he may not waive it if he desires; and if he submits himself to the jurisdiction of the court, either by voluntarily appearing and answering the information, or by failing to move to quash the same when arrested and brought up for arraignment, he thereby waives the defect. There are many rights vouchsafed an accused by our Constitution and laws which may be waived, and many of them have reference to the form of the accusation and the manner of its presentment. Thus it is provided by section 6738, Snyder's Comp. Laws, that an indictment must be set aside when it is not found, indorsed, presented, or filed as prescribed by the statutes of the state; but the section following provides that, if the motion to set aside the indictment on that ground be not made, the defendant is precluded from afterwards making the objection; and it seems to us that this provision is also applicable to informations. It is so held by the courts of practically all the states where prosecutions by informations are authorized.

Kansas has in effect the same constitutional and statutory provisions that we have, and

It is held in that state that the verification of an information must be made in positive terms and not on information and belief; but the Supreme Court of Kansas held, in *State v. Otey*, 7 Kan. 60, that the objection that an information is not properly verified is waived by pleading to the merits and going to trial. The same court reaffirmed that holding in a subsequent opinion by Justice Brewer in *State v. Adams*, 20 Kan. 311; and later, in *State v. Ruth*, 21 Kan. 583, Justice Brewer said: "It is alleged that the information was insufficient for lack of a proper verification. The verification was defective, but the defect was waived by the defendant's pleading to the merits and going to trial." And in *State v. Blackman*, 32 Kan. 615, 5 Pac. 173, the court said: "The third and last point made by counsel for the defendant is that the verification of the information is not sufficient. It appears that the information was verified by the county attorney, who, after being duly sworn, stated in his verification 'that the several allegations contained in the foregoing information are, according to the best of his knowledge, information, and belief, true in substance and in fact.' This point was not raised in the court below, and hence the defendant is not in any condition to raise it in this court. The record shows that the defendant in the court below waived arraignment, pleaded not guilty to the information, and went to trial upon the merits of the action, without making any objection to the sufficiency of the information or to its verification. The defendant therefore waived all irregularities with reference to the sufficiency of the verification." *State v. Longton*, 35 Kan. 375, 11 Pac. 163, goes still further, and holds that when the defendant enters into a recognizance for his appearance to answer the information, without making any objection to the sufficiency of the warrant or the verification of the information, he thereby waives the fact that the warrant was issued on an information insufficiently verified, and cannot afterwards have the warrant quashed or set aside on that ground. And in the case entitled *In re Cummings*, 11 Okl. 286, 66 Pac. 332, the Supreme Court of the Territory of Oklahoma held likewise. The syllabi of the latter case is as follows:

"The objection that a criminal complaint is verified on information and belief is waived by pleading to the merits, or entering into a recognizance for appearance at a future day.

"A verification on information and belief is sufficient for every purpose except merely the issuing of the warrant for the arrest of the defendant, and the objection to such verification must be made by motion to quash the warrant before plea to the merits, or other steps are taken which will operate as a waiver of such defect."

The Supreme Court of Kansas had the question before it again in *State v. Ellvin*, 51 Kan. 784, 33 Pac. 547, in *State v. Barr*, 54

Kan. 230, 38 Pac. 289, and in *State v. Osborn*, 54 Kan. 473, 38 Pac. 572; and in each of these cases reaffirmed its previous holding. See, also, *In re Lewis*, 31 Kan. 71, 1 Pac. 283, and *State v. Stoffel*, 48 Kan. 364, 29 Pac. 685.

The same question was before the Supreme Court of Colorado in *Brown v. People*, 20 Colo. 161, 36 Pac. 1040, *Taylor v. People*, 21 Colo. 426, 42 Pac. 652, and *Bergdahl v. People*, 27 Colo. 302, 61 Pac. 228; in each of which the court announced and adhered to the rule declared by the Supreme Court of Kansas. In the last-mentioned case the court said: "The failure to properly verify an information is not one which affects its sufficiency. It is required to be verified as designated by sections 1432b and 1432h, 3 Mills' Ann. St. These are provisions which are intended to and do comply with section 7, article 2, of our Bill of Rights, which, in substance, declares that no warrant to seize any person shall issue unless probable cause therefor is made to appear by oath or affirmation reduced to writing. This right, however, is one which may be waived, and, unless properly presented below, cannot be raised in this court."

In Nebraska an information must be verified in positive terms, and under the peculiar wording of the statute it is held that it must be verified before a judicial officer and cannot be verified before a notary public. Yet in *Hodgkins v. State*, 36 Neb. 160, 54 N. W. 86, the court said: "It is argued that there is no valid information, for the reason that the charge upon which plaintiffs in error were tried was sworn to before a notary public. It has been held by this court, in *Richards v. State*, 22 Neb. 145 [34 N. W. 346], and *Davis v. State*, 31 Neb. 247 [47 N. W. 854], that the information should be sworn to before some judicial officer. In the last above case, however, it was held that an objection to the information on that ground will be waived unless made before verdict. And Judge Norval, in the opinion of the court, uses the following language: 'It (the objection) should have been raised by motion to quash before pleading to the information.' This prosecution originated before the county judge of Lancaster county with whom the above information was filed. Plaintiffs in error, having been convicted in that court, appealed to the district court. The first record we find of any objection to the information is after the jury had been sworn in the district court, where it appears they objected to any evidence being offered or received: '(1) Because there is no legal presentment as required by the Constitution and laws of the state. (2) The affidavit of plaintiff does not contain facts sufficient to constitute a criminal action. (3) There is no complaint filed in this case as required by law.' In the opinion of the writer the objection set out above should be held to apply only to the form of the information and the sufficiency

of the allegations therein contained, and not to the want of a proper verification. But it is clear that the objection, even if sufficient, comes too late after a trial before the county judge upon the merits of the case, and after a jury had been selected and sworn in the district court. The provision for the verification of an information before a magistrate is surely not more imperative than the provision found in section 585 of the Criminal Code that no information shall be filed against any person, except fugitives from justice, until such person shall have had a preliminary examination as provided by law. Yet it has been repeatedly held that by pleading not guilty and going to trial on the issue thus formed the accused waives his right to object on the ground that he has not had a preliminary examination. *Cowan v. State*, 22 Neb. 519 [35 N. W. 405]; *Washburn v. People*, 10 Mich. 383; *People v. Jones*, 24 Mich. 215; *People v. Williams* [93 Mich. 623] 53 N. W. 779. It is evident that the plaintiffs in error are not now in position to assert that the information was not legally verified. The judgment of the district court is right and is affirmed." To the same effect are *Bailey v. State*, 36 Neb. 808, 55 N. W. 241; *Korth v. State*, 46 Neb. 631, 65 N. W. 792; *Johnson v. State*, 53 Neb. 103, 73 N. W. 463; and *Davis v. State*, 31 Neb. 247, 47 N. W. 854.

In *State v. Montgomery*, 181 Mo. 19, 79 S. W. 693, 67 L. R. A. 343, the Supreme Court of Missouri said: "This information is not verified; but no objection was taken to it on that account, and the failure was waived." And in *State v. Schnettler*, 181 Mo. 173, 79 S. W. 1123, the court said: "The omission to verify the information by the circuit attorney was simply an irregularity, did not render it or the proceedings under it void, and might have been amended at any time before trial by leave of court. It is axiomatic that a legal proceeding which is simply irregular is amendable; but, even if this rule does not apply here, it is expressly provided by section 2481, Rev. St. 1899 [Ann. St. 1906, p. 1490], that 'any affidavit or information may be amended in matter of form or substance at any time by leave of court before the trial, and on the trial as to all matters as to form and variance, at the discretion of the court, when the same can be done without prejudice to the substantial rights of the defendant.' It is therefore perfectly clear that the information was not void, and might have been amended by the circuit attorney by leave of court at any time before trial had, if so desired. If, however, such objection is not raised on or before trial, it will be waived and cannot be raised for the first time in this court."

A very full and able discussion of this question is found in *State v. Brown*, 181 Mo. 192, 79 S. W. 1111, in which the information was not verified at all. The opinion is quite lengthy and exhaustive. The syllabus states the conclusions reached, and is as follows:

"An objection that 'the verdict is insufficient to sustain the judgment,' even if timely made, does not raise the defect that the information was not supported by affidavit, because no such ground is specified. Nor would a motion in arrest alone suffice to prevent a waiver of the affidavit, even if the motion specified that there was no affidavit to support the information.

"The failure to verify the information does not render it so defective that a motion in arrest would reach it, nor is it such a defect that the Supreme Court should arrest it without motion.

"The affidavit is no part of the information itself, but a thing separate and apart from the information and something additional thereto.

"The purpose of the statute requiring an information to be supported by affidavit is to afford a guaranty of the good faith of the prosecution and to prevent a careless, or vindictive, or reckless prosecution of a citizen.

"A motion in arrest goes only to defects appearing on the face of the indictment or information, and not to an affidavit upon which the information may be based, or which merely verifies the charges in the information itself.

"The jurisdiction of the court over a felony case does not depend on the affidavit, neither is the sufficiency of the information affected by it. The filing of the affidavit or the verification of the information is but an additional step which the defendant may or may not waive.

"If the defendant fails to challenge the information for the reason that it is not supported by affidavit by motion to quash, he waives the affidavit, and it is too late to raise that objection by motion in arrest. Such objection, however specific, comes too late after verdict. Nor is it a matter to be reached by a demurrer. A motion to quash is the Missouri practice for reaching defects which do not appear on the face of the indictment or information."

See, also, *State v. Lewis*, 181 Mo. 235, 79 S. W. 671; *State v. Sheridan*, 182 Mo. 13, 81 S. W. 410; *State v. Hannigan*, 182 Mo. 15, 81 S. W. 406; and *State v. Speyer*, 182 Mo. 77, 81 S. W. 430—in all of which there was no verification or pretense thereof.

In *State v. Pancoast*, 5 N. D. 516, 67 N. W. 1052, 35 L. R. A. 518, which was a prosecution by information, this question was raised and was disposed of by the court as follows: "When the case was called for trial in Cass county, plaintiff in error moved to set aside the information, on the ground that it was not verified as the law requires. The information was verified by the state's attorney of Norton county, to the effect that he believed it to be true. Without in any manner intimating that this was not a good verification, we think the motion came too late. Our statutes, as found in the *Compil-*

ed Laws of 1887, were framed when accused persons were presented by indictment, and not by information; but chapter 71 of the Laws of 1890 substitutes an information by the state's attorney for the indictment of a grand jury, and section 5 of said act declares that the proceedings under indictment should, 'as near as may be, apply to prosecutions by informations.' Section 7283 of the Compiled Laws specifies the ground for setting aside an indictment; and these grounds, as applied to an information, would cover a defective verification. The next section provides: 'If the motion to set aside the indictment be not made, the defendant is precluded from afterwards taking the objections mentioned in the last section.' The substance and almost the language of these provisions was borrowed from Minnesota. See chapter 110, Gen. St. 1878. The Supreme Court of Minnesota, in *State v. Schumm*, 47 Minn. 373 [50 N. W. 362] and *State v. Dick*, 47 Minn. 375 [50 N. W. 362], held that a motion to set aside the indictment could not be made after plea entered. In this case plaintiff in error, prior to his first trial, was regularly arraigned, and pleaded not guilty. He has never withdrawn, or asked to withdraw, that plea for any purpose whatever, and hence the motion to set aside the information came too late. But counsel sought to save the point by motion in arrest. It has been held in Minnesota that a matter which might furnish a ground for a motion to set aside an indictment cannot be raised by demurrer or in any manner except by such motion. *State v. Brecht*, 41 Minn. 50 [42 N. W. 602]. By section 7432, Comp. Laws, the grounds for motion in arrest are the same as, and none other than, the grounds for a demurrer to the information, as specified in section 7292, Comp. Laws. As the objection under consideration was proper ground for motion to set aside, and was not proper ground for demurrer, it follows that it cannot be raised by motion in arrest. Learned counsel admit in argument that the point could not be raised on demurrer, and this must be so because, under our practice, a demurrer goes only to the body of the information."

In *State v. McCaffery*, 16 Mont. 33, 40 Pac. 63, it is held in terms that a defendant waives any right he may have to object either to the verification of the original complaint before the committing magistrate, or to the verification of the information in the district court, by pleading to the merits in such court; and that, to avail himself of such defect, he must move to quash or set aside the information before entering his plea. And to the same effect are *Bryan v. State*, 41 Fla. 643, 26 South. 1022, and *Hammond v. State*, 3 Wash. St. 171, 28 Pac. 334. In *Lambert v. People*, 29 Mich. 71, Justice Cooley said that an objection to the verification of an information, not made until after the jury is sworn, comes too late. In the

case of *In re Mary Eaton*, 27 Mich. 1, it was held that a writ of habeas corpus will not be granted, after a final judgment in an ordinary criminal case, to test the sufficiency of the information on which the defendant was convicted. See, also, *People v. Jones*, 24 Mich. 215; *People v. Harris*, 103 Mich. 473, 61 N. W. 871; *Sutton v. Commonwealth*, 97 Ky. 308, 30 S. W. 661, 17 Ky. Law Rep. 184; *Long v. People*, 102 Ill. 331; *Frisbie v. United States*, 157 U. S. 160, 15 Sup. Ct. 586, 39 L. Ed. 657; *Schott v. State*, 7 Tex. App. 616; *People v. Dowd*, 44 Mich. 488, 7 N. W. 71; *People v. Murphy*, 56 Mich. 546, 23 N. W. 215; *People v. Gardner*, 62 Mich. 307, 29 N. W. 19.

We take it as established, therefore, both on principle and by the authorities, that a defendant waives any objection which he may have to the information on account of a defective verification thereof or a total want of verification, by pleading thereto without moving to quash or set aside the information on that ground. He thereby admits what the verification is intended to show, namely, that there exists probable cause to believe him guilty sufficient to warrant his arrest and trial on the charge; and, after pleading to such information, he can no more take advantage of its want of verification than he could then take advantage of the fact that the indictment, if he were being prosecuted by indictment, was returned by the grand jury without hearing any evidence, or that the indictment was not indorsed "a true bill," and signed by the foreman of the grand jury, both of which matters by the terms of the statute are waived unless a timely motion to set aside is filed. It was even held by the Supreme Court of the United States, in an opinion rendered by Justice Brewer in the case of *In re Wilson*, 140 U. S. 575, 11 Sup. Ct. 870, 35 L. Ed. 513, that, if the law required that a grand jury be composed of not less than 17 nor more than 23 members, and a grand jury composed of only 15 members returned an indictment, "the defect in the number of grand jurors did not vitiate the entire proceedings, so that they could be challenged collaterally on habeas corpus, but it was only a matter of error to be corrected by proceedings in error"; and that "it is doubtful, at least, whether such defect is not waived if not taken advantage of before trial and judgment."

The requirement being that the verification shall be in positive terms, it follows that a verification on information and belief, as were many of those in the cases cited above, so far as a compliance with the law is concerned, is the same as and no better than no verification at all, and leaves the information as vulnerable as though no pretense at verifying it had been made; and therefore, if the information be not void in the first-mentioned case, it is not void in the latter. Also, if the defectiveness of a ver-

fication or the total want of one is waived by pleading to the information without moving to quash or set the same aside, then certainly the information cannot be void on that account, nor the court without jurisdiction; for all agree that jurisdictional matters may be raised even for the first time in the appellate court. And every time a court has sustained a conviction based upon an information not verified or defectively verified, it has thereby said that such defect was not jurisdictional. The record before us does not disclose whether the petitioner raised this question below, and, for the purposes of this case, whether he did so or not is immaterial, for if he filed a motion to quash the information, and the court overruled the same, the court committed error; but it was only error, and the court had as much jurisdiction after committing the error as it had before. The petitioner's proper remedy was by appeal or writ of error. In that way only could the error be corrected. We are aware that in *Salter v. State*, 2 Okl. Cr. 464, 102 Pac. 719, this court held that such a defect might be raised by a demurrer or an objection to the introduction of evidence, and that an information verified only on information and belief is insufficient to support a judgment of conviction. But upon further consideration we now hold that such an information will support a conviction; that the proper and only manner to raise the question of verification is by motion to quash or set aside the information on that ground, and that, if no such motion be filed and presented before pleading to the information, the defect is waived. And *Salter v. State*, supra, in so far as it is in conflict with this holding, is hereby overruled.

That no misunderstanding with respect to the statements made above as to the necessity of the verification of informations may arise, we deem it proper to state further that the holding that such requirement exists relates solely to informations charging a misdemeanor. There is no constitutional or statutory requirement in this state that informations charging a felony be verified at all. As to felonies, the constitutional provision for a showing of probable cause supported by oath or affirmation, to authorize the arrest and detention of the accused, is fully met: (1) By the verified complaint filed with the examining magistrate as provided for by section 6577, Snyder's Comp. Laws; and (2) by the evidence taken under oath in the accused's preliminary examination as required by section 30, art. 2, of the state Constitution, and by his being held to answer by the magistrate, or by the fact that the accused waived such preliminary examination, thereby admitting the existence of probable cause to believe him guilty sufficient to warrant his formal accusation and trial. But these preliminary proceedings are not required in misdemeanor cases; and for that reason, and also on account of the provisions

of section 6644, Snyder's Comp. Laws, informations charging the commission of a misdemeanor must be verified unless verification be waived by the defendant.

It follows from the foregoing that the petitioner's imprisonment is not illegal.

The writ of habeas corpus heretofore issued will therefore be discharged, and the petitioner remanded to the custody of the sheriff, with directions to execute the judgment of the court.

FURMAN, P. J., and DOYLE, J., concur.

Ex parte SIMMONS.

(Criminal Court of Appeals of Oklahoma. Dec. 3, 1910.)

Petition of John Simmons for a writ of habeas corpus. Writ discharged.

W. T. Banks and W. A. Huser, for petitioner. Fred S. Caldwell and J. C. Wright, for respondent.

PER CURIAM. John Simmons, the petitioner, being imprisoned under a judgment of the county court of Okfuskee county for a violation of the prohibition law, has applied to this court for a writ of habeas corpus to the end that he be discharged.

His contention is that the county court was without jurisdiction to try him, and that the judgment of conviction rendered against him is void, for the reason that the information upon which the prosecution was based was not verified. This presents the same question just determined by this court in case No. A-817, *Ex parte Tom Talley*, 112 Pac. 36, and the decision in that case is controlling here. The petitioner's imprisonment therefore is not illegal.

The writ of habeas corpus heretofore issued will be discharged, and the petitioner will be remanded to the custody of the sheriff of Okfuskee county, that he may execute the judgment of the county court.

Ex parte CRAWFORD.

(Criminal Court of Appeals of Oklahoma. Dec. 3, 1910.)

Petition of Will Crawford for a writ of habeas corpus. Writ discharged.

W. A. Huser and W. T. Banks, for petitioner. Fred S. Caldwell and J. C. Wright, for respondent.

PER CURIAM. Will Crawford, the petitioner, being imprisoned under a judgment of the county court of Okfuskee county for a violation of the prohibition law, has applied to this court for a writ of habeas corpus to the end that he be discharged.

His contention is that the county court was without jurisdiction to try him, and that the judgment of conviction rendered against him is void, for the reason that the information upon which the prosecution was based was not verified.

This case presents the same question just determined by this court in case No. A-817, *Ex parte Tom Talley*, 112 Pac. 36, and the decision in that case is controlling here.

The writ of habeas corpus heretofore issued herein will therefore be discharged, and the petitioner will be remanded to the custody of the sheriff of Okfuskee county, with directions to execute the judgment of the county court.

STATE v. VERTREES. (No. 1,878.)

(Supreme Court of Nevada. Dec. 2, 1910.)

1. CRIMINAL LAW (§ 371*)—EVIDENCE—OTHER OFFENSES—ACTS SHOWING INTENT.

In a prosecution for maliciously threatening injury to the person with intent to extort money, evidence of similar offenses committed about the same time are admissible to show intent.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 830-832; Dec. Dig. § 371.*]

2. CRIMINAL LAW (§ 423*)—EVIDENCE—ACTS AND DECLARATIONS OF CONSPIRATORS AND CODEFENDANTS—CONSPIRACY.

Where a man and wife were jointly tried for threatening to commit personal injury with intent to extort money, and the evidence tends to show that the wife was an accessory before the fact, acts and declarations made by her in the consummation of the unlawful act are admissible against the husband.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 989-1001; Dec. Dig. § 423.*]

3. CRIMINAL LAW (§ 1119*)—APPEAL AND ERROR—RECORD—MATTERS TO BE SHOWN—NECESSITY.

Where the bill of exceptions does not contain in full the motion of the defendant to strike out certain remarks of the prosecuting attorney, nor the ruling of the court nor the evidence in the case, the refusal of the motion cannot be considered as reversible error.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. 1119.*]

Appeal from District Court, Esmeralda County.

Jesse C. Vertrees was convicted of maliciously threatening an injury with intent to extort money, and he appeals. Affirmed.

T. L. Folley, for appellant. R. C. Stoddard, Atty. Gen., for respondent.

PER OURIAM. The defendant was jointly indicted with Annie May Vertrees, his wife, for the crime of maliciously threatening an injury to the person of one Charles Dahlstrom with intent thereby to extort the sum of \$50 from the said Dahlstrom. The appellant was granted a separate trial, was convicted of the crime charged, and sentenced to be confined in the county jail of Esmeralda county for the term of one year and to pay a fine of \$500. From the judgment of conviction and from an order denying his motion for new trial, the defendant has appealed. Error is assigned in the admission of certain testimony tending to establish other similar offenses committed about the same time as the offense charged in the indictment. In this character of cases where intent is the gist of the action, evidence of similar offenses is admissible for the purpose of establishing criminal intent, and the ruling of the court in this respect was not error. Rice on Evidence, vol. 3, § 155, p. 216; Crum v. State, 148 Ind. 401, 47 N. E. 833; People v. Cook, 148 Cal. 334, 83 Pac. 43; State v. McMahon, 17 Nev. 365, 30

Pac. 1000; State v. Roberts, 28 Nev. 374, 82 Pac. 100.

Error is assigned in admitting in evidence the testimony of a witness relative to the conduct and statements of the said Annie May Vertrees. It was the theory of the state, and the evidence tended to establish the fact, that the said Annie May Vertrees was an accessory before the fact, and upon this theory her acts and declarations in the consummation of the unlawful design were competent to go to the jury. State v. Ward, 19 Nev. 308, 10 Pac. 133. Error is assigned in the overruling of the motion of defendant's counsel to strike out certain remarks made by the assistant district attorney in his closing argument to the jury and to admonish the jury to disregard such statement. The bill of exceptions does not contain in full the motion of counsel for defendant or the ruling of the court, nor does it contain in full all of the evidence of the case. In the absence of these facts we cannot state that the remarks were so prejudicial as to constitute reversible error. We have had occasion frequently to consider alleged improper remarks of prosecuting attorneys, and have had occasion to reverse cases for conduct upon the part of such prosecuting officers prejudicial to the rights of the defendant. Counsel for the state owe a duty to be just and fair to the defendant, and when in their zeal they so overstep the bounds of propriety as to make it appear that the defendant's case has been prejudiced by their actions, a reversal must follow. State v. Rodriguez, 31 Nev. 342, 102 Pac. 863. Counsel assigns error in the giving of a number of instructions by the court of its own motion. These instructions do not appear to have been excepted to and hence are not before us for consideration. No reversible error appearing, the judgment is affirmed.

(33 Nev. 491)

GOLDFIELD MOHAWK MINING CO. v. FRANCES-MOHAWK MINING & LEASING CO. (No. 1,861.)

(Supreme Court of Nevada. Dec. 2, 1910.)

1. NEW TRIAL (§ 159*)—INSUFFICIENCY OF EVIDENCE—DUTY OF TRIAL JUDGE.

Under the statute making insufficiency of the evidence to justify the verdict ground for a new trial, the refusal of the trial judge to pass on such ground in support of a motion for new trial is error.

[Ed. Note.—For other cases, see New Trial, Dec. Dig. § 159.*]

2. APPEAL AND ERROR (§ 1178*)—DISPOSITION ON APPEAL.

Under Comp. Laws, § 2513, empowering the Supreme Court to review on appeal an order granting or refusing a new trial, and section 2515 providing that such court may reverse, affirm, or modify the judgment or order appealed from, and may, if necessary, order a new trial, etc., the court on reversing an order denying a new trial demanded for insufficiency of evidence to support the verdict may remand the case,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

with directions to the trial court to consider and pass on such ground anew.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1178.*]

Appeal from District Court, Esmeralda County.

Action by the Goldfield Mohawk Mining Company, a corporation, against the Frances-Mohawk Mining & Leasing Company, a corporation. Judgment for plaintiff, and from an order overruling a motion for a new trial, defendant appeals. Order set aside and case remanded, with instructions.

Powers & Marleoneaux and Frank J. Hange (Thompson, Morehouse & Thompson, of counsel), for appellant. W. H. Bryant and Chester L. Lyman, for respondent.

SWEENEY, J. This action was commenced in the district court of Nye county, Nev., on the 15th day of January, 1907, for the purpose of recovering two hundred thousand dollars (\$200,000) alleged damages for the violation of the terms of a written lease executed by the respondent, Goldfield Mohawk Mining Company, to the appellant. A motion for a change of venue was interposed and granted, removing the cause to Esmeralda county, Nev., because the plaintiff and defendant were doing business in that county, and the alleged cause of action arose therein.

It appears from the testimony that the Mohawk No. 2 and Slim Jim Fraction mining claims, located near the town of Goldfield, Nev., were for some time prior to the 1st day of September, 1905, owned by the Goldfield Mohawk Mining Company. Upon said date a tract of said claims of some seven hundred (700) feet in length and three hundred and seventy-seven (377) feet in width was leased to one G. H. Hayes, for a period of sixteen (16) months, expiring at noon on the 1st day of January, 1907. Afterwards one M. J. Monnette became a partner with Mr. Hayes, and thereafter certain other partners were taken in. The lease being for a considerable tract of land, the ground was cut up into several smaller areas, and among others a part of the ground two hundred (200) feet long and three hundred and seventy-three (373) feet in width was assigned to D. Mackenzie & Co., and afterwards by D. Mackenzie & Co. assigned to the appellant, Frances-Mohawk Mining & Leasing Company, on or about the 10th day of May, 1906. The entire tract proved to be very valuable; that portion known as the Hayes and Monette lease yielding some six or seven million dollars in about four or five months. The small block of the claim leased to the Frances-Mohawk Mining & Leasing Company also became very valuable; it appearing in the testimony in this case that something over \$2,000,000 was taken out.

The lease originally expired on the 1st day of January, 1907, but on account of shut-downs caused by various labor troubles, it was extended to the 8th day of January, expiring at noon upon that day. Although the action was originally commenced on the 15th day of January, 1907, the case was not called until March 22, 1909, when, after a trial by jury lasting until the 10th day of April, 1909, a verdict in the sum of seventy-five thousand dollars (\$75,000) and costs was rendered in favor of the respondent. A motion for a new trial was regularly argued and submitted to the court and denied, from which order overruling the motion for a new trial the defendant appeals.

It is claimed by the respondent that in operating the lease above mentioned, the appellant failed to comply with its terms in that it did not timber said property properly, nor did it remove or cause to be removed therefrom the loose rock and rubbish, as provided in said lease. That as a result of this violation of the terms of the lease, the respondent suffered damages in the sum of two hundred thousand dollars (\$200,000). The appellant, on its part, claimed that it did comply with the terms and conditions of the lease; that said ground was timbered in miner-like fashion and in accordance with the custom of the district, and that the loose rock and rubbish were removed from the workings of said ground, as provided for in the said lease. That the respondent was not damaged at all as a result of any failure on the part of the appellant to carry out the terms of the said lease. The appellant claimed as a further defense that the respondent, being fully aware of all of the conditions of the said lease, did, on or about the 1st day of January, 1907, approve of the work done and the condition of the property, and that it was thereby estopped from afterwards claiming any damages on account of any alleged violation of the terms of said lease. This in brief states the substance of the controversy between the parties hereto. Each side had its own theory of the case, and upon what the measure of damage, if any, should be based.

The defendant moved for a new trial in the lower court, and in support of its motion therefor, among many assigned, alleged errors, interposed one of our statutory grounds for a new trial, to wit: "Insufficiency of the evidence to justify the verdict." The court, in refusing to pass upon this ground for a new trial interposed by the appellant herein, among other things said: "I am not surprised that the defendant was dissatisfied with the verdict. A verdict of this kind could hardly result otherwise than as a surprise, and defendant naturally feels that justice has been outraged. I have had quite a long experience on the Bench, during which

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

time I have seen many verdicts rendered that I regarded as an outrage upon justice. I have seen many verdicts that I felt ought to be set aside in the interests of justice and fairness. * * * It is the duty of the judge to preside at the trial; to see that a fair and impartial trial is had; that all evidence, material and proper, should be submitted to the jury. The judge should properly instruct them upon the law. When that was done, I always felt that the judge's duty in relation to that matter was ended. * * * I could never bring my mind to see that it was a just and proper exercise of judicial discretion for the trial court to set aside the verdict of a jury, for the reason that, in the mind of the judge, the evidence did not justify the result. If I could have seen it that way, there have been many verdicts in my experience that I should not have hesitated to set aside, because I have felt outraged myself and felt that justice had been outraged by such verdict. For the reason that I believe it would be contrary to the spirit and letter of the jury system for a court to say that the jury had not properly weighed the evidence, I have not done so. * * * With that view of the law, for the court to say that, while it was the sole judge of the facts, if the jury did not decide the matter in accordance with the views of the court, the verdict should be set aside, would be exercising a discretion dangerous to the jury system. For that reason, I have never yet set aside a verdict of a jury on account of there being a question as to the preponderance of the evidence."

One of the main errors assigned in this court by the appellant, is, whether or not the refusal of the trial court to pass upon this particular ground in support of its motion for a new trial is not such a deprivation of a substantial right of appellant as to amount to error.

In our opinion the trial judge misconceived his judicial duty in failing and refusing to pass upon this vital ground of error assigned by appellant, at that particular stage of the proceeding, and laboring under his misconception of the law, by his refusal and failure so to consider this alleged error, deprived appellant of a substantial right to which it was entitled. The learned trial judge, during the progress of the trial, rightfully refused to express his opinion on the facts of the case to the jury, and in confining his instructions to the law of the case, leaving the jury to express its verdict as to the facts; but, on the motion for a new trial the situation was changed, and under our statutes which provide as a ground for a new trial "insufficiency of the evidence to support the verdict," it became his judicial duty to pass upon the evidence and to determine whether or not the evidence was sufficient to sustain the verdict.

It makes no difference in law what per-

sonal opinion the trial court may entertain as to the propriety of setting aside a verdict of a jury, or the merits or faults of our jury system. The Legislature has provided what grounds may be interposed in support of a motion for a new trial, and among them is the ground that the "evidence is insufficient to sustain the verdict," and it thereby becomes the plain judicial duty of every trial judge, irrespective of his personal views, when said ground is interposed, to review and pass upon the evidence to the end that he may properly rule on the motion.

Every litigant is entitled, on motion for a new trial, where this statutory ground for a new trial is properly interposed, to have the benefit of the judgment of the trial court, before his property or rights can be taken away from him, as to whether or not such a fair and impartial trial has been had as is contemplated by our Constitution and statutes, and whether or not the evidence is sufficient to justify the verdict; and it becomes, without question, the duty of the trial judge, who has heard the evidence and seen the witnesses on the stand during the trial, on motion for a new trial, to either grant or refuse a new trial, after a due consideration of the said ground assigned for a new trial. It is made his duty under the law, upon motion for a new trial, where this ground is assigned, to review the evidence, and if he is clearly satisfied in his judgment that the evidence is insufficient to sustain the verdict to set it aside, and if sufficient to refuse to disturb it, and in the discharge of his official duty under his oath of office he is required to so act.

The Supreme Court of Tennessee, speaking through Justice Lurton, now a justice of the United States Supreme Court, in the case of *Tennessee, C. & R. R. Co. v. Roddy*, 85 Tenn. 400, 5 S. W. 286, said: "If he [the judge] was not satisfied that under the facts and law the plaintiff should have a verdict, it was his plain duty to set it aside and grant a new trial. The doctrine is well settled in this court that if the circuit judge is of the opinion that a verdict is against the weight of the evidence, or is contrary to the law as charged by himself, he should grant a new trial. * * * Much of the importance and weight attached to jury trials proceeds from the presumption that an intelligent and learned circuit judge, accustomed to weighing evidence, has scrutinized the proof, looked into the faces of the witnesses and indorsed the action of the jury. The integrity and value of jury trials will largely disappear, if the circuit judges shall endeavor to avoid the duty imposed upon them by law in this regard. If he is dissatisfied with the verdict he ought to set it aside; and this court has held that where this dissatisfaction appears in the record this court will do what he ought to have done—grant a new trial." *England v. Burt*, 4 Humph. (Tenn.) 399; *Jones v. Jennings*, 10 Humph. (Tenn.)

423; *Nailing v. Nailing*, 2 Sneed (Tenn.) 631; *Vaulx v. Herman*, 8 Lea (Tenn.) 687.

In the case of *Nashville, C. & St. L. R. Co. v. Neely*, 102 Tenn. 700, 52 S. W. 167, where the court misconceived his judicial duty as to invading the province of a jury in setting aside its verdict, because of an opinion of his own that such action was not within the province of the judge, it was said: "The court then overruled the motion for a new trial, stating that the facts in the case were considerably mixed, but that it was a rule of his rarely to invade the province of the jury in setting aside their verdict if there were any substantial facts to support the same. The concluding part of this recital discloses erroneous action on the part of the court. It shows a misconception of the respective functions of the court and jury in regard to the evidence and gives unwarranted weight to the verdict. It is incumbent on the trial judge, in passing upon the motion for a new trial, to weigh the evidence for himself and decide whether or not the verdict, when reduced to \$2,000, was warranted thereby, and it would not have been an invasion 'of the province of the jury' for him to do so. It was his province to decide that question. The case had passed from the jury and had reached that stage in which the judge must approve or disapprove the verdict; and 'in discharging that exclusive and independent duty, he must unavoidably determine for himself, after giving all due weight to the verdict of the jury, whether or not the evidence introduced was sufficient to sustain that verdict.' His honor seems to have gone far enough in his consideration of the evidence to conclude that there were some 'substantial facts to support' the verdict, and, deeming that sufficient, he considered the evidence no further. That was a misapplication of a familiar rule of long standing in the practice of this court, but wholly inapplicable in nisi prius courts. Indeed, that rule, as here applied, is based upon the fact that both the trial judge and the jury have carefully weighed the evidence, and that while doing so they have had more favorable opportunity of ascertaining the truth than this court can have." *Railroad Company v. Brown*, 96 Tenn. 559, 35 S. W. 560; *Illinois Cent. R. Co. v. Brown*, 96 Tenn. 559, 35 S. W. 560; *Tate v. Gray*, 4 Sneed (Tenn.) 592; *England v. Burt*, 4 Humph. (Tenn.) 400; *Nailing v. Nailing*, 2 Sneed (Tenn.) 631; *Vaulx v. Herman*, 8 Lea (Tenn.) 683; *Turner v. Turner*, 85 Tenn. 389, 3 S. W. 121; *R. R. Co. v. Roddy*, 85 Tenn. 403, 5 S. W. 286; *Railroad Company v. Lee*, 95 Tenn. 389, 32 S. W. 249.

In the case of *Illinois Cent. R. Co. v. Brown*, 96 Tenn. 559, 562, 35 S. W. 560, 561, the court said: "So I carefully refrained from expressing to the jury any opinion as to whether or not these facts did or did not make out a case of willful neglect; and I do not intend to express any opinion on the

subject now, but will leave it to the Supreme Court." And he refused to disturb the verdict, and the court says: "In discharging that exclusive and indispensable duty, he must unavoidably determine for himself, after giving all due weight to the verdict of the jury, whether or not the evidence introduced was sufficient to sustain that verdict. That was one of the questions presented in the motion for a new trial, and he had no power to pretermitt it 'and leave it' to this court for decision. And having been pretermitted by him this court is without jurisdiction to decide it. To use apposite language of a very recent case, 'It was his duty either to approve or disapprove the verdict, and then, in due course of proceeding, let the aggrieved party bring the case into this court, if desired. It was his province and his right to decide, in the first instance, whether or not judgment should be pronounced upon the verdict rendered by the jury. This court cannot decide the question originally. It has no original jurisdiction. It cannot pass upon the evidence in a case before the verdict of the jury has received the approval or disapproval; it does not indicate whether the trial judge thought the verdict was right or wrong, on the evidence.'" *Railway Company v. Lee*, 95 Tenn. 389, 32 S. W. 249.

The Supreme Court of Kansas, in the case of *Cherokee & P. Coal & Mining Company v. Stoop*, 56 Kan. 426, 43 Pac. 766, said: "A trial court will be reluctant to set aside a verdict, where a doubtful question of fact exists, simply because its judgment inclines the other way; but the mere fact that it was a conflict in testimony does not relieve the court from examining the sufficiency of the evidence, nor make the verdict of the jury conclusive. While the case is before the jury for their consideration the jury are the exclusive judges of all questions of fact; but when the matter comes up before the court upon a motion for a new trial, it then becomes the duty of the trial court to determine whether the verdict is erroneous. * * * It has been the unvarying decision of this court, to permit no verdict to stand unless both the jury and the court trying the case together, within the rules prescribed, approve the same. Whenever a trial court determines that the verdict is clearly against the weight or preponderance of the evidence, it should not hesitate to set it aside and grant a new trial; and in arriving at this determination the judge of the trial court must be controlled by his own judgment and not by that of the jury." *Railroad Company v. Ryan*, 49 Kan. 1, 30 Pac. 108; *Williams v. Townsend*, 15 Kan. 563; *Railway v. Diehl*, 33 Kan. 422, 6 Pac. 566; *Railway Company v. Kunkel*, 17 Kan. 172.

The Supreme Court of California, in the case of *People v. Knutte*, 111 Cal. 453, 44 Pac. 166, said: "An equal opportunity with the jury to observe the manner of the witnesses, the character of their testimony, and

to judge of their credibility, and to discover their motives. He, too, ought to be satisfied that the evidence as a whole was sufficient to sustain the verdict. If he was not, it was not only the proper exercise of a legal discretion, but his duty to grant a new trial." *People v. Baker*, 39 Cal. 686; *People v. Ashnauer*, 47 Cal. 98; *People v. Hotz*, 73 Cal. 241. 14 Pac. 856.

In the case of *People v. Chew Wing Gow*, 120 Cal. 298, 52 Pac. 657, the Supreme Court of California, said: "It is made his [the trial judge's] duty to grant a new trial, if in his opinion the verdict is against the evidence. This is one of the most important duties which the trial judge has to perform, and, since no efficient review of his action can be had, it is peculiarly incumbent upon the judge to weigh the evidence with care, and conscientiously grant a new trial when in his opinion the interests of justice require it."

In the case of *Kramm v. Stockton Electric R. Co.*, 10 Cal. App. 271, 101 Pac. 914, the court, quoting from the case of *Green v. Soule*, 145 Cal. 102, 78 Pac. 337, said: "There is a clear and obvious distinction between the duty of a trial court and the duty of an appellate court with respect to the decision of such questions. The trial court cannot rest upon a conflict in the evidence, but must weigh and consider the evidence for both parties, and determine for itself the just conclusion to be drawn from it. If the judge is not satisfied with the verdict, and is convinced that it is clearly against the weight of the evidence, it is his duty to set it aside, even though there may have been some conflict in the testimony. * * * But in considering the question upon the motion he must act upon his own judgment as to the effect of the evidence. The parties are entitled to the judgment of the jury in reaching a verdict, in the first instance; but upon a motion for a new trial they are equally entitled to the independent judgment of the judge as to whether such verdict is supported by the evidence. It is clear therefore that, when the trial judge is satisfied that a verdict is wrong, and opposed to the evidence, if he refuses to set it aside he violates his oath of office. The judge of the trial court does not sit as a mere moderator to record the will of the jury. He has other duties and functions to perform which he cannot lawfully escape or evade. He must confine the evidence within the issues, and when a verdict is returned unwarranted by the evidence he must set it aside and grant a new trial when asked for. The judge before whom the case is tried in the first instance has the same opportunity as the jury to form an opinion with respect to the weight to be given to each witness; and one of the highest and most important functions of his office is the power to set aside a verdict whenever in the exercise of a sound discretion he considers that the jury, from any cause what-

ever, has returned an improper or unjust verdict." *Woods v. Richmond, etc., R. R. Co.*, 1 App. D. C. 169.

In the case of *People v. Knutte*, 111 Cal. 453, 44 Pac. 166, the court said: "While it is the exclusive province of the jury to find the facts, it is nevertheless one of the most important requirements of the trial judge to see to it that this function of the jury is intelligently and justly exercised in this respect. While he cannot competently interfere with or control the jury in passing upon the evidence, he nevertheless exercises a very salutary, supervisory power over their verdict. In the exercise of that power he should always satisfy himself that the evidence as a whole is sufficient to sustain the verdict; and if, in his sound judgment, it does not, he should unhesitatingly say so and set the verdict aside."

In the case of *Atchison, T. & S. F. R. Co. v. Consolidated Cattle Co.*, 59 Kan. 111, 113. 52 Pac. 71, 72, the trial court refused to hear argument of defendant upon the motion for a new trial. The Supreme Court says: "The parties to a cause pending in a court have an absolute right to be heard, not only at the trial of the issue of fact, but also on motions addressed to the court involving the merits of the controversy. While this exact question has perhaps never been presented to this court, the principle is declared in many cases. No court is ever warranted in assuming that it fully understands the merits of the cause until it has heard the parties to it. It is always permissible to limit arguments of counsel to such a reasonable time as may be necessary for the presentation of the matter under consideration. * * * It was incumbent on the trial court to review the whole case, and to pass his judgment on the justice of the verdict. * * * On motion for a new trial the attention of the court is for the first time challenged to the question of fact in the case. It is, at the same time, challenged to all matters involved in its final determination. We cannot give any sanction to the denial to a party of all opportunity to be heard on a matter of such importance. And the court, after further considering the matter, ordered a new trial." *Douglass v. Hill*, 29 Kan. 527; *State v. Bridges*, 29 Kan. 138; *Railroad Company v. Ryan*, 49 Kan. 1, 30 Pac. 108; *Larabee v. Hall*, 50 Kan. 311, 31 Pac. 1062.

Justice Brewer, while a justice of the Supreme Court of Kansas, and who afterwards became one of the most able of our United States Supreme Court Justices, very clearly laid down the rule upon the point under consideration, in the case of *Railroad Company v. Kunkel*, 17 Kan., page 172, as follows: "The one [the trial judge] has the same opportunity as the jury for forming a just estimate of the credence to be placed in the various witnesses, and if it appears to him that the jury have found against the weight of the evidence, it is his imperative duty to

set the verdict aside. We do not mean that he is to substitute his own judgment in all cases for the judgment of the jury, for it is their province to settle questions of fact; and when the evidence is nearly balanced or is such that different minds would naturally and fairly come to different conclusions thereon, he has no right to disturb the findings of the jury, although his own judgment might incline him the other way. In other words, the finding of the jury is to be upheld by him as against any mere doubts of its correctness. But when his judgment tells him that it is wrong, that, whether from mistake, or prejudice, or other cause, the jury have erred, and found against the fair preponderance of the evidence, then no duty is more imperative than that of setting aside the verdict, and remanding the question to another jury." *Larsen v. Navigation Co.*, 19 Or. 240, 23 Pac. 974; *State v. Billings*, 81 Iowa, 99, 46 N. W. 862; *City of Tacoma v. Tacoma Light & Water Co.*, 16 Wash. 288, 47 Pac. 738; *Hawkins v. Reichert*, 28 Cal. 534; *Dickey v. Davis*, 39 Cal. 565; *Bennett v. Hobro*, 72 Cal. 178, 13 Pac. 473; *Reid v. Young*, 7 App. Div. 400, 39 N. Y. Supp. 899; *Bank v. Wood*, 124 Mo. 72, 27 S. W. 554; *Colvin v. Northern Pac. Ry. Co.*, 42 Wash. 5, 84 Pac. 616; *Ruppel v. United Railroads of S. F.*, 1 Cal. App. 666, 82 Pac. 1073; *Shulze v. Shea*, 37 Colo. 337, 86 Pac. 117; *Crowley v. Shepard*, 38 Colo. 345, 88 Pac. 177; *Wendling Lumber Co. v. Glenwood Lumber Co.*, 153 Cal. 411, 95 Pac. 1029; *Gilbreath v. Gilbreath*, 42 Colo. 5, 94 Pac. 23; *Houghton v. Loma Prieta Lumber Co.*, 152 Cal. 574, 93 Pac. 377; *Condee v. Gyger et al.*, 126 Cal. 546, 59 Pac. 26; *Bjorman v. Ft. Bragg Redwood Co.*, 92 Cal. 500, 28 Pac. 591; *Rhode v. Steinmetz*, 25 Colo. 308, 55 Pac. 814; *Mitchell v. Reed et al.*, 16 Colo. 109, 26 Pac. 342; *Kramm v. Stockton Electric Co.*, 10 Cal. App. 271, 101 Pac. 914; *Weisser v. Southern Pac. Co.*, 148 Cal. 426, 83 Pac. 439; *Harrington v. Butte & B. Min. Co.*, 27 Mont. 1, 69 Pac. 102; *Patten v. Hyde*, 23 Mont. 23, 57 Pac. 407; *In re Carriger's Estate*, 104 Cal. 81, 37 Pac. 785; *Warner v. F. Thomas P. D. & C. Works*, 105 Cal. 409, 38 Pac. 960; *A. T. & S. F. R. Co. v. Consolidated Cattle Co.*, 59 Kan. 111, 52 Pac. 71; *People v. Chew Wing Gow*, 120 Cal. 298, 52 Pac. 657; *Sullivan et al. v. Board of Commissioners*, 47 Pac. 165;¹ *Clifford v. Railroad Co.*, 12 Colo. 125, 20 Pac. 335; *Garwood v. Corbett*, 38 Mont. 364, 99 Pac. 958; *Angus v. Wamba*, 50 Wash. 353, 97 Pac. 246; *Sherman v. Mitchell*, 46 Cal. 576; *State v. Billings*, 81 Iowa, 99, 46 N. W. 862; *Turner v. Turner*, 85 Tenn. 387, 3 S. W. 121; *Series v. Series*, 35 Or. 289, 57 Pac. 634; *Nashville, C. & St. L. R. Co. v. Neely*, 102 Tenn. 700, 52 S. W. 167.

In the light of these authorities, and oth-

ers which could be added did we deem it necessary, it is evident that the trial judge in the present case, misconceiving his judicial duty, fell into grave error in failing and refusing to pass upon this ground assigned by the defendant for a new trial.

Believing as we do that error was committed by the trial court, in failing and refusing to pass upon the ground assigned as error, we come now to a consideration of the motion of respondent in this case, who, during the argument in this court asked permission of the court, in the event we found the trial court to have committed error by reason of the error above committed, that they be permitted to file a motion to remand the case for further action by the trial court upon this point without trying the case anew, which privilege was accorded them, subject to the objection of the appellant. Accordingly a motion was regularly filed by Bryant and Lyman, attorneys for the respondent herein, the essence of which is as follows: "That the order denying the motion for a new trial be set aside, and the case be remanded to the court below, with instructions to hear and determine the motion for a new trial anew and decide the same upon its merits as the court may be advised in the premises."

The procedure thus invoked is a novel procedure, which this court for the first time is called upon to consider, and while it has been the custom of this court, where it found error to have been committed, in most cases to remand the same for new trials, yet, upon a consideration of the whole situation in this case, we believe that justice demands, and it is the better procedure to adopt and follow in the present case, to so set aside and modify the judgment as to grant the motion of respondent. While it is true that this procedure has never been adopted in this court, yet such authority is conferred on us by the Constitution and statutes (Comp. Laws, §§ 2513, 2515), and has been adopted in many courts and by authorities which relieve us of all doubt as to the legal right and propriety of setting aside the order and sending the case back for a ruling upon this point.

In *Felton v. Spiro*, 78 Fed. 576, 24 C. C. A. 321, in an able opinion rendered by William H. Taft, at that time a justice of the Circuit Court of Appeals for the United States, Sixth Circuit, and at the present time President of the United States, and which opinion was concurred in by Justice Lurton, now of the Supreme Court of the United States, in passing upon a point practically the same as the one involved in the present case, said: "The defendant receiver, therefore, is entitled to have the court below weigh all the evidence, and exercise its discretion to say whether or not, in its opinion, the verdict was so opposed to the weight of the evidence that a new trial should be granted, and the judgment of the Circuit Court must be reversed for this purpose.

¹ Reported in full in the Pacific Reporter; reported as a memorandum decision without opinion in 5 Kan. App. 580.

This reversal does not set aside the verdict. It only remands the cause for further proceedings from the point where the error was committed. We found no error in the action of the court upon the trial and before verdict, and hence we shall not disturb it, but shall leave it to the trial court, upon consideration of the weight of the evidence, to grant the motion for new trial, or not, as in its discretion it may deem proper. That the Supreme Court would have taken a similar course in the case of *Mattox v. U. S.*, 146 U. S. 140, 13 Sup. Ct. 50 [36 L. Ed. 917], already cited, had it not been that there were also errors on the trial requiring a new trial, may be seen from the language of the Chief Justice in delivering the opinion of the court, where, in summing up the result of the action of the court in refusing to consider affidavits on motion for a new trial, he says (page 151, 146 U. S. and page 53, 13 Sup. Ct. [36 L. Ed. 917]): 'We should, therefore, be compelled to reverse the judgment because the affidavits were not received and considered by the court; but another ground exists upon which we must not only do this, but direct a new trial to be granted.' See, also, *Elliott*, App. Proc. 580. The judgment of the Circuit Court is reversed, with instructions to the court below to consider and pass upon the motion for new trial in so far as it is based on the ground that the verdict was against the weight of the evidence. The costs of the writ of error will be taxed to the defendant in error. The costs of the Circuit Court will abide the event."

The Supreme Court of Oregon, in the case of *Series v. Series*, 35 Or. 289, 57 Pac. 634, said: "The defendants were entitled to have their motion for a new trial passed upon in pursuance of correct principles of law, and, the trial court having failed in this, the cause will be remanded, with directions to determine the motion under the rules herein announced. The cumulative character of the newly discovered evidence renders defendants' position upon the first ground untenable; and, as it pertains to the second, viz., that the damages assessed are excessive, that was a matter within the discretion of the trial court. By anything we have said in this opinion it is not intended to indicate in any manner our impressions touching the weight of the evidence submitted to the jury, and the court below, having seen the witnesses and observed their manner, must act entirely upon its own judgment in passing upon the motion."

In an opinion delivered by Justice Field, while a justice of the Supreme Court of the United States, in *Re Bunner*, 151 U. S. 242, 14 Sup. Ct. 323, 38 L. Ed. 149, although a criminal case, the procedure we believe should be adopted in the present case was sustained substantially by that high tribunal, speaking through him, wherein it was said: "Much complaint is made that persons

are often discharged from arrest and imprisonment when their conviction, upon which such imprisonment was ordered, is perfectly correct; the excess of jurisdiction on the part of the court being in enlarging the punishment or in enforcing it in a different mode or place than that provided by law. But in such case there need not be any failure of justice, for where the conviction is correct and the error or excess of jurisdiction has been as stated, there does not seem to be any good reason why jurisdiction of the prisoner should not be reassumed by the court that imposed the sentence in order that its defect may be corrected. The judges of all courts of record are magistrates and their object should be not to turn loose upon society persons who have been justly convicted of criminal offenses, but, where the punishment imposed in the mode, extent, or place of its execution, has exceeded the law, to have it corrected by calling the attention of the court to such excess. We do not perceive any departure from principle or any denial of the petitioner's right in adopting such a course. He complains of the unlawfulness of his place of imprisonment. He is only entitled to relief from that unlawful feature, and that he would obtain if opportunity be given to that court for correction in that particular. It is true where there are also errors on the trial of the case affecting the judgment, not trenching upon its jurisdiction, the mere remanding the prisoner to the original court that imposed the sentence, to correct the judgment in those particulars for which the writ is issued, would not answer, for his relief would only come upon a new trial; and his remedy for such errors must be sought by appeal or writ of error. But in a vast majority of cases the extent and mode and place of punishment may be corrected by the original court without a new trial, and the party punished as he should be whilst relieved from any excess committed by the court of which he complains. In such case the original court would only set aside what it had no authority to do and substitute directions required by the law to be done upon the conviction of the offender."

The Supreme Court of North Carolina, in the case of *Marsh v. Griffin*, 123 N. C. 660, 31 S. E. 840, said: "In the case at bar there is no suggestion of any intentional abuse on the part of his honor, but it clearly appears that, in addition to his failure to find certain facts, he was inadvertent to other material facts. How this inadvertence arose does not appear from the record, but it has been suggested that certain papers were not before him. Whatever its cause, its existence is apparent. He states in his findings of fact that the action is an 'ejectment suit,' and bases his decision partially upon the fact that the defendant gave no bond. As the pleadings show none of the requisites of an action in ejectment, the defendant was not required

to give bond, and therefore the action of his honor was clearly based upon a misapprehension of fact and law. The case must be remanded, as was done in *Warren v. Harvey*, supra [92 N. C. 137], in order that the application may be reheard and determined in the legal discretion of the court." *Sommer v. Sommer*, 87 App. Div. 434, 84 N. Y. Supp. 444; *In re Howard*, 59 Vt. 594, 10 Atl. 716; *Rosenthal v. Board of Education*, 239 Ill. 29, 87 N. E. 878; *Ohio Coal Company v. Scott*, 241 Ill. 448, 89 N. E. 665; *Utah Association, etc., v. Home Fire Ins. Co. (Utah)* 102 Pac. 631; *Rankin v. Rankin*, 224 Pa. 514, 73 Atl. 920; *Appeal and Error*, vol. 3, Cent. Dig. § 4614; *Fleld v. Winheim*, 123 Ill. App. 227; *Sutherland v. Bloomer*, 50 Or. 398, 93 Pac. 135; *Fishburn v. Londershausen*, 50 Or. 363, 92 Pac. 1060, 14 L. R. A. (N. S.) 1224; *Salstrom v. Orleans Co.*, 153 Cal. 551, 96 Pac. 292; *Northeastern Coal Co. v. Tyrrell*, 133 Ill. App. 472; *Bell v. Old*, 88 Ark. 99, 113 S. W. 1023; *Duffy v. Wilson*, 44 Colo. 340, 98 Pac. 826; *Boothe v. Farmers' National Bank*, 53 Or. 576, 98 Pac. 509; *Kosuth State Bank v. Richardson*, 141 Iowa, 738, 118 N. W. 906; *Griswold v. Szwaneck*, 82 Neb. 761, 118 N. W. 1073, 21 L. R. A. (N. S.) 222; *Louisville R. Co. v. Holland*, 132 Ga. 173, 63 S. E. 898.

Being of the opinion that the trial court erred, under his erroneous conception of the law, in failing and refusing to pass upon the motion for a new trial, in so far as the ground interposed by defendant of "insufficiency of the evidence to justify the verdict," because, according to his personal view entertained, he did not deem it his privilege or duty to consider this matter for the reason it had been passed upon by a jury, and believing that justice demands that the lower court should pass upon this motion for a new trial, upon this point, as it should have done in the first instance, it is hereby ordered that the order of the district court denying the motion for a new trial be, and the same is hereby, set aside, with instructions to the court below to consider and pass upon the ground for a new trial interposed by defendant, "of the insufficiency of the evidence to justify the verdict," for which purpose the case is herewith remanded. It is so ordered.

NORCROSS, C. J., and TALBOT, J., concur.

(40 Colo. 177)

HEAD CAMP PACIFIC JURISDICTION WOODMEN OF THE WORLD et al. v. SLOSS.

(Supreme Court of Colorado. Dec. 5, 1910.)

1. INSURANCE (§ 788*)—BENEFIT CERTIFICATE —"LIFE INSURANCE POLICY"—STATUTES.

A certificate in a mutual benefit association, providing that defendant association would

pay on the member's death to his sister as beneficiary a specified sum on certain conditions, was a life insurance policy, within Act April 11, 1903 (Acts 1903, c. 119), providing that, after its passage, the suicide of a policy holder of any life insurance company doing business within the state should not be a defense to the policy, whether the suicide was voluntary or involuntary, or the holder was sane or insane.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1956; Dec. Dig. § 788.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4154-4156; vol. 8, p. 7707.]

2. INSURANCE (§ 687*) — BENEFIT ASSOCIATIONS—STATUTES.

1 Mills' Ann. St. § 638, provides that corporations, associations, and societies not for pecuniary profit organized under the act shall be bodies corporate by the name stated in their certificate, and that such association and societies as are intended to benefit the widows, orphans, heirs, and devisees of deceased members without profit to the members will not be deemed insurance companies. *Held*, that such act did not apply to a voluntary association organized to write mutual benefit insurance not exclusively for widows, orphans, heirs, and devisees of deceased members, but authorizing the insured to name as the beneficiary any relative or dependant, though he be an entire stranger.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 687.*]

3. INSURANCE (§ 788*)—MUTUAL BENEFIT SOCIETIES—STATUTES.

3 Mills' Ann. St. Rev. Supp. § 2229, and 1 Mills' Ann. St. § 2238, authorizing fraternal and benevolent societies to issue indemnity contracts of insurance on the assessment plan without requiring them to organize under the statutes regulating the organization of insurance companies for profit, did not exempt mutual benefit associations from the application of Act April 11, 1903 (Acts 1903, c. 119), withdrawing from insurance companies the defense of suicide.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1956; Dec. Dig. § 788.*]

4. CONSTITUTIONAL LAW (§§ 89, 106*)—STATUTES—DEFENSE OF SUICIDE—OBLIGATION OF CONTRACT.

Act April 11, 1903 (Acts 1903, c. 119), withdrawing from insurance companies the defense of suicide, was not unconstitutional as impairing the obligation of contract, nor as depriving a citizen of the right to contract for himself or for the benefit of others with reference to a subject neither immoral, nor against public policy.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. §§ 89, 106.*]

En Banc. Appeal from District Court, Mesa County; Theron Stevens, Judge.

Action by Mary Sloss against the Head Camp Pacific Jurisdiction Woodmen of the World of the States of California, Colorado, Idaho, Montana, Nevada, Oregon, Utah, Washington, Wyoming, and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Carnahan & Van Hoorebeke (B. M. Carr, of counsel), for appellants. Wheeler & Welsner and R. D. Thompson, for appellee.

BAILEY, J. The plaintiff's cause of action is upon an indemnity contract, of date January 2, 1904, denominated a "Benefit Certificate," issued by the defendant association to

one William J. Bunting, payable upon his death to Mary Sloss, a sister, the beneficiary therein.

Two separate, special defenses were interposed. One, that the deceased came to his death by suicide, within one year after the issuance of the contract, which carries a provision to the effect that if the insured so dies within such period, no benefit whatever shall be paid thereunder; and the other, that the statute of the state of Colorado, in force July 11, 1903, upon which plaintiff relies to recover, despite the foregoing provision of the contract, known as the suicide statute, which in part is as follows: "From and after the passage of this act, the suicide of a policy holder of any life insurance company doing business in this state shall not be a defense against the payment of a life insurance policy, whether said suicide was voluntary or involuntary, and whether said policy holder was sane or insane" (Laws 1903, c. 119), is unconstitutional and void, as in violation and contravention of the provisions of the Fourteenth Amendment of the Constitution of the United States, because, it is claimed, it infringes and restricts the personal right of a citizen to make a contract for himself, or for the benefit of others, which is neither immoral nor against public policy.

The plaintiff interposed general demurrers to these defenses, which were sustained. The defendants elected to stand by their case as made. By consent, trial was to the court, and upon proofs judgment was for the plaintiff, for eleven hundred dollars, the full amount of indemnity, to review which defendants bring the case here on appeal.

The only questions fairly raised are: First. Is the contract sued upon a policy of life insurance, and, in the absence of allegations and proof of fraud in its procurement, subject to the provision of our suicide statute, since it was issued by a fraternal or mutual association not for profit? Second. Is the statute, for the reasons urged, or for any reason, unconstitutional?

1. This court, speaking through Mr. Justice Hayt, in *Chartrand v. Brace*, 16 Colo. 19, 26 Pac. 152, 12 L. R. A. 209, 25 Am. St. Rep. 235, involving a contest over the proceeds of a contract of like character with the one in suit, said:

"The certificate is, in legal contemplation, a policy of life insurance, and to be construed as such. That the amount can only be collected by assessment upon members of the association after due notice of death, and the payment of such assessment is purely voluntary, can make no difference. The association, so far as it is engaged in the business of life insurance, must be treated in law as a mutual life insurance company. The certificate is to be regarded as a written contract, and, so far as it goes, it is the measure of the rights of all parties."

And again in *Supreme Lodge, Knights of Honor, v. Davis*, reported in 26 Colo. at page

237, 58 Pac. at page 596, opinion by Mr. Justice Gabbert, this court said:

"In as far as the insurance feature of the organization is concerned, it is, in effect, a mutual life insurance company, and the general rules governing associations of that character control it in the transaction of this branch of its business."

That contracts like the one in suit are life insurance policies is, in this jurisdiction, settled beyond recall, and the courts, with great uniformity, have so treated them. Rightfully so because there is no essential difference between the provisions of this contract and those of the ordinary life insurance policy of regular or old line companies. That all life insurance contracts should receive the same construction, and be subject to the same statutory regulation and limitation, unless expressly exempted, must be conceded. The statute in question provides that the act of suicide shall not be a defense to the payment of a life insurance policy, and was directed against such defense in all cases, without regard to the character or class of the company putting forth the contract.

It being once determined that the contract sued upon is in fact a life insurance policy, then the conclusion is irresistible that the bare fact of suicide may not, in the face of the statute, be legally asserted against a suit to recover upon it. For the purpose of its insurance feature the defendant company was and is as much a life insurance company as an old line or regular company, and its contracts of indemnity are just as much life insurance policies as are those of any other company. The statute is clear and specific, and is capable of but one rational construction, namely, that it was the intent and purpose of the Legislature to prevent all companies, of whatsoever kind or character, issuing life insurance contracts, from escaping payment thereon, in the event of death, simply on the ground that the insured committed suicide. There is no exception in behalf of any particular kind of company, either expressed or implied, and manifestly none was intended. No good reason appears for reading into the statute such a limitation or exemption.

At the time this contract was written, and at the time of loss, this statute was the last expression of the Legislature upon the subject, and is controlling as against any prior, if there be such, and we know of none, conflicting legislative expression in reference thereto. The several statutory provisions, relied upon by defendants to take this contract out of this statute, were all in force at the time of the former decisions of this court, and they determined, in effect, that notwithstanding them, such a contract is a life insurance policy. These provisions have, and can have, no reference to, or bearing upon, the suicide statute, which is a separate, subsequent, independent and complete enactment in and of itself, and in no sense amendatory

of any previous legislative enactment. Neither do they create a limitation upon its application, since by its terms it reaches all insurance policies of all companies, without reference to their character, whether mutual organizations, on the assessment plan, or otherwise.

That part of section 638, 1 Mills' Ann. St., with which a consideration of this case has to do, reads as follows:

"Corporations, associations and societies, not for pecuniary profit, founded under this act, shall be bodies corporate and politic by the name stated in such certificate; * * * associations and societies which are intended to benefit the widows, orphans, heirs, and devisees of deceased members thereof, and where the members shall receive no money as profit or otherwise, shall not be deemed insurance companies."

This statute is specifically for the benefit of corporations, associations and societies, not for pecuniary profit, founded under this act. The record discloses that the defendant association is not a corporation, association or society so founded; it was sued as a voluntary association and defended as such, and does not come within the purview of this section and can claim no benefit or exemption from it. Again, by the terms of this section, it is only associations and societies which are intended to benefit exclusively the widows, orphans, heirs and devisees of deceased members which are exempted from being deemed insurance companies. This certificate, by its express terms, is widely extended in its benefits; they are not limited to fit the terms of this provision. The beneficiary may be any relative, or dependent of or upon the assured member, even an entire stranger. It needs no argument to demonstrate that this contract does not fall within the limitations, or conform to the requirements, of this section.

Neither is there anything in section 2229 of 3 Mills' Ann. St. Rev. Supp. nor in section 2238 of 1 Mills' Ann. St., which, by any possible intendment, can be held to take the contracts of the defendant association out of the operation of the suicide statute. These provisions simply recognize the right of fraternal and benevolent societies, of like character with the defendant, to issue indemnity or contracts of insurance on the assessment plan, without requiring them to organize under the statutes regulating the organization of insurance companies for profit. Under these provisions the defendant company had the unquestioned right to issue contracts of insurance, and such contracts, when issued, by whatever name designated, are in contemplation of law, and in fact, policies of life insurance, and thus subject to the provisions of this statute. The statute itself does not exempt them, nor does any other provision of our law, to which our attention has been called, do so.

2. Upon the question of the constitutionality of the statute, it is sufficient to say that its enactment was a legitimate exercise of power by the State Legislature. There is no reason suggested upon which to base a contrary view. No authority has been cited, and we have been unable to find any, in conflict with this conclusion. It was the province of the state, through its Legislature, to adopt such a policy touching this matter as it deemed best, provided it did not in so doing come in conflict with the Constitution of the state or of the United States. There is no such conflict here. The legislative will, within the limits stated, must be respected. If an insurance company does business at all within the state, it must do so subject to such valid regulations as the state may choose to adopt. By this statute the state, through the proper authority, has declared it to be against public policy to permit insurance companies to contract against the payment of their policies, in the event of loss, because the insured came to his death by suicide. The contract in suit was made subsequent to the passage of this act, and upon full notice as to the policy of the state in that behalf. The propriety and wisdom of the enactment was for the Legislature alone, and is not properly for consideration or review here. The provision in this contract making suicide a defense against payment, being against the policy of the state, as declared in the statute, is, for that reason, a nullity. The very object of the statute is to prohibit such stipulations. It can neither be waived nor abrogated by any plan or device whatever. The legislative will, when expressed in a peremptory statute, is paramount and controlling, and cannot be set aside by the private agreement of the parties.

We cite, in addition to the cases from our own state, as bearing generally upon the conclusions here reached and approving them, the following: *Berry v. Knights Templar & Masons' Life Indemnity Co.* (C. C.) 46 Fed. 441; *Knights Templar & Masons' Life Indemnity Co. v. Berry et al.*, 50 Fed. 511, 1 C. C. A. 561; *Note to Penn Mutual Life Ins. Co. v. Mechanics' Savings Bank & Trust Co.*, 38 L. R. A. 55, containing under paragraph VIII summary of authorities; *Commonwealth v. Wetherbee*, 105 Mass. 149; 2 May on Insurance (4th Ed.) § 550a, and authorities there cited; *Danlher v. Grand Lodge A. O. U. W.*, 10 Utah, 111, 37 Pac. 245; *Home Forum Benefit Order v. Jones*, 5 Okl. 598, 50 Pac. 165; *Baltzell v. Modern Woodmen of America*, 98 Mo. App. 153, 71 S. W. 1071; *Keller v. Travelers' Ins. Co.*, 58 Mo. App. 557; *Logan v. Fidelity Company*, 146 Mo. 114, 47 S. W. 948; and *Whitfield ex rel. Hadley v. Aetna Life Ins. Co.*, 205 U. S. 480, 27 Sup. Ct. 578, 51 L. Ed. 895.

The court having properly sustained the demurrers to the two special defenses, and

having, upon full hearing and ample proof, entered the correct judgment, it is affirmed.
Judgment affirmed.

GABBERT, J. I concur in the judgment, and also in the conclusion that under the defense and the facts of this case the statute in question is valid, because of the decision of the Supreme Court of the United States in *Whitfield v. Aetna Life Insurance Co.*, 205 U. S. 489, 27 Sup. Ct. 578, 51 L. Ed. 895, to the effect that the Missouri statute does not conflict with the federal Constitution. There is, however, a marked difference between the Missouri statute and our own. The former provides that suicide shall be a defense if it appears that the insured contemplated suicide at the time he made application for his policy, while our statute is silent upon that subject. This difference might be good ground for declaring our statute invalid, for the reason that literally it takes away the defense of suicide altogether, no matter what the circumstances might be; but that question has not been argued by counsel. Should, however, a case be presented where the defense interposed was that the insured contemplated suicide when he took out his policy, the holding in the case at bar would not foreclose a consideration of that proposition. Neither would it foreclose the other question suggested if presented in a future case.

(153, Cal. 593)

In re KILBORN'S ESTATE.

GOULD v. KILBORN.
(L. A. 2,740.)

(Supreme Court of California. Nov. 19, 1910.)

1. WILLS (§ 282*)—ACTION TO ANNUL PROBATE—ALLEGATION AS TO TESTATOR'S SANITY—SUFFICIENCY.

In a proceeding to set aside the probate of a will, the allegation in the petition that testator was not "of sound mind or memory, or in any respect capable of making a will," was a sufficient averment of the ultimate fact, and it was not necessary to aver the character of insanity in more detail.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 640; Dec. Dig. § 282.*]

2. WILLS (§ 221*)—ACTION TO ANNUL PROBATE—TESTAMENTARY CAPACITY.

A testator's unsoundness of mind at the time of making a will is a sufficient ground to sustain an action to annul the probate of the will.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 221.*]

3. APPEAL AND ERROR (§ 921*)—TRIAL BY JURY WITHOUT CONSENT OF PARTIES—REVIEW.

Where it was contended on appeal that the trial judge erred in submitting the case to the jury of his own motion, the judge's error must be shown, so that, where the only showing concerning it in the record was the judge's recital in the decree, "A jury, having been demanded and ordered by the court, was impaneled and sworn and proceeded to try the issues," it

will not be presumed that the jury was summoned other than at the wishes of the parties.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 921.*]

4. APPEAL AND ERROR (§ 213*)—TRIAL BY JURY WITHOUT CONSENT OF PARTIES—NECESSITY OF OBJECTING IN TRIAL COURT.

Where no objection was made below to the submission of a case to the jury without consent of parties, it cannot be made on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 213.*]

5. WILLS (§ 400*)—ACTION TO SET ASIDE PROBATE—APPEAL—WHO MAY ALLEGE ERROR.

Where, in a proceeding to set aside the probate of a will, the judge did not submit to the jury certain issues because of the lack of evidence to sustain them, with the exception of those relating to undue influence, defendant could not complain of such ruling on appeal, as it was in his favor.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 400.*]

6. WILLS (§ 399*)—PROBATE—ACTION TO SET ASIDE—APPEAL—RECORD—CONTENTS.

In a proceeding to set aside the probate of a will, the ruling of the trial judge that certain issues should not be submitted to the jury because of the lack of evidence to sustain them will be sustained on appeal, in the absence of any showing that the recital as to the evidence was not true.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 399.*]

Department 1. Appeal from Superior Court, Los Angeles County; Leon F. Moss, Judge.

Petition to revoke the probate of the will of Julia Ann Kilborn, brought by Mary Woodman Kilborn against Will D. Gould. Decree for petitioner, and defendant appeals. Affirmed.

James H. Blanchard and Will D. Gould, for appellant. James G. Maguire, for respondent.

SHAW, J. This is an appeal from an order revoking the probate of an alleged will of Julia Ann Kilborn, deceased, and the letters testamentary thereon issued to Will D. Gould, who was named in the will as executor. Gould appeals as executor and also in his own right. The appellant relies solely on matters appearing on the face of the record; the evidence and proceedings on the trial not being presented.

The petition to revoke the probate alleged that at the time of the execution of the will the said Julia Ann Kilborn was not of sound mind, that it was not executed in the manner prescribed by law, and that it was procured by the fraud and undue influence of Will D. Gould and Mrs. O. F. Sawyer, one of the subscribing witnesses thereto. The cause was tried by a jury and a verdict returned to the effect that the execution of the will was obtained by the exercise of undue influence by Mr. Gould and Mrs. Sawyer, acting jointly.

The first point urged by the appellant is that the court erred in overruling his de-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

murrer to the petition to revoke. The demurrer is based in part upon the ground that the petition is uncertain in that it does not set forth any facts showing that the testator was not of sound and disposing mind and memory and not acting under duress or menace or fraud, or undue influence of any person whatever, at the time she made the will. The petition alleges that at the time the testator made and subscribed the will she was not "of sound mind or memory, or in any respect capable of making a will." This is a sufficient allegation of the ultimate fact. It is not necessary to aver more particularly the character of the insanity. *Estate of Gharky*, 57 Cal. 279. As to the allegations relating to undue influence, we need only say that it is not necessary to aver that the testator was not acting under undue influence, in order to revoke probate of the will. If it is relied on as ground for revocation, it is necessary to allege that the testator was acting under undue influence and was thereby caused to execute the will, stating the facts. The insertion of the word "not" in the demurrer may be a clerical error. It is not explained or excused by the appellant. We might disregard it if good reason appeared and a meritorious case was presented. But the case was tried on the merits on the issue of undue influence alone. The appellant was not under any misapprehension with regard to the facts to be offered against him, nor in any wise misled by the uncertainty in this respect. The pleading is not a model, but the facts are stated with considerable detail, though not with great skill, and we are disposed to treat the demurrer according to its literal meaning. Even if we treated it otherwise, the defect in the complaint, if any, is so insignificant that it should be deemed cured by the verdict.

With respect to the contention that the petition does not "state facts sufficient to constitute a contest for revocation of said last will," it is sufficient to say that the averment that the testator was not of sound mind when she made the will, in connection with the other formal allegations, concerning which there is no question, is all that is necessary to answer this ground of demurrer. *Estate of Gharky*, supra.

Appellant further urges that the court below erred in ordering a trial by jury of its own motion. The only evidence in the record to show that it did so is the recital in the decree of revocation, as follows: "A jury, having been demanded and ordered by the court, was impaneled and sworn and proceeded to try the issues." The natural meaning of these words is that the court ordered a jury trial in compliance with the demand of one or the other of the parties. As error must be shown and is not presumed, we cannot presume that this language was intended to express other than its ordinary and ob-

vious meaning. Furthermore, it does not appear that the appellant objected to a trial by jury, and he cannot avail himself here of an objection of that character not made in the court below.

The decree recites that the issues other than those relating to undue influence were not submitted to the jury because there was not sufficient evidence to justify such submission. This was the equivalent of a nonsuit as to these other issues. It was a ruling in favor of the appellant of which he cannot complain. In the absence of anything to show that the recital as to the evidence is not true, we must accept it as a fact.

The above are the only points urged by the appellant as ground for reversal. They are obviously without substantial merit.

The judgment is affirmed, with costs.

We concur: ANGELLOTTI, J.; SLOSS, J.

(158 Cal. 596)

HOFF et ux. v. LOS ANGELES-PACIFIC CO. (L. A. 2,567.)

(Supreme Court of California. Nov. 19, 1910.
Rehearing Denied Dec. 19, 1910.)

1. TRIAL (§ 165*)—MOTION FOR NONSUIT—EVIDENCE.

A motion for nonsuit admits the truth of the plaintiff's evidence, and every inference of fact that can be legitimately drawn therefrom.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 373, 374; Dec. Dig. § 165.*]

2. NEGLIGENCE (§ 136*)—JURY QUESTION.

Negligence is a question of fact for the jury, though there be no conflict of evidence, if different conclusions can be therefrom rationally drawn.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 277-306; Dec. Dig. § 136.*]

3. STREET RAILROADS (§ 98*)—DUTY OF PERSON CROSSING TRACK—CARE REQUIRED.

While one about to cross a street railway track is not held to that high degree of care required in case of a steam railroad running through the country, he must exercise such care as is reasonable under all the circumstances.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. §§ 204-209; Dec. Dig. § 98.*]

4. NEGLIGENCE (§ 136*)—CONTRIBUTORY NEGLIGENCE—JURY QUESTIONS.

One in great peril, where immediate action is necessary to avoid it, is not required to exercise that carefulness required of a prudent man under ordinary circumstances, and the reasonableness of his effort to escape injury after discovering the danger is for the jury.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 333-336; Dec. Dig. § 136.*]

5. STREET RAILROADS (§ 117*)—COLLISION WITH VEHICLE—CONTRIBUTORY NEGLIGENCE—JURY QUESTION.

In an action for injuries in a collision between plaintiff's automobile and defendant street railway's car, whether plaintiff was guilty of contributory negligence held, under the evidence, for the jury.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. §§ 239-257; Dec. Dig. § 117.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r'l indexes

Department 1. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by Cory O. Hoff and wife against the Los Angeles-Pacific Company (a corporation). From a judgment of nonsuit, plaintiffs appeal. Reversed and remanded for new trial.

Gray, Barker & Bowen and Allen, Van Dyke & Jutten, for appellants. J. W. McKinley and Gurney E. Newlin (Roy V. Rep py, of counsel), for respondent.

ANGELLOTTI, J. This is an appeal from a judgment of nonsuit in an action for damages for personal injuries sustained by plaintiff Alta May Hoff, the wife of her coplaintiff, in a collision in the city of Los Angeles between an automobile in which she was riding and which was being operated by her husband, and two electric cars of defendant, coupled together and operated by defendant's servants. The collision occurred at the intersection of Sixteenth street, along which defendant operated a double-track electric street railway, with Western avenue, about 5 o'clock p. m. on August 23, 1908. Mr. Hoff was endeavoring to cross defendant's tracks at such intersection with his automobile, containing himself, his wife, and four other persons, when the machine was struck a little back of its center by defendant's cars, which were proceeding along Sixteenth street from the west, with the result that the machine was violently thrown quite a distance, and Mrs. Hoff severely injured.

The motion for a nonsuit was granted on the ground that the plaintiffs' evidence showed that Mr. Hoff was guilty of contributory negligence. It is conceded by defendant for the purposes of this appeal that such evidence showed negligence on the part of defendant's motorman, in that at the time of the collision defendant's cars were being propelled at a rate of speed in excess of that allowed by an ordinance of the city; such ordinance prohibiting a rate of speed in excess of eight miles per hour over any crossing in the district including the intersection of Sixteenth street and Western avenue, and that no bell was rung and no whistle blown as the cars approached this crossing.

Learned counsel for defendant freely concede the correctness of the rule stated as to the review of the action of trial courts in granting nonsuits in cases of this character in *Kramm v. Stockton Electric R. R. Co.*, 3 Cal. App. 606, 609, 86 Pac. 738, 739, as follows: "The motion for nonsuit admits the truth of plaintiff's evidence, and every inference of fact that can be legitimately drawn therefrom, and upon such motion the evidence should be interpreted most strongly against the defendant. If there is any evidence tending to sustain plaintiff's action, the nonsuit should be denied, without passing upon the sufficiency of such evidence, and, where there is a conflict in the evidence,

some of which tends to sustain the plaintiff's case, a motion for a nonsuit should not be granted. Nor is there any dispute as to the well-settled rule "that negligence is a question of fact for the jury, even when there is no conflict in the evidence, if different conclusions upon the subject can be rationally drawn from the evidence," and that, if but one conclusion can reasonably be reached from the evidence, it is a question of law for the court; but if one sensible and impartial man might decide that the plaintiff had exercised ordinary care, and another equally sensible and impartial man that he had not exercised such care, it must be left to the jury." *Herbert v. Southern Pacific Co.*, 121 Cal. 227, 229, 53 Pac. 651. "It has often been said by this court that it is very rare that a set of circumstances is presented which enables a court to say, as a matter of law, that negligence has been shown. As a general rule, it is a question of fact for the jury, an inference to be deduced from the circumstances of each particular case, and it is only where the deduction to be drawn is inevitably that of negligence that the court is authorized to withdraw the question from the jury. * * * If the conceded facts are such that reasonable minds might differ upon the question as to whether or not one was negligent, the question is one of fact for the jury." *Seller v. Market Street Ry. Co.*, 139 Cal. 268, 271, 72 Pac. 1006. In view of these well-established rules, we are of the opinion that the trial court erred in granting the motion for a nonsuit.

While it is true that one about to cross the track of a street railway is, as said in *Kernan v. Market Street Ry. Co.*, 137 Cal. 326, 70 Pac. 81, "not held to that high degree of care which is required in the case of an ordinary steam railroad running through the country, on which heavy trains of cars are moved at a high rate of speed and cannot be quickly stopped or controlled" (see, also, *Clark v. Bennett*, 123 Cal. 275, 55 Pac. 908), he must, of course, exercise such care as is reasonable under all the conditions, rights, and circumstances (*Scott v. San Bernardino, etc., Co.*, 152 Cal. 604, 610, 93 Pac. 677), and, if he fails to do so with the result that his own negligence contributes to the accident in which he is injured, he cannot recover, in the absence of the application to the other party of the doctrine of what is called in our decisions the last clear chance doctrine. The care required has been declared to be "that degree of care which people of ordinarily prudent habits—people in general—could be reasonably expected to exercise under the circumstances of a given case" (*Driscoll v. Cable Ry. Co.*, 97 Cal. 553, 567, 32 Pac. 591, 592 [33 Am. St. Rep. 203]), "that degree of care and prudence and good sense which men who possess those qualities in an ordinary or average degree exercise" under similar con-

ditions (Clark v. Bennett, 123 Cal. 278, 55 Pac. 908). While undoubtedly in some cases the facts may be such as to leave no room for doubt in the mind of any reasonable person as to the negligence of a plaintiff, as in *Bailey v. Market Street, etc., Co.*, 110 Cal. 320, 42 Pac. 914, where the plaintiff standing between two tracks waiting for a car stepped backward without looking upon one of the tracks in the face of an approaching car that was within a very few feet of her, the question of negligence is generally one upon which reasonable persons may well differ. We think that the evidence in this case construed most favorably to plaintiffs, as they are entitled to have it construed, presents such a case.

It is not seriously contended that the evidence compels the conclusion that Dr. Hoff's conduct after he first saw the approaching cars was such as to show contributory negligence on his part as matter of law. At that time he was from six to eight feet from the track upon which the cars were approaching, with the front of his machine nearly on the track, and traveling at a rate of speed of five or six miles an hour. As we must on this appeal, we are considering the evidence in the light most favorable to plaintiffs. He then saw the cars approaching at a point apparently about 100 or 125 feet away. He almost immediately increased his speed in an endeavor to get over the track. It is not at all clear that this was not his only chance to escape a collision under the existing circumstances, for the evidence is such as to warrant the conclusion that he could not then have stopped his machine before it reached the railroad track. But it is to be remembered "that a person in great peril, where immediate action is necessary to avoid it, is not required to exercise all of that presence of mind and carefulness which are justly required of a careful and prudent man under ordinary circumstances," and that the reasonableness of his effort to escape injury after discovery of the danger is a question for the jury to be determined by them in view of all the circumstances. *Harrington v. Los Angeles Ry. Co.*, 140 Cal. 514, 521, 74 Pac. 15, 63 L. R. A. 238, 98 Am. St. Rep. 85; *Bilton v. Southern Pacific Co.*, 148 Cal. 443, 450, 83 Pac. 440. It is further to be borne in mind that the evidence is of such a nature that it may reasonably be concluded that Mr. Hoff was warranted in assuming that the cars were approaching at such a rate of speed that they would not cross Western avenue at a greater rate than eight miles an hour, the speed allowed by the ordinance (see *Scott v. San Bernardino, etc., Co.*, 152 Cal. 604, 93 Pac. 677), and that, if such had been the fact, it would have been entirely reasonable to assume that the crossing would be made in safety.

Learned counsel for defendant assumes that Mr. Hoff was in a position of peril at

the time he discovered the approaching cars, and say that "his negligence consisted in getting into a position of peril through failure to use his sense of sight at the proper point in his approach towards the track." Mr. Hoff testified that he was traveling along Western avenue, between 12 and 15 miles an hour, that he saw the railroad track when he was about half a block away, that he at once looked and listened in both directions as far as he could see, that he heard or saw nothing to indicate the approach of a car, that he began to slow down when about 40 or 50 feet south of the track and decreased his speed until he was going only 5 or 6 miles an hour, that when about 35 feet from the track he looked to the west 150 feet or so and saw no car, that he then looked to the east to see if a car was approaching from that direction, that he then just looked at the track in front seeking a smooth place to go over and then to the west again when he saw the car as before stated, apparently some 100 or 125 feet away. The evidence does not compel the conclusion that he should have seen the car when he looked from a point about 35 feet from the track. We are at a loss to understand how upon this evidence it can be held as a matter of law that Hoff was guilty of negligence. There is nothing to indicate that the situation at this crossing was such that it was negligent to approach it at a rate of speed of 6 miles an hour. Of course, it was incumbent upon Hoff in so approaching the crossing to use ordinary care to detect the approach of cars on either track, and this involved the exercise of the senses of both sight and hearing on his part to the extent that an ordinarily careful person, regardless of the safety of himself and his companions, would exercise those faculties. See *Bailey v. Market St., etc., Co.*, supra; *Scott v. San Bernardino, etc., Co.*, supra. But we cannot agree that the evidence compels the inference that he refrained from the exercise of such faculties when once he had arrived at a point 35 feet from the track. It must be borne in mind that traveling at 6 miles an hour not more than 4 seconds would elapse between the time he looked to the west 35 feet from the track and the time he again looked and saw the car. In the meantime he had looked to the east to see if there was danger from that point, as it was his clear duty to do, and in so doing was necessarily compelled to momentarily withdraw his eyes from the west, and he had also looked to the front to see that his proposed crossing place was all right, the rails being slightly elevated above the ground, and then immediately looked west again, all this in the short space of four seconds. The best we can say for defendant upon the evidence in this record is that the question whether Hoff was negligent in approaching this crossing is one upon which reasonable

men might well differ. This being so, it was a question for the jury, and the trial court should not have granted the motion for a nonsuit. We find nothing in the cases cited by learned counsel for defendant that warrants a different conclusion.

In view of our conclusion upon the point discussed, it is unnecessary to consider any other point made for reversal.

The judgment is reversed, and the cause remanded for a new trial.

We concur: SHAW, J.; SLOSS, J.

(158 Cal. 603)

In re LOS ANGELES TRUST CO. (L. A. 2,585.)

(Supreme Court of California. Nov. 19, 1910.)

1. JUDGES (§ 39*)—DISQUALIFICATION—RIGHT TO ACT.

Under Code Civ. Proc. § 170, providing that no judge shall act in any proceeding where he is disqualified except to arrange the calendar or regulate the order of business, or transfer the proceeding to some other court, a judge who is disqualified to hear a petition under section 1276, by a corporation for leave to change its name, is not disqualified from making the order to show cause, required by section 1277, so as to fix the time for the hearing and direct the notice expressly required by law, since such act does not involve discretion, but relates solely to the arrangement of the calendar and regulation of the order of business.

[Ed. Note.—For other cases, see Judges, Cent. Dig. § 184; Dec. Dig. § 39.*]

2. TIME (§ 9*)—COMPUTATION—WEEKS—PUBLICATION OF ORDER TO SHOW CAUSE.

Under Code Civ. Proc. §§ 12, 1277, providing that the time in which any act is to be done must be computed by excluding the first day and including the last, and declaring that an order to show cause why the application of a corporation for leave to change its name should not be granted must be published for four successive weeks, an order to show cause on August 24th, made on July 27th preceding, which was published in every publication of a newspaper published daily except Sundays from and including July 27th to and including August 23d following, was sufficiently published.

[Ed. Note.—For other cases, see Time, Cent. Dig. §§ 11-32; Dec. Dig. § 9; Notice, Cent. Dig. § 29.]

3. COURTS (§ 486*)—TRANSFER OF CAUSE—DISQUALIFICATION OF JUDGE.

Under Code Civ. Proc. § 170, disqualifying a judge in enumerated cases, and requiring him to secure another judge, and when the superior court has more than one department the action shall be transferred to another department, a disqualified judge of a superior court of a county having more than one department, may transfer the proceeding to another department, notwithstanding section 398, relating to change to another county, which is applicable only when as provided in section 397, all the judges of the court are disqualified.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 486.*]

4. APPEAL AND ERROR (§ 1046*)—HARMLESS ERROR—NOTICE OF TRIAL.

The failure of the court on petition by a corporation for leave to change its name to comply with a rule of court as to five days' notice of trial does not affect the jurisdiction, and the corporation objecting to the change

could not complain thereof where it was not prejudiced.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4129; Dec. Dig. § 1046.*]

5. CORPORATIONS (§ 47*)—PETITION TO CHANGE NAME—FINDINGS OF FACT.

Findings of fact are not required in a proceeding by a corporation under Code Civ. Proc. § 1276 for leave to change its name.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 134; Dec. Dig. § 47.*]

6. CORPORATIONS (§ 47*)—PETITION FOR LEAVE TO CHANGE NAME—SUFFICIENCY.

A petition by a corporation for leave to change its name from "Los Angeles Trust Company" to "Los Angeles Trust and Savings Bank" which alleges that the corporation proposes to conduct a savings bank department as well as a trust department, and that it will be to its advantage to have its name indicate that fact, states a reason for a change of name within Code Civ. Proc. § 1276, sufficient to warrant the court in granting the petition, unless there is reasonable ground for concluding that the proposed name so closely resembles the name of another corporation that its adoption will tend to deceive the public to the injury of the latter corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 134; Dec. Dig. § 47.*]

7. CORPORATIONS (§ 47*)—CHANGE OF NAMES—PROCEEDINGS—OBJECTIONS.

The Los Angeles Trust Company applied for leave to change its name to the "Los Angeles Trust and Savings Bank" and showed that it proposed to conduct a savings bank department as well as a trust department. The Los Angeles Savings Bank resisted the application on the ground that the proposed name so closely resembled its own that the change would deceive the public with resulting injury to it. It was not actively engaged in the savings bank business, but had transferred practically all its business to another savings bank, and took no new business, and had only a small amount on deposit. *Held*, that the change in name was properly allowed.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 134; Dec. Dig. § 47.*]

8. EVIDENCE (§ 387*)—OFFICIAL CERTIFICATE—CONCLUSIVENESS—PAROL EVIDENCE.

A mere declaration by the Secretary of State as to his understanding when he issued a certificate to a corporation is not competent to impeach the certificate.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1608; Dec. Dig. § 387.*]

9. CORPORATIONS (§ 47*)—PROCEEDINGS FOR LEAVE TO CHANGE NAME—EVIDENCE.

Where a corporation resisted the application of another corporation for leave to change its name on the ground that the proposed name so closely resembled its own name that its adoption would tend to deceive the public, evidence of the reasons for the desire to change the name and as to the market value of the name of the objecting corporation was inadmissible, but evidence as to the cessation of active business by the objecting corporation was admissible on the issue of deception of the public and injury to the objecting corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 134; Dec. Dig. § 47.*]

10. APPEAL AND ERROR (§ 1058*)—HARMLESS ERROR—REFUSAL TO STRIKE OUT TESTIMONY.

The error, if any, in refusing to strike out testimony establishing a fact previously testified to by another witness is not prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4195; Dec. Dig. § 1058.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Department 1. Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

Application by the Los Angeles Trust Company for a change of name. From an order permitting the change, the Los Angeles Savings Bank appeals. Affirmed.

Shankland & Chandler, for appellant. Gibson, Trask, Dunn & Crutcher (Henry M. Young, of counsel), for respondent.

ANGELLOTTI, J. This is an appeal by the Los Angeles Savings Bank, a corporation, from an order of the superior court granting the application of the Los Angeles Trust Company for authorization to change its name to "Los Angeles Trust & Savings Bank," made under the provisions of sections 1275-1279, Code Civ. Proc. Appellant objected in the superior court to the granting of such application on the ground substantially that the proposed name so closely resembled its own name that it would tend to deceive the public as to the identity of the two corporations, with the result that it would be injured thereby.

The application of respondent, complying fully with the provisions of section 1276, Code Civ. Proc., was filed with the clerk of the superior court of Los Angeles county during the forenoon of July 27, 1909, and an order was thereupon made by Judge Wilbur, one of the 12 judges of said court, directing all persons interested in said matter to appear in his department on August 24, 1909, at 10 o'clock a. m. to show cause why the application should not be granted, and directing publication for four consecutive weeks of a copy of the order in the Los Angeles Express, a newspaper of general circulation in the county published daily except Sundays. This paper was what is known as an evening paper, being published in the afternoon. The order to show cause was published therein from and including July 27, 1909, to and including August 23, 1909, as often as said paper was published, viz.; every day except Sunday. On August 24, 1909, the matter came on for hearing before Judge Wilbur, respondent and appellant both appearing. Evidence on behalf of the parties was received, and on August 25, 1909, the matter was submitted for decision. On August 27, 1909, counsel for both parties attended at the judge's chambers at his request, and were informed by him that by reason of certain facts that had come to his knowledge it was possible that he was disqualified as matter of law to act as judge in such proceeding. Evidence was received upon the question of Judge Wilbur's disqualification, and on September 2, 1909, Judge Wilbur ordered the matter transferred to department 11 of said court, presided over by Judge Willis, for further proceedings. On September 3, 1909, the matter was taken up before Judge Willis in department 11,

both parties being present. Appellant objected to being compelled to proceed at once with the hearing, claiming that such procedure was in violation of a rule of the court requiring five days' notice, and that it was not ready to proceed. Its objections were overruled and a hearing was then had de novo. There is no pretense that it did not produce all the evidence that it desired to present, or that it was at all injured by being compelled to proceed with the hearing on that day. In its order granting respondent's application the trial court specifically found in favor of the allegations of respondent's application, and against the allegations of appellant's remonstrance. The facts in regard to the question of Judge Wilbur's alleged disqualification were substantially as follows: There was no pretense that there was any actual bias. Judge Wilbur and four other gentlemen were the trustees of a trust for charitable purposes known as the Hollenbeck Home, the property held by them as said trustees being certain land on a portion of which a home for indigent women and homeless children was to be erected, and twenty-five shares of stock in the First National Bank of Los Angeles. Certain of the directors of said National Bank held in trust for the stockholders of said bank all of the stock of respondent Trust Company. The Hollenbeck Home trustees received no compensation and had no personal interest in the execution of their trust other than such interest as any person acting as a trustee of a charitable trust might have in its welfare.

Upon the facts we have stated various technical contentions having no real connection with the merits of appellant's opposition to respondent's application are made by learned counsel for appellant.

Although the hearing was had and decision made by a judge admittedly qualified to act—Judge Willis—it is urged that the proceeding must fail because the order to show cause was made by Judge Wilbur, who it is claimed, was disqualified to act at all; section 170, Code of Civil Procedure, providing that no judge shall "sit or act" in "any action or proceeding, to which he is a party or in which he is interested." Assuming purely for the purposes of this decision that upon the facts stated Judge Wilbur was disqualified to sit or act in this proceeding, we are of the opinion that the making of the order to show cause was not such action as is prohibited on the part of the disqualified judge. Section 1277, Code of Civil Procedure, provides that upon the filing of the application in the form prescribed by section 1276, Code of Civil Procedure, the court shall thereupon make an order reciting certain things, and "directing all persons interested in said matter to appear before the court at a time and place specified, not less than four or more than eight weeks from the time of making said order, to show cause why the

application for change of name should not be granted." No discretion whatever is given to the court in the matter of making such order. It must be made upon the filing of a petition in the form prescribed by law, and the court simply fixes therein the date when the matter shall come on for hearing. Section 170, Code Civ. Proc., provides that the provisions "shall not apply to the arrangement of the calendar, or to the regulation of the order of business, nor the power of transferring the * * * proceeding to some other court." The whole purpose of the order to show cause is simply to give notice to the general public of the making of the application, and of the time when the same will come on for hearing, so that any person interested may present his objections. In making it the court is simply fixing the time of hearing and directing the notice expressly required by the law. Such action on the part of a judge may well be held to be action relating solely to the arrangement of the calendar and regulation of the order of business. It is not at all analogous to such action as is involved in extending the time within which a bill of exceptions may be filed, where the judge must determine whether good cause for such extension is shown by the applicant. See *Johnson v. German, etc., Ins. Co.*, 150 Cal. 336, 88 Pac. 985.

Section 1277, Code Civ. Proc., provides that the time of hearing specified in the order must be "not less than four or more than eight weeks" from the time of making the order, and that a copy of the order must be published for four successive weeks in some newspaper of general circulation printed in the county, if a newspaper be printed therein. The claim that these requirements were not complied with finds no support in the facts above set forth. The requirement as to a full four weeks' publication was complied with by the publication in the *Los Angeles Express* on every publication day from and including July 27, 1909, to and including August 23, 1909, and such four weeks' publication was completed with the publication in the issue of August 23, 1909. See *Derby v. City of Modesto*, 104 Cal. 515, 522, 38 Pac. 900; *Sherwood v. Wallin*, 154 Cal. 735, 738, 99 Pac. 191. And there is absolutely nothing in the record to show that there was not a full four weeks' period between "the time of making such order" and the time fixed for hearing thereby, even if we consider fractions of days. But it is settled by the authorities in this state that in such matters as this section 12, Code Civ. Proc., providing for the exclusion of the first day and the inclusion of the last, is applicable. See *Misch v. Mayhew*, 51 Cal. 514; *Hannah v. Green*, 143 Cal. 19, 21, 76 Pac. 708; *Wilson v. His Creditors*, 55 Cal. 476; *Dean v. Grimes*, 72 Cal. 442, 14 Pac. 178; *Hagenmeyer v. Board of Equalization*, 82 Cal. 214, 23 Pac. 14; *Bates v. Howard*, 105 Cal. 182,

38 Pac. 715; *Bellmer v. Blessington*, 136 Cal. 3, 68 Pac. 111.

There can be no question of the right of Judge Wilbur to transfer the matter from his department to another department of the same court, instead of to the superior court of another county, for hearing. The statutes clearly contemplate that this shall be the course followed in case of a disqualified judge in counties where there is more than one judge (section 170, Code Civ. Proc.), and the provision in section 398, Code Civ. Proc., relating to a change to another county, is applicable only when all the judges of the county are disqualified, and when, as specified in subdivision 4 of section 397, Code Civ. Proc., "there is no judge of the court qualified to act."

Assuming the applicability of the rule of court as to five days' notice of trial, failure to comply therewith in the matter of hearing before Judge Willis did not affect the jurisdiction, and it is clear that appellant's rights were not prejudiced thereby.

If findings of fact on the part of the trial court were essential, we are satisfied that the recitals in the order must be taken as constituting such findings. We are of the opinion, however, that formal findings of fact are not required in a proceeding of this character. See *In re Danford*, 108 Pac. 322, 324.

The petition for authorization to change name was in full compliance with the statute, and constituted a sufficient basis for the proceeding and subsequent order. The statute (section 1276, Code Civ. Proc.) provides that the petition must specify "the reason for such change of name." Appellant claims that no good reason was alleged. A reason stated was that as the applicant proposed to conduct a savings bank department as well as a trust department, it believed that it would be to its advantage to have its name indicate that fact, so that its customers and the general public might be informed by its name that it had a savings bank department, and not be led to believe thereby that it conducted only a trust department. This was certainly a compliance with that portion of the law requiring a statement of the reasons for change of name.

It was also a sufficient reason to warrant the court in granting the application, unless there was reasonable ground for concluding that the proposed name so closely resembled the name of appellant that its adoption by respondent would tend to deceive the public as to the identity of the two corporations, with resulting injury to the appellant. In *re U. S. Mortgage Co.*, 83 Hun, 572, 32 N. Y. Supp. 11. This is really the only question in which appellant has any interest. Upon this point, respondent filed in court, in compliance with section 1278, Code Civ. Proc., the certificate of the Secretary of State that the name desired to be used by the applicant is not the corporate name of any corporation existing

at said time, and that said name does not so closely resemble the name of any such existing corporation as will tend to deceive. We see no good ground for holding that the decision of the court below to the effect that no substantial right of appellant would be invaded by the proposed change of name was erroneous. It appeared that appellant was no longer actively engaged in the savings bank business, having transferred practically all its business to the Security Savings Bank, and taking no new business, and now having only about \$21,000 on deposit. It is apparent that until appellant does engage in active business again, a matter as to which there appears to be no certainty, there can be no probability of confusion existing or the identity of the two corporations being destroyed. If it ever does re-engage in active business along the lines specified in its articles of incorporation, being according to such articles strictly a savings and loan corporation, we are satisfied that the lower court was warranted in holding that the presence of the word "trust" in the proposed name of respondent, which has been a part of its name ever since its incorporation in 1902, will sufficiently serve to characterize it and distinguish it from appellant to prevent injury to appellant, and imposition or deceit upon the public. As said in *Re U. S. Mortgage Co.*, supra: "A mere possibility by the suggestion of extreme instances that might never occur should never be the basis of the court's action, the duty being to determine what with reasonable certainty would be the natural consequences of granting the application."

Several alleged errors of law in the rulings of the court in regard to evidence are specified by appellant, but none is of such a nature as to warrant a reversal. The evidence offered to impeach the certificate of the Secretary of State hereinbefore referred to, consisting of a mere declaration by that officer to appellant's attorneys as to his understanding when he issued the certificate, was not competent for that purpose. The questions asked Mr. Drake by appellant relating to the reasons for the desire to change respondent's name were of no importance so far as the controversy between these parties is concerned. The evidence elicited by respondent from Mr. Sartori on cross-examination in regard to the cessation of active business by appellant was material upon the question at issue between the parties, viz.: that of the deception of the public and injury to appellant in the event of the change of name being had. We do not see how evidence as to market value of appellant's name could assist in the determination of this question. No prejudice could have resulted to appellant from the refusal of the court to strike out certain testimony of Mr. Drake as to information regarding appellant obtained from

the report of the bank commissioners. The same facts had already been testified to by Mr. Sartori for appellant.

There is no other matter requiring notice. The order appealed from is affirmed.

We concur: SHAW, J.; SLOSS, J.

(158 Cal. 559)

McLEMORE v. EXPRESS OIL CO. (S. F. 5,179.)

(Supreme Court of California. Nov. 17, 1910.)

1. MINES AND MINERALS (§ 36*)—LOCATION FOR OIL—PROTECTION OF LOCATOR'S RIGHTS BEFORE DISCOVERY.

That one who has made a mining location on government land for oil, which Act Cong. Feb. 11, 1897, c. 216, 29 Stat. 526 (U. S. Comp. St. 1901, p. 1434), requires to be made under the laws relating to placer mining claims, may without actual possession of the claim be protected from a homestead entry of the land, his location must be valid and complete, for which discovery of oil is essential; and not having made such discovery, he is protected only while in possession, diligently prosecuting his work to a discovery, which means not the pursuit of capital to prosecute the work, or an attempted holding by cabin, lumber or unused derrick, but the diligent continuous prosecution of the work, with the expenditure of whatever money may be necessary to the end in view; the laws as to assessment work having no application till the discovery is made.

[Ed. Note.—For other cases, see *Mines and Minerals*, Dec. Dig. § 36.*]

2. PUBLIC LANDS (§ 35*)—HOMESTEADS—COMPLETE ENTRY.

A homestead entry is complete, so as to protect whatever preferential rights the homesteader has, without his actually going on the land, for which he is allowed six months from the date of the entry.

[Ed. Note.—For other cases, see *Public Lands*, Cent. Dig. § 74; Dec. Dig. § 35.*]

3. MINES AND MINERALS (§ 9*)—RIGHT TO EXPLOIT LANDS ENTERED AS HOMESTEAD.

The rule that a homestead entry removes the land out of the public domain is not subject to any exception that without minerals having been discovered on it, and proof of its present value for mineral purposes, another than the homesteader may enter on it merely for the purpose of exploiting it to see if perchance it possesses such value.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. § 11; Dec. Dig. § 9.*]

Department 2. Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by C. A. McLemore against the Express Oil Company. Judgment for plaintiff. Defendant appeals. Affirmed.

Frank H. Short and F. E. Cook, for appellant. Larkins & Feemster, for respondent.

HENSHAW, J. The action is in ejectment. Judgment passed for plaintiff, and from that judgment and from an order denying defendant's motion for a new trial it appeals. The controversy is between a claimant to government land under homestead entry, and a claimant to the same land under a purported mining location. An attempted location had

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

been made by eight associates, defendant's grantors, under the placer mining laws. The valuable mineral sought to be discovered was oil. This was in January, 1906. A cabin was constructed upon the claim, its boundaries were marked, some bits of road built, and, in the language of appellant's brief, work had been done and improvements made upon the claim "far in excess of the requirements of the United States statutes with respect to assessment work and before any claim had been initiated by the plaintiff, they had expended in a direct and legitimate way many times over the amount required in the way of assessment work." Upon April 12, 1907, plaintiff first connected himself with the land by fulfilling all the requirements for entering it as a homestead. At that time, finds the court, no one of the defendants was in possession of the land.

Appellant's first contention is that the evidence of location, occupation, and possession of the ground as a mining claim by defendant was sufficient to exclude it from entry by plaintiff upon the 12th day of April, 1907, when his homestead entry was made. Undoubtedly appellant's contention in this respect would be correct if the location was valid and complete at the time of the homestead entry, since "actual possession of a mining claim held under a mining location is no more necessary for the protection of the title thereto, than it is for any other grant of the United States" (*Belk v. Meagher*, 104 U. S. 279, 26 L. Ed. 735), and the principle has become axiomatic that discovery and appropriation are the source of title to mining claims, and that assessment or development work is the condition of their continued possession (27 Cyc. 588). But this rule applies only when the location is valid and complete. And a location is valid and complete only when, after compliance with other requirements, a discovery of valuable mineral in place has been made. In the case of ordinary minerals, little or no difficulty has been experienced by the courts in this matter. In practice, the miner went upon the public domain, and, before he took the trouble to stake his claim and post and record his notice, he made discovery. The staking of the boundaries of the claim and the posting of notice followed such discovery. When, however, Congress enacted that locations could and should be made of public lands containing petroleum or other mineral oils under the laws relating to placer mining claims (Act Feb. 11, 1897, c. 216, 29 Stat. 526 [U. S. Comp. St. 1901, p. 1434]), the courts were at once confronted with serious difficulty in their endeavor to obey the congressional mandate, and fit the placer mining laws to the exigencies of oil locations which in their nature were radically dissimilar. Thus, it is well established, that the sole power of disposition and control of the public lands being vested by the Constitution of the United States in Congress (Const. U. S.,

art. 4, § 3), Congress could at any time change its policy in regard to those lands so long as vested rights were not impaired.

It was fully established, also, that a qualified person, who had made a valid location upon a part of the public mineral domain (which valid location always, of course, included discovery), acquired vested rights, which no change in congressional policy could affect or impair, but per contra that a change in policy could impair the rights of one upon the public domain who had not acquired a valid location. As has been said, in the case of other minerals discovery preceded the demarkation of the boundaries, the posting and recording of the notice. In the case of oil, discovery, in the very nature of things, would rarely or never be made except at the end of much time and after the expenditure of much money, the discovery of oil involving the erection of a derrick and the laborious drilling of a well, frequently to the depth of 3,000 feet and more. If, therefore, the placer mining laws, which were declared by Congress to be the only laws under which oil locations could be established, were to be made of any practical benefit to the oil locator, it must be by permitting him to mark the boundaries of his location and post and record his notice, and protect him in possession while he was with diligence prosecuting the labor of digging his well to determine whether or not a discovery could be made. So it was held by the federal courts, by the courts of some of the other states, and by this court in *Miller v. Chrisman*, 140 Cal. 447, 73 Pac. 1084, 74 Pac. 444, 98 Am. St. Rep. 63, to the following effect: "One who thus in good faith makes his location, remains in possession and with due diligence prosecutes his work toward a discovery, is fully protected against all forms of forcible, fraudulent, surreptitious, or clandestine entries and intrusions upon his possession. Such entry must be always peaceable, open and above board, and made in good faith, or no right can be founded upon it." *Weed v. Snook*, 144 Cal. 439, 77 Pac. 1023; *Cosmos, etc., Co. v. Gray Eagle Oil Co.* (C. C.) 104 Fed. 20; *Id.*, 112 Fed. 4, 50 C. C. A. 79, 61 L. R. A. 230; *Id.*, 190 U. S. 301, 23 Sup. Ct. 692, 47 L. Ed. 1064; *Whiting v. Straup*, 17 Wyo. 1, 95 Pac. 849, 129 Am. St. Rep. 1093; *Mofat v. Blue River, etc., Co.*, 33 Colo. 142, 80 Pac. 139. But it is always to be borne in mind that, until the perfection of the inchoate and incomplete location by discovery, the locator has, first, no vested rights which Congress is obliged to recognize. So that Congress may change its policy in regard to the lands to the extent even of excluding therefrom the diligent operator who has not made discovery. However inequitable such a proceeding might be, it in no way would be illegal.

Second. It is to be observed that the laws touching assessment work are not applicable to such an imperfect location. When the

location is valid and complete, the law exacts the doing of but \$100 of work per year, and, when that is done, all of the locator's rights are fully protected, whether he remains in possession longer than is necessary to do that work or not. But, where the location is incomplete, no question of assessment work is involved. What the attempting locator has is the right to continue in possession, undisturbed by any form of hostile or clandestine entry, while he is diligently prosecuting his work to a discovery. This diligent prosecution of the work of discovery does not mean the doing of assessment work. It does not mean the pursuit of capital to prosecute the work. It does not mean any attempted holding by cabin, lumber pile, or unused derrick. It means the diligent, continuous prosecution of the work, with the expenditure of whatever money may be necessary to the end in view. Of such work defendant's grantors were not in the prosecution up to April 12, 1907. They were not only not in the actual possession of the land, as the court finds, but the evidence discloses that what they had done was no more than an attempt to hold the land under the theory that assessment work was adequate for that purpose. It is shown by the evidence that they were not only not engaged in the diligent prosecution of the work, but that they were not financially able so to prosecute it, and were either in search of capital to enable them to do so, or in search of a purchaser to buy out such interest as it might be thought that they had. The cases of *Cosmos, etc., Co. v. Gray Eagle Oil Company* (C. C.) 104 Fed. 20, and 112 Fed. 4, 50 C. C. A. 79, 61 L. R. A. 230, are not at all in conflict with these views. To the contrary, these views and those expressed in *Miller v. Chrisman*, supra, *Weed v. Snook*, supra, and *New England, etc., Oil Co. v. Congdon*, 152 Cal. 211, 92 Pac. 180, are themselves in great part based upon the opinion of the learned circuit judge in those cases. The federal cases involved conflicts between "scrippers" and oil locators, under an act which allowed the scrippers, for the land from which they had been displaced, to "select in lieu thereof an equal tract of vacant land open to entry." They endeavored to select land that was not only in the possession of oil men, but of oil men who were diligently prosecuting their work to a discovery so as to complete their locations. The circuit court held that such land so occupied and worked was not vacant land open to entry within the meaning of the act, and declared (we quote from the syllabus which correctly enunciates the determination): "A claimant of land entered under Act June 4, 1897 (Act June 4, 1897, c. 2, 30 Stat. 36 [U. S. Comp. St. 1901, p. 1541]), in lieu of land situated within a forest reservation, on an affidavit stating its nonmineral character, that it was free from mining claims, and was entered for agricultural purposes, will not be granted relief in equity

against another claimant in possession under an oil placer mining location, made prior to such entry, and followed up by development work, which was being prosecuted on the land when the entry was made, and resulted in valuable producing wells, where the affidavit of the entryman was also false in other particulars, the land being valueless for agricultural or grazing purposes, but situated in an oil district, and the entry being in fact made because of its supposed value for oil, although no discovery of oil had then been made thereon."

Plaintiff filing his homestead entry upon the 12th day of April, 1907, made physical and personal entry on the 5th day of October, 1907—within the six months limited by law. Appellant contends that plaintiff had made no "entry" within the meaning of the law until he took possession *pedis* on October 5th; that up to that time he had acquired merely a preferential right of entry over those claiming under the homestead or agricultural laws, but not over those who might have entered under the mining laws. In this connection appellant expounds the different meanings which have been given to the word "entry," and concludes that the entry of a homesteader is not complete, within the meaning of the law, until he has actually gone upon the ground. But this is not the meaning of the word as employed in the statute. In "Suggestions to Homesteaders" issued by the Commissioner of the General Land Office March 9, 1908 (paragraph 27, page 12), it is said: "Actual residence on the lands entered must begin within six months from the date of all homestead entries, except additional entries and adjoining farm entries of the character mentioned in paragraphs 14 and 15, and residence with improvements and annual cultivation must continue until the entry is five years old, except in cases thereafter mentioned, but all entrymen who actually reside upon and cultivate lands entered by them prior to making such entries may make final proof at any time after entry when they can show five years' residence and cultivation." Says the Supreme Court of the United States in *Hastings, etc., R. R. v. Whitney*, 132 U. S. 357, 10 Sup. Ct. 112, 33 L. Ed. 363: "Under the homestead law three things are needed to be done in order to constitute an entry on public lands: First, the applicant must make an affidavit setting forth the facts which entitle him to make such entry; second, he must make a formal application; and, third, he must make payment of the money required. When these three requisites are complied with, and the certificate of entry is issued to him, the entry is made—the land is entered." All of these things had been done by plaintiff, and his entry was therefore complete. What effect did this entry have upon the right of defendant subsequently to enter upon the land and exploit it for minerals?

"A homestead entry," says the Supreme Court of the United States, "which is prima facie valid removes the land, temporarily at least, out of the public domain." *Hastings, etc., Co. v. Whitney*, 132 U. S. 357, 10 Sup. Ct. 112, 33 L. Ed. 363; *U. S. v. Turner* (C. C.) 54 Fed. 228. But appellant contends that this language is to be construed with an exception, and that this exception is that one who claims the land to be valuable for mineral purposes has the right, notwithstanding such homestead entry, to enter thereon and explore it for the valuable minerals it is thought to contain. Herein reliance is placed upon *McClintock v. Bryden*, 5 Cal. 97, with the note which is appended to that case in 63 Am. Dec. 87. But it will be found upon examination that that, and the cases like it, all arose where the land was of proved mineral value, and the decisions were based upon the national laws, which, in effect, excepted from homestead entry the mineral lands of the nation, the mineral lands being those of more value for mineral than for agricultural purposes. We know of no case, and have been cited to none, where a right of entry upon lands held under an agricultural entry has been permitted without proof of the present value of the lands for mineral purposes merely for the purpose of exploiting them to see if perchance they possess such value. That is precisely what appellant desires here to do, and contends that it has the right to do. No discovery of oil has been made upon the lands, but defendant insists that it has the right to enter and explore them to see if there is oil therein. The decisions are against the existence of such a right. In *Lentz v. Victor*, 17 Cal. 273, it is declared that such an entry upon an agricultural holding can be justified and upheld only by showing, first, that the land is public land; and, second, "that it contains mines or minerals." The Land Department has uniformly laid down the rule to the following effect: "The burden of proof being upon the protestants (mineral claimants), they are required to show by a preponderance of testimony that the land is more valuable for mining than for agricultural purposes as a present fact; not that it might possibly hereafter develop minerals in such quantity, and of such character, as to establish its mineral value." 1 Land Dec. Dep. Int. 561; *Creswell Mining Co. v. Johnson*, 8 Land Dec. Dep. Int. 440; *Dobler v. Northern Pac. R. Co.*, 17 Land Dec. Dep. Int. 103; *Winscott v. Northern Pac. R. Co.*, 17 Land Dec. Dep. Int. 274; *Southern Pac. R. Co.*, 25 Land Dec. Dep. Int. 223; *Alldritt v. Northern Pac. R. Co.*, 25 Land Dec. Dep. Int. 349.

For these reasons the judgment and order appealed from are affirmed.

We concur: LORIGAN, J.; MELVIN, J.

(158 Cal. 616)

In re PEPPER'S ESTATE. (S. F. 5,107.)

(Supreme Court of California. Nov. 21, 1910.

Rehearing Denied Dec. 21, 1910.)

1. HUSBAND AND WIFE (§ 262*)—COMMUNITY PROPERTY.

It is presumed that personal property acquired after marriage by the husband was community property.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 913, 914; Dec. Dig. § 262.*]

2. HUSBAND AND WIFE (§ 264*)—COMMUNITY PROPERTY—SEPARATE PROPERTY—EVIDENCE TO ESTABLISH—WEIGHT.

In view of Code Civ. Proc. § 1826, providing that the law does not require such proof as excludes all possibility of error, and produces absolute certainty, but only such proof as produces conviction to an unprejudiced mind, or proof to a moral certainty, and section 1835, defining satisfactory evidence, justifying a verdict, as that which ordinarily produces moral certainty in unprejudiced minds, it is not necessary to the establishment of the separate character of property acquired by a spouse after marriage, that the evidence demonstrate that fact to the exclusion of the possibility of a doubt.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 916; Dec. Dig. § 264.*]

3. APPEAL AND ERROR (§ 1011*)—REVIEW—FINDINGS—CONCLUSIVENESS.

A finding of the trial court upon conflicting evidence that property acquired by a spouse after marriage was separate property is no more reviewable on appeal than any other finding under such circumstances.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.*]

4. HUSBAND AND WIFE (§ 248½*)—COMMUNITY PROPERTY—SEPARATE PROPERTY—PROPERTY ACQUIRED BEFORE MARRIAGE—PERFECTING OF TITLE AFTER MARRIAGE.

Where the husband had occupied a ranch for many years before his marriage under a claim of ownership, the fact that his title to a part of the land was not perfected by conveyance until thereafter would not affect the character of the land as separate property.

[Ed. Note.—For other cases, see *Husband and Wife*, Dec. Dig. § 248½.*]

5. HUSBAND AND WIFE (§ 257*)—SEPARATE PROPERTY—PROFITS OF LAND.

Under Civ. Code, § 163, providing that all property owned by the husband before marriage with the rents, issues, and profits thereof is his separate property, the profits of selling trees and plants raised by the husband in a nursery conducted on land acquired by him before marriage are his separate property; the fact that the husband's industry and attention to the business was an important element in conducting it not changing the character of such profits.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 904-910; Dec. Dig. § 257.*]

6. EXECUTORS AND ADMINISTRATORS (§ 222*)—CLAIMS AGAINST ESTATE—NECESSITY OF PRESENTATION.

If an amount advanced by the wife to her husband to be used by him in conducting his separate business was a loan, the wife's remedy was to present her claim therefor as a creditor to his executors, and not to claim such amount as separate property.

[Ed. Note.—For other cases, see *Executors and Administrators*, Dec. Dig. § 222.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

7. EVIDENCE (§ 220*)—ADMISSIBILITY—DECLARATIONS AGAINST INTEREST.

While the husband's declarations that all of his property was acquired before marriage were self-serving statements, and not admissible in favor of his successors in interest on the petition of his executor to distribute his estate as separate property pursuant to the will, against the wife's claim as community estate, if such declarations were made in his wife's presence, her conduct in respect thereto was admissible against her.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 220.*]

8. EVIDENCE (§ 236*)—DECLARATIONS AGAINST INTEREST—PERSONS AGAINST WHOM ADMISSIBLE.

Under Code Civ. Proc. § 1850, providing that where a declaration formed part of a transaction, which is itself the fact in dispute, or is evidence of that fact, such declaration is evidence as part of the transaction, statements by testator against his interest as to the community character of his property were admissible against parties claiming under his will as against his wife's claim to his estate as community property.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 236.*]

9. APPEAL AND ERROR (§ 1056*)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

On the executors' petition to distribute a husband's estate pursuant to his will, wherein his wife claimed a part of his estate as community property, a declaration by testator that upon his arrival in the county in 1858, which was 16 years before his marriage, he had very little property, had a bearing upon the issue or the community character of the property so remote as to make its exclusion harmless, especially where it did not appear that any large part of testator's estate was owned by him in 1858.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1056.*]

10. EVIDENCE (§ 471*)—OPINION EVIDENCE—CONCLUSIONS OF LAW.

Where the issue was whether property owned by testator at his death was separate or community property, testimony of a declaration by testator that he considered certain money he had acquired since marriage as community property was properly stricken; whether it was community property being a question of law.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2171; Dec. Dig. § 471.*]

In Bank. Appeal from Superior Court, Sonoma County; Emmet Seawell, Judge.

In the matter of the estate of William H. Pepper, deceased. From a decree of distribution, according to the will, Phebe Pepper appeals. Affirmed.

J. R. Leppo, for appellant. Thomas P. Boyd, W. F. Cowan, and F. A. Meyer, for respondents.

SLOSS, J. William H. Pepper died testate, leaving an estate which was appraised at \$113,000 and over. By his will he gave to his widow, Phebe Pepper, \$26,000, and a house and lot valued at \$4,000. In due course the executors petitioned for distribution of the estate in their hands in accordance with the terms of the will. The widow appeared and answered, claiming that all of the estate was community property, and

that she was entitled to one-half thereof, in addition to the legacy and devise given her by the will. The trial court, after hearing evidence on this issue, decided that the entire estate was the separate property of the decedent, and decreed distribution in accordance with the terms of the will. The widow appeals from the decree of distribution. The point most strongly urged by the appellant is that the evidence fails to support the finding of the separate character of the estate.

William H. Pepper came to Sonoma county in 1858 or 1859. He settled upon a tract of land in Green Valley, containing 160 acres. He took up his residence upon this land and commenced at once to cultivate it, putting in a nursery and an orchard, and devoting part of the land to pasturage and the growing of grain. Later, and prior to his marriage to the appellant, he acquired additional land adjoining his original holding, until his ranch or farm comprised about 291 acres. He was married to the appellant in 1874. At that time he had put upon his land various improvements, and was conducting thereon an active nursery business. His course of procedure was to grow plants, principally fruit trees, either from seed or from stock imported from France or the Eastern states, until they had attained the age of one or two years, and then to sell the plants so grown. From the time of his marriage until his retirement in 1900, he lived upon the land mentioned, and devoted his entire time and energy to the conduct of the nursery and the farming operations which were being carried on there. During all this time the appellant lived with him, and performed her household and other duties as a faithful wife should. The area of land applied to nursery purposes was, from time to time, increased by Pepper. There is the direct testimony of several witnesses, including Mrs. Pepper herself, to the effect that during all the years of his marriage Pepper was engaged in no business other than that which he conducted on the ranch. In January, 1900, he sold the land, with the nursery and the personal property thereon, to one Robinson for \$20,000, and took up his home in Petaluma. In March, 1906, he died. His estate consisted of the house and lot devised to his widow, of cash in bank to the amount of \$51,121.92, of interest-bearing notes to the amount of \$57,400, and of bank stock and furniture appraised at \$1,350. The bank deposits were made, and the notes and other personal property acquired, so far as appears, after his marriage. The presumption is, therefore, that all of these items were community property. In re Boody, 113 Cal. 682, 45 Pac. 858; Fennel v. Drinkhouse, 131 Cal. 447, 63 Pac. 734, 82 Am. St. Rep. 361. Was the trial court justified in finding that this presumption was overcome? There are to be found, in many of the decisions of this

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

court, expressions to the effect that the separate character of property acquired by either of the spouses after marriage is to be established only by "clear and convincing evidence," "clear and decisive proof," or the like. *Meyer v. Kinzer*, 12 Cal. 252, 253, 73 Am. Dec. 538; *Mott v. Smith*, 16 Cal. 557; *Adams v. Knowlton*, 22 Cal. 288; *Morgan v. Lones*, 78 Cal. 62, 20 Pac. 248; *In re Boody*, supra; *Davis v. Green*, 122 Cal. 364, 55 Pac. 9; *Rowe v. H. S. & L. S.*, 134 Cal. 405, 60 Pac. 569. But, as is said in *Freese v. Hib. S. & L. Soc.*, 139 Cal. 392, 73 Pac. 172, "It was never intended by this court to lay down a rule requiring demonstration in such matters; that is, such a degree of proof as, excluding possibility of error, produces absolute certainty. Code Civ. Proc. § 1826. Such proof is never required. Generally, moral certainty only is required, or that degree of proof which produces conviction in an unprejudiced mind, and evidence which ordinarily produces such conviction is satisfactory." Code Civ. Proc. §§ 1826, 1835. And, in speaking of a similar question in *Couts v. Winston*, 153 Cal. 686, 96 Pac. 357, we said that "whether or not the evidence offered * * * is clear and convincing is a question for the trial court. * * * In such cases, as in others, the determination of that court in favor of either party upon conflicting or contradictory evidence is not open to review in this court."

While the respondents were unable to trace with exactness the transmigrations of Pepper's acquisitions into the items of property which he left at his death, we think it can hardly be questioned that the record authorized an inference that his entire estate consisted of the proceeds of the sale of property owned by him at the time of his marriage, together with such profits and earnings as he had made in conducting his ranch. It was shown that he held the ranch before his marriage, and had been occupying it under a claim of ownership for many years. The mere fact that his title to a part of the land was not perfected by conveyance from the source of paramount title until a later date would not alter the character of the land itself as separate estate. *Lake v. Lake*, 52 Cal. 428; *Estate of Higgins*, 65 Cal. 407, 4 Pac. 389; *In re Lamb*, 95 Cal. 397, 30 Pac. 568; *Estate of Boody*, 119 Cal. 402, 51 Pac. 634. It was also shown that he had been engaged in no business other than that of conducting the ranch. In this testimony the court had a sufficient basis for the conclusion that whatever Pepper had at his death, over and above the property owned by him when he married, had been acquired in the business or occupation carried on by him on said ranch.

There can be little question, on the evidence, that the principal part of such business consisted of the conduct of his nursery. The appellant argues with great earnestness that the profits and earnings of such nur-

series business after marriage must, as matter of law, be held to be community property. We think this position cannot be sustained. Section 163 of the Civil Code provides that "all property owned by the husband before marriage, and that acquired afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is his separate property." The question here is whether the proceeds of the nursery conducted on the land can be considered as "issues" or "profits" of the land. Earnings, acquired by the exercise of the industry or skill of either husband or wife, are to be credited to the community. On the other hand, the products of land, separately owned by either spouse, and cultivated by either or both, become the separate property of the one owning the land. The appellant does not dispute the proposition that, if Pepper had, year after year, sown his land to grain, the resulting crops would have formed a part of his separate estate. But it is argued that, in the case of the nursery, the principal element in the success of the venture was the industry, skill, and attention of Pepper, and that the use of the land was merely incidental to what was, in effect, a commercial enterprise. We are unable to see that this argument furnishes a sufficient ground of distinction. In any agricultural enterprise, the labor and skill of man are essential to success. An orchard or a grain field must be cultivated and cared for. The resultant product is in part due to the processes of nature operating upon the land, and in part to the intelligent application of manual labor to the soil. It is, in the nature of things, impossible to apportion the crop so as to determine what share of it has come from the soil and what share from the exertions of man. The product must be treated as a whole, and, if it is the growth of land separately owned, it is the separate property of the owner of the land. See *Diefendorff v. Hopkins*, 95 Cal. 343, 352, 28 Pac. 263, 30 Pac. 549. The case of the nursery differs from that of the orchard or the grain field, if at all, only in the fact that the enterprise may require the application of personal skill, labor and attention in a greater degree. But the occupation is, none the less, one conducted upon land, and the product sold is the growth of that land. The seed or the cutting is planted in the soil, it is there nurtured and grown until it reaches a certain stage of development, and is then taken up and sold. If the crop of grain sown and harvested by the owner of the land constitutes "issues and profits" of the land, we are unable to see why the same may not be said of young trees and plants raised on the land until they are ready for transplanting. There may be cases in which the business is virtually one of purchase and sale of plants, the ground being used merely to preserve the plants until sales can be effected. In such cases it might well be said that the enter-

prise is so predominantly commercial that the profits are not to be treated as issuing from the land. But on the facts before us, the court below, while it might have regarded the case as coming within this class, was not bound to do so. The decisions of this court are not in conflict with these views. It would not be profitable to review the cases cited by counsel, since none of them deal with facts like those before us.

There was evidence that, soon after his marriage, Pepper has obtained from his wife the sum of \$2,000, which he had used in the nursery business. The money was never returned to Mrs. Pepper. This circumstance is not inconsistent with the finding that the entire estate was separate property of Pepper. Under the evidence the court might have concluded that Mrs. Pepper made a gift of the \$2,000 to her husband. If, however, it was a loan the lender's recourse was to present a creditor's claim to the executors.

The appellant complains of errors alleged to have been committed by the court below. The respondents were permitted to introduce evidence of declarations made by Pepper to the effect that all of his property had been accumulated by him before his marriage. Standing by themselves, these self-serving statements were, of course, not admissible in favor of the declarant or his successors in interest. There was, however, testimony to the effect that Pepper had made the declarations in the presence of his wife. Her conduct in the face of his assertions was competent as against her.

On the other hand, the court did not permit the appellant to prove declarations of Pepper himself. In so far as his statements were against his interest, they were admissible against the parties claiming under his will. Code Civ. Proc. § 1850. The first of Pepper's declarations sought to be proved was one to the effect that, upon his arrival in Sonoma county in 1858 he had very little property. This statement referred to a period antedating his marriage by sixteen years. Besides, it had not been shown by the respondents that any considerable part of the estate left by Pepper could be traced back to his possession in the year 1858. The evidence in question had so remote a bearing upon the ultimate issue that its exclusion, if error, must be regarded as of no consequence.

The court permitted one of appellant's witnesses to testify that Pepper had stated, some 16 years before his death, that he had accumulated \$40,000 since his marriage, and that this was, or that he considered it, community property. The court struck out the declaration that the amount stated was community property. We think there was no error in this ruling. Whether the property was community or separate was a question of law, depending on the manner and time

of its acquisition. The opinion of Pepper on this legal question was entitled to no weight. The statement of fact made by him was allowed to stand, and this was all the appellant was entitled to.

The judgment is affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.; LORIGAN, J.

(158 Cal. 611)

MESSENGER v. KINGSBURY, Surveyor General. (S. F. 5,252.)

(Supreme Court of California. Nov. 21, 1910. Rehearing Denied Dec. 21, 1910.)

1. NAVIGABLE WATERS (§ 37*)—TIDE LANDS.
The state may grant in private ownership such tide lands as are capable of reclamation without detriment to the public right.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 201-227; Dec. Dig. § 37.*]

2. PUBLIC LANDS (§ 144*)—SALE—WITHDRAWAL.

The disposition of the public lands is entirely in the control of the Legislature, which may withdraw or reserve from further sale any part of the public domain.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 144.*]

3. PUBLIC LANDS (§ 144*)—SALES—CONTRACTS—WITHDRAWAL.

Where no valid contract for the sale of public lands has been entered into between the state and a purchaser, and no right has vested in the latter, the withdrawal of the land from sale by repeal of the statute authorizing sales or otherwise precludes the government officers from transferring title.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 144.*]

4. PUBLIC LANDS (§ 144*)—SALE—WITHDRAWAL.

Where the survey of one applying for the purchase of swamp lands under Pol. Code, §§ 3440, 3443, had not been approved, and he had not paid the installment of the purchase price required by the statute, he acquired no vested rights, and the Legislature was authorized by Act March 25, 1909 (St. 1909, c. 444), enacting Pol. Code, § 3443a, to withdraw the lands from sale.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 144.*]

5. MANDAMUS (§ 16*)—DEFENSES—WRIT NOT BENEFICIAL.

Mandamus will not be granted to compel the reception of an application to purchase public lands, wrongfully rejected, where such lands have since been withdrawn from sale.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 48, 59, 60; Dec. Dig. § 16.*]

In Bank. Appeal from Superior Court, Solano County; Wm. S. Wells, Judge.

Proceedings by James E. Messenger for writ of mandate against W. S. Kingsbury, Surveyor General of the state of California. From the judgment and from an order denying a new trial, defendant appeals. Reversed.

U. S. Webb, Atty. Gen., R. C. Van Fleet, Deputy Atty. Gen., and Malcolm C. Glenn, Deputy Atty. Gen., for appellant. A. E. Bolton and Smith, Miller & Phelps, amici curiæ.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

SLOSS, J. This is a proceeding originally brought in the superior court for a writ of mandate to compel the defendant, as surveyor general, to receive and file an application of plaintiff made under section 3443 of the Political Code to purchase from the state a piece of land, a portion of which is swamp and overflowed land, and a portion is tide land bordering on the waters of Suisun Bay. Plaintiff recovered judgment in the trial court, and this judgment and an order denying defendant's motion for a new trial, were, on the 23d day of February, 1909, affirmed by the District Court of Appeal for the First appellate district. On the application of the appellant the proceeding was transferred to this court for hearing and determination.

As stated by the learned justice who wrote the opinion in the District Court of Appeal: "It clearly appears from the complaint and the findings that a portion of the land sought to be purchased is a strip of land lying along the margin of Suisun Bay, between the line of ordinary low tide and the line of ordinary high tide, and does not extend into or through the swamp and overflowed lands adjoining. It is alleged in the complaint, however, that all of the land sought to be purchased is capable of being reclaimed for agricultural purposes, and can be reclaimed without any interference with navigation, or any fishing or fisheries on Suisun Bay or elsewhere, and the court so found." Upon these facts, there were presented for decision the questions (1) whether the state has power to transfer its tide lands, constituting the shores of navigable waters, into private ownership, except in aid of navigation, commerce or fisheries; and (2) whether, granted that it has such power, it has upon a proper construction of its legislation in fact offered such lands for sale. Both questions are answered by the appellate court in the affirmative.

That the state may, if it sees fit so to do, grant in private ownership such tide lands as are capable of reclamation without detriment to the public right is a proposition that seems well supported by the authorities cited by the respondent. It will be sufficient for the present purpose to refer to *Shively v. Bowlby*, 152 U. S. 1, 14 Sup. Ct. 548, 38 L. Ed. 331; *Ward v. Mulford*, 32 Cal. 365, and *Oakland v. Oakland Water Front Co.*, 118 Cal. 160, 50 Pac. 277.

The other question—i. e., whether or not the state had, at the time of the proceedings under consideration, made provision by law for exercising this power—presents a more difficult problem. As the case stood when it was under consideration by the Court of Appeal, the determination of this question of statutory construction was necessary to a decision. But, as we shall presently point out, the law has now been changed so as to deprive the plaintiff of his right to relief under any view that may be taken of the meaning and effect of the statutes as they read at the time these proceedings were instituted.

The claim of the plaintiff is based upon sections 3440 and 3443 of the Political Code. Section 3440 provides that "the swamp and overflowed, salt-marsh and tide lands belonging to the state must be sold at the rate of one dollar (\$1.00) per acre, in gold coin, payable, twenty per cent. of the principal within fifty days of the approval of the survey by the surveyor general; and the balance, bearing interest at the rate of seven per cent. per annum, payable in advance, is due and payable one year after the passage of any act of the Legislature requiring such payment, or before, if desired by the purchasers. * * *" Section 3443 provides that "any person desiring to purchase swamp and overflowed, or tide lands, above low tide, must make * * * and file in the office of the surveyor general of the state" an affidavit stating certain matters. The section provides for the determination, by action in the superior court, of any contest filed in the office of the surveyor general.

Plaintiff herein had, at the time of instituting this proceeding, advanced to the point of offering for filing his affidavit and application to purchase, and no further. He has not, to the present time, gone beyond this point. His survey has not been approved, and he has not paid the first installment of twenty per cent., or any part of the purchase price. While matters were in this condition, the Legislature by an act approved and effective March 25, 1909 (St. 1909, p. 774), enacted section 3443a of the Political Code reading as follows: "The words 'tide-lands' mentioned and described in sections thirty-four hundred and forty and thirty-four hundred and forty-three of this code shall not be held or construed to apply to or to include the shore, or any part thereof, or the bed, or any part thereof, of the ocean or of any navigable channel or stream or bay or inlet within the state, between ordinary high and low water mark, and all such land over which the ordinary tide ebbs and flows is hereby withheld from sale. Nothing in this section shall be construed as a recognition that prior to the passage hereof, the tide-lands by this section withheld from sale have been offered for sale by the state."

Now, whatever may have been the effect of sections 3440 and 3443, standing alone, with respect to the purchase of tide lands forming the shore or bed of navigable waters, there can be no question that by the enactment of section 3443a further sales of such lands were forbidden. If lands of this character had theretofore been offered for sale, the Legislature, in passing the new section, manifested, by language too plain to be misunderstood, its intent to withdraw them from further sale under sections 3440 and 3443. The disposition of the public lands is a matter resting entirely within the control of the Legislature and that body has the undoubted right to withdraw or reserve from further sale any part of the public domain. 36 Am.

4 Eng. Ency. of Law (2nd Ed.) 225; Day Land, etc., Co. v. State, 68 Tex. 526, 4 S. W. 865. Where a valid contract of sale has been entered into pursuant to law between the state and a purchaser so that an equitable interest in the land is vested in the latter, the state will, of course, be prevented by force of familiar constitutional provisions from destroying the right so vested. *Pennoyer v. McConnaughy*, 140 U. S. 1, 11 Sup. Ct. 699, 35 L. Ed. 363. But where there is no contract, and no vested right in the intending purchaser, the withdrawal of the land from sale, by repeal of the statute authorizing sales or otherwise, absolutely terminates the power of the officers of the government to take the steps necessary to transfer title. *Frisbie v. Whitney*, 9 Wall. 187, 19 L. E. 668.

The decisions of this court are clear to the effect that an applicant who has merely filed his affidavit and application to purchase, without paying any part of the purchase price, under statutes essentially similar to the scheme provided by the Political Code for the disposition of public lands, has no such vested right as will prevent a termination of the opportunity to purchase upon a repeal of the law providing for sale.

In *Eckart v. Campbell*, 39 Cal. 256, the court had under consideration the act of March 28, 1868 (St. 1867-68, p. 507), an act which provided for the disposition of public lands in the same manner as that declared by the Political Code. Indeed, that act formed the basis of the provisions subsequently incorporated in the Political Code. Upon a consideration of the entire statute the court came to the conclusion that one whose application filed in due form had been accepted by the surveyor general, and who had received a certificate of location as provided for in section 12 of the act received "the exclusive privilege to become the purchaser of the particular premises described at any time within the 50 days from its (the certificate's) date. It is, however, a mere privilege which he might, at his option, accept or decline within that time—and his failure to pay the 20 per cent., as required, is conclusive evidence to the land officers that he has abandoned the privilege thus conferred upon him." Referring to section 4 of the act, identical in terms with section 3514 of the Political Code, the court says: "The holder of such a certificate as that held by Eckart (i. e., the certificate of location merely) is, under this section, distinctly characterized as an applicant merely, and it is the payment of the 20 per cent. which converts him into a purchaser, and entitles him to receive from the register a certificate, which sets forth the terms of the contract, now for the first time made between the applicant and the state, the description of the land purchased, the sum already paid, and the amount to be paid hereafter," etc. And finally, as summarizing its views on the proper construction of the law, the court says that: "It does not seem to have been the

intention of the statute that the state should be considered as having parted with any interest in the land, until she had received the payment of at least the first installment of the purchase money." Upon this reasoning it was held that the surveyor general had the right to entertain a second application to purchase where the first applicant had failed to make payment of 20 per cent. of the purchase price within 50 days after the date of his certificate of location.

Much closer in their facts to the case at bar, and, in our judgment, determinative of it, are the cases holding that article 17, § 3, of the Constitution of 1879, providing that state lands suitable for cultivation shall be granted only to actual settlers, operates as a restriction on applications made before, as well as after, the Constitution took effect. The first of these cases was *Johnson v. Squires*, 55 Cal. 103. That was an action to determine a contest over the right to purchase state lands. The plaintiff's application, made prior to the adoption of the Constitution complied, as is assumed by the court, with the law in existence when it was made. That law did not limit the right of purchase to actual settlers, and plaintiff was not such settler. It was held that, by reason of the constitutional provision, he was not entitled to purchase. Referring to said provision, the court said: "This language is clear and explicit, and operates as well on applications made before as after the Constitution took effect. As the case shows, appellant has paid no portion of the purchase money, nor has his proposition to buy been accepted by the agent of the state. He has parted with nothing of value, and can neither assert that the state Constitution has 'impaired the obligation' of a contract, or deprived him of property without due process of law." This case was cited with approval in *Dillon v. Saloude*, 68 Cal. 267, 9 Pac. 162, and was followed in *Urton v. Wilson*, 65 Cal. 11, 2 Pac. 411, *Mosely v. Torrence*, 71 Cal. 318, 12 Pac. 430, and *Manley v. Cunningham*, 72 Cal. 236, 13 Pac. 622.

The same principle was applied in *Klauber v. Higgins*, 117 Cal. 451, 49 Pac. 466. There the appellants claimed title to the lands in controversy by virtue of patents issued upon applications for purchase made under the act of March 28, 1868, supra. The property consisted of tide lands fronting on the bay of San Diego, and was situated within two miles of the city of San Diego. On April 4, 1870 (St. 1869-70, c. 573, § 8), the Legislature amended section 70 of said act of 1868 by excluding from the provisions of the act all swamp and overflowed, salt-marsh and tide lands "within two miles of any town or village." Assuming that the original act authorized the sale of the lands in question, the court held that the amendment took from the officials of the government the right to sell said land, no right to the same having vested in the appellants prior

to their making a payment. Says the court: "The applications under which appellants claim were not approved until November, 1871, and no payments were made by the applicants prior to that time. They therefore had made no contract with the state, and had no vested rights until that time." The opinion does not disclose the exact date of the filing of the applications, and a copy of the record is not, at the moment, accessible to us. It clearly appears, however, from the opinion itself, as well as the reported abstract of arguments of counsel, that the applications preceded the amendment of the statute. If this had not been so, there would have been no occasion for the court to hold that the right of the applicants did not vest until payment. Furthermore, the argument of counsel for respondents, on page 454, concedes that the applications to purchase were made before the passage of the amending statute.

The effect of these decisions is to put the applicant for the purchase of state lands in a position similar to that of one who enters federal lands under the pre-emption laws of the United States. Under those laws it was uniformly held that no right, as against the United States, vested in a claimant until he had made or tendered the required payment. Up to that time, the land might be withdrawn from sale. *People v. Shearer*, 30 Cal. 650; *Hutton v. Frisbie*, 37 Cal. 475; *Frisbie v. Whitney*, 9 Wall. 187, 19 L. Ed. 668; *Yosemite Valley Case*, 15 Wall. 77, 21 L. Ed. 82, affirming *Low v. Hutchings*, 41 Cal. 634; *Whitney v. Taylor*, 158 U. S. 85, 15 Sup. Ct. 796, 39 L. Ed. 906. In *Pennoyer v. McConnaughy*, 140 U. S. 1, 11 Sup. Ct. 699, 35 L. Ed. 363, the Supreme Court of the United States intimated, but found it unnecessary to decide, that an Oregon statute similar to that contained in the above-quoted sections of the Political Code was to be regarded as having the same effect as the pre-emption laws; i. e., of conferring a vested right only upon payment or tender of part of the purchase price.

Under these views, a granting to the plaintiff of the relief sought would be of no avail. If it be urged that private rights will not be permitted to be defeated by the wrongful action of government officials, plaintiff could at most, assuming the rejection of his application to have been unauthorized under the old law, be entitled to have his application received, filed, and approved. Conceding for argument's sake, that the law, as it stood at the time of his application, authorized the purchase of these lands, he would find himself in the position of having applied to purchase lands which the state has decided to withhold from sale. He would have no vested right which could prevent such withholding. Whether or not the superior court and the District Court of Appeal rightly held

that plaintiff was entitled to his writ of mandate, it is plain that, as the law now reads, no such writ should issue. It would assume to require the surveyor general to perform a mere preliminary act which could not be pursued to an effective termination without a violation of the law.

It is therefore a matter of no concern to the applicant to have this court decide whether sections 3440 and 3443, prior to the enactment of 3443a, authorized the sale of lands of the character here involved. That question, one of great importance, will properly require determination when it is raised in a case involving the claims of applicants who had received patents or had made partial or full payments, before section 3443a was made a part of the Code. It seems to us to be more fitting and proper to postpone its consideration until it shall be presented in a case in which parties really interested in its disposition may have an opportunity to be heard.

The judgment and order are reversed.

We concur: ANGELLOTTI, J.; SHAW, J.; LORIGAN, J.; HENSHAW, J.

(14 Cal. A. 328)

EVINGER v. MORAN. (Civ. 792.)

(Court of Appeal, Second District, California. Oct. 6, 1910.)

1. PLEADING (§ 264*)—AMENDED PLEADINGS—OPERATION—ABANDONMENT OF PRIOR PLEADING.

The filing of an amended answer operates as an abandonment of the original.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 803-805; Dec. Dig. § 264.*]

2. PLEADING (§ 231*)—AMENDED PLEADING—AMENDMENTS OF COURT—STATUTES.

Under the direct provisions of Code Civ. Proc. § 472, the permission is given to amend a pleading once as of right before the trial.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 594-598; Dec. Dig. § 231.*]

3. PLEADING (§ 231*)—AMENDED PLEADING—TIME OF AMENDMENT.

Where a stipulation was filed that a motion for judgment on the pleadings should be submitted upon briefs to be later filed, an amended answer under the direct provisions of Code Civ. Proc. § 472, could be made as of course before the time for filing such briefs had expired; therefore, where such an amended answer has been filed, it supplants the original pleading, and it is error to render judgment on the motion if the new answer presents a defense.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 594-598; Dec. Dig. § 231.*]

4. PLEADING (§ 34*)—CONSTRUCTION—RULES.

A pleading should be most strongly construed against the pleader, and no intendment can be indulged in its aid.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 66; Dec. Dig. § 34.*]

5. PLEADING (§ 345*)—DEFENSES.

In an action for money lent, where it was alleged that no time of repayment had been agreed upon, and the defendant's answer setting

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

up that the money was to be repaid when the plaintiff had paid certain moneys to the defendant upon the issuance of a certain patent, and that such patent had not been issued, it must be assumed that the money due defendant had been paid or he would have alleged its nonpayment, and a judgment was therefore properly given on the pleadings for plaintiff.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 345.*]

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by D. R. Evinger against T. L. Moran. From a judgment for plaintiff, defendant appeals. Affirmed.

W. W. Kaye, for appellant. Carter & Carter, for respondent.

ALLEN, P. J. The controlling question involved upon this appeal relates to the sufficiency of an amended answer filed by defendant pending the hearing of a motion for judgment upon the pleadings. This amended answer was filed before the trial of an issue of law raised by a demurrer to the original answer. The effect of filing such amended answer, if properly filed, was to supersede the original answer. *Kuhland v. Sedgwick*, 17 Cal. 123. The permission to amend a pleading once as of right before the trial of such issue is authorized by section 472, Code Civ. Proc. Were it even conceded that the motion for a judgment on the pleadings performs the same office as a demurrer, and therefore the section should be construed as only permitting such amendment as of right before an issue of law is heard under a motion presenting the issues which would be involved in a general demurrer, nevertheless it appears from the record that the amended answer was on file before such motion for judgment was disposed of. A stipulation was filed that the motion was submitted upon briefs thereafter to be filed. The effect of such stipulation is a submission upon the filing of such briefs. The amended answer was filed before the time allowed for filing briefs had expired. If the amended answer was sufficient to raise an issue of fact, the court erred in rendering judgment on the motion directed against the original answer. If, upon the other hand, the amended answer presented no defense, the trial court was warranted in rendering judgment. *Benham v. Connor*, 113 Cal. 171, 45 Pac. 258.

The complaint alleged a loan by plaintiff to defendant without agreement as to time of repayment. The answer denied that no time for repayment was agreed upon, but alleged that the same was to be payable when plaintiff and an associate paid to defendant a certain \$6,000, which they had agreed to pay when a patent was issued for certain land. It is alleged that such patent has never issued, but it is not averred that the \$6,000 has not been paid. The event which should mature the loan was the pay-

ment of the money. Construing the answer under the rule "that the pleading is to be construed most strongly against the pleader, and that no intendments can be indulged in its aid" (*Callahan v. Loughran*, 102 Cal. 481, 36 Pac. 836), it must be presumed that if the money had not been paid that such fact would have been averred.

The payment of the money not being negatived, we see no error in the record, and the judgment appealed from is affirmed.

We concur: SHAW, J.; JAMES, J.

(42 Mont. 216)

BAILEY v. EXAMINING AND TRIAL
BOARD OF POLICE DEPARTMENT
OF CITY OF HELENA et al.

(Supreme Court of Montana. Nov. 12, 1910.)

MANDAMUS (§ 3*)—DISCHARGE OF POLICEMAN
—REVIEW.

Under Rev. Codes, § 3308, providing that the judgment of the examining and trial board of the police department dismissing an officer for misconduct shall be final on questions of fact, but that the district court of the proper county shall have jurisdiction in a suit brought by the officer to determine whether the essential requirements of law have been complied with in the matter of his trial, such an officer could not obtain a review of the proceedings in the Supreme Court on application for a writ of supervisory control on the grounds that the charges filed against him did not state sufficient facts to constitute a cause of action, and that the evidence was not sufficient to support the finding, since these were questions of law which could be considered in the district court.

[Ed. Note.—For other cases, see Mandamus, Dec. Dig. § 3.*]

Application by Leonard Bailey for a writ of supervisory control against the Examining and Trial Board of the Police Department of the City of Helena and others. Petition dismissed.

Gunn & Hall, W. T. Pigott, and Massena Bullard, for plaintiff. Edward Horsky, for defendants.

SMITH, J. Petition for writ of supervisory control. The plaintiff alleges that he is captain of police of the city of Helena; that on September 30, 1910, the mayor filed with the defendant board certain charges against him, two of which the board sustained; that on October 11, 1910, the mayor discharged him from the police force; that the charges were fictitious, trivial, and insufficient to show that he is guilty, and do not state facts sufficient to constitute a cause of action against him; that there was not any substantial evidence to support the charges, and the board found him guilty without sufficient evidence to justify such a finding, and despite evidence fully exonerating him, and wrongly and arbitrarily decided that the charges were proven; that there is no appeal available and no remedy whereby he

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

can obtain relief, except by virtue of the supervisory power of this court. We are asked to make an order directing the defendant board to set aside its decision and dismiss the charges as not proven. Upon the petition being filed, an alternative writ was issued requiring the defendants to either set aside their decision and dismiss the charges, or show cause why they should not be required to do so. The defendants have interposed a motion to quash the alternative writ, alleging as a reason therefor that the plaintiff has a remedy by action in the district court. The point must be sustained.

Section 3308, Rev. Codes, reads as follows: "All applicants for positions on the police force shall be required successfully to undergo an examination before this board [examining and trial board], and to receive a certificate from said board that the applicant is qualified for appointment upon the police force. It shall be the duty of the board to examine all such applicants as to their legal, mental, moral and physical qualifications and ability to fill the position of member of the police department, and shall, subject to the approval of the mayor, make rules and regulations regarding such examinations, not inconsistent with this act or the laws of the state. And said board shall also have the jurisdiction, and it shall be its duty, to hear, try and decide all charges brought by any person or persons against any member or officer of the police department. A notice of not less than two days must be given to the accused of any charge made against him and of the time set for the hearing and trial thereof. No member or officer of the police force in cities of the first class shall be discharged without a hearing or trial before said board, and if such a board be instituted in any city of any other class, or in any town, then the same rule shall prevail regarding hearings and trials and the right thereof as in cities of the first class. The mayor, and the chief of police subject to the approval of the mayor, shall have the power to suspend a policeman or any officer under the chief, for a period of not exceeding ten days in any one month without any hearing or trial. The examining board shall decide whether the charge or complaint is proven or not proven but shall not have the power to discipline or impose a punishment. Where a charge or complaint against a member of the force is found proven by the board, the mayor, or the chief of police with the approval in writing of the mayor, may order the suspension from pay for some definite time of the member or officer found guilty or impose upon him a fine not exceeding fifty dollars, or reduce his grade, or discharge him from the police force, or subject him to any other discipline prescribed in the rules of the police department which is not inconsistent with the pro-

visions of this act or with other laws of the state. The decision of the board shall be final and conclusive, and shall not be subject to review by any court, on question of fact. The district court of the proper county shall have jurisdiction, however, in a suit brought by the officer or member, to determine whether the essential requirements of law have been complied with in the matter of his trial."

The effect of this provision is that a decision of the examining and trial board on questions of fact is final and conclusive on all courts if there is any substantial evidence to support it. Whether there is or not is a question in the first instance for a district court to decide. A charge without substance is no charge, and a finding without substantial evidence as its basis is no finding. One of the essential requirements of law is that a charge shall be brought against the officer and that such charge shall embody facts sufficient to constitute a cause of action within the meaning of the act. Another is that, before the charge can be sustained, some substantial evidence must be given in support of it. No question of fact can arise after the board has made its findings; but the district court has jurisdiction to determine every question of law necessary to insure to the accused officer the right guaranteed to him, to wit, that all essential requirements of law shall be complied with before he is discharged from the police department. A copy of the testimony taken before the examining and trial board has been filed in this court, but we have not examined it.

The motion to quash the alternative writ is granted, and the proceedings are dismissed.

Dismissed.

BRANTLY, C. J., concurs. HOLLOWAY, J., being absent, takes no part in the foregoing decision.

(42 Mont. 153)

FREDERICK v. HALE.

(Supreme Court of Montana. Oct. 27, 1910.)

1. NEGLIGENCE (§ 119*)—ISSUES, PROOF, AND VARIANCE.

Where several acts of negligence are charged in the complaint, a recovery will be sustained on proof of any one of them, provided the negligence proved was the proximate cause of the injury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 212-216; Dec. Dig. § 119.*]

2. NEGLIGENCE (§ 119*)—ISSUES, PROOF, AND VARIANCE.

Where two acts of negligence are charged in the complaint, and the pleading discloses that neither act in itself would have caused the injury, but that the concurrence of both was necessary; proof of both acts is necessary to justify a recovery.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 200-216; Dec. Dig. § 119.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

3. WATERS AND WATER COURSES (§ 179*)—ISSUES, PROOF, AND VARIANCE.

A complaint in an action for the destruction of property by a flood by the breaking of a dam of a reservoir, which alleges the construction and maintenance by defendant of an upper and lower reservoir and the relation of each, and which avers that neither was properly equipped with wasteways; that the dam of each was allowed to become insecure; that defendant negligently permitted more water to accumulate in each reservoir than its dam could hold; that defendant negligently turned water from the upper into the lower reservoir; that the dam of the lower reservoir gave way discharging water over plaintiff's premises—shows that the breaking of the dam at the lower reservoir caused the injury, and the other allegations are immaterial.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. § 179.*]

4. APPEAL AND ERROR (§ 1039*)—HARMLESS ERROR—VARIANCE.

Under Rev. Codes, § 6585, providing that no variance between the allegations and the proof shall be deemed material unless it has misled the adverse party, a defendant cannot complain of the variance between the pleadings and the proof, resulting from the court relieving defendant of the duty of meeting a part of the allegations of the complaint.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4086; Dec. Dig. § 1039.*]

5. APPEAL AND ERROR (§ 1053*)—HARMLESS ERROR—ERRONEOUS ADMISSION OF EVIDENCE.

A party cannot complain of the admission of evidence subsequently excluded.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4178-4184; Dec. Dig. § 1053.*]

6. APPEAL AND ERROR (§ 500*)—QUESTIONS REVIEWABLE—RULINGS ON EVIDENCE.

Where the record does not disclose any ruling on an objection to a question put to a witness, there is nothing for the Supreme Court to review on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2295-2298; Dec. Dig. § 500.*]

7. TRIAL (§ 76*)—OBJECTIONS TO EVIDENCE—TIME TO MAKE.

An objection to a question asked a witness, not made until after answer, comes too late, and is properly overruled.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 183-190, 237; Dec. Dig. § 76.*]

8. WATERS AND WATER COURSES (§ 179*)—DESTRUCTION OF PROPERTY BY FLOODS—EVIDENCE—ADMISSIBILITY.

In an action for injuries by flood caused by the breaking of a dam of a reservoir in 1908 evidence of the conditions at the reservoir in 1894 and of the making of improvements on the dam the summer of that year was admissible to disclose such a condition as to show that defendant had sufficient opportunity to ascertain the defects and remedy them.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. § 179.*]

9. WATERS AND WATER COURSES (§ 179*)—DESTRUCTION OF PROPERTY BY FLOODS—EVIDENCE—ADMISSIBILITY.

The evidence was competent for the purpose of making a comparison of the condition of the dam in 1894 with its condition immediately prior to its giving way in 1908.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. § 179.*]

10. EVIDENCE (§ 474*)—OPINION EVIDENCE—ADMISSIBILITY.

A witness who had not been in territory in which property damaged by a flood was located, and who did not know of the extent of the damages caused by the flood from a reservoir, was incompetent to testify as to damages.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 2219; Dec. Dig. § 474.*]

11. EVIDENCE (§ 474*)—OPINION EVIDENCE—ADMISSIBILITY.

Where a witness did not know the amount of fluming involved, its size, the quality of material used in its construction, or the condition in which it was left by a flood, his opinion as to the amount of damages was properly excluded as speculative.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 2219; Dec. Dig. § 474.*]

12. TRIAL (§ 85*)—EVIDENCE—ADMISSIBILITY.

Where an offer of evidence includes both incompetent and competent evidence, the court may exclude the evidence in its entirety, and it need not separate the competent from the incompetent.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 223-225; Dec. Dig. § 85.*]

13. APPEAL AND ERROR (§ 692*)—QUESTIONS REVIEWABLE—RULINGS ON EVIDENCE.

In the absence of an offer to prove, the court on appeal cannot determine that a party complaining of the exclusion of a question asked a witness was prejudiced thereby.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2905-2909; Dec. Dig. § 692.*]

14. APPEAL AND ERROR (§ 1058*)—HARMLESS ERROR—ERRONEOUS EXCLUSION OF EVIDENCE.

The error, if any, in sustaining an objection to a question asked a witness is harmless, where the witness subsequently testified to the facts sought to be elicited by the question.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4195, 4200-4206; Dec. Dig. § 1058.*]

15. APPEAL AND ERROR (§ 882*)—QUESTIONS REVIEWABLE—RIGHT TO COMPLAIN.

A party cannot complain of an instruction eliminating an issue, where the court at the request of the party excluded all evidence relating to such issue.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3591-3610; Dec. Dig. § 882.*]

16. APPEAL AND ERROR (§ 216*)—INSTRUCTIONS—REQUESTS.

Where an instruction does not set forth the issues as fully as counsel for a party desires, he must offer an instruction to meet his views, or he cannot complain on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 216.* *Trial*, Cent. Dig. §§ 627, 628, 630-641, 660, 662-676.]

17. TRIAL (§ 192*)—INSTRUCTIONS—ASSUMPTION OF FACT.

An instruction assuming the existence of a fact established by all the evidence is not erroneous.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 432-434; Dec. Dig. § 192.*]

18. APPEAL AND ERROR (§ 232*)—QUESTIONS REVIEWABLE—QUESTIONS NOT RAISED IN COURT BELOW.

Under Rev. Codes, § 6746, requiring counsel, on the settlement of the instructions, to specify the particular grounds on which any instruction is objected to, etc., the court in reviewing the instructions is limited to the objections

made at the time of the settlement of the instructions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1351, 1368, 1430, 1431; Dec. Dig. § 232; * Trial, Cent. Dig. §§ 211-222, 691-693.]

19. APPEAL AND ERROR (§§ 217, 1069*)—TRIAL (§ 256*)—INSTRUCTIONS—ISSUES.

Where the issues are fully stated in the instructions, the submission to the jury of the pleadings under Rev. Codes, § 6749, authorizing the jury on retiring to take with them papers, was not prejudicial, and, where the court did not fully state the issues, the party dissatisfied must propose proper instructions, and where he has not done so he cannot complain of the action of the court in submitting to the jury the pleadings for an understanding of the issues.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1257; Dec. Dig. §§ 217, 1069; * Trial, Cent. Dig. §§ 628-641; Dec. Dig. § 256.*]

20. TRIAL (§ 295*)—INSTRUCTIONS—CONSTRUCTION.

The instructions of the court must be considered as a whole, and where the charge in its entirety fairly presents the questions involved, it is sufficient.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 703-717; Dec. Dig. § 295.*]

21. WATERS AND WATER COURSES (§ 172*)—MAINTENANCE OF DAMS—LIABILITY FOR INJURIES.

Where damages to property by a flood was occasioned by a combination of negligence of the owner of a dam and by an unprecedented flood constituting an act of God, the owner of the property could recover damages from the owner of the dam provided his negligence was the proximate cause of the injury.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 172.*]

Appeal from District Court, Jefferson County; J. B. Poindexter, Judge.

Action by Jacob Frederick against R. S. Hale. From a judgment for plaintiff, defendant appeals. Affirmed.

Wm. Wallace, Jr., John G. Brown, and R. F. Gaines, for appellant. Purcell & Horsky, for respondent.

HOLLOWAY, J. The plaintiff recovered judgment in the district court, and the defendant has appealed from that judgment and from an order denying him a new trial. The action is one for damages for the destruction of property belonging to plaintiff. The complaint proceeds upon the theory that defendant was negligent in the maintenance and use of a certain reservoir; that by reason of such negligence the dam of the reservoir gave way releasing a large body of water which overflowed plaintiff's property, causing the damage for which compensation is sought.

Many years ago the defendant constructed two reservoirs near the head of Lump Gulch, in Jefferson county; the upper one, situated near the divide, covered a large area; the lower one was formed by throwing a dam directly across the gulch and was of much less extent. There was a feed pipe conducting water from the upper to the lower one.

The elevation of the lower reservoir was some 500 feet greater than plaintiff's premises, which were situated down the gulch. In the dam of this reservoir there was a waste gate, and at the upper reservoir there was a wasteway. On June 3, 1908, the waste gate and a part of the dam of the lower reservoir were washed out, releasing the waters which caused the injury to plaintiff's property.

1. It is contended that there is a fatal variance between the pleadings and the proof. The complaint describes with great minuteness of detail the location of each reservoir, the relation which each bore to the other, and defines the duty which the defendant owed in the maintenance and operation of such reservoirs. It is alleged that neither reservoir was properly equipped with overflows or wasteways; that the dam of each was allowed to become defective, insecure, and dangerous, which facts were known to the defendant, or, in the exercise of reasonable diligence, ought to have been known to him. It is then alleged that on or about June 3, 1908, the defendant negligently permitted more water to accumulate in each reservoir than its dam and embankments were capable of retaining; that thereupon defendant negligently turned water from the upper into the lower reservoir, the dam, embankments, waste gate, and overflow outlets of which gave way, thereby discharging large quantities of water down the gulch and over plaintiff's premises, causing loss and damage to his property.

At the close of plaintiff's case in chief the defendant moved for a nonsuit. Before passing upon the motion the court struck out all evidence in the record tending to show negligence on the part of the defendant in constructing, maintaining, or using the upper reservoir. The reason given for the ruling was that such negligence if any had been shown, did not appear to have contributed in any way to the breaking of the dam at the lower reservoir. After this ruling was made, counsel for defendant renewed their motion for nonsuit, adding the additional ground that there was then a fatal variance between the pleadings and proof. The motion was denied, and error is predicated upon the ruling. In their brief counsel for appellant say: "It seems to us there can be no question but what the complaint makes the care and handling of two reservoirs combined the cause of his damages, and in order to recover he must prove the same combination of circumstances as there alleged." In other words, as we understand counsel for appellant, they contend that, since plaintiff alleged negligence with respect to both reservoirs, he must prove negligence with respect to both to make his case, and, since the court struck out all evidence of negligence which referred to the construction, use, or main-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

tenance of the upper reservoir, the remaining proof of negligence with respect to the lower one does not correspond to the allegations of negligence with respect to both. There is not any dispute as to the general rule of law that, where several acts of negligence are charged in the complaint, proof of all of them is not necessary. A recovery will be sustained upon proof of any one of them, if the act of negligence proven is shown to be a proximate cause of the injury. *Mize v. Rocky M. Bell Tel. Co.*, 38 Mont. 521, 100 Pac. 971, 129 Am. St. Rep. 659; *Moyse v. Northern Pacific Ry. Co.*, 41 Mont. 272, 108 Pac. 1062.

But it is said that the act of negligence with respect to the upper dam, and the act of negligence with respect to the lower one, are pleaded as concurrent acts, both of which the plaintiff in his complaint made necessary to constitute his cause of action, and therefore it was equally necessary for him to prove both as alleged. While the courts have been somewhat lax in the use of the word "concurrent," we think the correct rule is that where two acts of negligence are charged in the complaint, and the pleading discloses that neither act in itself would have caused the injury, but that the concurrence of both was necessary to produce the result of which complaint is made, then proof of both concurrent acts is necessary. This is the rule deduced from the authorities by this court in *Forsell v. Pittsburgh & Mont. Copper Co.*, 38 Mont. 403, 100 Pac. 218. The complaint in this action charges negligence with respect to the upper reservoir, but it also discloses beyond question that it was the breaking of the dam at the lower reservoir which caused plaintiff's injury. The plaintiff does not charge directly nor indirectly that but for the negligent construction, maintenance, or use of the upper reservoir the lower dam would not have given way. In fact, as we understand the complaint, the allegations with respect to the negligent use of the upper reservoir are wholly immaterial, in the sense that, had they been omitted, plaintiff would still have stated his cause of action, and those allegations do not add anything to, nor detract from, the cause of action stated with respect to the negligence at the lower reservoir. The gist of plaintiff's complaint is that defendant negligently permitted the dam at the lower reservoir to become in a weakened, defective, and dangerous condition, and with knowledge of this fact he then negligently permitted more water to accumulate in the reservoir than the dam in its defective condition could withstand. It appears to us that the allegations with respect to negligent construction, use, and maintenance of the upper reservoir were intended merely as a description or recital of the conditions which finally resulted in the breaking of the lower dam. But it was immaterial, as a matter of pleading or as a matter of fact,

for what reason the surplus water was let into the lower reservoir, or whether that surplus came from the upper reservoir or from melting snow or any other source, if the allegations with respect to negligence at the lower reservoir were proven. Counsel for appellant cite *Pierce v. Great Falls & C. Ry. Co.*, 22 Mont. 445, 56 Pac. 867; *Spellman v. Rhode*, 33 Mont. 21, 81 Pac. 395; *Flaherty v. Butte Electric Ry. Co.*, 40 Mont. 454, 107 Pac. 418; and *Knuckey v. Butte Electric Ry. Co.*, 41 Mont. 314, 109 Pac. 979. But those cases present an entirely different question from the one before us, viz., allegations constituting one cause of action, and proof of another and different cause of action. If we assume that there was a technical variance in this instance, it is hardly conceivable that the defendant was injured in that he was not called upon to meet proof of all the allegations of the complaint. So long as he was not surprised by having to meet at the trial issues not pleaded, he cannot have been misled to his prejudice, and the provisions of section 6585, Rev. Codes, are properly invoked against him. *Vreeland v. Edens*, 35 Mont. 413, 89 Pac. 735.

2. Objection was made at the trial to certain inquiries directed to the witness Wade, concerning conditions at the reservoirs in 1894. But the witness testified that his investigation at that time was confined to the upper reservoir, and the evidence was afterwards excluded from the jury by the ruling made at the time the motion for nonsuit was denied, and defendant cannot complain. An objection was made to a question propounded to the witness Botkin; but the record fails to disclose any ruling made thereon by the trial court, and there is therefore nothing for us to review. *People v. Murray*, 52 Mich. 288, 17 N. W. 843, cited with approval in *State v. Vanella*, 40 Mont. 326, 106 Pac. 364.

The witness Brack was asked: "Q. Did you ever know of any improvements that were made on that dam, or either of those dams, from the first time you saw them in 1894, until it broke?" and answered: "Yes, sir; there was some improvements made that summer. I think it was in 1894. They put up some cribbing on the lower dam, and done some work on the side of the big dam." After the answer was made, an objection was interposed and overruled. The ruling was correct. The objection came too late. *Poin-dexter & Orr Livestock Co. v. Oregon Short Line R. Co.*, 33 Mont. 338, 83 Pac. 886; *Martin v. Corscadden*, 34 Mont. 308, 86 Pac. 38; *State v. Rhys*, 40 Mont. 131, 105 Pac. 494. But aside from the ground suggested above for the justification of the trial court's ruling in the last instance, the court was correct in admitting the testimony of each of the last two witnesses. If it served no other purpose, the evidence tended to disclose such a condition at the lower dam for such a length of time that defendant could not be

heard to say that he had not been given sufficient opportunity to ascertain the defects and remedy them. 5 Thompson on Negligence, 5974; Hunt v. Dubuque, 96 Iowa, 314, 65 N. W. 319. The evidence was also competent for the purpose of making a comparison of the condition of the dam in 1894, with its condition immediately prior to the time it gave way. Cook v. Town of Barton, 66 Vt. 65, 28 Atl. 631. The evidence, taken as a whole, fairly shows that the condition of the lower dam had gradually grown worse from 1894 to the time it gave way, and that the people below the dam were apprehensive as to the safety of themselves and their property.

3. While the witness Wilson was on the stand, counsel for defendant propounded to him this question: "Mr. Wilson, in your placer mining experience have you ever had your flume boxes and ditches filled with water or mud or débris?" An objection was made, but the record fails to disclose any ruling. Counsel for defendant then made the following offer of proof: "Defendant offers to prove by the witness Wilson, now on the stand, that an unprecedented flood or washout which somehow takes out or removes a box flume which is imbedded in a prepared ditch, and also a flume which has been built by cutting into the natural ground may be at a small expense reasonably expected to be repaired and put in good working condition by the removal of the earth and débris which has become lodged therein, and that the simple filling up or flooding of a flume ditch or flume box does not necessarily mean its destruction, and that the same may be put in good working condition by the removal of the débris therein." This offer was excluded, and error is predicated upon the ruling. The ruling was correct for several reasons:

(1) The witness had not shown that he was ever in Lump Gulch or knew anything of the extent to which the flood from defendant's reservoir had damaged the plaintiff's property.

(2) Considered in the light of a hypothetical question calling for the opinion of an expert, the offer was too broad and covered matters for which a proper foundation had not been laid. If the flume was destroyed, the cost of repairing it was a matter of proof which did not involve any difficulty. If it was merely filled with débris, the cost of removing the débris, was a matter susceptible of proof; while, if the flume was injured, but not totally destroyed, the cost of repairing it was a matter of proof; but none of these matters called for the form of proof contained in the offer. In the absence of a showing that the witness knew the amount of fluming involved, its size, the quality of material used in its construction, etc., or the condition in which it was left by the flood, the testimony sought to be elicited by the offer would amount to nothing

more than a mere speculation by the witness.

(3) The offer contained some matters upon which the witness might properly have given his opinion, and others for which there was not any proper foundation; as, for instance, the assumption that the flume was merely filled with débris. In Farleigh v. Kelley, 28 Mont. 421, 72 Pac. 756, 63 L. R. A. 319, this court said: "So long, then, as the offer included evidence incompetent, coupled with that which may have been competent, the court committed no error in excluding the offer in its entirety. It was not the duty of the court to separate the competent from the incompetent matter, and admit the one and exclude the other. It properly passed upon the offer as made, and was not required to do for counsel that which he should have done for himself." To the same effect was the ruling in Bair v. Struck, 29 Mont. 45, 74 Pac. 69, 63 L. R. A. 481.

Error is also predicated upon the refusal of the trial court to permit the witness Pratt to answer the following question: "From your experience and knowledge of drainage conditions, would the relative drainage conditions be anywhere near similar from the Chessman reservoir and out of it as they would be in the Hale reservoir and out of it?" In passing upon the objection the trial court said to counsel for defendant: "If you will prove the conditions pertaining in the Hale reservoir drainage territory, and base a hypothetical question on that, the witness may answer and give his opinion in regard to it." After the ruling was made, the witness was interrogated further, and testified that the Chessman and Hale reservoirs are about $2\frac{1}{2}$ miles apart; that they are on opposite sides of a separating watershed, and further said: "I should say that the altitude and the timber conditions of both places, and the general topographical conditions are similar, but I don't think I can say that the precipitation would necessarily be the same. The altitude and the topographical and timber conditions are the same." Counsel did not renew the question to which the objection had been sustained, or attempt further to comply with the suggestion of the court, and are not now in position to complain. Doubtless the answer of the witness just quoted discouraged further investigation.

The following question was also asked the same witness: "Assuming that the dam in question had been there for thirty years, what have you to say as to its sufficiency for ordinary and expected rainfalls?" An objection to this question was sustained, and error is predicated upon the ruling. In the absence of an offer to prove, it is impossible for us to say that the defendant was prejudiced by the court's ruling. The record discloses, however, that immediately after the ruling was made counsel for defendant

asked the witness: "Mr. Pratt, what have you to say from your experience as to the sufficiency of the dam in question to hold or take care of a reservoir of twenty acres, whose greatest depth is between twenty and twenty-eight feet?" and the witness answered: "The dimensions of the dam are ample, and the age of it is a very good indication that it is capable of standing that work." It appears, then, after all, that defendant got from the witness just what he sought by the other question, so far as we can determine.

4. Objections are made to instruction No. 1, given to the jury. It is said:

(a) The court told the jury that the issues before them related only to the lower reservoir, and complaint is made that this eliminated the issue with respect to the upper reservoir; but, on the motion of counsel for defendant, the court had excluded all evidence relating to negligence in the construction, use or maintenance of the upper reservoir, and certainly they cannot now complain that the trial court adopted their own view. In any event, if the instruction did not set forth the issues as fully as counsel for defendant thought they should have been, it was their duty to offer an instruction to meet their views. Having failed to do this, they cannot complain. *Hardesty v. Largey Lumber Co.*, 34 Mont. 151, 86 Pac. 20.

(b) It is said that the instruction is objectionable in that it assumes as a fact a matter in dispute, viz., that the lower dam actually broke or gave way. Admitting that the instruction really assumes that the lower dam broke, we do not agree with counsel that this was a matter in dispute. The evidence is practically all one way—that the dam itself broke. The very best justification for this conclusion is found in defendant's Exhibit 3, which vividly portrays the fact we have stated. But counsel is not entitled to have this objection heard here, for it was not made at the time the instructions were settled; and by section 6746, Rev. Codes, we are limited in our review to the objections made at that time. *Poor v. Madison River Power Co.*, 41 Mont. 236, 108 Pac. 645; *Yergy v. Helena Light & Ry. Co.*, 39 Mont. 213, 102 Pac. 310; *Robinson v. Helena Light & Ry. Co.*, 38 Mont. 222, 99 Pac. 837; *Lehane v. Butte Electric Ry. Co.*, 37 Mont. 564, 97 Pac. 1038.

(c) The third objection is that this instruction submits to the jury the pleadings for a more complete understanding of the issues involved. We will assume, without deciding, that this form of objection raises the question of the right of the trial court to submit the pleadings to the jury. Section 6749, Rev. Codes, provides: "Upon retiring for deliberation, the jury may take with them all papers which have been received as evidence in the cause, except depositions or copies of such papers as ought not, in the opinion of the court, to be taken from the person having

them in possession; and they may also take with them notes of the testimony or other proceedings on the trial taken by themselves or any of them, but none taken by any other person." In some states having similar statutory provisions, the practice of submitting the pleadings to the jury has been condemned. Manifestly the only purpose which a court can have in permitting the jury to take the pleadings with them to the jury room, is to obtain a definite idea of the issues tried. If the issues are stated fully in the instructions, the pleadings do not serve the jury any purpose. If the court undertakes to state the issues, but does not do so to the satisfaction of counsel for either party, it is the duty of the dissatisfied counsel to propose an instruction which meets his views. In *Paxton v. Woodward*, 31 Mont. 195, 78 Pac. 215, 107 Am. St. Rep. 416, this court said: "While the jury may be permitted to take with them to the jury room the pleadings in the case, and, if they desire, study the issues for themselves, the practice of setting forth in the instructions a clear and concise statement of the nature of the case and the issues to be determined, is to be commended." In *Rand v. Butte Electric Ry. Co.*, 40 Mont. 398, 107 Pac. 87, the foregoing excerpt was quoted with approval. After all is said that can be said upon the subject, we fail to see wherein the defendant could have been prejudiced in this instance.

5. Objection was made in the trial court to instruction No. 5 given, on the ground that it permitted a recovery upon proof of negligence at the lower reservoir, ignoring altogether the allegations of negligence at the upper reservoir. This presents the same question considered in paragraph 1 and subdivision (a) of paragraph 4 above, and which has been determined adversely to appellant's contention. It is said that this instruction also eliminates the defense of act of God; but that defense was properly presented in other instructions. The charge of the court is to be considered as a whole. The court cannot be required to present every phase of a case in a single instruction; but if the charge in its entirety fairly presents the questions involved, it will be held sufficient. *Harrington v. Butte, Anaconda & Pac. Ry. Co.*, 36 Mont. 478, 93 Pac. 640.

6. We think instruction No. 6, given by the court, is not open to any objection made to it in the trial court. In effect, this instruction told the jury that if the injury to plaintiff's property was occasioned by a combination of (1st) negligence on the part of the defendant, and (2d) an unprecedented flood, or, in other words, an act of God, then plaintiff would still be entitled to recover if the negligence of defendant was a proximate cause of the injury. No doubt, had the defendant requested it, the trial court would have defined "proximate cause" in the language of this court in *Mize v. Rocky Mountain Bell Tel. Co.*, above. The instruction

correctly states the law as declared by this court in *Melsner v. City of Dillon*, 29 Mont. 116, 74 Pac. 130; *Mulrone v. Marshall*, 35 Mont. 238, 88 Pac. 797; and *Birsch v. Citizens' Electric Co.*, 36 Mont. 574, 93 Pac. 940.

We have examined the other assignments made by counsel for appellant, but do not find therein any questions which merit special mention. In our review of this case we have proceeded upon the theory followed in the lower court—the theory of negligence on the part of the defendant. Just what effect should be given to sections 2138 and 2139, Rev. Codes, has not been urged upon our attention, and we shall not express our views until the question has been fully presented.

This record contains 440 closely printed pages, and in our opinion is as free from error as any we have had before us. The cause was tried exceedingly well on the part of the court and counsel; the issues were fairly presented to the jury, and with their disposition of them we find no reason for interfering.

The judgment and order are affirmed.
Affirmed.

SMITH, J., concurs. BRANTLY, C. J., being absent, takes no part in the foregoing decision.

(42 Mont. 224)

DE ATLEY v. NORTHERN PAC. RY. CO.
(Supreme Court of Montana. Nov. 22, 1910.)

1. RAILROADS (§ 345*)—INJURIES AT CROSSINGS—NEGLIGENCE—COMPLAINT.

A complaint in an action for injuries caused by a train frightening a team at a crossing which charges that the company was negligent in placing box cars on a side track near the crossing, obstructing the view of the main track, in failing to give any warning signal as the train approached the crossing, in running the train at an excessively high rate of speed, and in sounding the whistle unusually loud as the train passed the team, does not charge the several acts of negligence as concurrent in the sense that proof of all is necessary to make out a case.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1113-1116; Dec. Dig. § 345.*]

2. RAILROADS (§ 313*)—OPERATION—SIGNALS OF TRAINS APPROACHING CROSSINGS—STATUTES.

A railway company failing to give any signal of the approach of a train to a crossing until it was approximately 100 feet from the crossing when the whistle was sounded, violated Rev. Codes, § 4289, requiring the giving of signals by sounding the whistle and ringing the bell from 50 to 80 rods from the crossing and a prima facie case of negligence was shown.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1002, 1004, 1005; Dec. Dig. § 313.*]

3. APPEAL AND ERROR (§ 1039*)—HARMLESS ERROR—VARIANCE.

The variance between the complaint in an action against a railroad company alleging that it negligently failed to give any warning signal as its train approached a crossing, and the evi-

dence that the train approached the crossing without any signal until it was approximately 100 feet from the crossing when the whistle was sounded, was immaterial, as the evidence showed a violation of Rev. Codes, § 4289, requiring signals from 50 to 80 rods from the crossing so that a prima facie case of negligence was established by mere proof of the violation of the statute.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4086; Dec. Dig. § 1039.*]

4. RAILROADS (§ 350*)—ACCIDENTS AT CROSSINGS—NEGLIGENCE—QUESTION FOR JURY.

Whether a railroad company which operated a passenger train at the rate of 25 miles per hour within city limits and over a crossing obstructed from view by cars standing on an adjacent track, and without giving any warning of the approach of the train until it was within 100 feet of the crossing, was guilty of actionable negligence, *held* for the jury.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1152-1165; Dec. Dig. § 350.*]

5. RAILROADS (§ 344*)—ACCIDENT AT CROSSING—COMPLAINT—SUFFICIENCY.

A complaint in an action against a railroad company for injuries caused by a train frightening a team at a crossing, which alleges that the company was negligent in placing cars on an adjacent track obstructing the view of the main track on which the train was running, in failing to give any warning signal as the train approached the crossing, in running the train at an excessively high rate of speed, and in sounding the whistle unusually loud as the train passed the team, though indefinite for failing to aver the causal connection between some of the acts of negligence and the injury, is sufficient in the absence of a special demurrer or a motion to make more specific.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1107-1112; Dec. Dig. § 344.*]

Appeal from District Court, Park County; Frank Henry, Judge.

Action by W. H. De Atley against the Northern Pacific Railway Company. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

Miller & O'Connor, for appellant. Wm. Wallace, Jr., John G. Brown, and R. F. Gaines, for respondent.

HOLLOWAY, J. Near the easterly yard limits in the city of Livingston, during the month of July, 1908, the defendant railway company maintained four tracks, which for the purposes of this appeal will be designated the "Main," "No. 1," "Old," and "Stock Yards" tracks. The "Main" track over which passenger trains were operated was the most southerly one. Some 66 feet north of this track was the "No. 1" track. North of "No. 1" track was the "Old" track; and north of this the "Stock Yards" track. These four tracks crossed the public road within the city limits. On or about July 9, 1908, the plaintiff was hauling grain from his home north of Livingston, to the elevator in that city, using a four-horse team in his work, and it was necessary for him to cross the four tracks mentioned at the public road crossing referred to above. When plaintiff's team had crossed track "No. 1," a passenger train

moved rapidly from the west on the "Main" track, passed plaintiff's team, which became frightened and unmanageable, upset the wagon on which plaintiff was riding, with the result that plaintiff was crippled, his wagon damaged and one of his horses injured. At the conclusion of the testimony upon the trial of the case, the court granted defendant's motion for a directed verdict, and under instruction a verdict was returned in favor of the defendant and a judgment rendered and entered in accordance therewith. From an order denying his motion for a new trial the plaintiff appealed.

The complaint charges that the railway company was negligent in the following particulars: (1) In placing a number of box cars on track "No. 1" immediately west of the crossing, which cars obstructed the plaintiff's view of the "Main" track to the west; (2) in failing to give any warning signal as its passenger train approached the crossing; (3) in running its train at an excessively high rate of speed; and (4) in sounding the whistle of the locomotive drawing the passenger train, unusually loud as the train passed plaintiff's team. All these allegations of negligence were denied in the answer, and the defendant pleads affirmatively the defense of contributory negligence. The motion for a directed verdict specifies as the grounds thereof, that plaintiff failed to prove all the concurring acts of negligence charged; that he failed to prove any act of negligence alleged, and that the evidence shows contributory negligence on plaintiff's part. The order sustaining the motion is general. In this court counsel for respondent railway company have not urged the defense of contributory negligence, but have insisted that the trial court's order is fully justified upon the other grounds of the motion.

1. It is insisted that the several acts of negligence are charged as concurrent, in the sense that proof of all of them is necessary to make out the plaintiff's case, but with this we do not agree. In attempting to show the causal connection between the acts of negligence charged and the injury to plaintiff, the complaint might have been much more specific, and we are not prepared to say at this time that proof of *any one* of the acts of negligence charged would warrant a recovery in plaintiff's favor; but we think that the allegations with respect to one or two of the negligent acts might have been omitted and the complaint still state a cause of action; in other words, that the several acts of negligence are not charged to be so far interdependent that proof of all is essential to make out a case. For instance: It cannot be said that the complaint makes the allegation with respect to the act of leaving the box cars on "No. 1" track essential to a complete statement of the cause which led directly to plaintiff's injury. The case of *Forsell v. Pittsburgh & Mont. Copper Co.*, 28 Mont. 403, 100 Pac. 218, presents one of

the best examples to be found in the books, of a complaint which charges concurrent acts of negligence, using the term "concurrent" in the sense of acts so far mutually dependent that in the absence of any one the accident would not have occurred. The word "concurrent" is not an apt one to use in this connection, but the courts have adopted it for want of a better term. In *Frederick v. Hale*, 42 Mont. —, 112 Pac. 70 [not yet officially reported], we reviewed this question at length, and distinguished cases of the class to which the *Forsell* Case belongs from cases in which several acts of negligence are charged, but in which a combination of all the acts is not made essential to produce the injury. Our conclusion is that under the allegations of this complaint it was not necessary for plaintiff to prove all the acts of negligence as charged in order to make out his case.

2. It is urged that plaintiff did not prove any act of negligence alleged. One act of negligence charged was the failure of defendant's employes who operated the passenger train to give any warning signal as the train approached the crossing over which plaintiff was about to pass. Section 4289, Rev. Codes, provides: "If any railroad corporation within this state * * * shall permit any locomotive to approach any highway, road or railroad crossing, without causing the whistle to be sounded, at a point between fifty and eighty rods from the crossing, and the bell to be rung from said point until the crossing is reached, * * * [It] shall be deemed guilty of a misdemeanor," etc. The evidence in this case tends to show that the passenger train approached the crossing in question without giving any warning signal whatever until it was approximately 100 feet from the crossing, when the whistle was sounded. There is in fact a slight variance between the allegation of the complaint and the proof, but it can hardly be said to be material. The evidence tends to show a violation by the defendant company of the provision of the statute referred to above, and this of itself makes out a *prima facie* case of negligence. *Hunter v. Montana Central Ry. Co.*, 22 Mont. 525, 57 Pac. 140; *Sprague v. Northern Pacific Ry. Co.*, 40 Mont. 481, 107 Pac. 412.

3. The evidence tended to show that the passenger train was proceeding at the rate of 25 miles per hour. We are not prepared to say that, standing alone, this evidence is sufficient to establish negligence as a matter of law, but when considered in connection with the evidence tending to show that the crossing was within the city limits; that plaintiff's view was obstructed by the cars standing on "No. 1" track; and that there was not any warning given of the approach of the train until it was within 100 feet of the crossing, it became a question for the determination of the jury whether under the circumstances the rate of speed was exces-

sive. *International & G. N. R. Co. v. Starling*, 16 Tex. Civ. App. 365, 41 S. W. 181; 3 Elliott on Railroads, § 1160; 2 Thompson on Negligence, § 1873 et seq.

4. It cannot be said that the evidence in this case establishes contributory negligence on the part of plaintiff as a matter of law. In fact, counsel for respondent do not urge that ground of their motion in this court.

5. We think the complaint states a cause of action. Some of the allegations are so indefinite that it is difficult, if not impossible, to see the causal connection between some of the acts of negligence and the injury. But in the absence of a special demurrer or motion to make more specific, we think the complaint is sufficient under the rule repeatedly announced by this court. *Logan v. Billings & Northern R. Co.*, 40 Mont. 467, 107 Pac. 415, and cases cited.

Our conclusion is that the case should have gone to the jury for a determination of the merits. The order denying plaintiff's motion for a new trial is reversed, and the cause is remanded for a new trial.

Reversed and remanded.

BRANTLY, C. J., and SMITH, J., concur.

(61 Wash. 1)

SAVAGE v. CITY OF TACOMA.

(Supreme Court of Washington. Dec. 2, 1910.)

1. MUNICIPAL CORPORATIONS (§ 866*)—PROCEEDINGS OF COUNCIL—ORDINANCES—CONFORMITY TO CHARTER PROVISIONS—CREATING INDEBTEDNESS.

Tacoma City Charter, § 49, provides that no ordinance obligating the city for payment of more than \$1,000 shall be passed before a second regular meeting of the council, etc. Ordinance No. 3,204, providing for the construction of an extension to the waterworks system, the letting of contracts therefor and payment thereof, and establishing a special fund for such payment, was passed on the night of its proposal, and was submitted to and signed by the mayor on the following day. The amount of the contract was more than \$100,000, and the ordinance provided that this indebtedness should be met by setting aside into a special fund certain revenues from the waterworks system, etc. *Held*, that the charter provision could not be limited to the creation of a general indebtedness, and that the ordinance, although it created a special fund to pay the debt, obligated the city for debt, and was invalid, as in violation of the charter, and a contract entered into under it could not be the basis of an action.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 866.*]

2. MUNICIPAL CORPORATIONS (§ 106*)—PROCEEDINGS OF COUNCIL—ORDINANCES—CONFORMITY TO CHARTER.

Where a municipal charter prescribes a definite method for the enactment of ordinances, such requirements are mandatory, and no authority is vested in the law-making body of the municipality to pass ordinances except in the manner required.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 221-228; Dec. Dig. § 106.*]

3. JUDGMENT (§ 634*) — CONCLUSIVENESS IN GENERAL.

For a judgment to operate as an estoppel there must be an identity of parties and subject-matter and the same issue depending on the same state of facts or the same transaction although in relation to different rights or different property.

[Ed. Note.—For other cases, see *Judgment*, Dec. Dig. § 634.*]

4. JUDGMENT (§ 735*)—CONCLUSIVENESS—MATTERS CONCLUDED—MATTERS NOT IN ISSUE.

A prior judgment in a suit to restrain a city and a contractor from proceeding with a contract made under an ordinance of the city for extension of a waterworks system on the ground of invalidity of the contract, which sustained its validity, is no bar to a later action by the contractor against the city for damages for breach of the contract, in which the city alleges the invalidity of the ordinance under which the contract was made.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 1263; Dec. Dig. § 735.*]

5. JUDGMENT (§ 704*)—CONCLUSIVENESS—PERSONS CONCLUDED—PARTIES ON RECORD IN GENERAL.

A prior judgment, rendered in an action where the plaintiff and defendant in a later action were defendants, assisting each other in maintaining the validity of a contract, is not conclusive of that question as between them in such subsequent action.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 1229; Dec. Dig. § 704.*]

Department 2. Appeal from Superior Court, Pierce County; M. L. Clifford, Judge.

Action by George Milton Savage against the City of Tacoma. From a judgment for defendant, plaintiff appeals. Affirmed.

Marshall K. Snell, for appellant. T. L. Stiles, F. R. Baker, and Frank M. Carnahan, for respondent.

MORRIS, J. Appellant brought this action to recover damages alleged to have been sustained because of the failure of the city to keep and perform its contract, providing for an extension to its water system, known as the "Maplewood Springs Extension." He alleged the passage of the initial ordinance, the execution of the contract thereunder, the failure of the city to perform, and finally the repeal of the ordinance. There are other allegations in the complaint, but they are not material to the discussion of the points before us. The city answered, alleging the invalidity of the initial ordinance, in that it was not passed in accordance with the provisions of the charter, and conferred no authority upon the commissioner of public works to enter into the contract, and that the contract itself was invalid because of certain irregularities. The facts alleged by the city, from which it drew its conclusions of invalidity and irregularity, were all admitted, so that the only question before the court was one of law, which was passed upon on motion for judgment, upon the pleadings, the court sustaining the position of the city. Appellant, in order to escape the legal contention of the city, con-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

tends (1) that the ordinance is valid, and (2) that the opinion and judgment of this court in *Griffin v. Tacoma*, 49 Wash. 524, 95 Pac. 1107, which involved this same contract, are res adjudicata as to the questions now presented, and estop the city from questioning the legality of the ordinance. So that two questions are presented: Was the ordinance valid? and, if not, is the city estopped by the rule of res adjudicata? Section 49 of the city charter provides that: "No ordinance obligating the city for the payment of more than one thousand dollars, or vacating any street, highway, or alley, or granting any franchise or privilege shall be passed before the second regular meeting of the city council after its introduction, nor until read in full at two regular meetings of the council, and no ordinance granting a franchise shall be passed within thirty days from its introduction." On March 4, 1908, ordinance No. 3,264, entitled, "An ordinance providing for the construction of a wood stave pipe line, intake head works, pumphouse, all necessary work and machinery, and the acquiring of the necessary lands, right of way, easements and privileges for the purpose of bringing in water from Maplewood Springs in Pierce county and delivering the same to the low-service reservoir in the city of Tacoma, providing for the letting of contracts therefor and for the payment thereof, and establishing a fund for such payment," was introduced in the city council, read a first time, and, upon the same night, passed to the second and third reading, and put upon its final passage. Upon its passage, it was submitted to the mayor, and was approved by him on March 5, 1908. This was in plain violation of the provisions of the charter supra, unless it can be held, as contended by appellant, that this ordinance does not fall within the provisions of the charter, in that it does not create a general indebtedness of the city. In support of this contention he cites *Winston v. Spokane*, 12 Wash. 524, 41 Pac. 888, *Faulkner v. Seattle*, 19 Wash. 320, 53 Pac. 365, and *Dean v. Walla Walla*, 48 Wash. 75, 92 Pac. 895, holding that where a city enters into a contract for the doing of some public work, the cost of which is not to be charged against the city generally, but against some special fund thereby created, and the only obligation assumed by the city is payment out of such special fund, the indebtedness thus contracted is not a general municipal indebtedness within the meaning of the constitutional limitation. No question was raised in those cases touching the validity of the ordinance or contracts initiating the fund involved, except that the constitutional limitation was or would be exceeded. In other words, the ordinance was valid if the indebtedness was legal. So that it might be here held, if a like question were presented by this record, that if the ordinance by its terms established a special

fund, out of which payment for this water extension should be made, the indebtedness thus created is not a general municipal indebtedness. But such is not the primary question here. There is here no contention as to whether the indebtedness created by this ordinance is a general or special indebtedness, but rather is this ordinance one "obligating the city for the payment of more than \$1,000." It is admitted that the contract entered into between the city and appellant called for more than \$100,000, in payments to be made by warrants drawn on the Maplewood Extension fund, which fund is created by the ordinance "by setting aside into said fund, from the gross revenues or proceeds from the waterworks system now belonging to, or which may hereafter belong to, said city, at least fifty per centum (50%) thereof." It was further provided that, "the comptroller of said city is directed to draw a warrant in payment," and "the city treasurer of said city is authorized and directed to pay the same." Under the ordinance, while the city did not contract for a general municipal indebtedness, it did contract for a special indebtedness and did thereby obligate itself to the establishment of a special fund and for the payment of the money in the special fund, which was within the meaning of the ordinance, obligating itself for the payment of money as much as if a general indebtedness had been created. The character of the fund did not disturb the obligation; it only determined the character of the obligation and the manner of its enforcement. "The obligation assumed by a public corporation under a contract may be general and payable from funds raised by general taxation, or special and payable only from moneys raised by special assessments upon designated property. In the former case the contractor or his assignee can compel payment from the general funds at the disposal of the corporation. If the obligation for the payment is based upon a special fund he is limited on his recovery to such fund." *Abbott's Municipal Corp.* § 294.

The words "obligating the city" cannot be limited to the creation of a general indebtedness against the city. They have a broader and more extended meaning. The city under the ordinance undertook an obligation to create this special fund for the benefit of the contract, by setting aside 50 per cent. of its gross revenues from its water system, and it further obligated itself to pay this fund to appellant. Each of these obligations which the city undertook under this ordinance was "obligating the city for the payment," first, of 50 per cent. of its gross revenues from its water system into a special fund, and, second, to pay the money in this special fund to appellant. The purpose of this provision in the city charter was to insure caution, deliberation, and a full understanding of the character of the expenditure, before it could obligate itself for the payment of pub-

lic funds. Such purpose would be entirely done away with if appellant's construction be given to the charter. Many if not all the ordinances initiating great public improvements undertaken by our municipalities, provide for the creation of a special fund to pay the costs of such improvement, or create a special assessment district in which the money shall be raised by special assessment upon property benefited. It would not do to give a construction to the charter which would permit ordinances of such a character to be rushed through a common council, without opportunity for deliberation and the exercise of due care and complete understanding of the character of the act, before it should assume the dignity of a municipal enactment, and bind the city either directly or indirectly, or a portion of its citizens, to the payment of large sums of money; thus removing the safeguards upon the power of the municipality over the property of its citizens, which are sought to be created by the charter provision. The charter provision, having been violated, in the enactment of this ordinance, the ordinance was void, and no authority could be based upon it for the making of the contract which is made the basis of this action.

We believe it to be the law that, where a municipal charter prescribes a definite method for the enactment of ordinances, such requirements are mandatory, and no authority is vested in the lawmaking body of the municipality to pass ordinances except in the manner required by the charter. *Dillon's Mun. Corp.* (4th Ed.) § 309; *Abbott's Mun. Corp.* § 525; *Smith's Modern Law of Mun. Corp.* § 506; *State v. Town of Bergen*, 33 N. J. Law, 72; *Avis v. Vineland*, 55 N. J. Law, 285, 26 Atl. 149; *Danville v. Shelton*, 76 Va. 325.

The ordinance being void, no authority was thereby vested in the commissioner of public works, to enter into the contract, and the contract or its breach could not be made the basis of an action at law, unless, as urged by appellant, the judgment in the *Griffin Case* is *res adjudicata* and estops the city from now raising such contention. Reference is made to that case for a determination of the questions therein submitted to the court. It will be observed that the court there held:

(1) That the Maplewood Springs extension was not an addition to the water system of the city requiring special ratification by the electors of the city, but such source of water supply was included in the ratification given by the election of 1893 which gave the city the authority to purchase and acquire all sources of water supply then owned by the Tacoma Light & Power Company; (2) that the contemplated extension was not a change in the adopted plan for supplying the city with water within the purview of the act of 1895, found at page 18 of the session laws of that year; (3) that a temporary transfer of funds from the general fund to

a special water fund was not prohibited by the city charter; (4) that the pledging of water receipts, and the transfer from the general to a special water fund, did not obligate the city for a new indebtedness which it could not incur by reason of the constitutional limitation; (5) that the failure of the city comptroller to countersign the contract did not invalidate it. None of these holdings involved the validity of the ordinance; nor was there in that case any suggestion of the invalidity of the ordinance, nor any facts such as here are disclosed from which the court in that case could have held the ordinance invalid. Its validity was assumed by all parties, except in so far as it was then contended that it established a general municipal indebtedness. The court, therefore, in that case could not have held, as we now hold, that this ordinance was void because of the violation of mandatory requirements of the charter, as to the manner of its passage. No such issue was tendered the court, nor was it possible under the issues of that case to frame such a controversy and submit it to the court for determination. It is almost apparent from the record of that case that there was no real controversy between the parties, but that the case was instituted as a moot case in order to determine a favorable construction of the contract, and thus forestall any controversy thereafter. The suit was commenced April 10, 1908, the city and this appellant answered April 13th; reply was filed April 15th, the cause submitted to the lower court for judgment April 18th, and on April 20th, the entire transcript and briefs of both appellant and respondents, with a stipulation to submit, were filed in this court. To constitute a judgment as estoppel there must be an identity of parties and subject-matter, and the same issue depending upon the same state of facts or the same transaction, although in relation to different rights or different property. But where the question in the second suit, although similar to that in the first, growing out of a different transaction or state of facts, is between different parties, and, although growing out of the same subject-matter, involves a different question, there is no *res adjudicata* in the first judgment. 23 Cyc. pp. 1237, 1299.

The purpose of the *Griffin* suit was to enjoin the city from proceeding with the contract, upon the ground that it was illegal, for the reasons referred to by the court in its opinion. The causes of action here pleaded are breaches of contract, and the relief sought is damages for such breach. Appellant and the city in the *Griffin Case* were in friendly relations, each assisting the other in maintaining the validity of the contract. In this case they are unfriendly, and antagonistic in all their contentions and issues. Under such circumstances, there could be no *res adjudicata* in the *Griffin* judgment. *Long v. Eisenbels*, 21 Wash. 23, 56 Pac. 933; *Fogg v. Hoquiam*, 23 Wash. 340, 63 Pac. 234;

Brier v. Traders' National Bank, 24 Wash. 385, 64 Pac. 831.

The judgment is therefore affirmed.

RUDKIN, C. J., and CHADWICK, CROW, and DUNBAR, JJ., concur.

(61 Wash. 107)

JONES v. LESLIE et al.

(Supreme Court of Washington. Dec. 7, 1910.)

1. APPEAL AND ERROR (§ 837*)—REVIEW—DIRECTING VERDICT.

Where a case is taken from the jury on motion of defendant, the court on appeal need only notice evidence of the plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 837.*]

2. TRIAL (§ 143*)—PROVINCE OF COURT AND JURY—JURY QUESTION.

Where the evidence is conflicting, it is a question for the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 342, 343; Dec. Dig. § 143.*]

3. PROPERTY (§ 2*)—SUBJECTS—LABOR.

Labor or the right to labor is as much property as land or money.

[Ed. Note.—For other cases, see Property, Cent. Dig. § 2; Dec. Dig. § 2.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5693-5728; vol. 8, pp. 7768-7770.]

4. TORTS (§ 10*)—INTERFERENCE WITH ANOTHER'S RIGHT OF EMPLOYMENT.

In an action against defendant for interfering with plaintiff's right of employment, it appeared that plaintiff had been defendant's servant, but, securing a better job, prepared to leave defendant. Defendant protested, and claimed that plaintiff was doing him an injury, and to get even with plaintiff notified his prospective employers that, if they engaged plaintiff, he would deprive them of his custom and trade. *Held*, that this was an unwarranted invasion of plaintiff's right, and defendant was liable for his malicious intermeddling.

[Ed. Note.—For other cases, see Torts, Cent. Dig. § 10; Dec. Dig. § 10.*]

Department 2. Appeal from Superior Court, King County; Wilson R. Gay, Judge.

Action by C. R. Jones, by his guardian ad litem, against John C. Leslie, the Leslie Power Company, L. S. Winans, and the Seattle Cracker & Candy Company. From a judgment for defendants, plaintiff appeals. Reversed and remanded.

John E. Humphries and George B. Cole, for appellant. Farrell, Kane & Stratton, for respondents.

DUNBAR, J. C. R. Jones, by his guardian ad litem, John Jones, complains of the defendants John C. Leslie, Leslie Power Company, Incorporated, L. S. Winans, and Seattle Cracker & Candy Company, a corporation, and alleges, in substance, that on or about the 12th day of August, 1909, and long before said time, the plaintiff, C. H. Jones, was employed by the defendant Leslie Power Company as a teamster, and was driving a wagon and team for said defendant; that

some time prior to the 12th day of August plaintiff made an oral contract and agreement with Steeves Bros., who were then in the teaming business in Seattle and who were employed as teamsters by the defendant cracker company, to work as a teamster for Steeves Bros. for a stipulated price for an indefinite period; that on or about the 12th day of August, 1909, the defendants J. C. Leslie and Leslie Power Company, Incorporated, notified the cracker company that, if the cracker company permitted Steeves Brothers to employ Jones, the Leslie Power Company would withdraw all its patronage from the cracker company, and refuse to trade with it further; that the cracker company, for the purpose of keeping the plaintiff from being employed by Steeves Bros., connived, confederated, and conspired together and notified Steeves Bros. that they must not employ this plaintiff as a teamster at all, and caused Steeves Bros. to refuse to employ the plaintiff as a teamster; that the said defendants then and there wrongfully and unlawfully, and against the rights of plaintiff, blacklisted the plaintiff with Steeves Bros.; that, by reason of the things aforesaid, the plaintiff was thrown out of employment, and remained idle from the 12th day of August, 1909, until the 27th day of September, 1909, and alleged specific damages. The answer of all the defendants was practically a denial. On motion a nonsuit was granted in favor of defendants L. S. Winans and the Seattle Cracker & Candy Company, and at the close of all the testimony the court sustained a motion of the defendants J. C. Leslie and the Leslie Power Company for judgment in their favor, and dismissed the case as to all the defendants, entering judgment in their favor and against the plaintiff. From this judgment, this appeal is taken.

The testimony in this case is somewhat conflicting. It will be necessary, therefore, to examine only the testimony of the appellant, plaintiff below, to determine whether or not the court erred in granting the motion of nonsuit. We may state here that we think there was no error of the court in granting the motion in favor of Winans and the Seattle Cracker & Candy Company, as there is no indication of any conspiracy in the case. It seems that the appellant, young Jones, was working for the Seattle Cracker Company and Steeves Bros.; that during the summer vacation he was laid off, so that some relative who was at home during the vacation could take the job, with the understanding that the appellant should have the advantage of the first opening. He then went to work for the respondent Leslie Power Company, and in time he was notified that he could have work again with Steeves Bros. or the cracker company. One of the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

employés of the respondent Leslie Power Company informed Mr. Leslie, the president and manager of that company, that Jones was going to quit. Mr. Leslie called him in and asked him about it, and he told him that he was going to quit, as he had a better job at more wages. Leslie wanted to know of him if he was going to leave him in the lurch, and the appellant told him that he could not give him any more time, that he would commence working for his new employer on Monday the 15th, whereupon Leslie told appellant that, if he left him in the lurch, he would see that he never got the job with the cracker company, and he immediately repaired to the telephone, and sent the following message to the cracker company: "Q. State what he said over the telephone. A. He told him that he thought I didn't do him right. He said that he was a good customer there, and he said, 'You know it.' He said, 'If you hire him, I will certainly not buy any more crackers from you.'" Another witness testified to hearing substantially the same message, and there is some evidence from the guardian Jones and a man who was with him that Leslie admitted having tried to injure the appellant for the reason that he had tried to injure him, or, as he expressed it, "had done him dirt." The message which Leslie testifies to sending was of a different character, and would probably not be actionable. But the determination of the credibility of the witnesses was a matter resting entirely with the jury. It also appears from the testimony that the appellant was discharged by Steeves Bros. through the interposition of the cracker company, for the reason that they did not want to lose a good customer.

This presents a case here which is purely a question of law. It would be well to remember in the beginning that it is fundamental that a man has a right to be protected in his property. This was the doctrine of the common law, is, and always has been, the law in every civilized nation. It is of necessity one of the fundamental principles of government, the protection of property being largely one of the objects of government. For the protection of life, liberty, and property, men have yielded up their natural rights and established governments. Is, then, the right of employment in a laboring man property? That it is we think cannot be questioned. The property of the capitalist is his gold and silver, his bonds, credit, etc., for in these he deals and makes his living. For the same reason, the property of the merchant is his goods. And every man's trade or profession is his property, because it is his means of livelihood, because, through its agency, he maintains himself and family, and is enabled to add his share towards the expenses of maintaining the government. Can it be said with any degree of sense or justice that the property which a man has

in his labor which is the foundation of all property and which is the only capital of so large a majority of the citizens of our country is not property; or, at least, not that character of property which can demand the boon of protection from the government? We think not. To destroy this property, or to prevent one from contracting it or exchanging it for the necessities of life, is not only an invasion of a private right, but is an injury to the public, for it tends to produce pauperism and crime. This relief has been granted to employers in many forms. Workmen have been enjoined from collecting about the employer's place of business for the purpose of ridiculing his employés with a view of causing them to stop work; and many other demonstrations of the same character and purpose have been enjoined, of course, on the theory that it was an unlawful act. To deny the same relief to the employé under similar circumstances would be a reproach to the law. It is true that in many cases the element of conspiracy existed, but the principle is the same. Nor have the courts refused this protection to employés, but in a vast majority of cases of the kind it has been held that a legal right had been invaded, and the law imposed a liability.

There are a few cases that might possibly sustain the respondents' contention. Those which they have cited, however, we think are clearly not in point, or are easily distinguished from the case at bar. *Benjamin v. Wheeler*, 8 Gray (Mass.) 409, and *Randall v. Hazelton*, 12 Allen (Mass.) 415, do not deal in any way with the principle under discussion here. In *Heywood v. Tillson*, 75 Me. 225, 46 Am. Rep. 373, it was held that an employer had a right to refuse to employ, or to retain in his service, any person renting certain specified premises; and the owner of such premises had no cause of action against him for the exercise of such right, though such refusal was through malice or ill will to the owner. An examination of that case shows that there were conditions which the defendant had a right to take into consideration in employing men, and which no one else had a right to question; that if his employés remained in the house, the rent of which was the subject of controversy, the renting of the house being the business of an enemy of the employer, it was liable to affect the character of the workmen and their attitude towards their employer. So many other questions entered into the consideration of that case that it seems to us it has no bearing on the case at bar. *Raycroft v. Tayntor*, 68 Vt. 219, 35 Atl. 53, 33 L. R. A. 225, 54 Am. St. Rep. 882, was another case of somewhat the same character. There a superintendent of a quarry refused to permit another to take stone therefrom unless the latter discharged a certain employé, and it was held that he was not

liable for causing such discharge. But, whether the court wisely decided this case on the circumstances controlling it, it was evident that the court proceeded upon the theory that there was no lawful right invaded in that particular case, and that, where the lawful right was invaded, an action would lie, for in discussing the case it said: "The authorities cited for the plaintiff clearly establish that if the defendant, without having any lawful right, or by an act, or threat, allunde the exercise of a lawful right, had broken up the contract relation existing between the plaintiff and Libersant, maliciously or unlawfully, although such relation could be terminated at the pleasure of either, and damage had thereby been occasioned, the party damaged could have maintained an action against the defendant therefor."

The English case upon which this doctrine of nonliability rests—and we have gone outside of the cases cited by the briefs for the purpose of determining this case as the principle involved seems to us to be of some importance—is, *Allen v. Flood*, *Law Journal*, 1898 (Q. B.) p. 119. This is the celebrated *Boiler Makers' Case*, where the boiler makers in common employment with the respondents, who were shipwrights working on wood, objected to work with the latter on the ground that in a previous employment they had been engaged on iron work. The appellant, an official of the *Boiler Makers' Union*, in response to a telegram from one of the boiler makers, came to the yard and dissuaded the men from immediately leaving their work, as they threatened to do, intimating that, if they did so, he would do his best to have them deprived of the benefits of the union, and also fined. The appellant then saw the managing director, to whom he said that if the respondents, who were engaged from day to day, were not dismissed, the boiler makers would leave their work or be called out. The respondents were thereupon dismissed, and it was held by a majority of the judges in the House of Lords that no action would lie. This opinion by the different Lords is entirely too long to review or to make any attempt to review. But, whatever may be said of it, it is tinged with the idea which prevails in many of the decisions that, where competition is the stimulating motive in interfering with employment, such competition is a justification for the act. But, even outside of that question, the opinions of the majority of the Lords in this case show that they are not in harmony with the rule that had theretofore been established in the English courts, and that has since been almost universally followed in both England and America. The Lords themselves were informed of this by the very able dissenting opinion of the Lord Chancellor, who, after reviewing the cases and the case under consideration, concluded as follows: "I regret that I am compelled to dif-

fer so widely with some of your Lordships, but my difference is founded on the belief that in denying these plaintiffs a remedy we are departing from the principles which have hitherto guided our courts in the preservation of individual liberty to all. I am encouraged, however, by the consideration that the adverse views appear to me to overrule the views of most distinguished judges going back now for certainly 200 years, and that up to the period when this case reached your Lordships' House there was an unanimous consensus of opinion, and that of eight judges who have given us the benefit of their opinions six have concurred in the judgments which your Lordships are now asked to overrule." One of the oldest cases on this subject is that of *Keeble v. Hickeringill*, 11 East, 574. This was an action for interfering with a certain right of hunting by the plaintiff, and of a right to the use of a certain pond or grounds. The discussion of the case took a wide scope. The opinion was rendered by Chief Justice Holt, and, in the course of the discussion by the eminent judge, he divided these different classes of actions as follows: "Now there are two sorts of acts for doing damage to a man's employment, for which an action lies. The one is in respect of the man's privilege. The other is in respect of his property. In that of a man's franchise or privilege whereby he hath a fair market, or ferry, if another shall use the like liberty, though out of his limits, he shall be liable to an action, though by grant from the King. But therein is the difference to be taken between a liberty in which the public hath a benefit, and that wherein the public is not concerned. The other is where a violent or malicious act is done to a man's occupation, profession, or way of getting a livelihood. There an action lies in all cases." In *Bowen v. Hall*, *Law Journal*, 1881, p. 305, on appeal from the judgment of Queen's Bench, it was held that, where one had a contract for exclusive personal service, the plaintiff could maintain an action against the defendant for maliciously procuring the other party to the contract to break it, notwithstanding that the strict relation of master and servant did not exist between them. There it was said: "Merely to persuade a person to break his contract may not be wrongful in law or fact, * * * but if the persuasion be used for the indirect purpose of injuring the plaintiff, or of benefiting the defendant at the expense of the plaintiff, it is a malicious act, which is in law and in fact a wrong one, and therefore a wrongful act, and therefore an actionable act if injury ensue from it"—citing *Lumley v. Gye*, 22 Law J. (Q. B.) 463.

In an article in the 54 *Central Law Journal*, commencing at page 426, an extended review is made of this subject, and the authorities cited. There a quotation is made from the case of *Doremus v. Hennessy*, 176 Ill. 608, 52 N. E. 924, 54 N. E. 524, 43 L. R. A.

797, 802, 68 Am. St. Rep. 203, where the court said: "The common law seeks to protect every person against the wrongful acts of others, whether committed alone or by combination, and an action may be had for injuries done which cause another loss in the enjoyment of any right or privilege or property. No persons individually or by combination have the right to directly or indirectly interfere or disturb another in his lawful business or occupation, or to threaten to do so for the sake of compelling him to do some act, which in his judgment his interest does not require. Losses willfully caused by another from motives of malice or one who seeks to exercise and enjoy the fruits and advantages of his own experience, industry, skill, and credit will sustain an action." In that case the action was for the interference with an employment. It was further said: "Appellant's counsel concede, and we think it is the law, that where one maliciously brings about the discharge of an employé, where the contract between the latter and his employé is terminable at will, the injured employé is entitled to recover." The same author in discussing the natural consequence of competition between laborers, where it is conceded that the man who underbids his rival may retain the latter's situation with impunity, says: "But if an interloper seeks, not employment for himself or for one in whom he is directly interested, but the mere wanton discharge of another, such conduct is wanton, unjustifiable in law, and actionable if damage result." And the article concludes as follows: "From the foregoing discussion the rule of law may be deduced that every one has a natural right to conduct his trade, business, profession, or legal relationship arising out of contract free from all intentional and wanton interference on the part of those whose sole object is to damage him by refusing his patronage, withdrawing his employes, or interrupting the valuable relation into which he, by contract, has entered."

In *Purinton v. Hinchliff*, 219 Ill. 159, 76 N. E. 47, 2 L. R. A. (N. S.) 824, 109 Am. St. Rep. 322, it was held that any person or combination of persons who unlawfully by direct or indirect means obstruct or interfere with another in the conduct of his lawful business are liable in damages for loss willfully caused by such action. In the case of *London Guarantee & Accident Company v. Horn*, 206 Ill. 493, 69 N. E. 526, 99 Am. St. Rep. 185, appellee was in the employ of Arnold, Schwinn & Co. of Chicago, as foreman of the frame department of its bicycle factory, and on that day, while engaged in his work, was injured while attempting to operate a milling machine, from which he suffered the loss of two fingers on his right hand. At the time of this injury, Arnold, Schwinn & Co. carried an indemnity policy in the London Guarantee & Accident Company, indemnifying the firm from injuries to

its employes, to the extent of \$5,000. The policy provided that, if any suit should be brought against the assured to enforce a claim for damages on account of an accident covered by the policy, immediate notice thereof should be given to the company, and the company would defend, etc., the ordinary provisions in an indemnity policy. The company offered the appellee a certain amount of money in settlement of his claim, and informed him that, unless he accepted that amount, they would see to it that he was not re-employed by Arnold, Schwinn & Co. The offer was refused, and suit was brought against Arnold, Schwinn & Co., in which a verdict was subsequently rendered for \$3,500. The statement is long, but the essence of it is that the insurance company prevailed upon the employer to discharge the plaintiff by threatening to cancel the policy which the manufacturing company had in its company, and the suit was brought against the London Guarantee Company by Horn for damages for loss of employment, and the court held that he could recover, holding that one whose discharge from employment was procured by a third party had a right of action against such party. In this case the authorities are reviewed at great length, and the general doctrine announced as we have indicated.

In *Chipley v. Atkinson*, 23 Fla. 206, 1 South. 934, 11 Am. St. Rep. 367, it was held that an action lies in behalf of an employé against a person who has maliciously procured the employer to discharge such employé from employment in which he is engaged under a legal contract, and that an action will lie where the period for which the employment is to continue is not certain, if damage result from the discharge; that the fact that no contract or legal right of the employé as against the employer is violated by the employer, or that no action can be maintained by the employé against the employer for such discharge, cannot prevent a recovery against the third person who has maliciously procured the discharge, and which discharge would not have occurred but for such procurement. In *Thacker Coal Company v. Burke*, 59 W. Va. 253, 53 S. E. 161, 5 L. R. A. (N. S.) 1091, it was decided that one who maliciously entices a servant in actual service of a master to quit his service is liable to action therefor, and that if one wantonly and maliciously, whether for his own benefit or not, induces a person to violate his contract with a third person to the injury of that third person, it is actionable. In *Moran v. Dunphy*, 177 Mass. 485, 59 N. E. 125, 52 L. R. A. 115, 83 Am. St. Rep. 289, which was an action for maliciously by means of slanderous charges inducing a third person to discharge the plaintiff from his employ, the action was sustained, the court saying: "Finally, we see no sound distinction between persuading by malevolent advice and accomplishing the same result

by falsehood or putting in fear. In all these cases the employer is controlled through motives created by the defendant for the unprivileged purpose. It appears to us not to matter which motive is relied upon. If accomplishing the end by one of them is a wrong to the plaintiff, accomplishing it by either of the others must be equally a wrong." See, also, *Employing Printers' Club v. Doctor Blosser Co.*, 122 Ga. 509, 50 S. E. 353, 69 L. R. A. 90, 106 Am. St. Rep. 137; *Perkins v. Pendleton*, 90 Me. 166, 38 Atl. 96, 60 Am. St. Rep. 252; *Addison on Torts* (8th Ed.) p. 7. There are hundreds of these cases cited in the cases which we have quoted from which sustain the doctrine that the person causing the loss of employment under such circumstances as were the cause of the loss in this case are liable if damages ensue. It seems to be almost the universal doctrine of the courts of the country. Nor are we able to find any just criticism for such a rule. It is an excellent rule of action to refrain from interference with the affairs of others and especially if the motive actuating such interference is to work injury to others.

The judgment will be reversed, and the cause remanded, with instructions to proceed with the trial of the case.

RUDKIN, C. J., and CROW, CHADWICK, and MORRIS, JJ., concur.

(61 Wash. 162)

STATE v. RISABURO.

(Supreme Court of Washington. Dec. 12, 1910.)

1. CRIMINAL LAW (§ 323*)—SEX OF ACCUSED—PRESUMPTIONS.

Where, on the trial of accused, his sex was not made an issue, but was accepted by all as a conceded fact, and he repeatedly responded to masculine pronouns addressed to him, the jury were authorized to presume that he was a male person, and hence he could not obtain a reversal of a conviction of living with and accepting the earnings of a common prostitute because his sex had not been proved.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 323.*]

2. PROSTITUTION (§ 1*)—ACCEPTING EARNINGS OF PROSTITUTE—EVIDENCE.

Where accused for many years had lived with the same prostitute at different points, and had no other visible means of support, he was properly convicted of living with and accepting the earnings of a common prostitute.

[Ed. Note.—For other cases, see Prostitution, Dec. Dig. § 1.*]

Department 1. Appeal from Superior Court, Walla Walla County; Thos. H. Brents, Judge.

Kanda Risaburo was convicted of living with and accepting the earnings of a prostitute, and he appeals. Affirmed.

E. C. Dalley, for appellant. Everett J. Smith, for the State.

RUDKIN, C. J. This is an appeal from the judgment and sentence of the court below,

convicting the appellant of the crime of living with and accepting the earnings of a common prostitute. Insufficiency of the evidence to justify the verdict is the only error assigned. The appellant first contends that there is no evidence in the record tending to show that he is a male person, and, secondly, that there is no sufficient evidence that he accepted the earnings of the prostitute in question, whose character and calling are admitted. These assignments are wholly without merit. Conceding that it was incumbent on the state to prove that the appellant was a male person, and that there is no direct evidence in the record to that effect, the fact remains that the appellant appeared before the jury, and responded repeatedly to masculine pronouns addressed to him during the trial, without objection or protest. Any bystander might have testified that the appellant was a male person from his appearance only, and the jury might properly draw the same inference. The sex of the appellant was not made an issue during the trial, but was accepted by all parties concerned as a conceded fact, and under such circumstances the question will not receive serious consideration here. *Lewis v. People*, 37 Mich. 517.

It is next contended that there is no evidence tending to show that the appellant accepted any earnings of the prostitute, but, if confessions and admissions go for aught in a court of justice, there is ample testimony on that point also. Aside from this, there was abundant evidence that the appellant has lived with this same prostitute for a number of years, at different points, and has no other visible means of support.

The judgment is affirmed.

FULLERTON, GOSE, MOUNT, and PARKER, JJ., concur.

(61 Wash. 157)

BARNUM v. SEATTLE, R. & S. RY. CO.

(Supreme Court of Washington. Dec. 12, 1910.)

APPEAL AND ERROR (§ 1004*)—AWARD OF DAMAGES—REVIEW.

Where, in an action by plaintiff for injuries, the medical evidence as to the extent thereof was in conflict, and, if plaintiff's evidence was to be believed, the amount awarded was not excessive, the verdict will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3944-3947; Dec. Dig. § 1004.*]

Department 1. Appeal from Superior Court, King County; R. B. Albertson, Judge.

Action by Gertrude Barnum against the Seattle, Renton & Southern Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Morris B. Sachs, for appellant. Hastings & Stedman, for respondent.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

FULLERTON, J. The respondent was injured while riding as a passenger upon one of the appellant's cars, and recovered therefor in this action in the sum of \$3,500. The appellant admits its liability for the accident causing the injury, and its liability to respondent in damages for such injury as was actually suffered by the respondent, but contends that the verdict of the jury and judgment entered thereon are grossly excessive when measured by such actual injury. The respondent at the time of the accident was riding in the car near the door in the partition which divides the car into compartments. She was standing up, bracing herself against the side of the door, as the car was so crowded she could not find a seat. As she was in that position, the car met with a head-on collision with another car of the appellant. The shock threw her violently against the door, from which position she fell to the floor and was trampled upon by other passengers.

That the respondent received some severe bruises from the accident and was under the doctor's care for some time thereafter is conceded; the principal dispute being over the question whether the injuries received were of a permanent nature, and were the proximate cause of the apparent arrested development from which the respondent subsequently suffered. On these questions the medical evidence is squarely in conflict. If that offered on behalf of the respondent is to be believed, the amount awarded by the jury is no more than adequate to compensate her for her suffering and injury. On the other hand, if we were to adopt the theory of the appellant's witnesses, it could well be said the damages are excessive. But these matters this court cannot determine with any certainty from the record. Each is supported by evidence and plausible reasoning. We can do no more, therefore, than abide by the verdict of the jury.

The judgment is affirmed.

RUDKIN, O. J., and GOSE, MOUNT, and PARKER, JJ., concur.

(61 Wash. 146)

VAN GELDER v. VAN GELDER.

(Supreme Court of Washington. Dec. 10, 1910.)

1. DIVORCE (§ 231*)—ALIMONY.

Where, in a suit for divorce in which the husband filed a cross-complaint for similar relief, the findings showed no equities in favor of plaintiff, but established that she undertook to and did put herself in a legal position where she believed she could demand a share of defendant's property, and she charged unspeakable cruelties to further her cause, all of which were rejected as unsustained, and there was no community property requiring division, the court erred in allowing her \$1,000 alimony on granting the husband a divorce on his cross-complaint.

[*Ibid.* Note.—For other cases, see Divorce, Cent. Dig. §§ 658-661, 664; Dec. Dig. § 231.*]

2. DIVORCE (§ 223*) — ATTORNEY'S FEES — COSTS.

In a suit for divorce, it was within the discretion of the trial court to allow plaintiff attorney's fees and costs, though denying her a divorce, and granting her husband a decree on his cross-complaint.

[*Ibid.* Note.—For other cases, see Divorce, Cent. Dig. § 645; Dec. Dig. § 223.*]

Department 2. Appeal from Superior Court, Whatcom County; *Ed. E. Hardin, Judge.*

Action by *Lora E. Van Gelder* against *Henry Van Gelder*. From so much of a judgment decreeing a divorce to defendant on his cross-complaint as allowed complainant \$1,000 alimony, defendant appeals. Reversed and remanded.

Brown, White & Perringer, for appellant. *Fairchild & Bruce*, for respondent.

CHADWICK, J. Appellant and respondent were married at Bellingham, July 26, 1907. Both had been previously married, and each was possessed of some property; appellant having, as the trial judge found, about \$10,000, and respondent about \$2,500. The property had never been commingled, and was owned separately at the time the decree was entered. The parties came together through correspondence, following an advertisement inserted by appellant in a spiritualistic journal published in Chicago, stating that he desired to secure a housekeeper. There is nothing in the findings of the court to indicate that respondent ever had any real affection for the appellant, or that his property grew in volume under her influence, or while they lived together as husband and wife. In her complaint respondent charges appellant with the grossest wrongs and cruelties, all of which were denied by appellant, who filed a cross-complaint setting up a state of domestic infelicity, cruelty, and indignities which rendered his life burdensome. The trial court found all of the material allegations of respondent's complaint to be wholly groundless, and the material allegations of the cross-complaint of appellant to be fully sustained by the evidence. The court further found that the parties had corresponded prior to her coming West, and "the plaintiff sought to and did ascertain from the defendant something of his financial status; that by finesse and various suggestions, statements, and acts fully set out in the exhibits introduced on the part of the defendant in this case and admitted in evidence, endeavored to and did influence the defendant to enter into the marriage relation with the plaintiff; that such conduct and acts and suggestions on the part of the plaintiff to and of this defendant were for the purpose of inducing the defendant to marry the plaintiff and to secure a portion of his property; and that the defendant was induced to enter into the said relation be-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

cause of such statements, acts, and suggestions on the part of the plaintiff." The court adjudged that appellant take a decree of divorce upon his cross-complaint, and further that the defendant pay to the plaintiff as alimony the sum of \$1,000, said sum to be paid within 60 days from the date thereof, \$250 of which sum was to be paid to J. W. Rose, attorney for plaintiff. To this part of the decree exceptions were reserved, and from it this appeal is prosecuted.

A motion is made to strike what purports to be a statement of the facts, being the letters written by respondent to appellant pending the negotiations which culminated in their marriage. These letters are here, being referred to in the findings, "and which said exhibits are made a part of these findings as fully as if specifically set forth herein." No other certificate of the trial judge was made. It is contended that the exhibits cannot be so considered as a part of the findings, for the reason that they are evidence in the case, and could only be considered when certified as a statement of facts under the appeal statute. But we feel that it is not necessary to pass upon this question, or to refer to the exhibits. The findings of the court are ample to sustain the decree of divorce. Both parties sought a separation; the only question being which one of them should take the decree. The facts found are in no way challenged on this appeal; the only question being one of law, whether from the facts as found by the court it should have allowed respondent the sum of \$1,000 out of the property of appellant. Those cases holding that alimony will not as a rule be granted where the wife is at fault can rarely be applied under our community property system. A wife may be at fault and yet be entitled to an allowance, not because of any theory of punishment to the husband, but because the property is her own. So that we will pass the cases upholding the common-law rule which have been cited by appellant, and consider the facts and the law of the instant case.

The findings show no equities whatever in favor of respondent. She designedly undertook to, and did, put herself in a legal position where she believed she could demand at the hands of the law a share of appellant's property. She charged unspeakable cruelties to insure her cause, all of which the court rejected as unsustainable. There was no property requiring division, nor was respondent in necessitous circumstances. There is no ground, in fact, to sustain the arbitrary allowance of \$1,000 to respondent, unless it be that she was the legal wife of appellant. This, as we have heretofore held, is not enough. To allow a recovery in this case would put a premium upon the cupidity of a designing woman, and invite the adventures to invade the property of her victim,

sanctioned and encouraged by the law. In *State ex rel. Lloyd v. Superior Court*, 55 Wash. 347, 104 Pac. 771, 25 L. R. A. (N. S.) 387, we said: "Alimony or maintenance and counsel fees are not granted as a matter of course, or upon the mere allegation of marriage. Neither is the order imposed as a penalty, but to compel the performance of a duty, and must be sustained on equitable grounds, having reference to the relative situation of the parties." And in *Pringle v. Pringle*, 55 Wash. 93, 104 Pac. 135, the rule was declared that: "If she [the wife] be otherwise provided for, or have property in her own right, there can be no reason for the assertion of the right to an allowance out of the separate property of the husband." In all cases of this kind or character, the court should be governed by the facts of the particular case before it. Respondent cast the die and lost. Under such a state of facts, the rule of justice should be to leave the parties as they were at the time of their marriage.

The allowance of attorney's fees and the costs of a particular action is a matter peculiarly within the discretion and province of the trial judge. No reason is suggested, and we find none in the record, which would warrant us in denying that part of the decree allowing attorney's fees in the lower court. This is an allowance, not to respondent, but to her counsel.

This case will be remanded, with instructions to the lower court to modify its decree denying the allowance of \$1,000, and charging appellant with the sum of \$250 as counsel fees in the court below. Neither party will recover costs on appeal.

RUDKIN, C. J., and MORRIS and CROW, JJ., concur.

(61 Wash. 175)

SMITH et ux. v. SEATTLE ELECTRIC CO.
(Supreme Court of Washington. Dec. 12, 1910.)

APPEAL AND ERROR (§ 1004*)—AMOUNT OF DAMAGES—REVIEW.

Where, in an action for injuries to a street car passenger, a verdict for \$6,500 was reduced to \$4,000 by the trial judge, and it appeared that, if plaintiff's testimony was to be believed, he suffered and continued to suffer substantial injury on account of the accident, the judgment for the reduced amount will not be set aside as excessive.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3944-3947; Dec. Dig. § 1004.*]

Department 1. Appeal from Superior Court, King County; Wilson R. Gay, Judge.

Action by Herbert Smith and wife against the Seattle Electric Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

James B. Howe and H. S. Elliott, for appellant. A. R. Rutherford and Milo A. Root, for respondents.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

PER CURIAM. This is an action to recover for injuries to the person of the respondent Georgia E. Smith, resulting from the sudden starting and stopping of one of appellant's street cars in the city of Seattle. Mrs. Smith was at the time a passenger upon the car. Appellant admitted liability for the injury, and the case was tried to the jury solely upon the amount of damages. A verdict was returned for the respondents in the sum of \$0,500. Upon motion for a new trial, the court entered an order, granting the motion unless the respondent would remit \$2,500 from the verdict. The remission was made, and a judgment was entered against the appellant for \$4,000. This appeal followed.

The only question presented is that the amount of the judgment is still excessive. If the testimony of the injured plaintiff and that received in her behalf is to be believed, she suffered, and still suffers, substantial injury on account of the accident. We think it is unnecessary to discuss the character of the injury or the evidence. It is sufficient to say that we have read the evidence, and have concluded that the injury is substantial, and that the trial judge, having made a material reduction after having seen and heard the witnesses, is better able to arrive at a just conclusion than we are.

We conclude, therefore, that the judgment as it stands is not excessive, and must be affirmed.

(61 Wash. 167)

JONES v. NELSON.

(Supreme Court of Washington. Dec. 12, 1910.)

1. MECHANICS' LIENS (§ 281*)—MODIFICATION OF CONTRACT—EVIDENCE.

Evidence in a mechanic's lien case held to authorize a finding that the building contract was modified by the parties as to the length of the building.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Dec. Dig. § 281.*]

2. DAMAGES (§ 122*)—DELAY IN COMPLETING BUILDING.

Even if a flat building built for rent was not completed for a month after the time provided by the contract, refusal of interest to the contractor prior to the filing of the lien, a month after the completion and delivery of the building, was ample damages for the delay, there being no evidence of application for rooms before the completion and delivery.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 309-319; Dec. Dig. § 122.*]

3. DAMAGES (§ 1*)—EVIDENCE AUTHORIZING AWARD.

"Damages" means compensation for the loss suffered or the injury sustained, and are not to be awarded unless based on something more substantial than guess, assumption, or speculation.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 1; Dec. Dig. § 1.*]

For other definitions, see *Words and Phrases*, vol. 2, pp. 1812-1820; vol. 8, pp. 7625-7626.]

4. APPEAL AND ERROR (§ 1008*)—FINDINGS OF FACT.

Where the findings are correct if the testimony of the witnesses for the party in whose

favor they are adopted, the advantage of the trial court in seeing and hearing the witnesses should turn the scale in favor of its findings.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3955-3969; Dec. Dig. § 1008.*]

5. APPEAL AND ERROR (§ 1072*)—HARMLESS ERROR.

The case being triable de novo on appeal, and the motion for new trial having been properly denied, the hearing and deciding of the motion in the wrong county was harmless error.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4233½; Dec. Dig. § 1072.*]

Department 1. Appeal from Superior Court, King County; M. L. Clifford, Judge.

Suit by C. L. Jones against Olaf Nelson. Decree for plaintiff. Defendant appeals. Affirmed.

Gule & Gule, for appellant. Kerr & McCord, for respondent.

GOSE, J. This is a bill in equity for the foreclosure of a mechanic's lien. On August 26, 1908, the respondent entered into a building contract with the appellant Olaf Nelson, acting through one Anderson as his attorney in fact. By the terms of the contract the respondent agreed to erect for the appellant Nelson, hereafter called the appellant, a two-story frame building consisting of 12 flats; six of five rooms each, and six of four rooms each. Respondent agreed to furnish the labor and material and complete the building on or before December 15, 1908. It was further agreed that the building should be "an exact duplicate" of a building theretofore erected by the respondent for one Mays, except that it should be four feet longer. The Mays building was 108 feet in length. The contract price was \$7,000. Two thousand dollars was paid before the commencement of the action. The appellant claims an offset in damages to the extent of \$3,888.15, on account of a shortage of two feet in the length of the building, and for defective work and inferior material. There was a judgment for the respondent for \$5,000, the balance of the contract price, and for \$493.75 for extra work, for attorney's fees and costs, and a decree establishing and foreclosing the lien. Nelson has appealed.

The appellant first contends that the building as constructed is only 110 feet in length instead of 112 feet, as the contract requires. Upon this feature of the case the court found: "The defendant contended in this action that the building constructed by the plaintiff was from eighteen inches to two feet shorter than required by the contract. I find from a preponderance of evidence that at the time the plaintiff was ready to commence the construction of said building the dimensions of the building were made the subject of discussion between the plaintiff and the agent and attorney in fact of the defendant, and that under an agreement then entered into a ground dimension slightly

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

shorter than the length of the lot was determined on, but that the cornice and bay windows of said building practically reached to the limits of said lot, and that it was constructed upon a plan satisfactory to the defendant to avoid any possible controversy with the building inspector of the city of Seattle." We think the finding is supported by the evidence. The respondent testified that the lot was represented to him to be 114 feet in length, but that when measured it was found to have a length of 112 feet; that he had had trouble with the city inspectors when attempting to put the cornice and windows of other buildings over the street, and that he so informed Anderson, the appellant's attorney in fact, and that the latter said to him that he need not so extend it. His testimony is supported by the circumstances of the case. The agent was around the building while it was being constructed, and no complaint was made as to its length until after the commencement of the action. Including the cornices, the building is 111 feet 4 inches. Measured on the foundation line. It is 110 feet 6 inches. One of the appellant's witnesses stated that, when constructed, \$75 would have covered the expense of extending the base of the building to the exterior lines of the lot. In the light of the record, we cannot say that the learned trial court committed error in the finding quoted.

It is next insisted that the building was not completed within the time fixed by the contract, and that the appellant should have been allowed an offset in damages. The court found: "It was contended by the defendant that the building was not ready for occupancy on December 15, 1908, the time fixed in the contract, but the court finds that there is no competent evidence that the defendant sustained any damage by reason thereof, and that the delay in that behalf was due largely to the inclemency of the weather." The respondent testified that the building was ready for occupancy on December 15th, the date fixed for its completion, and that the appellant took possession January 22d following. "Damages," in legal acceptance, means compensation for the loss suffered or the injury sustained. The flats were built for renting. There is no evidence that there were any applications for rooms before the completion and delivery of the building. Damages will not be awarded unless they are based on something more substantial than guess, assumption, or speculation. *McCarthy v. Gallagher*, 4 Misc. Rep. 188, 23 N. Y. Supp. 884. Interest was allowed only from February 15, 1909, the date of the filing of the lien. This, we think, afforded the appellant ample compensation for the delay, if any, in the completion of the building.

It is next urged that the appellant should have been allowed a large sum as damages

arising from defective material and bad workmanship. The appellant's witnesses fixed the damages from these sources from \$2,000 upwards. The court found that "the material and labor used in its construction were practically the same to all intents and purposes as that used in the construction of the Mays building of which it was to be a duplicate; that the defendant has failed to sustain any claim for damages by reason of either the labor or material used in the construction thereof." If we accept the testimony of the appellant's witnesses, both the material and workmanship were inferior to that in the Mays building. Indeed, it appears from their testimony that the quality of the workmanship is extremely bad. If, however, we adopt the testimony of the respondent's witnesses, the finding of the court is correct. No claim was made for much the larger part of the damages now claimed until after the commencement of this action. The trial court saw and heard the witnesses, and this is peculiarly a case where that advantage should turn the scale in favor of its findings. We have carefully read the testimony, comprising more than 400 pages exclusive of the exhibits, and are constrained to concur in the findings of fact of the learned trial court. A more detailed review of the evidence would be of no value either to the parties to the suit or to the bar.

Finally, it is said that the motion for a new trial was heard and decided in Pierce county, and that this was error. The record shows that the motion was denied in King county in open court. Accepting, however, the statement of counsel for the appellant, it was error without prejudice. The case is tried here *de novo*. The motion for a new trial was properly denied. *Shaw v. Spencer*, 57 Wash. 587, 107 Pac. 383.

The judgment is affirmed.

RUDKIN, C. J., and FULLERTON, PARKER, and MOUNT, JJ., concur.

(61 Wash. 171)

NAPPLI v. SEATTLE, R. & S. RY. CO.
(Supreme Court of Washington. Dec. 12, 1910.)
1. STREET RAILROADS (§§ 85, 117*)—STREET CROSSING—USE.

The right of a street car approaching a street crossing and the driver of a team to use the crossing are equal, the driver of the vehicle under ordinary circumstances being justified in proceeding to cross in the face of the approaching car only when he has reasonable ground to believe that he can pass in safety if both he and those in charge of the car act with reasonable regard to the right of each other; the vehicle driver, however, having no right to calculate close chances as to his ability to reach the track before the car, and whether the chances were close under the particular circumstances is ordinarily a question for the jury.

[Ed. Note.—For other cases, see *Street Railroads*. Cent. Dig. §§ 193-195, 249, 257; Dec. Dig. §§ 85, 117.*]

2. STREET RAILROADS (§ 117*)—CROSSING ACCIDENT—CONTRIBUTORY NEGLIGENCE.

Plaintiff endeavored to drive over certain street car tracks at a crossing in front of an approaching car, and was struck before he got across. The track approaching the crossing was on a heavy downgrade, and the car which struck him was from 100 feet to a block away when he got on the track, and was approaching at the rate of 60 miles an hour, in violation of a city ordinance limiting the speed to 12 miles. Held, that plaintiff had the right to assume that the car was under control, and when it was that far away that he would be in no danger, and was therefore not negligent as a matter of law.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 249, 257; Dec. Dig. § 117.*]

3. STREET RAILROADS (§§ 99, 117*)—CROSSING ACCIDENT—RIGHTS OF TRAVELERS.

That a street car is approaching a crossing in plain sight does not determine the right of a traveler to cross the street. Such right depends on what a reasonably careful man would do under the circumstances. If the car is so close and coming so fast that it cannot be stopped in time to avoid a collision, and such fact is known or should have been observed, then the traveler attempting to cross would be negligent as a matter of law, but if the car is far enough away to be stopped after the person has passed on the track, or when a reasonably careful man would undertake to cross ahead of it, then it could not be said as a matter of law that he was negligent in attempting to do so.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 209-216, 249, 257; Dec. Dig. §§ 99, 117.*]

Department 1. Appeal from Superior Court, King County; John A. Shackleford, Judge.

Action by Frank Nappi against the Seattle, Renton & Southern Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Morris B. Sachs, for appellant. William C. Keith, for respondent.

MOUNT, J. The defendant prosecutes this appeal from a judgment rendered on the verdict of a jury in an action for personal injuries. The injury occurred to the plaintiff on April 6, 1908, between the hours of 5 and 6 o'clock in the evening. He was driving a team of horses hitched to an express wagon across the tracks of the appellant company, in Seattle, where Dearborn street crosses Rainier avenue, when one of the defendant's cars ran upon him, killed his team, and severely injured the plaintiff. The complaint alleged that the car was running at an excessive rate of speed. The defense was a general denial, and also that the plaintiff was guilty of contributory negligence. The action was tried to the court and a jury, and verdict was returned for the plaintiff in the sum of \$3,500. After motion for new trial was denied, judgment was entered upon the verdict, and defendant has appealed.

Several assignments of error are made, but the only question upon which a reversal is urged is that the court should have directed a verdict for the defendant. It appears that the appellant operates a line of double

track electric street railway, on Rainier avenue in the city of Seattle. This avenue runs north and south. On the west of the railway track the street is planked and used for general travel. On the east of the tracks the street is not improved and is not used. Dearborn street crossed Rainier avenue at right angles. From Dearborn street north, Rainier avenue is straight for four blocks to Jackson street, where another electric street car line crosses Rainier avenue, and where cars always come to a full stop. On Rainier avenue there is a steep downgrade—about 9 per cent.—all the way from Jackson street south to Dearborn street. On the evening of April 6, 1908, about 5:30 p. m., when it was daylight, the respondent was driving south on the west side of the railway tracks on Rainier avenue between Jackson and Dearborn streets. When he came to Dearborn street, he attempted to cross east over the railway tracks when he was run down by the car. He testified that, before he came to the crossing, he looked back three different times to see if the car was coming, and saw nothing; that he looked back the last time when he was within 25 feet of the crossing, and saw no car; that when he drove upon the street car tracks, one wheel of his wagon dropped into a hole between the tracks, and while his horses were pulling on the wagon the car struck him. Some witnesses testified on his behalf that, when respondent drove upon the track, the car was a block away; others, that it was 100 feet away, coming downgrade from Jackson street to Dearborn street and running at 60 miles an hour. It is agreed that the city ordinance prohibited a greater rate of speed than 12 miles per hour for street cars within the business and settled residence district of the city.

The question in the case is whether the court should have said, as a matter of law, that the respondent was guilty of contributory negligence in crossing the street car tracks as he did. If respondent drove his team in front of a car which he knew, or should have known, was coming down upon him and could not be stopped, he is himself negligent and cannot recover. The rule we think is correctly stated in *McCarthy v. Consolidated Ry. Co.*, 79 Conn. 73, 63 Atl. 725, and cited by the appellant as follows: "At highway crossings, a street car has no paramount right as against any other vehicle approaching on the cross street. The right attaching to each is equal, and must be exercised with due regard to that attaching to the other, and so as not to interfere with or abridge it unreasonably. It is not necessarily the duty of the driver of an approaching team to wait until the street car has passed, nor is it necessarily his right to push on and cut off its advance. Each party must act reasonably under all the attending circumstances. The driver of an ordinary vehicle can, under ordi-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

nary circumstances, be justified in proceeding, at a highway crossing, to go over a street railway in the face of an approaching car, when, and only when, he has reasonable ground for believing that he can pass in safety if both he and those in charge of the cars act with reasonable regard to the rights of each other. The duty to slow up or stop, if necessary to prevent a collision, rests equally on each party. In practical effect these doctrines give any railroad car approaching a highway crossing what amounts to a right of precedence. This follows from the rule respecting contributory negligence. No man has the right to calculate close chances as to his ability to reach the track before the car, and throw the risk of injury on the other party. As to whether the chances were close, however, and the railroad company was not the one really in fault, or whether the party injured did not push forward under circumstances of emergency which left him no time for calculation, will ordinarily be a question for the jury."

In this case, assuming that the respondent should have seen the car before he drove upon the track because the car was evidently in plain view at that time, it was 100 feet or possibly a block away. Under these circumstances, we think it cannot be said as a matter of law that the respondent should not have attempted to cross over the tracks. He had a right to assume that the car was under control, and, when the car was that far away, that he would be in no danger, and might pass in safety without risk of danger. At any rate the question whether he was negligent in attempting to cross the track when the car was that far away was a question for the jury. Street crossings are to be used, and the mere fact that an approaching car is in sight does not determine the right of a traveler to cross. His right depends upon what a reasonably careful man would do under the circumstances. If the approaching car is so close and coming so fast that it cannot be stopped in time to avoid a collision, and such facts are or should be observed, then a person attempting to cross may be said to be negligent as a matter of law. But where an approaching car is far enough away to be stopped after a person has passed upon the tracks, or when a reasonably careful man would undertake to cross ahead of it, then it cannot be said as a matter of law that a person attempting to cross is negligent. This rule was substantially applied in *Denny v. Seattle, Renton & Southern Ry. Co.*, 111 Pac. 450.

The question of negligence of the respondent was therefore properly referred to the jury, and the judgment must be affirmed.

RUDKIN, C. J., and PARKER, FULLERTON, and GOSE, JJ., concur.

(61 Wash. 154)

LEWIS v. CONTINENTAL CASUALTY CO.

(Supreme Court of Washington. Dec. 10, 1910.)

INSURANCE (§ 665*) — ACCIDENT POLICY — CAUSE OF DEATH—INJURIES—EVIDENCE.

In an action on an accident policy, exempting death resulting wholly or in part directly or indirectly from drowning, evidence that certain persons aboard a steamer, who went down with insured at the time when she died or was killed, met with personal bodily injuries when the vessel sank, was insufficient to raise a presumption that insured perished because of personal bodily injuries, and not by drowning.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 665.*]

Department 1. Appeal from Superior Court, King County; R. B. Albertson, Judge.

Action by C. S. Lewis against the Continental Casualty Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Manton Maverick, Giel, Hoyt & Frye, and R. L. Blewett, for appellant. • B. B. Moser, E. E. Simpson, and H. T. Granger, for respondent.

FULLERTON, J. The appellant, an accident insurance company, issued a policy of insurance to one Mabel B. Lewis, whereby it promised that in the event the insured, while the policy was in force, should receive personal bodily injury, through external, violent, and purely accidental causes, and death should result necessarily and solely from such injury within 90 days after the accident, the company would pay the beneficiary named in the policy the sum of \$2,500. The policy contained certain conditions, among which was one to the effect that it did not "cover death * * * which results wholly or in part, directly or indirectly, * * * from drowning." After procuring the policy the appellant took passage on the steamer Columbia, from San Francisco, Cal., to Portland, Or. While the steamer was en route, and some 15 miles off the coast of California, it collided with another steamer, known as the San Pedro, and sank. The insured perished in the accident, which occurred during the life of the policy. The respondent was the husband of the insured, and was named in the policy as the beneficiary thereof. After his wife's death he made proof thereof to the appellant company, and demanded payment of the sum named in the policy. Payment was refused, and this action was begun to recover the same. The cause was tried before the court sitting with a jury, and resulted in a verdict and judgment in favor of the respondent. This appeal was taken therefrom.

While a number of questions are presented by the record, we have found it necessary to notice but one, since we conclude it to be

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep't Indexes

fatal to the respondent's right to recover. By the terms of the policy it was incumbent upon the respondent to allege and prove that his wife received a personal bodily injury, through external, violent, and purely accidental causes, and that her death resulted necessarily and solely from such injury. The evidence introduced to meet this requirement was the evidence of the respondent himself. He testified that, immediately following the collision, some person alarmed the sleeping passengers, directing them to take life preservers and go on deck; that he and his wife obeyed the call, ascending to the deck by a stairway that took them to the stern of the vessel; and that just as they reached the deck the vessel sank headfirst into the sea. He testified that up to that time his wife had received no personal bodily injury of any kind, and that she went down with the vessel and was seen no more; her body never having been recovered. He testified further, however, that as the vessel sank he was within reaching distance of his wife; that he was thrown by the water against the hurricane deck and received severe bodily injuries; that of the passengers rescued with him and brought to shore in the same lifeboat, one, a man, died on the way in; that most of the others in the boat were more or less hurt; and that he saw still others in the hospital who were injured.

It is the contention of the respondent that it is reasonably inferable from the evidence that the insured met with a personal bodily injury at the time of the sinking of the vessel, and that such bodily injury was the proximate cause of her death, or at least that the evidence tended to prove that fact, and it was for the jury to draw the deduction. But we think these proofs fall far short of making a case for the respondent. The fact that certain persons aboard the steamer met with personal bodily injuries when the vessel sank might raise a presumption that another person who had received bodily injuries obtained them from the same cause, were the causes of the injuries a matter of inquiry; but we think it can raise no presumption that another person perishing by the accident, the cause of whose death is unknown, perished because of having received personal bodily injuries, especially since there was an all-sufficient cause for the death aside from personal bodily injuries, namely, by drowning. We have not felt it necessary to review the cases cited by the respondent to sustain his contention. In the main they are cases where it was shown beyond controversy that the insured did receive a personal bodily injury, and the question was whether the injury or some intermediate agency was the proximate cause of death. Manifestly these cases are not parallel to the case at bar. Here there were

no competent proofs of injury; much less was it proven that the death of the insured resulted necessarily and solely from such injury.

The judgment appealed from is reversed and remanded, with instructions to enter a judgment in favor of the defendant, appellant in this court.

RUDKIN, C. J., and GOSE, CHADWICK, and MORRIS, JJ., concur.

(61 Wash. 103)

MURKOWSKI v. MURKOWSKI et ux.

(Supreme Court of Washington. Dec. 7, 1910.)

1. CANCELLATION OF INSTRUMENTS (§ 10*)— RIGHT TO CANCELLATION—REMEDY AT LAW.

Where the grantor in a deed to his interest in a blacksmith shop was under no disability or infirmity, and executed the deed knowing its effect, with full intent to divest himself of the title, and in consideration of a contract with the grantee which was collateral, and in no sense an integral part of the deed, whereby the grantee agreed to pay him \$6 a week as long as he (the grantor) might live, and that if the grantee should sell the shop he would pay the grantor \$1,000, upon which the weekly payments should cease, the grantor's remedy upon the grantee's refusal to carry out his contract is not in equity to cancel the deed for fraud, but an action at law to enforce the consideration.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 18-22; Dec. Dig. § 10.*]

2. CANCELLATION OF INSTRUMENTS (§ 57*)— FAILURE OF MINDS OF PARTIES TO MEET.

Plaintiff, who owned a half interest in a blacksmith shop, conveyed his interest therein unconditionally to defendant, who owned the other half interest, in consideration of a collateral contract between the parties, whereby defendant agreed to pay plaintiff \$6 a week as long as plaintiff might live, and that if defendant should sell the blacksmith shop he would pay plaintiff \$1,000, upon which the weekly payment should cease, and plaintiff agreed to work for defendant in the blacksmith shop as long as he might be able to perform such work. The minds of the parties did not meet on the effect of the collateral agreement, defendant acting upon the belief that the \$6 a week was to be paid only when plaintiff worked, while plaintiff believed when the contract was executed that he was to receive \$6 a week in any case. Defendant advanced to plaintiff \$350 for use in a divorce action. Neither party would have executed the contract had he not understood its effect as he did. *Held*, that the minds of the parties not having met as to the collateral agreement, the whole transaction—deed and contract—may be set aside, reserving a lien on plaintiff's one-half interest in the property in favor of defendant for the \$350 advanced, but in view of the express willingness of plaintiff to accept \$1,000 if the property had been sold to a third person, and his declaration as a witness in his own behalf that he would take \$1,000 in settlement of his claim, defendant, being the owner of an established business upon as well as an undivided interest in the property, should be allowed to retain it if he so desires, upon payment into the registry of the court of \$1,000, subject to plaintiff's order within 60 days after the remittitur goes down.

[Ed. Note.—For other cases, see Cancellation of Instruments, Dec. Dig. § 57.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep't Indexes

Department 2. Appeal from Superior Court, King County; Ralph Kauffman, Judge.

Action by Jacob Murkowski against Louis Murkowski and wife. From a judgment for plaintiff, defendants appeal. Reversed and remanded, with directions.

Faben & Kelleran, for appellants. Aust & Terhune, for respondent.

CHADWICK, J. In July, 1898, plaintiff and defendant, Louis Murkowski, who will be hereafter referred to as the defendant, operated a blacksmith shop at Enumclaw, King county. Whether they were partners as asserted by plaintiff, or plaintiff was employed by the defendant upon a division of the earnings, is uncertain. About the time their relations began, plaintiff advanced the amount due upon a contract to purchase the three lots which were occupied by the blacksmith shop, and they became equal owners of the land. In the fall of 1907, plaintiff and his wife, the stepmother of defendant, had some trouble over property; plaintiff asserting his rights by an action at law or in equity. His wife retaliated by bringing an action for divorce, which was granted. The blacksmith shop—that is, an undivided one-half interest—was decreed to be the property of the plaintiff in his sole and separate right. Thereafter, and, as we think the evidence fairly shows, by the mutual understanding and consent of both plaintiff and defendant, and with no contemplated fraud or advantage of the one over the other, but with the intent to defeat any possible chance of the wife and her children by a former marriage sharing in the property set over to plaintiff by the decree, the parties caused a deed, absolute in form, to be prepared, which plaintiff executed, conveying the fee-simple title unconditionally to defendant. At the same time a contract in writing was entered into, whereby the defendant, as party of the first part, agreed that he would "pay to the party of the second part the sum of six dollars per week as long as he may live; provided, however, that if the party of the first part should sell his blacksmith shop, then he agrees to pay to the party of the second part the sum of \$1,000, and the payment of six dollars per week shall then cease;" and the plaintiff, as party of the second part, agreed to "work for the party of the first part in his blacksmith shop, as long as he is able to perform such work." On January 18, 1908, plaintiff remarried his divorced wife. From the time the deed and contract were executed, the parties acted thereunder until the summer of 1909, when plaintiff, his wife having in the meantime been informed of the transaction, quit working for defendant, asserting his sickness and inability to work, but demanding the \$6 per week as provided in the contract. Defendant denied his liability unless plaintiff actually worked for him, and in addition thereto asserted plaintiff's health and

ability to work. In the due progress of the family row, plaintiff brought this action to set aside the deed as fraudulent. Defendant, answering, denied the alleged fraud, and set up a breach of the contract. The trial judge made no findings of fact, but decreed that the deed be canceled as fraudulent; conditioned, however, upon the payment of the sum of \$350 by plaintiff into the registry of the court for the use of the defendant. The testimony revealed the fact that defendant had advanced that sum for the benefit of plaintiff in the divorce suit, and the possibility that it was a part of the consideration for the deed. Defendants have appealed.

It is contended by the appellant, and we think correctly, that there was no evidence sufficient to warrant the court in setting aside the deed as a fraud upon respondent. He executed it, knowing its effect, and with full intent to divest himself of the title. He was under no disability or infirmity of mind or body. He made the deed in consideration of the contract, which was collateral and in no sense an integral part of the deed. We think that, where a deed is so made, the remedy is not in equity to cancel the deed, but the enforcement of the consideration must be sought at law. *Ford v. Jones*, 22 Wash. 111, 60 Pac. 48; *Goodrich v. Kimble*, 49 Wash. 516, 95 Pac. 1084; *Florin v. Florin*, 49 Wash. 37, 94 Pac. 658; *Balam v. Rouleau*, 52 Wash. 339, 100 Pac. 833; *McClellan v. O'Conner*, 47 Wash. 121, 91 Pac. 562. At this point, however, we are met by a fact which seems to us to be evident from a careful reading of the testimony. The minds of the parties did not meet on the effect of the collateral agreement. They made their contract in the Polish language. Respondent speaks English brokenly, while the appellant seems to suffer some impediment of speech. Having made their contract in their own tongue, it was reduced to writing by a scrivener. Appellant believed, and acted upon the belief, that the six dollars a week was to be paid only in the event of labor performed and services rendered by the respondent; whereas respondent believed at the time the contract was executed, that he was to receive the sum of six dollars a week as long as he lived. Both parties seem honest in their belief, and we do not think either of them would have entered into the contract if he had not so understood it. The whole transaction, deed and contract, may be set aside for this reason, reserving a lien in the sum of \$350 as the one-half interest in the property in favor of the appellant.

However, considering the general equities of the case, and the expressed willingness of the respondent to accept the sum of \$1,000 if the property had been sold to a third party, and his declaration when a witness in his own behalf that he is willing to take \$1,000 in settlement of his claim, we think appellant, who is the owner of an established business upon, as well as an undivided half

interest in, the property, should be allowed to retain it if he so desires. Therefore, if within 60 days after the remittitur goes down the appellant shall pay into the registry of the court the sum of \$1,000, subject to the order of respondent, the title of the property will be confirmed in him. Otherwise, the decree will be modified in that the deed is set aside, but subjecting the property to a lien in favor of appellant in the sum of \$350, and providing for its enforcement.

We see no reason, except that the parties are of the same blood and possibly urged on by others who have married into the family, why this controversy should have ever reached the courts, or why either party should pay the costs on appeal.

The case will be remanded, with instructions to enter such a decree as may be necessary to meet these suggestions. Neither party will recover costs in this court.

RUDKIN, C. J., and DUNBAR, CROW, and MORRIS, JJ., concur.

(61 Wash. 694)

COLER v. CENTER.

(Supreme Court of Washington. Dec. 12, 1910.)

ADVERSE POSSESSION (§ 13*)—REQUISITES.

Adverse possession, to supersede a record title, should be open, notorious, and continuous for the required period.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 65-76; Dec. Dig. § 13.*]

Department 1. Appeal from Superior Court, Pierce County; M. L. Clifford, Judge.

Action by W. N. Coler, Jr., against Lewis W. Center. Judgment for plaintiff, and defendant appeals. Affirmed.

A. H. Garretson and Jesse Thomas, for appellant. Frank D. Nash, for respondent.

PER CURIAM. This action was brought by the respondent under section 785 of the Code (Rem. & Bal.) to recover from the appellant the possession of certain lands situated in Pierce county, of which the respondent alleged he was the owner in fee, to quiet his title thereto, and to enjoin the defendant from asserting rights therein or otherwise interfering with the property. In his complaint the respondent deraigned his title from the government of the United States, showing a complete record title to the property in himself. The appellant in defense pleaded the statute of limitations, alleging that he had been in the open, notorious, and exclusive possession of the property under a claim of right for a period of more than 10 years next preceding the commencement of the action. The court on the trial, which was had without the intervention of a jury, found for the respondent, and entered judgment in his favor. This appeal followed.

There is no serious difference between the parties over the rules of law involved. The questions discussed are principally questions of fact, and these questions we think the trial court correctly resolved in favor of the respondent. The respondent's evidence shows a complete record title to the property in himself, and we think the appellant failed to show any such open, notorious, and continuous possession for the required period as would ripen into a right by adverse possession. It would serve no useful purpose to review the evidence. It is sufficient to say that we have examined it, and are satisfied with the conclusions drawn therefrom by the trial judge.

The judgment is affirmed.

(88 Kan. 615)

Ex parte MORAN.†

(Supreme Court of Kansas. Dec. 10, 1910.)

(Syllabus by the Court.)

CONTEMPT (§ 35*)—EXECUTORS AND ADMINISTRATORS (§ 85*)—HABEAS CORPUS (§ 20*)—CONCEALMENT OF DECEDENT'S PROPERTY—IMPRISONMENT FOR CONTEMPT.

Under sections 3632 and 3636 of the General Statutes of 1909, the probate court has authority to examine for concealed or embezzled property belonging to an estate and enforce its return to the administrator or other proper custodian, and if the person so embezzling or concealing such property refuse to comply with the order to restore the same, he may be imprisoned as for contempt of court and when so imprisoned, he will not be discharged by a writ of habeas corpus.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. § 104; Dec. Dig. § 35.* Executors and Administrators, Cent. Dig. § 337; Dec. Dig. § 85.* Habeas Corpus, Cent. Dig. § 18; Dec. Dig. § 20.*]

Application of George E. Moran for a writ of habeas corpus. Writ denied.

H. M. Jackson and Z. E. Jackson, for petitioner. J. L. Berry, B. F. Hudson, and Charles T. Gundy, for respondent.

GRAVES, J. This is an application for a writ of habeas corpus by George E. Moran who is imprisoned in Atchison county for contempt of court. He claims that the order of imprisonment is void.

It appears that the petitioner was called to Atchison by his brother, John H. Moran, who was seriously sick at that place. While there the brother, John H. Moran, died. His property, or a part of it, was left by the deceased in the possession of the brother, George E. Moran. The widow who had separated from her husband being apprehensive as to the safety of the property belonging to the estate of her deceased husband, began a proceeding against George E. Moran under sections 3632 and 3636 of the General Statutes of 1909, which read: "Upon complaint made to the probate court

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

† Rehearing denied.

by the executor, administrator, creditor, devisee, legatee, heir or other person interested in the estate of any deceased person, against any person suspected of having concealed, embezzled or conveyed away any money, goods, chattels, things in action or effects of such deceased, the said court shall cite the person suspected forthwith to appear before it and to be examined on oath or affirmation touching the matters of the said complaint. If upon such examination the probate court shall be of opinion that the person accused is guilty of either having concealed, embezzled, or conveyed away any moneys, goods, chattels, things in action, or effects of the deceased, as aforesaid, the court may compel the delivery thereof, by attachment, to the executor or administrator or other person entitled to receive the same." The court held an examination and found that the accused was guilty as charged, and ordered him to return the concealed property to the administrator of John H. Moran, deceased. Failing to comply with the command, an order of attachment was issued and the accused was committed for contempt until the order should be obeyed. Thereupon this application for a writ of habeas corpus was made; it being contended that the order of the court was without jurisdiction and void.

It is claimed that under the statute the probate court may hold an examination as to the concealment of property, but has no power to enforce its production and return by attachment. We do not so regard the law. The primary and principal purpose of this statute is to protect and preserve the property of estates that it may not be lost. The probate court is required, when property is withheld from the administration or other proper custodian, to cause it to be restored to such person. This is a convenient and appropriate tribunal for such purpose, and it has been clearly and expressly authorized to perform this duty. It does not seem reasonable that such a duty would be imposed upon the probate court without power to enforce the necessary orders to accomplish that end. Without such power, the statute would be useless. What effect, other than the return of the property, the decision of the court in such proceeding would have as to the title to the property, whether the order would be conclusive or not or how the rights of the parties in other respects might be affected, need not be determined here. The scope of this statute has been to some extent stated in *Humbarger v. Humbarger*, 72 Kan. 412, 83 Pac. 1005, 115 Am. St. Rep. 204, and *Hartwig v. Flynn*, 79 Kan. 595, 100 Pac. 642. The statute positively authorizes the use of an attachment with which to enforce the order and this is what the court did. It seems that the court pursued the remedy

prescribed by statute and nothing more. If the law is valid, the court was right; the law is not assailed as invalid, and we do not know of any reason why it should be so held. We are unable to find that the court committed error in issuing the writ of attachment and do not feel authorized to issue the writ of habeas corpus as requested.

The writ is denied. All the Justices concurring.

(83 Kan. 484)

QUINTON v. ADAMS.†

(Supreme Court of Kansas. Dec. 10, 1910.)

(Syllabus by the Court.)

HOMESTEAD (§ 163*)—ABANDONMENT—EVIDENCE.

Under the facts stated in the opinion, it is held that a tract of land is not occupied as a residence by the family of the owner, so as to exempt it from sale upon execution for his debts.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. § 320; Dec. Dig. § 163.*]

Johnston, C. J., dissenting.

Appeal from District Court, Shawnee County.

Action by Nena H. Quinton against P. H. Adams. Judgment for defendant, and plaintiff appeals. Reversed.

Edwin A. Austin, for appellant. J. B. Larimer, for appellee.

BURCH, J. Nena H. Quinton recovered a judgment against P. H. Adams and caused his farm in Menoken township, Shawnee county, to be sold for its satisfaction. Motions to confirm and to set aside the sale were made, and after a hearing the district court set aside the sale on the ground that the land is the homestead of the judgment debtor. The creditor appeals. The hearing was had in June, 1909, upon affidavits, and the controversy is presented to this court in the same form that it was to the district court.

In 1899 the appellee lived on the farm with his wife and minor son. Prior to that time they had been in the habit of coming to Topeka for the winter and going back to the farm in the spring. In 1899, appellee and his family removed to Topeka and have never returned to the farm to reside. At first they lived at No. 308 West Sixth street, Topeka, but soon afterward moved into the dwelling house at 621 Topeka avenue, then owned by Sara H. Quinton, the mother of Mrs. Adams. They have ever since resided there. Later in 1899 the appellee went to New Mexico on some cattle business, and, beginning with that year, was in New Mexico much of the time for three years. During that period he was back and forth between Topeka and New Mexico several times. About five years before the hearing he was

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Index.

† Rehearing denied.

employed, from month to month, as a salesman at the Mills Company's store in Topeka, which employment still continues. In 1906, while the son was still a minor, the property at 621 Topeka avenue was deeded to him by Sara H. Quinton. During appellee's absence from the farm it has been rented, sometimes for crop rent and sometimes for cash rent. In 1907 he leased it for three years, beginning March 1, 1908, to John M. Skinner. Skinner has subleased the premises to a tenant who occupies the buildings. No reason of any kind is offered for leaving the farm, and no hint is given of what the appellee expected to do in town. Mrs. Adams testifies at length in the case, but withholds all information as to the character of the arrangement whereby she and her husband and son jointly occupied the Topeka avenue property with her mother. She says the arrangement was made at the request of her mother, was "temporary," and was mutually satisfactory to all parties. The appellee says the arrangement was made at the request of his wife's mother, and was "understood to be temporary and liable to be terminated by defendant's removing with his family to said homestead on said farm." Witnesses for the appellant undertake to state the facts. Mrs. Quinton bought the house and fixed it up for a home for appellee and his family, they to furnish her a home with them and take care of her there. Mrs. Quinton had one room for herself and the appellee and his family had the remainder of the house, which was fitted up and furnished for permanent occupancy. The appellee and his wife say in general phrases that "nearly all of the time" and for "a large part of the time" he has had horses and other personal property on the land, and that he retained the right to use and occupy a portion of it. These statements are met by definite evidence of the facts. When the appellee first came into town some household goods were left at the farm, but when he moved into the Quinton house they were all brought there and used to furnish the new quarters. At least as early as 1903, and probably much earlier, the appellee had no personal property of any kind left at the farm, particularly no tools, implements, or stock necessary on a farm, and he never reserved or retained for himself any rooms or portions of the dwelling, barn or buildings necessary to residence there. Immediately after appellee established himself at No. 621 Topeka avenue he engaged in the New Mexico venture. He stated to his wife's brother that he had gone into the cattle business with W. W. Mills; that they had a lease on several thousand acres for several years; that he expected to make some money, and that that was the only thing he could do because his wife would not go back to the farm—would not live there. Two witnesses relate conversations with appellee's wife, in his presence, in which she said they had left the farm for good,

and never intended to return to it. Appellee does not deny these statements and conversations. He merely says he has never expressed an intention to abandon the homestead, and has always intended "ultimately" to return to it. His wife merely says that she has never stated that the land was not the homestead of herself and family and has always claimed the farm as her permanent residence. When the appellee withdrew from New Mexico he did not go back to the farm. For two or more years, and until he went to work for the Mills Company, he gives no account of himself. Why he was detained from returning to his homestead is not stated. At no time was it leased for longer than a year until the Skinner lease was given; and hence he could have obtained possession had he so desired.

Being unable, during the long, blank period mentioned, to mature his persistent intention to return to his farm, and thereby terminate his "temporary" absence from it, the appellee changed his occupation a second time, at least. He secured "temporary" employment, "liable to be terminated at any time," with the Mills Company. This precarious tenure, however, had lasted for five years at the time of the trial. Although it can be terminated any month, the appellee expresses no purpose to resign this employment and no fact, situation, or relation is offered in evidence indicating even a remote probability that it will come to an end, or that he will ever go back to the farm.

The farm itself is no longer a desirable one. The appellee has been willing to sell it but has been unable to find a purchaser for it, because it has been seriously damaged by floods. Besides testifying directly to their intention the appellee and his wife offer in evidence some self-serving acts and declarations. Two witnesses say they have frequently heard appellee express an intention to return to the farm. He has voted in Menoken township and not elsewhere, and years ago paid some tuition for his son's attendance at the Topeka schools. Such tuition, however, was rarely demanded by the school authorities. This evidence is quite consistent with a purpose to hold creditors at bay, while maintaining a settled residence in town.

The Constitution and statutes of this state exempt from sale on execution a homestead "occupied as a residence by the family of the owner." Const. art. 15, § 9 (Gen. St. 1909, § 235; Gen. St. 1909, § 3646). The affairs of men are too varied to permit them to occupy their homesteads every moment of time. Duty, necessity, or even pleasure may occasion extended absences which will not defeat the exemption. But it must appear from the circumstances that an absence, in fact, is genuinely temporary, or the homestead privilege is lost. Otherwise the words of the Constitution and statute, which require not only occupancy but occupancy as a family

residence, would be deprived of all force. All the evidence considered, the appellee's claimed intention to occupy the land in controversy as a residence for his family is refuted, and an absence is disclosed which is incompatible with occupancy for residence purposes, as the law contemplates.

The judgment of the district court is reversed and the cause is remanded, with direction to confirm the sheriff's sale.

MASON, SMITH, PORTER, GRAVES, and BENSON, JJ., concurring. JOHNSTON, C. J., dissenting.

(33 Kan. 543)

WARNER et al. v. WARNER et al.

(Supreme Court of Kansas. Dec. 10, 1910.)

(Syllabus by the Court.)

1. DISMISSAL AND NONSUIT (§ 7*)—SUBMISSION—RIGHT TO DISMISS.

Under the facts as shown by the record, where the plaintiff in an action has submitted his case, by introducing his evidence and filing a written brief, and the court has taken the case under advisement, and has considered the merits thereof, the plaintiff is not entitled as a matter of right to dismiss his action without prejudice.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 15-22; Dec. Dig. § 7.*]

2. COSTS (§§ 3, 177*)—FEES OF GUARDIAN AD LITEM.

Costs in an action were not recoverable at the common law, and before they can be awarded to either party under our Code some warrant therefor must be found in the statute, and a statute which provides for the allowance of costs does not authorize the taxing of any fees for guardians ad litem for the prevailing party as costs against his opponent, there being no statutory provision therefor.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 1, 4, 5, 695; Dec. Dig. §§ 3, 177.*]

Appeal from District Court, Butler County.

Action by Lincoln Warner and others against W. A. Warner and others. Judgment for defendants, and plaintiffs appeal. Modified and affirmed.

N. A. Yeager and H. C. Sluss, for appellants. Hamilton & Leydig, for appellees.

SMITH, J. This case, being an action to set aside a will, was tried to the district court of Butler county, without a jury, on June 15, 1908, and after the evidence of each party had been introduced the records of the court show the following proceedings:

"Thereupon the court suggested that the cause be submitted on written briefs, and, the parties consenting thereto, the court gave the plaintiffs 60 days in which to submit their written brief and argument to the court, or the judge thereof, and to serve a copy thereof on the attorneys for the defendants, and if the court so desired, after considering the brief of the plaintiffs, the defendants should have a reasonable time thereafter in

which to submit written briefs in reply to the brief of the plaintiffs, and the further hearing of said cause was continued until the November, 1908, term of said court. On August 12, 1908, at an adjourned day of the June term of said court, an extension of time for filing plaintiffs' brief was granted, and they were given until within a reasonable time prior to the November, 1908, term of said court to submit their written brief. Now, on this 19th day of November, 1908, said plaintiffs, by their attorneys, filed their motion and moved the court to dismiss said action without prejudice to a new action, and said motion was passed to a later day in the term. Now afterwards, to wit, on this 27th day of November, 1908, comes on for hearing the motion of the plaintiffs to dismiss said action without prejudice to a future action. All the parties to said cause appearing by their respective counsel, and after argument by counsel, and the court, being fully advised, finds that said cause was finally submitted for decision and judgment on the written brief and argument of the counsel of the plaintiffs prior to the filing of said motion to dismiss without prejudice, and the court takes the matter under advisement and continues the further hearing of said cause until January 4, 1909, the same to be an adjourned day of said November, 1908, term of said court.

"Now, on this 4th day of January, 1909, being an adjourned day of the November, 1908, term of said court, comes on to be heard the motion of the plaintiffs to dismiss said cause without prejudice, and the court, being fully advised in the premises, finds that said cause was fully and finally submitted on its merits by said plaintiffs prior to the time said motion to dismiss was filed, and the court overruled said motion to dismiss without prejudice, to which ruling of the court the plaintiffs duty objected and excepted. Thereupon said cause came on for final judgment and decision on its merits, and the court, being fully advised in the premises, finds that the writing purporting to be the last will and testament of Filena Warner, deceased, as admitted to probate, in the probate court of Butler county, Kansas, is the valid last will and testament of said Filena Warner, deceased, and that said plaintiffs should not recover in said action.

"It is therefore considered, ordered, and adjudged by the court that the prayer of the said plaintiffs' petition be and the same is hereby denied, and that said defendants have and recover judgment against said plaintiffs for their costs, taxed at \$383.30. To each and all of the rulings, decisions, and judgments of the court the said plaintiffs objected and duly excepted. Whereupon the respective guardians ad litem each moved the court that an allowance be made by said court for

fees for services as such and asked the court to tax said fees up as costs in said action against said plaintiffs. And the court being fully advised in the premises allows the following amounts: To T. A. Kramer, \$185; to E. N. Smith, \$35; to C. A. Leland, \$35; to E. D. Stratford, \$35. It is therefore considered, ordered, and adjudged by the court that \$35 of the sum allowed to T. A. Kramer be taxed to the plaintiffs as costs, and that \$150 of the allowance to said T. A. Kramer be taxed against the estate of said Filena Warner deceased, and that the sums allowed respectively to C. A. Leland, E. N. Smith, and E. D. Stratford, being \$35 each, be taxed as costs against said plaintiffs; to which ruling of the court taxing said guardians ad litem fees as costs and against said plaintiffs and to each and all of said findings, rulings, orders, and judgments said plaintiffs duly objected and excepted. And afterwards, on the same day, the said plaintiffs filed and presented their motion to set aside the judgment and decision of the court herein rendered, and for a new trial, and the court after hearing the argument of counsel and being fully advised in the premises overrules said motion, to the ruling and order of the court overruling said motion said plaintiff duly objected and excepted. And afterwards, to wit, on the same day, plaintiffs filed and presented their motion to the court to retax the costs allowed for the respective guardians ad litem, the hearing of which motion was continued to the March term of said court."

The facts which determine whether a case is finally submitted to a trial court for determination are largely within the knowledge of the judge thereof, especially the fact whether or not he has considered all the claims and contentions of the parties, and whether or not it would be in furtherance of justice to allow a plaintiff to dismiss his action and begin anew.

The case below was heard at one term of court, so far, at least as the evidence of the parties was concerned, and was taken under advisement for decision until the next term, with ample provision for written briefs and arguments, to which the parties both consented. The motion to dismiss the action without prejudice was filed nine days after the beginning of the ensuing term, and we cannot say from the facts presented in the record that the judge had not fully examined all of the claims and contentions of the parties and arrived at a full decision of the case in his mind. Indeed, at the very time the case was taken under advisement and continued, the intimation of the court was that it was inclined to decide the case in favor of the defendants, and would not care to hear from them, unless the plaintiffs made some showing which wavered his judgment in this respect. With knowledge of this in-

timination the plaintiffs presented their brief to the court. It may fairly be said that the defendants, also, under the agreement, submitted their case without any brief, and the decision of the court upon this question will not be reversed.

The appellees by the judgment of the court were awarded three allowances of \$35 each, aggregating \$105, as fees to the respective guardians ad litem, which allowances were taxed as costs in the case, and a motion to retax the costs was overruled. Neither party to an action at common law could recover his costs, but each party was responsible for the costs he had made. It has, therefore, been frequently said that before costs can be awarded in an action under our Code some warrant therefor must be found in the statute. Unless otherwise provided costs in actions for money or for the recovery of specific real or personal property are to be adjudged in favor of the prevailing party; in other actions, costs are to be taxed and apportioned as in its discretion the court thinks right and equitable. Sections 6208, 6209, and 6210, Gen. St. 1909 (Code Civ. Proc. §§ 613, 614, and 615). But these allowances are not, properly speaking, costs. They seem rather to be in the nature of penalties imposed for bringing an unfounded action against minors.

It is said in *Prest v. Black*, 63 Kan. 683, 66 Pac. 1017: "The fees of a guardian ad litem are not costs in the case, and therefore are not chargeable against the unsuccessful party." (Syllabus.)

The allowance will therefore be set aside, and the judgment so modified is affirmed. All the Justices concurring.

(83 Kan. 511)

HULSE v. WEBSTER et al.

(Supreme Court of Kansas. Dec. 10, 1910.)

(Syllabus by the Court.)

LANDLORD AND TENANT (§ 91*)—CONSTRUCTION—OPTION TO RENEW.

A lease by its terms terminated in one year, but contained in addition a provision which reads: "It is also agreed by party of the first part that party of the second part may at their option, continue this lease to July 1, 1908, by paying thirty-three and one-third (33 1/3) dollars on the 1st day of every month during its continuation." Held, that under this stipulation the lessee, by exercising his option at the expiration of the year, elected to extend his lease two years, or to July 1, 1908, and became liable to pay rent for that time. It was unnecessary, in order to become liable for rent, to exercise his option every month.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 280, 281; Dec. Dig. § 91.*]

Appeal from District Court, Shawnee County.

Action by Hiram Hulse against F. H. Webster and others. Judgment for plaintiff, and defendants appeal. Affirmed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Edwin A. Austin, for appellants. Whitcomb & Hamilton, for appellee.

GRAVES, J. This is an action for rent. The controversy arises over the interpretation of the lease. The abstract does not give a copy of the instrument, and we can only judge of it by the description given by counsel in their briefs. The lease is in the ordinary form of a lease for one year, ending upon July 1, 1906. It then provides for the future as follows: "It is also agreed by party of the first part that party of the second part may, at their option, continue this lease to July 1, 1908, by paying thirty-three and one-third (33 $\frac{1}{3}$) dollars on the 1st day of every month during its continuation." The lessee occupied the premises for the one year. He afterward occupied it, by exercising his option and payment of rent as stipulated in the lease, for about 18 months, and then abandoned the premises and ceased payment.

The landlord brought this action to recover the rent at \$33.33 $\frac{1}{3}$ a month for the unexpired term up to July 1, 1908, and recovered. The lessee appeals, contending that the option expired upon the 1st day of each month if not exercised. The lessor, however, held that at the expiration of the one year the option was one for the term of two years, or up to July 1, 1908, and not for one month only, and that one option was sufficient, and 24 unnecessary. No authorities directly in point have been cited. We think, however, that the interpretation of the court is correct. 18 A. & E. Encycl. of L. 687 and 690.

The judgment is affirmed. All the Justices concurring.

(92 Kan. 592)

HESS v. HARTWIG.

(Supreme Court of Kansas. Dec. 10, 1910.)

(Syllabus by the Court.)

1. WITNESSES (§§ 94, 139*)—QUALIFICATION—INTEREST—"PARTY."

No one is disqualified as a witness by reason of his interest in the result of a litigation, and the term "party" as used in section 320 of the Code of Civil Procedure (Gen. St. 1909, § 5914), which prohibits a party from testifying concerning personal transactions and communications with a person since deceased, does not mean or include one not technically a party to the action, however much he may be interested in the result of the action.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 249-257, 582-616; Dec. Dig. §§ 94, 139.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5202-5213; vol. 8, p. 7747.]

2. GIFTS (§§ 22, 41*)—NECESSITY FOR DELIVERY.

While a complete and unconditional delivery is essential to the validity of a gift, a constructive or symbolic delivery will meet the requirements of the law, and, where there is a delivery, the fact that the property may be

redelivered to the donor as agent or trustee of the donee or for safe-keeping will not nullify or affect the gift.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. § 37; Dec. Dig. §§ 22, 41.*]

3. GIFTS (§ 50*)—SUFFICIENCY OF EVIDENCE—QUESTION FOR JURY.

Testimony relating to a gift held to be sufficient to require the submission of the question to the jury.

[Ed. Note.—For other cases, see Gifts, Dec. Dig. § 50.*]

Appeal from District Court, Allen County.

Action by C. H. Hess, administrator, against William Hartwig. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Lamb & Hogueland, for appellant. G. A. Amos, L. V. Orton, and Ewing, Gard & Gard, for appellee.

JOHNSTON, C. J. The ownership of certain notes and mortgages is the subject of dispute between the parties. On a former appeal many of the facts out of which the controversy arose were stated. Hartwig v. Flynn, 79 Kan. 595, 100 Pac. 642. In the final trial to determine the title of the notes and securities, wherein the administrator prevailed, there was contention as to the admissibility of the testimony of William and Frederick Hartwig, much of which was excluded, and, upon the conclusion of the testimony for appellant, the court sustained a demurrer to his evidence on the ground that it did not prove a defense to the action of appellee.

On the exclusion of testimony and the sustaining of the demurrer to the evidence of appellant errors are assigned. The question tried out was whether Gotlieb Hartwig in his lifetime had given the notes and mortgages, or moneys represented by them, to his sons William and Frederick. As the action of the administrator was brought against William Hartwig, he was incompetent to testify to any transactions or communications had with his father in respect to the notes and mortgages acquired from the father. Code Civ. Proc. § 320 (Gen. St. 1909, § 5914). A number of rulings excluding testimony of which complaint is made were clearly correct because it came within the statutory limitation. In some cases the testimony excluded, although not communications or transactions between William and his father, and therefore not within the limitation, appears to be immaterial. William was asked to tell why the notes taken in his name were allowed to remain in his father's box until after his death, but he was not permitted to answer. As the inquiry admitted of an answer that would be neither a communication nor a transaction with his father, the objection should not have been sustained. Frederick Hartwig was also asked why the notes in which he and William were named

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

as payees remained in his father's box, and in the same connection he was asked to state whether the three notes were in his father's box for safe-keeping. These questions were excluded; and in support of the ruling it is argued that as Frederick was interested in the result of the litigation because one of the notes was claimed by him he was incompetent to testify to any communications with his father in relation to these notes. The fact that a person other than the parties may have an interest in the result of the action does not disqualify him as a witness. The Code specifically provides that no one shall be disqualified by reason of his interest in the event of the litigation. Code Civ. Proc. § 317 (Gen. St. 1909, § 5911). The prohibition in Code Civ. Proc. § 320, is not to be extended by implication, and it has been held to apply only to those who are technically parties to the action. The term "party," as used in the Code, does not mean or include persons not parties in the technical sense, however much they may be interested in the result of the suit. *Mendenhall v. School District*, 76 Kan. 173, 90 Pac. 773. Frederick was therefore a competent witness in this action as to any communications or transactions with his father which bore upon the ownership of the notes. The testimony of William to the effect that he had paid taxes on the notes was erroneously stricken out. The assessment of the notes to William and his payment of taxes upon them were circumstances going to show ownership. There was testimony in the case to the effect that Gottlieb had suggested to William when he moved into town that he should list the notes for taxation. If William's father, instead of listing the notes for taxation as his own and paying taxes thereon, in fact asked William to list them and also left him to pay the taxes on the property, it tended to prove that he regarded and treated William as the owner of the notes. This testimony should have been received and the jury allowed to determine the truth of the testimony, and the probative force to be given it.

There appears to have been sufficient testimony supporting the defense of appellant that the notes involved had been given by Gottlieb Hartwig to his sons, and had become their property prior to their father's death. There was testimony that two of the notes were payable to the order of William Hartwig and one to Frederick Hartwig. The mortgage securing each of these notes was executed in favor of the payee named in the note. Gottlieb Hartwig appears to have placed the mortgages on record, and this indicated to some extent that the notes and mortgages were the property of the sons. There was no assignment of the notes and mortgages prior to the death of the father. While the notes and mortgages were

in the father's box at the time of his death, it appears that other notes belonging to Frederick, the ownership of which is not in dispute, were also kept in that box. Although William could not testify to communications or transactions had with his father, it does appear that for a considerable time before the father's death William knew that the notes and mortgages were in his own name. There was testimony of a statement by the father that he had given the real estate to his daughter and her husband, and that all the rest of the property would go to William and Frederick. Testimony was received to the effect that about a year before his death the father suggested to William that he list the \$2,500 note for taxation in William's name. In addition, a witness testified that the father at one time sent a message to William to come and get these notes. It appeared, too, that after reaching manhood William had worked years for his father without wages, and that while serving in the army during the Civil War he sent his earnings to his father, and that these were used to swell his father's estate. More than that, it appears that at all times the relations between William and his father were cordial and friendly. It is clear that accepting the foregoing testimony as true, and drawing every inference favorable to appellant to which it is open, as we must, the case should have been submitted to the jury. The fact that the notes were still in the box of the father at the time of his death was not controlling. While a complete and unconditional delivery is essential to a gift, the donation may be consummated by a constructive or symbolic delivery, and the donor may constitute himself, or be constituted, a trustee of the donee, and the fact that the property may thereafter come into his possession would not necessarily be incompatible with the theory of a gift. *Barnhouse v. Dewey*, 83 Kan. 13, 109 Pac. 1061. The relationship and the former dealings between father and sons are entitled to consideration in measuring the force of the testimony offered to show a gift. It has been decided that "it requires less positive unequivocal testimony to establish the delivery of a gift from a father to his children than between persons not related, and, where there is no suggestion of fraud or undue influence, very slight evidence will suffice." *Love v. Francis*, 63 Mich. 181, 29 N. W. 843, 6 Am. St. Rep. 290.

The contention that there was a variance between the evidence and the issues formed between the parties is not good. The trial court admitted testimony tending to prove a gift, and under the pleadings such testimony was admissible.

The judgment will be reversed and the cause remanded for a new trial. All the Justices concurring.

(3 Kan. 463)

ROBERTSON et al. v. BEAR.

(Supreme Court of Kansas. Dec. 10, 1910.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 1170*)—REVERSAL—IRREGULAR PROCEEDINGS.

Where one who is not a party to a judgment, more than three years after the rendition thereof, seeks to vacate the judgment by filing a motion attacking the jurisdiction of the court, and therein also seeks to vacate a sheriff's deed to land sold in execution of the judgment, and serves notice upon one who is in possession of the land under claim of ownership, who by leave of court files an answer setting forth his claims to the land, and the court tries the issues joined as an action to quiet title, *held* that, although such proceeding is irregular, the judgment resulting from such trial will not be set aside; it appearing that a full and fair trial was had and the judgment was well supported by the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1170.*]

2. QUIETING TITLE (§ 15*)—MORTGAGEE IN POSSESSION—RENTS AND PROFITS.

Where, in such a proceeding, the defendant claims title to the land, but prays, in case his title be held to be invalid, he be adjudged to be a mortgagee in possession, he is not estopped from asserting his claims against the land by failure to render an account in his answer of rents received. Any claim for rents received should be pleaded by the plaintiff as a counterclaim in reply.

[Ed. Note.—For other cases, see Quieting Title, Dec. Dig. § 15.*]

Appeal from District Court, Cheyenne County.

Action by Fred Robertson and R. M. Jacques against M. L. Bear. Judgment for defendant, and plaintiffs appeal. Affirmed.

Fred Robertson, for appellants. J. L. Finley and T. M. Noble, for appellee.

SMITH, J. In the year 1889 one Aaron Bowers obtained a patent to the land in question from the United States, executed one mortgage thereon for \$250, and one for \$15, and was also indebted to one Egan on account for \$25. Soon thereafter Bowers left the state of Kansas and removed to the state of Colorado where he has ever since resided, although he was personally present in the locality of the land during a portion of the years 1894 and 1896.

In October, 1890, Egan brought suit to recover on the account for \$25, attached the land, and attempted to get service on Bowers by publication. The publication notice, although fatally defective, was approved by the court. Judgment was rendered in favor of the plaintiff, and the land was sold to Jessie A. Egan to pay the judgment and costs. The sale was confirmed, and sheriff's deed to the purchaser was duly issued and recorded. In 1894 Jessie A. Egan and her husband, Thomas F. Egan, conveyed the land to the appellee by warranty deed. There appear to have been no buildings on the land, but the land had been rented by Egan and

appellee to tenants, except for some two or three years, from the time of the recording of the sheriff's deed until the filing of the motion.

In November, 1896, Bowers and wife conveyed the land by quitclaim deed to one Hotchkiss, and Hotchkiss conveyed the same by warranty deed to the appellants, and soon thereafter the appellants filed a motion, which was really the commencement of this action, to vacate the judgment and set aside the sheriff's deed issued thereon to Jessie A. Egan. The appellee, by leave of court, filed an answer to the motion, and set forth therein the facts substantially as above stated, and claimed title by adverse possession for more than 15 years. A trial was had to the court, without a jury, on these pleadings. Judgment was rendered, setting aside the judgment and vacating the sheriff's deed; but the court adjudged that the appellee was equitably a mortgagee in possession, and allowed a lien on the land for the amount of the mortgages paid by the appellee and interest, and also for the taxes paid by him, with the interest thereon, and awarded him the possession of the land until the amount of the lien so adjudged should be paid.

The appellee has filed a cross-petition in error, in which he claims that the court erred in not adjudging that he had title to the land by prescription under the 15-year statute. An answer to this is that the court found, on sufficient evidence, that the appellee had not been in continuous possession of the land for 15 years. The proceeding was, of course, very irregular, in allowing one, not a party to a suit, to attack a judgment by motion to vacate, especially after the lapse of more than three years from the date of the rendition thereof, and also in permitting an answer and cross-petition to be filed to such motion, to which the appellants made proper objection.

The appellants contend that, regarded as a mortgagee in possession, the appellee was not entitled to recover on the mortgages and for taxes paid without accounting for rents received. While a mortgagee in possession is held to account for rents actually received, or which should have been received by fair management of the property, yet we do not understand that such mortgagee is estopped from claiming the amount due on his mortgages and amounts paid for taxes by reason of the failure to set forth the amount of rents, if any, received, or which should have been received. In such case rents are in the nature of a counterclaim, and it devolved upon the appellants to make the claim in a reply. It may fairly be said that the evidence discloses that the mortgagee in possession received little, if any, rents other than the payment of taxes on the land, and it does not appear that he claimed any taxes which

were paid by the renters. It therefore appears that justice was done in the case, and the evidence fully sustains the judgment of the court.

The judgment is therefore affirmed. All the Justices concurring.

(83 Kan. 580)

DUNCAN v. SCHOOL DIST. NO. 8, RENO COUNTY.

(Supreme Court of Kansas. Dec. 10, 1910.)

(Syllabus by the Court.)

1. SCHOOLS AND SCHOOL DISTRICTS (§ 141*)—DISMISSAL OF TEACHERS.

Where the members of a school district board meet and unanimously agree that a teacher, who has been employed and is teaching their district school, is incompetent and negligent and should be dismissed, and two members of the board, with the knowledge and consent of the third, meet with the county superintendent, and unanimously agree that the teacher should be discharged, but take no formal action except that the superintendent directs that the members of the board return to their homes and have a full meeting of the board, and prepare and sign a notice of dismissal and have it returned to him for his signature, which is done, and a notice of dismissal is signed by each member of the board and by the county superintendent, and such notice is served upon the teacher, such teacher is thereby dismissed in compliance with the statute.

[Ed. Note.—For other cases, see Schools and School Districts, Dec. Dig. § 141.*]

2. SCHOOLS AND SCHOOL DISTRICTS (§ 141*)—DISMISSAL OF TEACHERS.

While the school district board and the county superintendent constitute, in a sense, a tribunal to determine whether a teacher, who has been employed and is conducting a school, should be dismissed under the provisions of section 7468, Gen. St. 1909, it is not necessary that there should be any formal organization of such tribunal; it is sufficient if the board or a majority thereof act in conjunction with the county superintendent in such dismissal.

[Ed. Note.—For other cases, see Schools and School Districts, Dec. Dig. § 141.*]

3. SCHOOLS AND SCHOOL DISTRICTS (§ 141*)—DISMISSAL OF TEACHERS—VALIDITY OF PROCEEDINGS.

If a school district board decides to have a meeting with the county superintendent for the purpose of considering the dismissal of a teacher, and two members of the board meet with the county superintendent at a time and place of which the third member has notice, the unanimous decision of the two members of the board and the county superintendent is effective although the third member of the board unavoidably or intentionally fails to attend such meeting.

[Ed. Note.—For other cases, see Schools and School Districts, Dec. Dig. § 141.*]

Appeal from District Court, Reno County.

Action by Laura Duncan against School District No. 8, Reno County. Judgment for plaintiff, and defendant appeals. Reversed and remanded, with instructions.

F. L. Martin, for appellant. Prigg & Williams, for appellee.

SMITH, J. There is no question as to the sufficiency of the pleadings in the case, and the undisputed evidence shows that the board of the appellant school district entered into a written contract with the appellee by the terms of which the appellee was to teach the public school in such school district for a term of seven school months, commencing on the 9th day of September, 1907, for the sum of \$45 per month. The contract was in the usual form and signed by two members of the board and the teacher. The appellee entered upon her duties as such teacher and continued thereafter until the 25th day of November, 1907, when she was served with a notice, signed by all the members of the school board and the county superintendent, to close the school, and that she was dismissed on charges of incompetency and negligence, and the schoolhouse was closed against her. She was paid full wages, according to the terms of the contract, for the time she taught the school. After the full expiration of the term for which she was employed she brought this action to recover the amount of the wages unpaid at the rate prescribed in the contract. A trial was had to the court and a jury and a verdict returned in favor of the teacher for the full amount claimed. A motion for a new trial was overruled and judgment rendered accordingly. There is no conflicting evidence in the case.

Practically the only question presented is whether the steps taken by the school district board and county superintendent to dismiss the teacher complied with section 7468, Gen. St. 1909. The notice introduced in evidence reads: "Sterling, Kansas, Nov. 20, 1907. We, the school board of District No. 8, county of Reno, state of Kansas, do hereby notify Laura Duncan, teacher of said school, to close and vacate said school. Charges of dismissal are incompetency and negligence. John Nusser, Treas. I. E. Deadmond, Director. C. C. Johnson, Clerk. Above approved Nov. 23, 1907. By A. W. Hamblen."

Charles Johnson testified, in substance, that he was the clerk of the school district; that the district board met and considered the question of the teacher's competency; that he could not go down to see the county superintendent; that it was understood and agreed that the treasurer (Nusser) and director (Deadmond) should go the next day to see the county superintendent, which they did; and that he afterwards signed the dismissal notice.

John Nusser testified that he was present at a meeting of the board at which the conduct of the school by the teacher was talked about; that the board met and talked the matter over three times; that he and Mr. Deadmond went to Hutchinson and talked the matter over with the county superintendent; and that all members of the board, after

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the meeting at the county superintendent's office, signed the notice of dismissal.

Mr. Deadmond testified that two weeks before the dismissal notice was prepared he visited the school; that all members of the board met thereafter and decided to go down to Hutchinson to see about the dismissal of the teacher; that Mr. Johnson, the clerk, had business which prevented him from going, and authorized Mr. Nusser and himself to go; that Nusser and he did go and talked with the county superintendent about the school; that he told what he had observed as a visitor to the school, and the county superintendent told what he had observed when he visited the school; that the county superintendent, Mr. Nusser, and himself came to the conclusion that they should dismiss the teacher; that in two or three days thereafter the school board had another meeting, at which all were present; that they wrote out and all signed the notice of dismissal and authorized the director to take it to the county superintendent to indorse it, which was done, and the director then took the paper back and served it on Miss Duncan.

Testifying in regard to the meeting with the two members of the board, the county superintendent said, in substance, that they wanted her to quit and she was unwilling to do so, and he told them they could not dismiss her without his consent; that they made complaint that she did not keep order and that the children were not learning anything; that he told them he was ready to pass his judgment and there was only one way to do it, and that was by acting as they thought it should be done; that they said she should quit; that he and the two members of the board agreed in every respect; that afterwards Mr. Deadmond brought the notice of dismissal to his office and he approved and signed it; that he had visited the school and talked with the teacher. Among the things referred to in his visit to the school, he said the discipline was so bad that the teaching was of no consequence. The teacher herself testified that the last week of school she had only 2 scholars and that the week before she had 23 scholars. As before stated, there was no evidence contradicting these statements. It is not contended but that the evidence of the plaintiff teacher was insufficient to justify the verdict and judgment if she was not legally dismissed. At the conclusion of the evidence the court was requested, in writing, to instruct the jury to return a verdict in favor of the defendant, and we see no reason why this instruction should not have been given.

The instructions of the court generally were correct and told the jury, in substance, that no formality was requisite in the proceedings of the school district board and county superintendent; that if the school board and county superintendent had consid-

ered the matter and decided, however informally, to dismiss her, such acts would be sufficient to constitute a valid dismissal of the plaintiff under the law, and that their verdict should be for the defendant.

The fifth instruction, however, seems to submit the question of fact to the jury whether the school district board and county superintendent did act in conjunction in dismissing the teacher. And it was undoubtedly argued there to the jury, as it is here, that to act in conjunction the school district board must meet and organize as a tribunal, and that their action as taken was not sufficient. Upon no other theory can we account for the second and fifth findings of fact: "(2) Did they (that is, the two members of the board) together consider with the county superintendent the competency and negligence of the teacher? A. No." "(5) Did the two members of the board and the county superintendent agree that the plaintiff should be dismissed? A. No."

Not only is there no evidence to support these findings, but they are directly opposed to all the evidence relating thereto. These findings should have been set aside or disregarded. The other findings are: "(1) Did two members of the board meet with the county superintendent at his office a few days before the dismissal? A. Yes." "(4) Did Johnson, clerk, know the time and place that the other two members of the board were going to meet and consult the county superintendent? A. Yes." "(6) Did Johnson, the other member, subsequently meet with the said two members and sign the order of dismissal? A. Yes."

The request for an instruction to return a verdict for the defendant should have been allowed and the motion for a new trial, on the ground that the verdict was not sustained by the evidence, should have been sustained. The judgment is therefore reversed and the case is remanded with instructions to render judgment in favor of the defendant. All the Justices concurring.

(83 Kan. 497)

BURGESS v. ATCHISON, T. & S. F. RY. CO.†
(Supreme Court of Kansas. Dec. 10, 1910.)

(Syllabus by the Court.)

1. CARRIERS (§ 358*)—EJECTION OF PASSENGER—NEGLIGENCE.

Where a passenger without a ticket takes a train for a station at which the train is not scheduled to stop, it is not negligence to eject such passenger, even if he offers to pay cash fare to the station where he wishes to stop.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 358.*]

2. RAILROADS (§ 376*)—INJURY TO PERSON ON TRACK—NEGLIGENCE.

In such a case, where the person so ejected sits down on the end of a tie, and takes a position so that he is not plainly visible, and while in such position another train comes along, and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

† Rehearing denied.

the engineer, who sees an object upon the track, is uncertain what the object is until the engine gets so close that he is unable to stop it before it strikes such person, the company is not guilty of culpable negligence.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1275-1279; Dec. Dig. § 376.*]

3. RAILROADS (§ 359*)—TRESPASSER ON TRACK—CARE REQUIRED.

A person who goes upon a railroad track without the leave or knowledge of the company, and without any business with it, is wrongfully there and a trespasser; and while a trespasser, the company owes him no duty, except not recklessly or wantonly to do him an injury.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1238, 1239; Dec. Dig. § 359.*]

Appeal from District Court, Reno County.

Action by W. C. Burgess against the Atchison, Topeka & Santa Fé Railway Company. Judgment for plaintiff. Defendant appeals. Reversed.

W. R. Smith, O. J. Wood, and A. A. Scott, for appellant. F. L. Martin, for appellee.

GRAVES, J. This action was commenced in the district court of Reno county by W. C. Burgess to recover damages for a personal injury received by being struck with one of appellant's passing trains. He recovered therefor, and the company appeals.

Burgess was at Ellinwood, and wished to go to Raymond. He boarded a train which did not stop at Raymond. When about two miles from Raymond, the conductor asked him for his ticket. He had none. When he told the conductor that he wanted to stop at Raymond and would pay cash fare, he was informed that he could not stop the train at that place, and he must get off. The train was stopped and he was ejected. This was not negligence. Burgess was intoxicated. He was left by the side of the track, and he attempted to follow the train afoot on the track. After walking a short distance, he sat down on the end of the ties, and was soon overcome with a stupor. While in this condition a train passed along and struck his side, whereby he was pushed off on the side of the track and severely injured.

It is claimed that the men in charge of the train which struck the plaintiff were negligent in not discovering him in time to avoid the injury. It was a clear day, about noon. The track was straight; the ground smooth and practically level. It was in the month of January, when rank vegetation does not stand along the track. The plaintiff was sitting on the end of a tie, crouched down, with his head between his knees, and partially lying down. He would not readily be taken for a human being. He was not at a crossing, or where a human being would be expected. After the engineer discovered that the object was really a human being, he attempted to stop the train, but did not succeed in time to avoid the injury. It must be remembered that, when a person

is upon a railroad track without leave and has no business with the company, such person is a trespasser, and the company owes him no duty, except not wantonly to injure him. It is not pretended here that the company was recklessly or wantonly negligent in this case. In the absence of such a degree of negligence, the plaintiff has no cause of action, and should not recover a judgment. The rule of law controlling such a case is clearly and forcibly stated by Chief Justice Doster in the case of *Railway Co. v. Prewitt*, 59 Kan. 734, 54 Pac. 1067. The following cases decide practically to the same effect: *Railway Co. v. Hathaway*, 121 Ky. 666, 89 S. W. 724, 2 L. R. A. (N. S.) 498; *Railway Co. v. Williams*, 69 Miss. 631, 12 South. 957; *Railway v. McMillan*, 100 Tex. 562, 102 S. W. 103. In harmony with these cases we hold that the company was not guilty of such negligence as creates a liability.

The judgment is reversed, with direction to enter judgment for costs in favor of the defendant. All the Justices concurring.

(83 Kan. 508)

BADGER LUMBER CO. v. MARTIN et al.

(Supreme Court of Kansas. Dec. 10, 1910.)

(Syllabus by the Court.)

1. MECHANICS' LIENS (§ 277*)—FILING STATEMENT—EVIDENCE.

In an action to have a mechanic's lien adjudged and foreclosed, the allegation of the petition that a statement therefor was filed within four months after the completion of the work, being traversed, a lien should be denied if no evidence of such filing is produced on the trial.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Dec. Dig. § 277.*]

2. APPEAL AND ERROR (§ 1005*)—REVIEW—CONFLICTING EVIDENCE.

In this case the defendants tendered the issue that the alleged improvements were of no value for the purposes for which they were ordered, and produced evidence tending to support such issue. The plaintiff produced evidence of the value of the material used, if taken from the building. Held, that a finding of the jury that the improvement was of no value as such, and a general verdict for plaintiff for the value of the materials, being approved by the court, the judgment thereon will not be reversed.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3948-3954; Dec. Dig. § 1005.*]

Appeal from District Court, Dickinson County.

Action by the Badger Lumber Company against Alfred D. Martin and Helen F. Martin. Judgment for plaintiff against Alfred D. Martin for less than the relief claimed, and plaintiff appeals. Affirmed.

S. S. Smith and Hurd & Hurd, for appellant. C. S. Crawford, for appellee.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

SMITH, J. Action brought in the district court of Dickinson county for the purchase price of a hot air furnace (\$125) and a bath tub and plumbing (\$434), and to foreclose a mechanic's lien on residence property in the city of Hope. There was an oral contract of purchase made with the appellee Alfred D. Martin, about which there is no dispute, while the title to the real estate was held by the wife, Helen F. Martin. The appellees answered jointly, and alleged that the furnace, bath tub, and plumbing outfit were sold under a guaranty; that both utterly failed to meet the requirement; that the defendant Alfred D. Martin agreed to pay plaintiff for such improvements, provided the appellant should do the work as contracted; that after repeated notices on the part of the defendants of the failure of the improvements to meet the requirements and repeated attempts on the part of appellant to adjust and perfect the same, and failure so to do, Alfred D. Martin had several times requested the appellant to remove and take away the furnace, bath tub, and plumbing fixtures. The appellees also alleged that, as constructed the works put in by the appellant were entirely worthless. They further alleged that the furnace, bath tub, and plumbing were all completed and put in the residence by the appellant more than four months prior to February 13, 1908, which date seems to be the time of filing the mechanic's lien by the appellant. The action was tried and a jury returned a verdict in favor of the appellant against the defendant Alfred D. Martin in the sum of \$45. The appellant filed a motion for a new trial on all the statutory grounds, which the court overruled, and rendered judgment against Alfred D. Martin for the amount of the verdict, but allowed no lien upon the property. There were no special findings submitted to the jury or made by the court, and we are unable to say whether the lien upon the property for the amount of the judgment was refused on the ground that the installing of the works was no improvement to the property, there being evidence to show that the furnace, bath tub, etc., were of a value, taken out, at least equal to the amount of the verdict, or whether the court found that the statement of the lien had not been filed within the time prescribed by law. The abstract contains no evidence as to the time of the filing of the statement of the lien, nor is it therein asserted that there was no evidence tending to prove that the work was completed more than four months before the filing of such statement. We must, therefore, assume that the court refused the lien for the reason that it found on the evidence that the work had been completed more than four months before the filing of the statement.

It is urged that the court erred in allowing a witness to testify, after he had shown

some qualifications, that the heating and plumbing plants as installed were worth nothing, and it is contended that, as the appellees retained the property, they were under obligation to pay for it whatever it was worth for any purpose whatsoever in accordance with the decision in *Aultman, Miller & Co. v. Mickey*, 41 Kan. 348, 21 Pac. 254. We have no intention of departing from that decision, but it was competent for the appellees in this case to prove that the machinery or appliances were worth nothing for the purposes for which they were installed, and for the appellant to prove, either by cross-examination or by independent evidence, their value for any other purpose, as the appellant in fact did.

Again, it is urged that the court erred in its instructions to the jury. The record shows that the court instructed the jury orally, and one sentence of the instructions, as transcribed, appears to be so erroneous and so inconsistent with the other portions that it necessarily suggests that there was a mistake in transcribing. The correct rule on the same subject, however, follows in the very next sentence, and defines the true measure of the damages which the appellees were entitled to offset against the purchase price. The motion for a new trial is based upon the same alleged error. If we assume that the instructions were orally given to the jury, just as reported, still it must follow that the second statement of the rule was intended as a correction of the imperfect statement preceding it.

The verdict is sustained by ample evidence and the judgment is affirmed. All the Justices concurring.

(33 Kan. 809)

GOODRICH v. DINGMAN.

(Supreme Court of Kansas. Dec. 10, 1910.)

1. SALES (§ 52*)—EVIDENCE—OBLIGATION OF BUYER.

Testimony of an agreement to buy, the purchase at a sale by one claiming to act for the buyer, and the acceptance of the chattel by the buyer when shipped to him, warrants the inference that a purchase was made by the buyer, binding him to pay the price.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 118-144; Dec. Dig. § 52.*]

2. APPEAL AND ERROR (§ 1052*)—HARMLESS ERROR—ADMISSION OF EVIDENCE—ORDER OF PROOF.

The admission of secondary evidence without a proper foundation therefor is not ground for reversal, where a sufficient basis for its admission is subsequently proved.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4171-4177; Dec. Dig. § 1052.*]

Appeal from District Court, Clay County. Action by Fred A. Goodrich against C. W. Dingman. From a judgment for defendant, plaintiff appeals. Affirmed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Hy W. Stackpole, for appellant. Coleman & Williams, for appellee.

PER CURIAM. An action to recover on a note given by appellee to appellant, wherein appellee pleaded as a set-off the price of a sow sold by him to appellant. The demurrer to the evidence of appellee was properly overruled. The testimony of an agreement to purchase, the purchase at the sale by one claiming to act for appellant, and the acceptance of the sow by appellant when she was shipped to him, warranted the inference of the jury that a purchase was made by appellant and that a liability for the price arose.

The admission of what occurred at the sale, including the memorandum of the clerk, is no ground for reversal. If the foundation for its introduction was not properly laid when the testimony was received, there was sufficient basis for its admission before the testimony was closed. That testimony may have been received out of order is not a good ground of complaint. There was sufficient foundation to authorize the admission of secondary evidence of the letter written by appellant's agent.

No material error being found, the judgment will be affirmed.

(83 Kan. 489)

MERCER v. MORRISON.

(Supreme Court of Kansas. Dec. 10, 1910.)

(*Syllabus by the Court.*)

1. APPEAL AND ERROR (§ 1068*)—HARMLESS ERROR—ERRONEOUS INSTRUCTION.

An erroneous instruction is not ground for reversal where the amount of recovery shows that the jury did not act upon it.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1068.*]

2. APPEAL AND ERROR (§ 586*)—RECORD—ABSTRACT.

In preparing an abstract to present the question whether there was evidence to support a verdict, the appellant may and should omit testimony which is merely repetition.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 586.*]

Appeal from District Court, Chase County.

Action by J. H. Mercer against A. L. Morrison. Judgment for plaintiff. Defendant appeals. Affirmed.

Frith & Kretsinger and John A. Atwood, for appellant. Johnston Bros. and Kellogg, Huggins & Kellogg, for appellee.

MASON, J. J. H. Mercer sued A. L. Morrison for a commission upon the sale of real estate, and recovered a judgment, from which an appeal is taken.

The defendant's principal contention is that the evidence showed conclusively that the sale was not procured or influenced by the plaintiff. There was evidence that the

buyer's attention was first called to the land by the plaintiff, who recommended its purchase; that later he was again approached by him, and considered the proposition more favorably all the time, and at the time he met the owner "felt pretty favorably of buying the place." However, he did not see the land until he met the owner, who showed it to him, and the sale was completed without any further action on the part of the plaintiff, and without any reference being made to his connection with the transaction. The buyer testified that if he had not met the owner when he did the matter might have dropped from his mind. Under this evidence it was a fair question for the jury whether the sale resulted from the plaintiff's efforts or from the independent action of the owner, after the first negotiations had been abandoned. The verdict must therefore be deemed conclusive on this point.

The plaintiff testified to an agreement that he should receive \$1,000 if he made a sale for \$22,000. The defendant said that he had promised a commission of \$1,000 only in case he received \$25,000. The court instructed the jury in substance that if they accepted the defendant's version of the contract they might return a verdict for the plaintiff for 4 per cent. of \$22,000, which was the actual selling price. This instruction is complained of upon the ground that a promise to pay \$1,000 on a sale for \$25,000 does not imply an agreement to pay a like percentage of the selling price if a buyer is accepted at a lower figure. Granting this, it does not follow that the judgment should be reversed. The verdict was for \$1,000, which conclusively shows that the jury took the plaintiff's view of the contract. If they had followed the defendant's testimony they would necessarily, under this instruction, have placed the amount of recovery at \$880. An erroneous instruction is not ground of reversal where it is clear that the jury did not act upon it. *C. K. & W. Rld. Co. v. Parsons*, 51 Kan. 408, 32 Pac. 1083; *Whitney v. Brown*, 75 Kan. 678, 90 Pac. 277, 11 L. R. A. (N. S.) 468; 4 Cyc. 503. Usually where this principle has been applied the fact of nonprejudice has been shown by a special finding, but the general verdict may be equally effective for the purpose, where, as in this instance, the sum allowed shows how the jury resolved a controversy in the evidence, and amounts to a special finding on the subject.

The appellee has filed a counter abstract. We find, however, that the appellant's abstract sets out, in a properly condensed form, all the matters necessary for the determination of the questions presented. Some testimony was omitted, but so far as otherwise important it was merely repetition, and therefore could not aid in deciding whether there was any evidence to support the verdict. Not all of the charge to the jury was print-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ed, but so much of it as related to the questions at issue were set out in full.

The judgment is affirmed, but costs will not be allowed for printing the counter abstract. All the Justices concurring.

(33 Kan. 481)

GRADEN v. MAIS et al.†

(Supreme Court of Kansas. Dec. 10, 1910.)

(*Syllabus by the Court.*)

1. MOTIONS (§ 56*)—ENTRY OF ORDER—NUNC PRO TUNC ORDER..

Where an order is made by a probate court, and through accident, mistake, or neglect is not entered on the records, it is competent for the court to enter such order nunc pro tunc even after the lapse of considerable time and upon any satisfactory evidence, parol as well as written.

[Ed. Note.—For other cases, see *Motions*, Cent. Dig. § 67; Dec. Dig. § 56.*]

2. MOTIONS (§ 56*)—ORDER—BELATED ENTRY—EFFECT.

Lapse of time may call for closer scrutiny and stronger testimony showing that the order was in fact made, and as to the nature and extent of the ruling, and also as to the effect the belated entry may have upon third parties, but when it is made by a court having the power to do so it must be respected and enforced the same as if it had been entered when it was made.

[Ed. Note.—For other cases, see *Motions*, Cent. Dig. § 67; Dec. Dig. § 56.*]

Appeal from District Court, Ellis County.

Action by Mary Graden against Frederick Mais and others. Judgment for plaintiff, and defendants appeal. Reversed and remanded.

A. D. Gilkeson, for appellants. W. E. Saum, for appellee.

JOHNSTON, C. J. A point of controversy in an action of ejectment between Mary Graden and Frederick Mais is the validity of an administrator's deed. In an earlier appeal it was determined that a preliminary order of the probate judge requiring notice of the time and place of hearing an application to sell land and prescribing the length of time and the manner in which notice should be given is essential to the validity of the notice, and that as the record of the probate court failed to show such an order the notice and the deed based thereon could not be upheld. *Graden v. Mais*, 77 Kan. 702, 95 Pac. 412, 127 Am. St. Rep. 456. Some time after the case had been remanded for a new trial steps were taken in the probate court to have the order mentioned entered nunc pro tunc, it being claimed that the order had actually been made at the proper time, and that there was a failure to make it a matter of record. When this cause came up for a new trial appellant undertook to prove the nunc pro tunc entry of the order, and, while it was shown that a hearing for that purpose had been had in the pro-

bate court, the probate judge had not at that time actually made an entry of the order. He appeared to be satisfied by the testimony taken at the hearing that the entry should be made if the notice of the proposed correction of the record had been given, but he deferred the making of the entry until satisfied that a certain notice had reached the appellee. The trial court excluded the testimony of the proceedings in the probate court, but made his ruling on the assumption that the probate judge had made his decision and had actually made a nunc pro tunc entry of the required order. It appeared on the motion for a new trial that in the meantime the probate judge had completed the record and made a nunc pro tunc entry of the order. Proceeding on the theory that the record could not be corrected or completed at that late date by parol testimony, the court held the administrator's deed to be valid. If the trial court had made its ruling excluding testimony on the ground that there was no proof of the necessary order, and not on the assumption that the probate court had entered the order, the ruling must have been upheld upon the ground that there was not at that time a record entry of the required order. The fact that the court decided the case on that assumption may have prevented the appellant from procuring a postponement of the trial long enough to enable him to obtain the completion and correction of the record in the probate court. Counsel for appellant appears to have understood that the probate court had already decided in his favor, and as we have seen that officer did complete the record and make a nunc pro tunc entry of the order before the motion for a new trial was heard. Assuming, then, as the district court did, that the entry had been made in the records of the probate court, is decision excluding parol proof of the entry cannot be upheld. The contention is that if there is no written order among the files of the probate court, and no written evidence that such an order was made, there is no basis for a nunc pro tunc entry, and that a correction cannot be made on parol proof. While there are authorities holding that evidence to justify the entry of a judgment or order nunc pro tunc must be record or written evidence (23 Cyc. 835), it is not the rule in this and many other states. In *Aydelotte v. Brittain & Co.*, 29 Kan. 98, the testimony of a former judge was accepted as a basis for a nunc pro tunc entry of an order. In *Martindale v. Battey*, 73 Kan. 92, 84 Pac. 527, it was held that an entry may be supplied or corrected and made to conform to the order or judgment actually rendered after the expiration of the term at which it was rendered and upon any satisfactory evidence parol as well as written. It is important that in all such cases the court shall be well assured that the ruling

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

† Rehearing denied.

proposed to be entered is one that was actually made. In the cited case it was said: "The change should be allowed only where the proof in support of the application is clear and convincing. But where it is satisfactorily established that the requisite facts exist we think relief should not be denied merely because the evidence rests entirely in parol." In making the entry the court does not review or rectify an order previously made, but only places on the record some ruling or act of the court which, through accident, mistake, or neglect, was not carried into the record. The probate court which made the order is a court of record, and it retained jurisdiction over its records with power to complete or correct them. "A court of record has an inherent power over its own records which includes the authority to require the correction of any errors that may crop into them. This power is not lost by lapse of time or the expiration of a term of court." *Christisen v. Bartlett*, 73 Kan. 404, 85 Pac. 595. Lapse of time may call for closer scrutiny and stronger testimony showing that the order was in fact made and as to the nature and extent of the ruling, and also as to the effect the belated entry may have upon third parties, but when it is made by a court having the power to do so it must be respected and enforced the same as if it had been entered when it was made. Treating the order as having been entered by the probate court it, as well as the notice and the administrator's deed, was competent evidence which should have been received, and, as this entry practically settled the controverted question in the case, the ruling here will be that the judgment of the district court will be reversed and the cause remanded, with directions to enter judgment in favor of the appellants. All the Justices concurring.

(33 Kan. 471)

JOHNSON v. HARVEY et al.†

(Supreme Court of Kansas. Dec. 10, 1910.)

(Syllabus by the Court.)

PLEADING (§ 345*)—FORECLOSURE—JUDGMENT ON PLEADINGS.

Plaintiff brought an action to foreclose a mortgage which was in the form of a warranty deed. The answer consisted of a general denial, an express admission that the deed was executed for the purpose of securing an extension of a note and mortgage which were canceled and surrendered to the defendants, and further alleged that one of the purposes for which the deed was executed was to enable the mortgagor to avoid the payment of taxes. There was no plea of payment. *Held*, that the answer stated no defense and that judgment was rightly awarded on the pleadings.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1055-1059; Dec. Dig. § 345.*]

Appeal from District Court, Leavenworth County.

Action by Victor Johnson against Ida Har-

vey and John Harvey. Judgment for plaintiff, and defendants appeal. Affirmed.

R. E. Melvin and A. E. Dempsey, for appellants. M. A. Gorrill and Lee Bond, for appellee.

PORTER, J. Action to foreclose a mortgage in the form of a warranty deed. Plaintiff was awarded judgment on the pleadings. The defendants appeal.

It is first contended that the demurrer to the petition should have been sustained because it is said that there was no statement showing when the indebtedness matured or what the implied conditions of the mortgage were. We have no difficulty in discovering from the petition that the note was dated August 30, 1902, was due five years thereafter, and that no part of the principal or interest had been paid when the suit was brought which was long after the note matured by its terms. It is also alleged in the petition that by the terms of the original mortgage the whole sum became due and payable upon the first default in payment of interest, and that the implied conditions of the deed were the same as those contained in the mortgage. The demurrer was properly overruled. The defendants fall into the error of assuming that because the note and mortgage were canceled and surrendered the indebtedness in some way was satisfied. But the petition alleges, and the answer admits, that the deed was given for the purpose of securing an extension of the debt represented by the note and mortgage. The fact that the plaintiff surrendered the note to the defendants under these circumstances carried no presumption that the note was paid. Besides, there was no plea of payment. The court rightly awarded judgment on the pleadings. The answer raised no defense. The general denial amounted to nothing. True, the answer alleges that one of the purposes for which the plaintiff took the deed was to avoid payment of taxes. But, coupled with this is the admission that the deed was executed for the purpose of securing an extension of time. The plaintiff being the holder of the indebtedness and the real party in interest, the defendants cannot rely upon the case of *Sheldon v. Pruessner*, 52 Kan. 579, 35 Pac. 201, 22 L. R. A. 709. In that case the mortgage had been assigned in order that the mortgagor might avoid the payment of taxes. The assignment was held to be fraudulent, and it necessarily followed that the assignee was not the real party in interest, and it was held that he could not maintain the action. According to the averments of the answer in the case at bar the avoidance of taxes was only one of the reasons for changing the form of the security. The satisfaction of the judgment against defendants would be a complete protection from further

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

† Rehearing denied.

liability. *Greene v. McAuley*, 70 Kan. 631, 79 Pac. 133, 68 L. R. A. 308; *Cobe v. Hackney* (just decided) 83 Kan. 306, 111 Pac. 458. It is no concern of theirs whether the taxes on the mortgage were paid or not. This is not a case where the plaintiff in order to establish his case is obliged to rely upon an illegal transaction.

The judgment is affirmed. All the Justices concurring.

(33 Kan. 627)

MURPHY v. EDGAR ZINC CO.

(Supreme Court of Kansas. Dec. 10, 1910.)

1. MASTER AND SERVANT (§ 217*)—INJURIES TO SERVANT—ASSUMED RISK—KNOWLEDGE OF DANGER—NECESSITY.

Where there was no evidence from which it could be said as a matter of law that a servant appreciated, or should have appreciated, the danger of falling from a wall by reason of the sudden stopping of a car he was pushing along the track, a demurrer to the evidence on the ground that he had assumed the risk of injury from falling from the wall was properly overruled under the rule that, before a master can be relieved of liability by the servant's assumption of risk incident to the service, the servant must have equal opportunity with the master to know the surroundings and be equally competent to judge of the risks and hazards.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 574-600; Dec. Dig. § 217.*]

2. MASTER AND SERVANT (§ 207*)—INJURIES TO SERVANT—SPECIAL FINDINGS.

Plaintiff was injured by falling from a wall while walking along the narrow space near the edge thereof while pushing a loom car. It was found that between the rails of the track was a safe place to walk while pushing a loaded car, and that there was nothing to prevent plaintiff from walking there when he was injured, though the jury found that the car could not be pushed around the curve safely and easily while the operator was walking directly behind it. There was no finding from which it could be said that it was negligence for plaintiff to walk on the space where he walked, as he testified it was necessary for him to do in order to push the car around the curve, or that an ordinarily prudent person would not have done so. *Held*, that such findings did not require a verdict for defendant.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 297.*]

3. MASTER AND SERVANT (§ 288*)—TRIAL—QUESTIONS FOR COURT OR JURY.

In an action for injuries to a servant by falling from a wall, the court properly denied defendant's request to submit to the jury the question whether plaintiff, in walking on a wall and pushing loaded loom cars took upon himself the risk of falling; that being a question of law, and not of fact.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1068-1083; Dec. Dig. § 288.*]

Appeal from District Court, Wilson County.

Action by James S. Murphy against the Edgar Zinc Company. From a judgment for plaintiff, defendant appeals. Affirmed.

O. P. Ergenbright, for appellant. Francis M. Brady and J. A. Brady, for appellee.

PER CURIAM. The demurrer to the evidence was properly overruled. Although the plaintiff admitted in his testimony that during the time he used the push cars he learned that some of them worked harder than others, and that he knew this was because the cars stood out in the weather and got rusted and were never oiled, and that they would have run easier if they had been oiled, there is no testimony from which it can be said, as a matter of law, that he appreciated, or should have appreciated, the danger of falling from the wall by reason of the car suddenly stopping. Before the master can be relieved of liability by the servant's assumption of the risk incident to the service, the servant must have equal opportunity with the master to know the surroundings and be equally competent to judge of the risks and hazards. The very cases cited by the defendant in support of his contention (*Rush, Adm'x, v. Mo. Pac. Ry. Co.*, 36 Kan. 129, 12 Pac. 582, and *Clark v. Mo. Pac. Ry. Co.*, 48 Kan. 654, 25 Pac. 1188) recognize the requirement that the servant appeared to have been equally competent with the master to judge of the risks. In *Rush, Adm'x, v. Mo. Pac. Ry. Co.*, supra, it was held that the surroundings were such that the danger must have been known to the employé, and therefore he assumed the risk. To the same effect is *Buoy v. Milling Co.*, 68 Kan. 436, 75 Pac. 466; *Gillaspie v. Iron Works Co.*, 76 Kan. 70, 20 Pac. 760; and *Railway Co. v. Quinlan*, 77 Kan. 126, 93 Pac. 632. In *Clark v. Mo. Pac. Ry. Co.*, supra, the servant was held to have assumed the risk because he had equal knowledge of the conditions and surroundings and knew of the dangers and hazards. There are, of course, cases where the court can say, as a matter of law upon the facts, that the servant must have known, as in *Gillaspie v. Iron Works Co.*, supra, where the employer was held not liable because "the facts and the danger were within the comprehension of any ordinarily intelligent and prudent man and were as completely within the knowledge and appreciation of the servant as of the master."

The defendant was not entitled to judgment on the special findings. While the findings show that between the rails of the track was a safe place to walk while pushing a loaded loom car, and that there was nothing to prevent the plaintiff from walking there when pushing the car at the time he was injured, the jury further find, in answer to question No. 18, that a loaded car could not be pushed around the curve safely and easily by the operator pushing and walking directly behind the car. The effect of these findings, taken together, is that there were two ways in which the car could be pushed, one more easily than the other. Although one of these ways was doubtless

safer than the other, there is no finding from which it can be said that it was negligence for the plaintiff to walk on the narrow space which he testified it was necessary for him to do in order to push the car around the curve, or that an ordinarily prudent person would not have done so.

Although this was an ordinary action by a servant to recover for injuries caused by the alleged negligence of the master, it requires 15 printed pages of the abstract to set out the petition. The defendant moved to require the petition to be made more definite and certain in 46 particulars. The motion was overruled, as was a demurrer, and these rulings are complained of. In the brief the defendant abandons all but 14 of the grounds of the motion, and, as none of those remaining appear to be sufficient, it must be held that the ruling of the court thereon was correct. The petition stated with a great deal of useless repetition the facts upon which plaintiff relied to entitle him to recover, but stated a good cause of action as against the demurrer.

The court properly denied the request to submit to the jury the question whether the plaintiff in walking on the wall while pushing loaded loom cars took upon himself the risk of falling. That was a question of law and not of fact.

We find no error in the judgment, and it will be affirmed.

(83 Kan. 625)

BROWN v. NEULING.

(Supreme Court of Kansas. Dec. 10, 1910.)

1. APPEAL AND ERROR (§ 1008*)—EVIDENCE—SUFFICIENCY.

The court on appeal will construe the evidence most favorably to sustain the findings of the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3955-3969; Dec. Dig. § 1008.*]

2. PUBLIC LANDS (§ 54*)—SCHOOL LANDS—FORFEITURE OF PURCHASE—NOTICE—SERVICE.

The testimony of the sheriff as to his service of a notice of forfeiture of a purchase of school land is immaterial, unless it overcomes the presumption created by statute from the indorsement by the county clerk on the school land record that notice was posted in a conspicuous place, and the testimony that he posted a copy of the notice in the office of the county clerk, without saying that he posted it in a conspicuous place in the office, does not overcome the presumption by showing a failure to post the notice in a conspicuous place.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 152-169; Dec. Dig. § 54.*]

3. PUBLIC LANDS (§ 54*)—SCHOOL LANDS—FORFEITURE OF PURCHASE—ESTOPPEL.

Where a purchaser of school land lived quite near the land for about 10 years after he learned that his claim to the land was forfeited, and during that time exercised no act of ownership over the land, but to all appearances acquiesced in the forfeiture, he was es-

topped from claiming the land as against a grantee of a subsequent purchaser.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 152-169; Dec. Dig. § 54.*]

Appeal from District Court, Lane County. Action between H. N. Brown and Mary E. Neuling. From a judgment for the latter, the former appeals. Affirmed.

W. H. & Frank U. Russell, for appellant. J. S. Simmons, for appellee.

PER CURIAM. The determining question in this case is whether the appellant's claim to the school land in question was legally canceled before the purchase of the land by the appellee's grantor. The school land was purchased on the usual terms on the first certificate of sale in 1889, and in 1892 the certificate was assigned to the appellant. Thereafter no interest payments were made thereon. In 1896 the county clerk of the county issued a proper notice of forfeiture, and on the return thereof by the sheriff entered upon his school land record, opposite the description of this tract, the words: "Reported September 15, 1896. Forfeited December 10, 1896." It is conceded that, if this were the only evidence in regard to the forfeiture, it would be sufficient under the act of 1907; but it is contended by the appellant that the sheriff, who made the return, being called as a witness, testified to facts which prove that no legal service of the notice was made. His evidence is not very positive, and is to some extent contradicted by the evidence of appellant. The court below having found in favor of the appellee, we should construe the evidence most favorably to sustain its finding.

The sheriff testified, in substance, that at the time he had the notice for service and return it was his best recollection that the appellant was not in the county, and that the land in question was unoccupied; that he posted a copy of the notice on the land, and also a copy in the office of the county clerk. True, he does not say that he posted it in a "conspicuous place" in the office of the county clerk; but his evidence, under the provisions of the statute, is immaterial, unless it tends to overcome the presumption which the statute provides should arise from the indorsement by the county clerk of the words upon the school land record, and the sheriff's evidence does not show that he did not post the notice in a "conspicuous place" in the county clerk's office. However this may be, we think the circumstances shown by the evidence, that the appellant lived quite near the land in question for about 10 years after he had learned from the county clerk that his claim to the land was canceled, and during all those years exercised no act of ownership over the land, but to all appearances acquiesced in the forfeiture

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

proceedings, estopped the appellant from claiming this land as against the appellee's grantor. Therefore the appellee's grantor had good title to the land, and his deed to the appellee conveyed good title to her.

Considering the evidence in the most favorable light to the appellant, we think it is sufficient, and the judgment is affirmed.

(2 Kan. 513)

WORTH v. BUTLER et al.†

(Supreme Court of Kansas. Dec. 10, 1910.)

(Syllabus by the Court.)

1. CONSTRUCTION OF DEED.

The effect of a clause in an instrument, otherwise in the usual form of a warranty deed, reserving the use and possession of the premises for the life of the grantor, with the right to a reconveyance whenever demanded, is referred to, but not decided.

2. DEEDS (§ 208*)—DELIVERY—EVIDENCE.

The rule that, before a deed can operate as a valid transfer of title, there must be a delivery of the instrument (*Wuester v. Folin*, 60 Kan. 334, 56 Pac. 400), is applied to the evidence, and it is found that there was no evidence to sustain a finding of delivery.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 625-632; Dec. Dig. § 208.*]

3. APPEAL AND ERROR (§ 1176*)—REVERSAL—DIRECTING ENTRY OF JUDGMENT.

Where an issue was fairly tried after full opportunity had been afforded to present the case, and there was no accident or surprise nor any ruling causing a party to withhold his evidence, and all the facts appear to be fully presented by the evidence, leaving only questions of law to be decided, this court may, under the Revised Code, in the furtherance of justice, direct the entry of a proper judgment by the district court when the judgment of that court is reversed.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4538-4596; Dec. Dig. § 1176.*]

Appeal from District Court, Jewell County.

Action by Earl Worth, by his next friend, against J. T. Butler and others. Motions to set aside findings of jury and for a new trial were overruled, and plaintiff and defendant Butler appeal. Reversed, with directions.

R. W. Turner and G. H. Bailey, for appellants. W. R. Mitchell and Hugh Alexander, for appellees.

BENSON, J. Earl Worth, the plaintiff, alleging that he owned an undivided one-sixth of 200 acres of land by inheritance from his deceased grandmother, Barbara E. Butler, sued for partition. J. T. Butler, one of the defendants, claimed one-half of the land as the surviving husband of Barbara E. Butler. The other defendants, George E. Butler and Minnie Higbee, her sole surviving children, claim to own the land in fee as grantees in instruments which they allege convey 160 acres of the land to George E. Butler and 40 acres thereof to Minnie Higbee. These instruments are dated November 25, 1907.

Barbara E. Butler died on May 19, 1908. The plaintiff and J. T. Butler are entitled to partition unless the instruments referred to operate as valid conveyances.

Two objections are made to these instruments: (1) That they were never delivered to the grantees; and (2) that they conveyed no interest.

The latter objection is based upon the following clause appearing in each deed after the description, and preceding the habendum: "This deed is executed upon the express agreement and understanding between the said first and second party that the said first party reserves the right to possession of said premises during her lifetime, also a life lease to said real property and with the farther understanding that if the said grantor B. E. Butler desires or requests a reconveyance of the above described real property from the said grantee, her heirs or assigns, to the said grantor B. E. Butler, then and in that event the said grantee agrees to reconvey upon notice from said grantor." Otherwise the instruments are in the ordinary form of warranty deeds. The argument to sustain the objection is that no estate in present was intended, and any future estate depended on the will of the grantor, who reserved possession for life and the power to revoke at pleasure. On the other hand, it is contended that the reservation of a life estate does not prevent the immediate vesting of the remainder, subject to the exercise of the right to a reconveyance in the lifetime of the grantor. The question thus presented in some of its phases has been the subject of much judicial consideration, but, as delivery must appear before interpretation becomes necessary, that matter will be first considered. A jury found that the instruments had been delivered to the grantees, and the court, holding that they were valid conveyances, refused partition. The appellants, however, contend that there was no evidence of delivery, and that all the evidence on the subject proves that Barbara E. Butler retained them in her possession and control until her death. Motions to set aside the findings and for a new trial were overruled.

Preliminary to a review of the evidence, it should be stated that, in an action for divorce brought by Barbara E. Butler against her husband, a judgment was rendered in November, 1906, refusing a divorce, but awarding to her the lands in question as her separate property, and ordering her husband to join her in conveyances thereof as she might request. She then occupied the premises as her home, and continued to do so until her death. Her son George and his wife shared the occupancy with her and remain in possession. The instruments in question contained the names of Barbara E. Butler and J. T. Butler as grantors and warrantors, and were drawn in form for execution by

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

† Rehearing denied January 2, 1911.

both. After they were signed by Mrs. Butler, her husband, although requested by letter, refused to execute them, and returned them to her by mail some time in the early winter of 1907. In March, 1908, George E. Butler, who was present when his mother signed the deeds, saw them in her possession.

Concerning this he testified: "Q. Who had them at that time? A. Well, they were there in the house. Q. Answer the question. A. Didn't any one have them when I saw them. Q. Where were they? A. In a drawer in the machine—sewing machine. Q. Your mother's machine? A. My wife's machine. Q. They were in the drawer? A. Yes, sir. Q. Who called your attention to them? A. My mother." Referring to the same matter, he testified that he came home from Oklahoma in March, 1908, and further: "Q. She kept them and said nothing to you about them from the 4th day of December, 1907, until some time in March, 1908? A. She wrote to me about them. Q. Have you got the letter she wrote to you? A. No, sir; I haven't. Q. You have not? A. No, sir. * * * Q. Then from March she kept the deeds up to the 2d of May, 1908, when she gave them to you? A. She showed them to me when I first came home. * * * Q. And she gave them to you on the 2d of May, and told you to see an attorney and bring an action to have Mr. Butler sign them? A. Yes, sir. Q. And when did you see an attorney? A. On the same day I went to Belleville and seen Mr. Alexander. * * * Q. She gave you these deeds for the purpose of having you go to an attorney for her, and have this matter brought up in court? A. Yes, sir. Q. She didn't give them to you for any other purpose? A. She didn't say so. She gave them to me, and only told me to go and see an attorney. Q. For her, or for you? A. For her. Q. For her? A. Yes, sir. Q. In this matter you were simply acting as her agent, is that right? A. Yes, sir." The witness then testified that he took the deeds to Lebanon where his father then was, and gave them to a notary to be presented for his father's signature; that the notary returned the deeds unsigned, and the witness then gave them back to his mother. He further testified: "Q. She was buried on the 20th day of May? A. Yes, sir. Q. At the time she was taken sick in her last illness, who was at home at that time? Were you? A. Yes, sir. Q. Who else? A. My wife and family. Q. You were living in the same house with her? A. Yes, sir. Q. After your mother's death, did you find these papers among her effects? A. Found them in a box in the bedroom. Q. And gave them to your attorney? Mr. Alexander? A. Yes, sir."

Mrs. Higbee, grantee in one of the instruments, testified that she never saw the deeds until after the death of her mother, when she saw them in the possession of her brother George, but that she had heard her mother say about two weeks before her death that

she had sent them to Mr. Butler, and that he would not sign them.

Mrs. George E. Butler testified: "Q. Was there a sewing machine at your house? A. Yes, sir. Q. Who owned it? A. It was mine. Q. Where was it kept? A. In the bedroom—in my room. Q. At any time did you see Barbara Butler put some deeds in the drawer of this machine, or did she have you put them? A. She had me put them in the drawer of the machine. Q. What did she say at the time? A. She said for me to take care of them, that they were deeds. * * * Q. Did you find them there after her death? A. Yes, sir. Q. What did you do after you found them? A. I gave them to Mr. Butler. Q. That is, your husband? A. Yes, sir. * * * Q. What was done at the time she gave you those deeds and told you to take care of them? A. You mean she told me to put them in the machine drawer? Q. Yes, sir? A. Well, she brought the deeds in from the mail, and they were in an envelope, and she says these are the deeds, and she told me to put them in the machine drawer. Q. And you put them in the machine drawer? A. Yes, sir. Q. And that was all, that was said and all that was done? A. Yes, sir. Q. And that is all that you know about them being in there? A. Yes, sir. Q. You don't know whether it was after she died or before? A. No. Q. What is your best recollection? Was it before or after? A. Before, I believe. * * * Q. You say now you went to the sewing machine and got them before her death? A. I said I didn't say it was before, but I think it was. Q. How long before? A. Well, I don't know how long."

It will be noticed that George Butler testified that he found the deeds in a box in his mother's room after her death, and that Mrs. Butler at first testified that she took them from the machine drawer after the mother's death, but afterwards said that she believed it was before the mother's death. No irreconcilable conflict appears here, for Mr. Butler said that in March his mother showed him the deeds, and that they were then in the machine drawer. It appears that they were taken by him to Lebanon early in May, and then returned to his mother. This is consistent with the fact that they were found in her box after her death. The testimony of neither witness proves or tends to prove a delivery. That of George E. Butler clearly indicates that his mother at all times had the control and dominion of the papers, and was giving directions with a view of procuring her husband's signature, evidently considering them incomplete without it. He caused an attachment to issue against his father to compel him to sign the papers, commencing the proceeding six days after his mother's death. This would indicate that such proceeding was contemplated by her resulting from the legal advice she had, as he testified, directed him to obtain. She died rather suddenly, leav-

ing the instruments still incomplete. The testimony of Mrs. Geo. E. Butler fails to show any delivery or attempted delivery. The papers came in from the mail. Mother and daughter-in-law were members of the same household. The younger woman was asked to put them away, and the machine drawer was made the receptacle. She was given no order, directions or authority as custodian. If she took them out before her mother's death and gave them to her husband, it was not a valid delivery, for the consent of the grantor had not been given. If she took them out after the grantor's death, she had no authority to deliver them to the grantees.

There is some additional evidence that it is claimed bears upon this question of delivery. The assessor testified that in the spring of 1908 Barbara E. Butler told him to assess the place—referring to this land—to her or in her name. Neighbors testified that shortly before her death she had told them that she had deeded the place to her son and daughter—160 acres to the former, and 40 acres to the latter. It is true she had signed and acknowledged the instruments, and upon some issues the testimony might be important, but here the facts are stated by one of the grantees himself, and by his wife, relating just what the grantor did do, and showing the disposition made of the instruments from which it clearly appears that no delivery was made. The appellees rely on *Wuester v. Folin*, 60 Kan. 334, 56 Pac. 490. It was held in that case that: "Before a deed can operate as a valid transfer of title, there must be a delivery of the instrument which becomes effective during the life of the grantor." It is true that it was also said that "an unconditional delivery to a third person for the use and benefit of the grantee, where the grantor intends to divest himself of the title and to part with all control over the instrument, is ordinarily a sufficient delivery," but here there is no evidence of any delivery to a third person for the use or benefit of the grantees. Mrs. George E. Butler when told to put the papers in the drawer was not made a custodian for the grantees, nor given any charge concerning the papers except to put them away as directed. There is no evidence that Mr. Butler was given any custody or other authority over them except to consult an attorney and have them executed by his father. That he so understood it is shown by the fact that he returned them to his mother.

While delivery is largely a matter of intention, still it must appear, as stated in *Wuester v. Folin*, supra, that the deeds have passed beyond the control of the grantor. In this case it distinctly appears that they had not. The grantor was exercising an active control over them a few days before her death, and they were still under her dominion and in her possession when

death came. Whether she would have delivered them had she lived, and had been finally convinced that her husband would not join, or could not be made to join, in their execution, we may never know. The fact that her purpose was to deliver the instruments if he signed them does not prove that she would do so if his signature could not be obtained. And if it should be supposed that she intended to deliver the deeds in the future, whether he united with her or not, that would not prevent her from changing her purpose at any time before the delivery was made. But all this is elementary. It would be a dangerous precedent to hold that a delivery is shown by the evidence in this case. As there was no delivery of the instruments, an interpretation of their terms will not be attempted.

A question of practice is presented. There is no dispute concerning the interests of the respective parties if the alleged conveyances are held inoperative. The question of delivery has been fully tried. Upon undisputed facts appearing from the evidence given principally by the parties claiming under the instruments, they are inoperative for want of delivery. There was no accident or surprise nor any ruling that led the parties opposing partition to withhold evidence. All facts appear to be fully presented, leaving only a question of law to be decided. Section 581 of the Code of Civil Procedure provides that the Supreme Court shall "render such final judgment as it deems that justice requires, or direct such judgment to be rendered by the court from which the appeal was taken, without regard to technical errors and irregularities in the proceedings of the trial court." Gen. St. 1909, § 6176. Under the former Code (section 559) it was provided that: "In cases decided by the Supreme Court, when the facts are agreed to by the parties, or found by the court below or a referee, and when it does not appear by exception or otherwise that such findings are against the evidence in the case, the Supreme Court shall send a mandate to the court below directing it to render such judgment in the premises as it should have rendered on the facts agreed to or found in the case." Gen. St. 1901, § 5045. It was generally held that, under this provision, judgments could be ordered by this court only when the facts had been agreed to or found. The omission in section 594 of the new Code of that part of the old section quoted above indicates an intention to give the court power to order the proper judgment when it can be done in furtherance of justice and without the denial of legal rights. Section 307 of the Code of 1909, providing for new trials upon the order of a district court, directs that "a new trial shall not be granted as to any issues in a case unless on the pleadings and all the evidence offered at the trial and on the motion for a new trial the court shall be of

the opinion that the verdict or decision is wrong in whole or in some material part, and the new trial shall be only of the issues as to which the verdict or decision appears to be wrong, when such issues are separable." Gen. St. 1909, § 5901. These provisions of the Revised Code, to which reference has been made, indicate the legislative purpose to expedite procedure, and avoid new trials of an issue once fairly tried after a sufficient opportunity to present the case, where a proper judgment has been rendered or may be ordered.

No reason appears why an issue fully and fairly tried should be retried when the facts clearly appear upon the hearing in this court, although shown by evidence instead of findings.

The judgment is reversed, with directions to enter judgment for partition among the parties according to their respective interests, unaffected by the instruments referred to, which are held to be inoperative for lack of delivery. All the Justices concurring.

(33 Kan. 504)

CENTRAL MERCANTILE CO. v. OKLAHOMA STATE BANK.

(Supreme Court of Kansas. Dec. 10, 1910.)

(Syllabus by the Court.)

1. CARRIERS (§ 58*)—BILL OF LADING—RIGHTS ON TRANSFER—DRAFT WITH BILL OF LADING ATTACHED.

Where the seller of goods ships them and makes a draft upon the purchaser with the bill of lading attached, one who buys the draft and receives payment thereof from the drawee is not liable for the return of any portion of the proceeds on account of any defect in the quality of the goods.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 179-190; Dec. Dig. § 58.*]

2. CARRIERS (§ 58*)—RIGHTS ON TRANSFER—DRAFT WITH BILL OF LADING ATTACHED.

This rule is not affected by the fact that the draft was bought in reliance upon a written guaranty of its payment, in which the bill of lading was described as covering goods of a designated quality.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 179-190; Dec. Dig. § 58.*]

3. CARRIERS (§ 58*) — BILLS OF LADING — RIGHTS OF INTERVENING PARTIES.

Where, under the circumstances stated, the drawee, after paying the draft to a collecting agent, seeks to hold the proceeds by garnishment as the property of the drawer, the owner waives no rights by intervening and asserting his title.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 58.*]

Appeal from District Court, Reno County.

Action by the Central Mercantile Company against the Oklahoma State Bank. Judgment for plaintiff, and defendant appeals. Reversed and remanded, with directions.

S. E. Gidney and J. U. Brown, for appellant. Prigg & Williams, for appellee.

MASON, J. H. A. Paul, of Muskogee, Okl., sent out a circular soliciting business as a shipper of potatoes. The Central Mercantile Company, of Hutchinson, Kan., receiving a copy, wired Paul, asking him to quote price on a car. In the course of resulting correspondence he reported in effect that he had two cars of choice stock, and asked for a bank guaranty. Thereupon, at the request of the company, the Citizens' Bank of Hutchinson on June 17, 1908, sent a telegram to the Oklahoma State Bank of Muskogee, reading: "We guarantee draft bill of lading attached, two cars choice potatoes for Central Mer. Co., H. A. Paul shipper." Two days later Paul shipped two cars of potatoes to Hutchinson, and drew upon the company for the agreed price, making two drafts, payable to the Oklahoma State Bank, which he delivered to that bank, with the bill of lading attached. The Oklahoma bank sent the drafts and bill of lading to the Citizens' Bank with directions to collect and remit. The mercantile company paid the drafts to the Citizens' Bank, and received the potatoes. Before the money was remitted, the company sued Paul, principally on account of the quantity of dirt found in the potatoes, and served a garnishment summons on the Citizens' Bank. The bank filed an answer as garnishee, setting out that it still had the proceeds of the drafts, but did not know whether they belonged to Paul or to the Oklahoma bank. The Oklahoma bank was made a party and claimed the fund. The plaintiff in a reply maintained that the Oklahoma bank had acted only as the agent of Paul, and also that its conduct made it a guarantor of the quality of the potatoes. Upon the trial the plaintiff was given judgment for \$308.42, which was ordered paid out of the proceeds of the drafts. The Oklahoma bank appeals.

Paul testified, in substance, that, in his business of marketing potatoes not having sufficient capital to make purchases outright himself, he found it necessary for the buyer either to advance him the money, or to furnish him with a bank guaranty by means of which he could procure it, inasmuch as the grower always required payment before shipment; that in the present instance the Oklahoma bank paid the price of the potatoes to the grower, and received in return the two drafts on the mercantile company, with the bill of lading attached; that the bank was the sole owner of the drafts, Paul retaining no interest in them. The testimony of an officer of the Oklahoma bank was to the same effect. There was no evidence to the contrary. Therefore the transaction must be treated as what it appears to have been on its face. The contention that the bank was acting merely as the agent of Paul, and that the proceeds of the drafts belonged in whole or in part to him, is not sub-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

stantiated. Consequently the plaintiff's attempt to enforce its claim against Paul by garnishment has failed.

In behalf of the plaintiff the argument is made that the telegram it caused to be sent amounted to a conditional acceptance of the drafts, the condition being that the potatoes covered by the bill of lading should be "choice," that the rights of the Oklahoma bank are the same as though it were seeking to collect the drafts, that the use of the word "choice" in the telegram prevented it from being an innocent purchaser of them, and that the mercantile company can recover against the Oklahoma bank whatever amount it could have recouped had Paul sued it for the agreed price of the potatoes. Whatever effect the word "choice" in the telegram might have in an action founded upon it, it can have none here. The Oklahoma bank is not suing the Citizens' Bank upon its guaranty, or the mercantile company upon an acceptance of the drafts. The drafts have been paid by the mercantile company, the drawee, to the Citizens' Bank as agent for the Oklahoma bank, the payee. No occasion arose to look to the guarantor. The act of the drawee in paying the drafts placed the payee in at least as good a position as though there had been an unqualified acceptance. The situation is the same as though payment had been made to the Oklahoma bank directly. The proceeds of the drafts have become its property as effectually as though it had their actual possession. The plaintiff cannot hold any part of them unless upon a showing that it had a valid cause of action against the Oklahoma bank. Unless the Oklahoma bank was in collusion with Paul, and of that there is no evidence, it conducted an ordinary business transaction in an ordinary way, not being in fault in any respect. We perceive no ground of liability on its part, unless one who purchases and collects a draft with a bill of lading attached is deemed to guarantee the character or quality of the goods shipped. A few cases have so held, but two of the principal ones (*Landa v. Lattin Bros.*, 19 Tex. Civ. App. 246, 46 S. W. 48; *Finch v. Gregg*, 126 N. C. 176, 35 S. E. 251, 49 L. R. A. 679) have been recently overruled (*Blaisdell Co. v. National Bank*, 96 Tex. 628, 75 S. W. 292, 62 L. R. A. 968, 97 Am. St. Rep. 944; *Mason v. Cotton Co.*, 148 N. C. 402, 62 S. E. 625, 18 L. R. A. [N. S.] 1221, 128 Am. St. Rep. 635). The general doctrine to the contrary is well settled. See notes in 49 L. R. A. 679; 1 L. R. A. (N. S.) 242; 18 L. R. A. (N. S.) 1221; 91 Am. St. Rep. 212. In *Hall v. Keller*, 64 Kan. 211, 215, 216, 67 Pac. 518, 519 (62 L. R. A. 758, 91 Am. St. Rep. 209), it was said: "If the banks in whose favor such bills are drawn are made liable for damage on account of the defective quality of the property shipped, and covered by the bill of lading, * * * a serious impediment would be plac-

ed in the way of shippers who need a part or all of the price of the commodity sold before its arrival in the market to which it is consigned."

In the plaintiff's brief it is suggested that, because the Oklahoma bank has come into this case and litigated its rights to the money held by the garnishee, its situation is the same as though it were suing the mercantile company for the value of the potatoes. We cannot agree to this. The bank is not seeking to collect the drafts, but to hold the proceeds which have already been paid to its agent for its benefit. The statute (Gen. St. 1909, § 5834 [Code Civ. Proc. § 241]) provides that, where the answer of a garnishee discloses that any other person than the defendant claims the indebtedness or property in his hands, the court may order the claimant to be made a defendant, and notice to be served upon him. Here the plaintiff made the Oklahoma bank a defendant by so designating it in an amended petition. If the bank entered an appearance without waiting to be served with summons, its rights were in no way prejudiced thereby.

The judgment is reversed and the cause remanded, with direction to order the money, paid to the Oklahoma State Bank. All the Justices concurring.

(83 Kan. 522)

COBE v. COUGHLIN HARDWARE CO.†
(Supreme Court of Kansas. Dec. 10, 1910.)

(Syllabus by the Court.)

1. PLEADING (§ 345*)—MOTIONS—JUDGMENT ON PLEADINGS.

Ordinarily a judgment on the pleadings in favor of plaintiff cannot be ordered in a case where issue is joined upon a general denial and other defenses, unless the general denial is overthrown by other statements in the answer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1065-1059; Dec. Dig. § 345.*]

2. EVIDENCE (§ 594*)—WEIGHT AND SUFFICIENCY—CREDIBILITY OF WITNESSES.

A court or jury is not required to believe a witness or accept his statements as conclusive merely because there is no direct evidence contradicting his statements.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2341; Dec. Dig. § 594.*]

3. APPEAL AND ERROR (§ 248*)—EXCEPTIONS TO RULINGS—NECESSITY.

The new Civil Code dispenses with the necessity of taking or saving exceptions to rulings of the trial court. A party is now entitled to have all rulings including the giving and refusal of instructions reviewed on appeal without notifying the court that he intends to have the ruling reviewed or preserving an exception to the ruling.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1432-1408; Dec. Dig. § 248.*]

4. TRIAL (§ 251*)—SUBMISSION OF ISSUE—ISSUE RAISED BY ABANDONED PLEADING.

Ordinarily a court is not warranted in submitting to a jury by instructions an issue raised by a pleading which is abandoned by the party

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

† Rehearing denied.

pleading it and in support of which no testimony is presented.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 587-596; Dec. Dig. § 251.*]

6. BANKS AND BANKING (§ 264*)—NATIONAL BANKS—UNAUTHORIZED USE OF FUNDS BY OFFICERS.

Neither the cashier of a national bank nor a member of the discount board who owns a majority of the stock, nor the two conspiring together, can by any device or fraud give away the funds of the bank nor use them to pay the individual debts of either.

[Ed. Note.—For other cases, see Banks and Banking, Dec. Dig. § 264.*]

6. BANKS AND BANKING (§ 264*)—NATIONAL BANKS—UNAUTHORIZED USE OF FUNDS BY OFFICERS.

If these officers connived together to pay the debt of the stockholder to his creditor by the entry of credits in the books of the bank in favor of such creditor based on fictitious notes, and the amount of the credits is checked out by the creditor without any one having made a deposit in the bank to justify the entry of the credits and without the sanction of the board of directors, the creditor who drew out the money without giving any consideration therefor is liable to the bank for the money so drawn and received by him, although he may have had no knowledge of the fraud of the officers.

[Ed. Note.—For other cases, see Banks and Banking, Dec. Dig. § 264.*]

Appeal from District Court, Shawnee County.

Action by Ira M. Cobe against the Coughlin Hardware Company. Judgment for defendant, and plaintiff appeals. Reversed and remanded for new trial.

Mulvane & Gualt and D. R. Hite, for appellant. Charles Blood Smith, R. F. Hayden, Geo. P. Hayden, and Samuel Barnum, for appellee.

JOHNSTON, C. J. This was an action brought by Ira M. Cobe, as assignee of the receiver of the insolvent First National Bank of Topeka, against the Coughlin Hardware Company, to recover \$4,000 alleged to have been due the bank for money obtained from the bank by the hardware company. It was alleged and shown that on May 20, 1905, the books of the bank disclosed that the Coughlin Hardware Company had overdrawn its account to the amount of \$1,344.18, and that upon that date a demand note for \$1,500 payable to the bank was given to the bank signed "Coughlin Hdw. Co., by Chas. J. Devlin," and the amount of the note was credited to the account of the hardware company. Three days later the books of the bank showed that the hardware company had again overdrawn its account, and a similar note dated May 24, 1905, for \$2,500, payable to the bank, was executed, which was also signed "Coughlin Hdw. Co., by Chas. J. Devlin." The credits received on these notes amounting to \$4,000 were entered upon the deposit book of the hardware company as of the dates the notes were given, and the hardware company

from time to time checked against such account and the credits given by reason of such notes until the full amount of \$4,000 was checked out. In addition to the foregoing facts, Cobe alleged that, although the hardware company had received the \$4,000 from the bank and had become indebted to the bank and the assignee in that amount, it had failed to pay the same upon demand, and for this amount, with interest, the assignee, Cobe, asked judgment. The hardware company answered with a general denial, and alleged that C. J. Devlin owned a majority of the stock of the bank and was a director who largely controlled its affairs, and that he owned and controlled certain coal companies which were indebted to the hardware company, and that he agreed to pay on this indebtedness \$4,000, and that the credits in the bank of \$1,500 and \$2,500 were made in compliance with this agreement. It also alleged that, if any loan was made or discount extended by virtue of the notes, it was made to Devlin himself, and that the bank knew that the notes had not been executed by the hardware company. It further alleged that it had no notice that Devlin had executed the notes until the bank had become a bankrupt. The answer contained a verified denial of the execution of the notes and the right of Devlin to execute them. In the reply Cobe denied generally, and also made specific denials of certain averments of the answer. He also alleged that the hardware company presented its claim of indebtedness against the coal company mentioned in a bankruptcy proceeding, but did not credit that company with the \$1,500 and \$2,500 payments referred to in the answer. At the trial the cashier of the bank testified on behalf of Cobe that Devlin owned a majority of the stock, was a member of the discount board, and to a great extent controlled the affairs of the bank. He testified of the overdrafts of the hardware company, and that Devlin came in and handed him the notes which were discounted, and that on his direction the amounts of the notes were credited to the account of the hardware company. He also testified that he recognized that the signature on the notes was not the one usually attached to the paper of the company, but that he understood Devlin to be a partner or stockholder in the hardware company, and he therefore assumed that the notes were the paper of the company, and he accepted them in payment of the overdrafts, and passed the amounts to the credit of the company. In addition to the testimony of the cashier, the evidence consisted of the notes, slips, and book entries of the bank. No testimony whatever was offered in behalf of the hardware company, and the trial court, after overruling a motion for judgment on the pleadings and one to instruct a verdict for Cobe, submitted the case to the jury on instructions of which

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

there is complaint, and the jury later returned a verdict for the hardware company.

It is first argued that the court erred in denying the motion by appellant for judgment on the pleadings; but, as the answer of appellee set up a general denial as its defense to the cause of action stated in the petition, the motion could not well be sustained. The appellant did not demur to the answer or any of the defenses alleged in it. It is plausibly argued that the second count of the answer did not state a defense to the action; but, if a demurrer had been sustained to that count, the denials would have remained, which of themselves are sufficient.

The next contention is that the court should have directed a verdict for appellant. It is true that no testimony was offered in behalf of appellee; but a court or jury is not required to accept a statement of a witness as conclusive, although there may be no direct evidence contradicting his statements, and hence the court could not direct the verdict. *Railway Co. v. Geiser*, 68 Kan. 281, 75 Pac. 68; *Jevons v. Railroad Co.*, 70 Kan. 491, 78 Pac. 817.

There is complaint and reason to complain of the instructions upon which the case was submitted to the jury. Appellee insists that, as the record and abstract fails to show that any exceptions were taken to the instructions of the court, they are therefore not open to review. The provisions of the old Code (Code Civ. Proc.) extending from section 299 to and including section 305 (Gen. St. 1901, §§ 4746-4752), relating to the taking of exceptions, are wholly omitted from the new Code. Under the old Code, error of law occurring at the trial was a ground for a new trial, but was not available unless "excepted to by the party making the application," while in the new Code this reference to an exception is omitted, and an aggrieved party whose substantial rights are affected may now have a new trial for "erroneous rulings or instructions of the court" without the formality of an exception. New Code Civ. Proc. § 305 (Gen. St. 1909, § 5899). Of course, a party cannot obtain a reversal of a judgment because of an instruction which he induced the court to give, nor for an erroneous ruling which he invited the court to make. By striking from the Code all of the provisions relating to exceptions, the Legislature manifestly intended to dispense with the taking of exceptions which in actual practice had largely become a mere formality. It is no longer necessary for a party to notify the trial court that he intends to have a ruling reviewed on appeal or to have an objection saved by a record entry. *Kelley v. Schreiber*, 82 Kan. 403, 108 Pac. 816. After calling the attention of the jury to the contention of appellant, and that appellee had formed an issue by a general denial and by the special denial challenging the authority of Devlin to execute the notes, the court presented in some detail the claims of appellee

on his second defense, upon which no evidence had been offered. Appellee, as we have seen, did set up that Devlin owed it, and that he had agreed to pay money into the bank for it, and that the credits extended because of the notes executed for the appellee by Devlin were in compliance with this agreement, and further that the execution of the notes without authority was a shift and device of Devlin in connivance with the cashier to raise \$4,000 to pay on his indebtedness to appellee and was in fact a loan from the bank to Devlin; but this defense appears to have been abandoned by appellee, as no proof of these averments was offered. The submission of these questions to the jury without evidence was unwarranted and quite likely to have been prejudicial. Aside from that, the defense itself is defective. Neither the cashier nor a stockholder of a bank can by any device or fraud give away its funds, nor can they use them to pay their individual debts to appellee or any one else. Appellee had overdrawn its account with the bank and was indebted to it. Assuming, as we may, that Devlin was without authority to execute the notes, and that they were worthless, the bank never received anything from appellee on its debt nor for the \$4,000 drawn out of the bank by it. It obtained this sum from the bank on its checks over and above its deposits for which no consideration was paid to the bank. The funds of the bank could not be diverted or appropriated to the individual debts of Devlin or the cashier by the mere agreement between Devlin and the appellee to enter a credit in its favor. The appellee had paid nothing to the bank, and the bank had received nothing to warrant such a credit. If something had been received by the bank or something had been accepted by the governing board as a basis for the credit, other considerations and liabilities might arise.

Hier v. Miller, 68 Kan. 258, 75 Pac. 77, 63 L. R. A. 952, illustrates the effect of entering a credit in a bank book by a cashier and allowing the amount of it to be drawn out in payment of the cashier's debt, when there was in fact no deposit, and also where the creditor was entirely innocent of the misappropriation. There the cashier was indebted individually to a depositor of the bank. He pretended to make several deposits in favor of the creditor as payments on that debt and entered credits of the amounts upon her passbook. A final settlement was had between them, and in consideration of the credits thus extended the note representing the debt of the cashier was surrendered, and for a balance that was still due her a cashier's draft on another bank was drawn. No money was deposited in the bank when the credits were entered, and no other officer of the bank knew of the transaction; but the creditor acted in good faith throughout the transaction and knew nothing of the fraudu-

lent diversion of the funds. It was held that the cashier could not pay his debt in that manner, and that the receiver of the bank, which in the meantime had become insolvent, could recover from the innocent creditor the amount of the bank's money which she had checked out on the faith of the fraudulent entries of credit. In referring to the entries of credit in the creditor's passbook, it was said: "Those entries were made in payment of the cashier's private debt, and, if of any effect at all, amounted to an appropriation of the money of the bank to the discharge of his personal obligations. The cashier had a right to dispose of the funds of the bank for the purposes contemplated by its charter. For this his office is a warrant of authority. But he could not absorb the funds of the bank in the satisfaction of his private debts without an express and especial authorization." On the question of whether the creditor could rely on the apparent authority of the bank officer when he undertook to extend a credit in the payment of his debt, it was said: "Whether or not such authority actually did exist the defendant was bound to inquire. It has been well understood from of old that no man can serve two masters. He will hold either to one or to the other. For a like reason the cashier could not serve both himself and the bank in a single transaction, and, because he was attempting such a perilous thing, the defendant was put upon guard as to the extent of his power." On the same line it was further said: "The cashier of a bank may not pledge the credit of the corporation or use the corporate assets for the satisfaction of his individual indebtedness, without the consent of the board of directors. That is a use foreign to the charter purposes of the corporation; and, because such conduct falls outside the scope of a cashier's lawful authority, any one dealing with him privately must do so at his peril."

Devlin and the cashier, acting in connivance with him, could no more appropriate the funds of the bank to pay the individual debts of Devlin without the sanction of the board of directors than could the cashier of the bank in the cited case, and it was incumbent on the appellee, as it was upon the creditor in that case, to inquire whether the officers of the bank were acting within the scope of their authority. If appellee intrusted Devlin to make a deposit or procure a credit for it in the bank, it devolved upon it to see that the deposit was actually made, or that a real credit was obtained. The fact that Devlin was a member of the discount board and owned a majority of the stock did not give validity to the action of the cashier nor relieve appellee from responsibility for the funds which were obtained from the bank, if, as alleged, the cashier

and Devlin connived together to obtain \$4,000 of the bank's money with which to pay Devlin's debt. In *Dowd v. Stephenson*, 105 N. C. 468, 10 S. E. 1101, a president of a bank, who was indebted to another, instructed the cashier to pay the checks of his creditor out of the funds of the bank. This was done for the president's convenience. The creditor's account was overdrawn, but the checks were honored by the cashier on the instructions of the president, who appeared to be indebted to the creditor more than the amount of the overdraft. The cashier stated that he honored these checks and looked to the president to pay them. No notice was sent to the creditor of his overdrafts, but the checks were charged on the books of the bank to the creditor. It was decided that: "In the absence of special authority for such purpose, neither its president, nor its cashier, nor these officers acting conjointly, had authority or right to appropriate and devote any part of the funds of the bank of which the plaintiff is receiver to the payment of such president's personal debt due to the defendant. Such authority, ordinarily, was beyond the scope of the purpose and duties of such officers. No doubt the directors, the governing authority of the bank, might allow them to exercise such power, or they might ratify such transaction; but it must in some way sufficiently appear that they did." See, also, *National Bank v. Drake*, 29 Kan. 311, 44 Am. Rep. 646; *Cattle Co. v. Loan Co.*, 65 Kan. 359, 69 Pac. 332. Other considerations would arise where there was some authorization or ratification of the acts of the officers by the board of directors, or where there were facts that would estop the bank to deny the authority of the officers; but, as there was no proof supporting these theories, there is no occasion to discuss them.

The instructions of the court did not conform with these views, and, besides, there was no basis in the evidence for some of the instructions that were given, and, for the error of the court in charging the jury, the case will be reversed, and the cause remanded for a new trial. All the Justices concurring.

(83 Kan. 500)

LOGSDON et al. v. HUDSON et al.
(Supreme Court of Kansas. Dec. 10, 1910.)

(Syllabus by the Court.)

COMPROMISE AND SETTLEMENT (§ 12*)—EFFECT.

A compromise of a disputed claim made upon sufficient consideration, with knowledge of facts upon which an alleged defense thereto is based, will operate as a surrender of such defense, when the adverse party has executed the terms of the settlement on his part.

[Ed. Note.—For other cases, see *Compromise and Settlement*, Cent. Dig. §§ 63, 64; Dec. Dig. § 12.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Appeal from District Court, Haskell County.

Action by Mary L. Logsdon and others against O. B. Hudson and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

B. F. Milton, for appellants. T. W. Marshall and Herbert Rhodes, for appellees.

BENSON, J. This is an appeal by Hudson and wife from a judgment for the specific performance of an agreement to convey land.

In the year 1902, Patrick, a real estate and collection agent at Santa Fé in Haskell county, sold land to Hudson, a lawyer, living in Missouri, and afterward sold one of the tracts to another party for Hudson as his agent. In the same year Hudson bought lands in Haskell county at tax sales, and following this Patrick made collections from time to time of redemption money and purchased other tax sale certificates for him, and sold county warrants to him. Considerable correspondence followed between them relating to these matters, and relating to a proposed purchase by them jointly of 40 quarter sections of land, which, however, was not made. In the year 1905, while this business and correspondence was still in progress, P. A. Logsdon entered into partnership with Patrick, and the firm continued the business. Logsdon was the owner of a pasture which included a large number of tracts held by Patrick & Logsdon under tax titles and otherwise, taken and held in the name of James A. Hill for their use. In the year 1906, Patrick & Logsdon purchased the quarter section, the subject of this action, which was included in this pasture, and upon which Hudson held a tax deed, taking a conveyance to Hill. Mr. Logsdon then wrote to Hudson, informing him that he (Logsdon) owned the land, that it was in his pasture, offering to redeem from the tax deed, and asking for a quitclaim deed. Several letters were written between them on this subject and a suit was commenced by Logsdon to redeem from the tax deed. Hudson then took counsel to determine whether he should make the deed. Following the advice thus obtained he wrote to Logsdon, on September 15, 1906, a letter, too long to be inserted here, saying in substance that it was the duty of Patrick as his agent to buy in the outstanding title for him; that Logsdon, as a partner of Patrick, had no better right to hold the land against him than Patrick had; complaining that the circumstances of the purchase had been concealed from him, and adding: "And I am further convinced that if all the facts were laid bare that you would be defeated in a suit contesting the title to this land. I have decided, however, acting on the advice above referred to, to accept my money and a bonus of \$5 offered by you. I have footed up the interest and expenses

and it amounts to \$66.76, a statement of which I enclose you. As I understand your law my investment bears 12 per cent. interest from the date of my deed; \$33.65 of this amount was paid for your tax certificates. The following statement shows the items composing my expenses in this matter, to wit:

Paid for tax deed.....	\$10 21
" county clerk fees.....	1 10
" recording deed.....	1 25
" to redeem Logsdon tax certificate	33 65
" taxes for year 1905.....	8 65
Interest since deed was issued at 12%	
on \$56.84.....	6 90
Bonus offered.....	5 00
	<hr/>
	\$66 76

If you are satisfied, send draft for \$66.76 and I will deliver you quitclaim deed to this land." Logsdon answered this letter at once, sending the amount, \$66.76, which was duly received by Hudson, and by further letters it was agreed that he should execute the deed in a short time on the return of his wife, then absent from home. The deed was made accordingly and taken by Hudson to Kansas, but on his arrival he found that Logsdon was dead and it was not delivered. Afterward, in a division of the real estate of the firm between Mrs. Logsdon, sole heir of her deceased husband, and Patrick, this tract became the property of Patrick, although the legal title was still in Hill. Hudson finally refused to convey and this suit was brought in the name of Mrs. Logsdon as plaintiff. After a partial trial, Patrick was admitted as a party plaintiff and the cause was continued; issues were then made up, and the cause was tried at the next term. In his answer Hudson pleaded the agency of Patrick, and his duty and the duty of the firm to act for him. He also pleaded fraud on the part of Logsdon in falsely representing that he was the owner of the land, and in concealing the real facts, and offered to return or to pay into court the consideration received.

There was a conflict in the evidence concerning the nature and extent of Patrick's agency, but the evidence showed that the correspondence relating to the purchase of the tax title was carried on in Logsdon's name on the belief that Hudson would be more likely to make the conveyance if it appeared that Logsdon owned the land, than he would if the true situation were stated. But after his suspicions were thoroughly aroused, with full knowledge that Logsdon was a partner with his own agent, with a suit to redeem from his title pending against him, acting upon advice of counsel, and with due deliberation, he proposed a settlement, and named the sum he would accept for a conveyance, which was promptly paid, and the time fixed for making the deed. It is said, however, that he still did not know that Patrick was interested in the land. Even if this be true, the fact of the partnership, the nature of

the business of the firm, and all the circumstances, as shown by the correspondence and his conduct, were sufficient to put him upon inquiry, which he ought to have made, if he did not in fact do so. The letter of September 15, 1906, plainly stated that he believed that upon all the facts he could defeat the pending suit, and yet with this knowledge he made the compromise. Having done so, the action having been dismissed, and Mr. Logsdon having died, it would be inequitable now to set aside the settlement thus made. The law favors settlements, and they will not be disturbed except for cogent reasons.

Findings of fact were not requested or made, but the decision can, and we believe should, be sustained on the ground that whatever defenses existed were surrendered by the compromise. *Minor v. Fike*, 77 Kan. 806, 93 Pac. 264.

Complaint is made of the action of the court admitting Patrick as a plaintiff with Mrs. Logsdon, but full opportunity was given to meet the claim made by the new plaintiff, and whether Mrs. Logsdon had any interest in the controversy is immaterial to the defendants. All parties in interest were before the court, and their respective rights were fully investigated and determined.

The alleged error in the admission in evidence of an answer filed in another action is regarded as immaterial.

The judgment is affirmed. All the Justices concurring.

(83 Kan. 810)

EWING et al. v. WHITE et al.

(Supreme Court of Kansas. Dec. 10, 1910.)

Appeal from District Court, Marshall County. Action by Laura L. Ewing and Marion R. Ewing against James White and P. R. Wolf. Judgment for plaintiffs, and defendants appeal. Affirmed.

Gregg & Gregg, for appellants. W. W. Redmond, for appellees.

PER CURIAM. This action was commenced in the district court of Marshall county to recover a balance claimed to be due on the sale of a farm. Laura L. Ewing sold the farm to James White. He went into possession after payment of a part of the purchase price, and then refused to pay the balance. Mrs. Ewing then commenced this action to recover the remainder. She claims that she sold the farm for \$11,200, and only \$10,400 had been paid before she commenced this action, leaving \$800 due. White claims that the farm was to contain 140 acres, for which he was to pay \$80 an acre; but it only contained 130 acres, and he did not want to pay for the 10 acres that were deficient, hence the refusal to pay more. The case was tried to a jury, and it settled the only dispute between the parties, and settled it in favor of the plaintiff. The only error pointed out was that the jury did not find the facts correctly. Of course, where a jury settles a question of fact, and the court approves the finding, there is nothing left for this court to do.

The judgment is affirmed.

STAHL v. HODGINS.

(Supreme Court of Kansas. Dec. 10, 1910.)

Appeal from District Court, Shawnee County.

Action by Frank M. Stahl against R. F. Hodgins. Judgment for plaintiff, and defendant appeals. Affirmed.

O. A. Magaw and Ferry & Doran, for appellant. W. H. Cowles, for appellee.

PER CURIAM. This is an action upon a replevin bond to recover damages for the failure of the plaintiff to return the property. The scope and effect of the judgment in the replevin action was determined in the case of *Hines v. Stahl*, 70 Kan. 88, 99 Pac. 273, 20 L. R. A. (N. S.) 1118, 131 Am. St. Rep. 280, and the doctrine there announced requires an affirmance of the judgment.

(38 Utah, 242)

STATE ex rel. SKEEN v. OGDEN RAPID TRANSIT CO.

(Supreme Court of Utah. Nov. 25, 1910.)

1. RAILROADS (§ 227*)—DUTIES TO STOP TO RECEIVE AND DISCHARGE PASSENGERS—STATUTES.

The duties imposed on carriers by Comp. Laws 1907, § 449, requiring every railroad to furnish sufficient accommodations for the transportation of persons and property at any station or stopping place established for receiving and discharging passengers and freight, must be discharged by a carrier at depots or stopping places duly established, and it does not require a carrier to stop its cars at any particular place to discharge or receive passengers. [Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 741; Dec. Dig. § 227.*]

2. RAILROADS (§ 58*)—DUTIES TO ESTABLISH STATIONS—POWER OF COURTS.

The statutes do not confer on the courts power to determine whether a carrier should or should not establish and maintain a depot or stopping place for the reception and discharge of passengers or freight, or either, at any particular place or places along its line of road.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 130-136; Dec. Dig. § 58.*]

3. MANDAMUS (§ 140*) — PERFORMANCE OF COMMON-LAW DUTY.

Where the common law imposes on a person a duty and the right of another to require performance thereof is clear and reasonably free from doubt, mandamus lies to compel such person to discharge that duty.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. § 275; Dec. Dig. § 140.*]

4. RAILROADS (§§ 58, 227*)—CONSTITUTIONAL LAW (§ 62*)—MANDAMUS (§ 133*)—REGULATION—DEPOTS.

The Legislature may, within limits, direct where a carrier shall maintain depots or stopping places for the convenience of the public, and it may require a carrier to stop its trains or some of them at such depots, or stopping places, or it may confer the power to determine whether a carrier shall do so on some board, and, in either case, the courts may coerce a defaulting carrier by mandamus to comply with the legislative edict or with an order of the board.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 130-136; Dec. Dig. §§ 58, 227.* Constitutional Law, Dec. Dig. § 62.* Mandamus, Dec. Dig. § 133.*]

5. RAILROADS (§ 58*)—REGULATION—DEPOTS.

Under ordinary circumstances, no inherent power is vested in the courts to control a carrier in its determination of the number of depots or stopping places that it will establish

or maintain, or in the selection of the places where it will establish and maintain them along its line of railroad, but the matter is for legislative regulation.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 130-136; Dec. Dig. § 58.*]

6. CARRIERS (§ 13*)—REGULATION—DISCRIMINATION.

The courts may prevent discrimination by a carrier.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 13.*]

7. MANDAMUS (§ 133*)—REGULATION—DISCRIMINATION.

Where the duty of a carrier to receive a particular person at a particular place is clear, the courts may by mandamus compel the carrier to discharge the duty.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 268; Dec. Dig. § 133.*]

8. COURTS (§ 1*)—JURISDICTION.

A court is an agency of the state by means of which justice is administered, and it may not exceed the powers vested in it for the sole reason that in its judgment it is necessary to exercise the power in the administration of justice.†

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 2; Dec. Dig. § 1.*]

9. RAILROADS (§ 227*)—TRAIN SERVICE—DISCRIMINATION—STATUTES.

Under Comp. Laws 1907, § 455, providing against discrimination from the same place under like conditions, and independent thereof, an interurban railway which stops its cars to receive and discharge passengers at resorts along its line of road and which refuses to do so at another resort is not guilty of discrimination, in the absence of evidence that any person stopped off at the former resorts simply because he could not do so at the latter resort, though the carrier refuses to stop at the latter resort merely out of ill will, and though there is no ground for its refusal to receive and discharge passengers there.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 741; Dec. Dig. § 227.*]

10. RAILROADS (§ 227*)—TRAIN SERVICE—DISCRIMINATION.

The court in determining whether an interurban railway company is guilty of discrimination because it stops its cars to receive and discharge passengers at resorts along its line and refuses to do so at another resort may not consider the fact that it stops its cars at one resort, where such stop is by virtue of a special contract executed by it for a valuable consideration.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 741; Dec. Dig. § 227.*]

11. RAILROADS (§ 227*)—MANDAMUS (§ 133*)—DISCRIMINATION—REMEDY.

Where a carrier refuses permission to one person to enter or alight from its cars at a place where under similar circumstances it extends the privilege to others, the carrier is guilty of discrimination against the former, and the court may by mandamus prevent it.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 741; Dec. Dig. § 227.*; Mandamus, Cent. Dig. § 268; Dec. Dig. § 133.*]

Appeal from District Court, Weber County; J. A. Howell, Judge.

Mandamus by the State, on the relation of J. D. Skeen, against the Ogden Rapid Transit Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Richards & Boyd, for appellant. J. D. Skeen, for respondent.

FRICK, J. On the 27th day of June, 1910, the plaintiff applied to the district court of Weber county, Utah, for a writ of mandate to require the defendant, as a common carrier of passengers, to stop its cars at a certain place named in the application for the purpose of permitting the plaintiff and others to enter upon said cars as passengers and to alight therefrom at the place stated. The district court, after a hearing, issued a peremptory writ in which the prayer of the plaintiff was granted, and the defendant now presents the record of the proceedings in due form to this court for review on appeal.

A careful reading of the entire record, including all of the evidence adduced at the hearing, discloses substantially the following facts concerning which there is practically no dispute:

The defendant is a corporation organized as a common carrier of passengers, and owns and operates a certain line of street and interurban railway. The line of railway is operated, as aforesaid, for a distance of about seven miles between the Ogden Union Depot and what is known as the "Hermitage" located in Ogden Canyon, in Weber county, Utah. At the mouth of Ogden Canyon is located what is known as the Ogden Canyon Sanitarium, which is a public summer resort. A hotel for the accommodation of patrons, saloon, dance hall, and other places of amusement are maintained there for the pleasure and amusement of the public generally. The sanitarium is located immediately east of the corporate limits of Ogden City, and west of that point defendant's railway is operated as a street railway while east thereof—that is, within the Ogden Canyon proper—the road is operated as an interurban line. Some distance east of the sanitarium, and within Ogden Canyon, there is what is known as the "Peery Resort," where a few people temporarily live during the summer season. About three-quarters of a mile farther east, and up the canyon, is what is known as the "Lewis Resort," which is located on lands owned by J. S. and Eva Lewis, and to which we shall further refer hereafter. Farther up the canyon still is what is known as the "Hermitage," which is the eastern terminus of defendant's line of railway. The Hermitage, like the Ogden Canyon Sanitarium, is a public resort with hotel and other conveniences, dancing pavilion, boating pond, and other attractions similar to those at the sanitarium aforesaid. The Ogden river, a considerable stream of water, flows through Ogden Canyon. The canyon is therefore a desirable place for camping, and for many years has been used by many citizens as a temporary place of residence during the summer or heated months of the year. While the canyon

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

†Larson v. Salt Lake City, 34 Utah, 318, 97 Pac. 483, 23 L. R. A. (N. S.) 462.

proper at many places is too narrow, and the sides thereof too precipitous, to be used for the purposes of either public or private resorts, yet there are numerous places where the canyon widens out somewhat, and at some of such places public resorts have been established, while at other points resorts for summer residence have been maintained as aforesaid. A good road for all kinds of ordinary vehicles has been constructed and is maintained in the canyon.

It appears that prior to 1909 the line of railway terminated at the sanitarium, but that in that year the road was extended into the canyon to the Hermitage as before stated. In extending the line the road passed through the Peery resort before mentioned, and also through said Lewis resort. In consideration of being granted a right of way through the lands owned by the Peerys the defendant entered into a contract whereby it agreed to stop its cars at that point when requested to do so by any person who desired to enter on or to alight from its cars there. Pursuant to this agreement the defendant has stopped and continues to stop its cars on request at said point. When the land owned by Lewis was reached, the defendant was refused permission to construct its road thereon, and it was compelled to condemn a right of way through the same, and a strip of land one rod in width and a little over 2,000 feet in length was accordingly condemned through said lands for a right of way. In the center of said tract defendant laid its track, which is standard gauge, namely, 4 feet 8½ inches between rails, while the cars are about 8 feet 10 inches wide, projecting somewhat over each rail. While the Lewises own quite a large tract of land in and along each side of the canyon, the amount that is fit for summer residence is merely an oblong strip embracing between four and five acres of ground through which defendant's line of railway is constructed and operated. When the line of railway was constructed in the summer of 1909, the defendant requested, and was given, permission by Mr. Lewis to stop its cars at a certain private road crossing on the strip of land used for summer residences as aforesaid. What is called the Lewis resort is purely private—that is, a small parcel of ground is leased to any one who desires to pitch a tent on the strip, or Mr. Lewis, with the land, also furnishes the tent or summer cottage to any one desirous of renting an abode during the summer months. Mr. Lewis testified that about nine-tenths of all the tenants rent the tent or house from him, while the remainder provide their own tents or summerhouses. Either the parcel of land to live on, or the tent or house, is rented for the summer season commencing some time in June and ending some time in September of each year, and each tenant is given the privilege of taking the same place the following summer if he so desires. The business has been conducted as aforesaid at the so-

called Lewis resort for quite a number of years, and the number of those who have rented summer residences or places there has increased somewhat each year. This year there were about 100 persons, children and adults, exclusive of the Lewis household, living at the resort.

In June of this year plaintiff rented a summer residence from Lewis, and in that month moved into it with his family. On the 27th day of April, and before the summer season opened in Ogden Canyon, the defendant posted notices in its cars that after that date it would not stop any of its cars at any point in the canyon "between Peery's and the Hermitage." The defendant also prepared a schedule for the running of its cars between said Ogden Union Depot and the Hermitage, and at the time of plaintiff's demand was operating them in accordance with said schedule. According to this schedule, west of the sanitarium, and within the Ogden city limits, the cars are stopped at regular intervals, and at such places signs are placed on the overhead wires which read: "Cars stop here." In this connection the evidence shows that one of the motormen, perhaps some others, upon request, has stopped and permitted some persons to enter the car at points other than where the signs are put up, but it also appears that to do this was contrary to the orders of defendant, and occurred only on rare occasions. It also is made to appear that during the period of time that the road was being constructed in the summer of 1909 in Ogden Canyon the defendant's motorman also frequently permitted persons to either get on or alight from the cars at the Lewis resort, or at the upper end thereof at the point where the defendant at that time maintained a switch, but which has since been removed. There is no evidence, however, that the defendant stopped its cars for the purpose of permitting any person either to enter on or to alight from them at any point in the canyon except at the sanitarium, Peery's, and the Hermitage after the 27th day of April, 1910. On the contrary, the evidence is all to the effect that within the canyon the cars were stopped only at those three points. On the 16th day of June, 1910, plaintiff demanded from the defendant that it stop its cars at the Lewis resort for the purpose of receiving him as a passenger on one of its cars, and on the same day, while he was returning on one of defendant's cars as a passenger from Ogden City to said Lewis resort to his family, plaintiff timely demanded from defendant's conductor in charge of the car that said car be stopped at the Lewis resort for the purpose of permitting plaintiff to alight therefrom. The defendant, through its conductor, refused, and continues to refuse the request of the plaintiff, and refuses to stop its cars or any of them at said Lewis resort, and refuses to receive the plaintiff or any one else at that point as a passenger, and also

refuses to stop its cars or any of them to permit the plaintiff or any other passenger to alight therefrom at said point. The evidence also shows that at least a number of those who have rented summer residences at the Lewis resort carry on or conduct some business in the city of Ogden and are desirous of passing daily over its line between said resort and Ogden City, and that many of them, including the plaintiff, are considerably inconvenienced by defendant's refusal to stop its cars at the Lewis resort because they must either stop off at the Peery resort and walk three-quarters of a mile east on the defendant's track to reach their summer home at the Lewis resort, or must pass through that place and go to the Hermitage one mile beyond, and then walk down the track for that distance to reach their summer home.

Mr. Lewis also testified that the permission to stop the cars which he gave the defendant in 1909 has never been withdrawn, but further says that he never granted, and that the defendant has not obtained, any other facilities to stop its cars on his land except the one-rod strip which was condemned, and that there are no public roads or highways which enter the resort located on his land. He also says that the resort is purely private, and no one can locate on the land without his permission and without paying rent, and that all ingress and egress to and from the same is shut off between the months of October of one year and June of the following year. It is also made to appear that defendant's cars can be stopped with the same facility at the Lewis resort that they can be at any of the other resorts, and that defendant does stop its cars at at least one place where it has no better facilities to stop them than it has at the Lewis resort.

It is also contended, and the court so found, that the reason for refusing to stop the cars at the Lewis resort is "entirely because of ill will and malice growing out of certain condemnation proceedings instituted against John S. Lewis by the said defendant." This finding is, however, assailed by the defendant upon the ground that it is not supported by the evidence. The only evidence to support it is the testimony of the plaintiff, who, in answer to a question propounded to him while a witness in his own behalf as to whether he did not know that the defendant would not stop its cars at the Lewis resort before he went there in June, 1910, testified: "Well, Matt. Browning told me that they were going to get even with Mr. Lewis on that proposition, and I rather supposed it was of a temporary nature." By this the witness meant that the refusal to stop cars at the Lewis resort would be merely temporary. When, and under what circumstances, the statement was made, and what, if any, relation Matt. Browning sustained to the defendant at the time it was made, is not disclosed. The finding in our judgment is not supported by any evidence.

But, in view of all the circumstances, the finding is without controlling force, as will more fully appear hereafter.

We have been thus explicit in stating the facts for the reason that the case is one of first impression in this state, and because no claim is made that the defendant either in its charter or by contract has assumed the duty of stopping its cars at the Lewis resort. The plaintiff, however, contends that the duty to stop its cars is imposed upon the defendant either by the common law which is in force in this state, or by section 449, Comp. Laws, 1907, which reads as follows: "Every railroad company shall furnish sufficient accommodations for the transportation of all persons and property as shall, within a reasonable time previous to the departure of any train, offer or be offered for transportation at any station, siding or stopping place established for receiving and discharging passengers and freight, and at any railroad junction; and shall take, transport, and discharge such passengers and property at, from, and to such places, on the due payment of tolls, freight, or fare therefor; and if the company or its agents shall refuse to take and transport any passenger or property, or to deliver the same at the regularly appointed places, it shall be liable to the party aggrieved for all accruing damages, including costs of suit." Upon the other hand, the defendant insists that no such duty is imposed by either the common law or by the provisions of the foregoing section, and further contends that no authority is vested in the courts of this state to require the defendant to establish a depot or stopping place, or to stop its cars, at any particular point along its line of railroad for the purpose of receiving or discharging either freight or passengers, and that, therefore, the district court has exceeded its powers in issuing the peremptory writ of mandate.

A mere cursory reading of the foregoing section discloses that it contains nothing from which the court can deduce a legislative command that a common carrier must establish and maintain depots or stopping places at any particular place or places along its line of road. The duties imposed by that section are to be discharged by the common carrier at depots or stopping places which have been duly established, and what is there said had no reference to the establishment of depots or stopping places, or to the stopping of trains or cars, where there are no regularly established depots or stopping places. The defendant, therefore, was not required to stop its cars at the Lewis resort by reason of the provisions of section 449, supra. Nor is there anything in that section or in any other to which our attention has been directed or that we can find which confers upon any of the courts of this state the right or power to determine whether a common carrier should or should not es-

establish and maintain a depot or stopping place for the receipt and discharge of passengers or freight or either at any particular place or places along its line of railroad. There was therefore neither a contractual nor a statutory duty imposed on the defendant to stop its cars at the Lewis resort.

The next inquiry, therefore, is: Does the common law impose the duty upon a common carrier to establish and maintain depots or stopping places along its line of railroad for the accommodation and convenience of individuals or communities at points other than such as the carrier in its judgment deems necessary and proper in the conduct of its business? If the common law imposes such a duty upon the defendant in this case, and the right of the plaintiff to require the defendant to comply with it is clear and reasonably free from doubt, then the power of the district court to coerce the defendant by mandamus to discharge that duty is likewise beyond question. It is now well settled that the Legislature of any state may within certain limitations determine and direct at what places a common carrier shall establish and maintain depots or stopping places for the convenience of the public, and that it may require the carrier to stop its trains or cars, or some of them, at such depots or stopping places, and that the Legislature, within what are now well-defined limits, may confer the power to determine whether the carrier shall do so or not upon some board or tribunal. In either case the courts have the power to coerce a defaulting carrier by mandamus to comply with the legislative edict, or with the order of such board or tribunal. 33 Cyc. 43, 44. Upon the question whether the courts may inquire into and determine the necessity for establishing a depot at a certain place, and, if it be found by the court that the necessity for one exists, in the absence of statutory authority to do so, may order a carrier to establish such a depot or stopping place for the receipt and discharge of freight and passengers, the courts are not unanimous. A careful analysis of the cases will show that, while a number of cases are usually cited in support of the doctrine that the courts possess inherent power to control the carrier in the establishment of depots or stopping places, yet there is in fact but one case that really goes to that extent, namely, the case of *State v. Republican Valley Ry. Co.*, 17 Neb. 647, 24 N. W. 329, 52 Am. Rep. 424. The cases upon the subject are nearly all collated by Mr. Elliott in notes to section 662 in volume 2 of the second edition of his excellent work on Railroads. The decisions in all of the cases, except the one from Nebraska, are in fact based upon particular statutes. There are quite a number of courts, however, who have given the subject careful consideration, and, after doing so, have arrived at the conclusion that under ordinary circumstances no

inherent power is vested in the courts of this country to control a common carrier in its determination of the number of depots or stopping places that it will establish and maintain or in the selection of the places where it will establish and maintain them along its line of railroad. Among the well-considered cases in which the question is passed on are the following: *Nashville, etc., Ry. Co. v. State*, 137 Ala. 439, 34 South. 401; *Northern Pac. Ry. Co. v. Washington ex rel. Dustin*, 142 U. S. 492, 12 Sup. Ct. 283, 35 L. Ed. 1002; *State ex rel. Smart v. Kansas City, etc., Ry. Co.*, 51 La. Ann. 200, 25 South. 126; *People ex rel. Linton v. Brooklyn, etc., Co.*, 172 N. Y. 90, 64 N. E. 788; *People v. N. Y. L. E. & W. Ry.*, 104 N. Y. 58, 9 N. E. 856, 58 Am. Rep. 484; *State ex rel. Atty. Gen. v. Southern, etc., Co.*, 18 Minn. 40 (Gil. 21); *Chicago, etc., Ry. Co. v. People ex rel. Atty. Gen.*, 152 Ill. 230, 38 N. E. 562, 26 L. R. A. 224; *Honolulu Rapid Trans., etc., Co. v. Hawaii Terr.*, 211 U. S. 282, 29 Sup. Ct. 55, 53 L. Ed. 186; *Atchison, Topeka & S. F. Ry. v. Denver, etc., Ry. Co.*, 110 U. S. 667, 4 Sup. Ct. 185, 28 L. Ed. 291. In *Northern Pac. Ry. Co. v. Washington ex rel. Dustin*, supra, Mr. Justice Gray, after discussing at some length the lack of the power of the courts in this regard, at page 500, says: "To hold that the directors of this corporation, in determining the number, place and size of its stations and other structures, having regard for the public convenience as well as its own pecuniary interests, can be controlled by the courts by writ of mandamus, would be inconsistent with many decisions of high authority in analogous cases." In support of this doctrine both American and English cases are cited. The case of *State v. Republican Valley Ry. Co.*, supra, is referred to by Mr. Justice Gray, but it is disapproved. It is true that in the *Northern Pac. Ry. Co. Case*, supra, there is a dissenting opinion concurred in by two of the justices, but a careful perusal of the dissenting opinion discloses the fact that the dissenting justices merely assumed the power to be vested in the courts without inquiring from what source such a power is derived. In all of the cases which we have cited above, the facts and circumstances were much stronger than they are in the case at bar, but, notwithstanding this, the appellate courts all promulgated the doctrine that the power to control a common carrier with respect to proper depots or stopping places for its trains or cars for the convenience of the public is inherent in the legislative, and not the judicial, department.

When the Legislature has declared when and under what conditions and circumstances depots and stopping places shall be established and maintained, the courts may by mandamus compel the carrier to comply with the conditions imposed by the Legislature, but the courts have no inherent power to de-

termine for themselves when, where, and under what conditions and circumstances a common carrier shall establish and maintain a depot or stopping place for the convenience of the public, or to stop its trains or cars at a particular place either to receive or discharge a passenger or passengers. It is true that courts may prevent discrimination, and, where the duty to receive a particular person at a particular place is clear, the courts may, by writ of mandate, compel the carrier to discharge such duty.

From the record it is made to appear that the district court in issuing the writ of mandate in this case was impelled to do so for the following reasons, which we give in his own words: "It seems to me that inasmuch as the court cannot find any other valid reason for the failure of this company to perform its duty to the public at this particular resort, and inasmuch as the contradicted testimony in this case shows that it is a matter of spite against Mr. Lewis on account of the proceedings that were had in this court as it has been shown by the statement which Mr. Browning made as testified to by Mr. Skeen, which is contradicted by Mr. Browning, this court should let its mandate issue." The court then proceeds to state that under the decisions of the Supreme Court of the United States there is some doubt of the power of the court to compel the defendant to comply with plaintiff's demands, but notwithstanding such doubt the court grants the writ for the reason, as appears from his own statement, that "this court should not consider itself absolutely helpless to remedy this obvious discrimination on the part of this carrier; and, if it is helpless, some other court will have to decide that it is so." Courts no doubt are often tempted to, and do, interfere where in their judgment justice demands interference, although there may be some doubt with respect to their power. It should be remembered, however, that courts are merely the agencies of the sovereign state by means of which the sovereign administers justice, not according to the notions of the judges, but in accordance with fixed rules and forms of law. A court may in its judgment deem the exercise of a certain power necessary in order to administer full and complete justice in a particular case, yet unless the power to be exercised is one of the inherent powers of the court, or is conferred upon it by the lawmaking power, the court would be guilty of usurpation if it exercised the power, although to do so might reflect justice in that particular case. The doctrine that courts may not exceed the powers vested in them, for the sole reason that in their judgment the exercise of such a power is necessary in the administration of justice is clearly stated and illustrated by Mr. Justice Straup in the case of *Larson v. Salt Lake City*, 34 Utah, 318, 97 Pac. 483, 23 L. R. A. (N. S.)

462. In that case the district court exercised what in our judgment constituted a legislative power which the Legislature had not authorized the court to exercise, and for that reason, and for no other, the judgment of the lower court was reversed by us. In our judgment the same principle is involved here. The power that the district court exercised in this case is under the great weight of authority clearly legislative, and not judicial, and, unless and until the Legislature confers the right upon the courts to exercise such a power, they cannot legally exercise it, although to do so would reflect justice in a particular case. It is true that the district court seemed to be impressed with the thought that this was a case of discrimination, and that the court, as he expressed it, was not "helpless to remedy this obvious discrimination." By this the court meant that because the defendant stopped its cars at the sanitarium, at Peery's, and at the Hermitage, and did not do so at the Lewis resort, therefore the defendant discriminated against the Lewis resort and in favor of the other resorts. That this so-called discrimination was not in favor of the other resorts is too obvious to require argument. The evidence is conclusive that no person stopped off at any of the other resorts simply because he could not stop off at the Lewis resort. Moreover, the Lewis resort is a place where certain persons stopped off only because they had a temporary abiding place there, and not because they sought after amusement or entertainment, as was the case at the sanitarium and at the Hermitage. The only discrimination, therefore, that could possibly exist would be one against the Lewis resort, which would have to be based on the mere fact that the cars of the defendant refused to stop at that place while they stopped at the other resorts. The so-called Peery resort cannot be taken into consideration, since the cars stopped there by virtue of a special contract and for a consideration received by the defendant. It is manifest, therefore, that the district court in truth and in fact merely directed the defendant how to conduct its business under particular circumstances under the guise of preventing discrimination. If a common carrier by stopping its trains or cars at one village or settlement and by refusing to do so at another village or settlement through which its trains and cars pass and where the cars can be stopped is guilty of legal discrimination against the latter village, then it follows that a common carrier must stop its trains or cars, or some of them, at every village or settlement through which it passes if requested to do so by the inhabitants or some of them, or it will be guilty of discrimination. In the absence of a statute requiring the carrier to do so, it ordinarily at least commits no breach of duty in failing or refusing to stop its cars at one village, al-

though it does so at another similarly situated. Nor was the defendant guilty of discrimination against the plaintiff or others who, like him are staying at the Lewis resort. Our statute (section 455, Comp. Laws, 1907), which is declaratory of the common law, simply provides against discrimination "from the same place, under like conditions, under similar circumstances and for the same period of time." Nor is the fact that there is no good reason why the defendant does not stop its cars at the Lewis resort, or that it refuses to do so because of ill will of one or more of its managing officers, a matter of controlling importance. Where the power to examine into the question whether the carrier should stop its trains or cars at certain places under certain conditions and circumstances is conferred either upon a court or some other body or tribunal, it may easily become material if not a controlling factor in the case that the carrier refuses to stop its trains or cars at a particular place out of mere ill will. Where, however, as in this case, the court is powerless to compel the carrier to stop its cars at a particular place, it is, to say the least, immaterial upon what ground the refusal to stop is based. We have no hesitancy in saying that, if the matter were left to our judgment or discretion, we would be compelled to hold that under the undisputed facts and circumstances of this case defendant's refusal to stop some of its cars, at least mornings and evenings, at the Lewis resort, is wholly inexcusable, if not entirely arbitrary. This, however, is a matter to be regulated by the Legislature, and not by the courts.

Where the legitimate power of the court ends and it nevertheless acts, the act is usurpation pure and simple, and any attempt to justify the act upon the ground that in the opinion of the court justice demands the act cannot rescue the act from constituting usurpation, nor does it palliate the offense. If the defendant had refused plaintiff permission either to enter upon its cars or to alight therefrom at the Lewis resort, while, under similar circumstances, it extended the privilege to enter and to alight from its cars to others at that place, it would be a clear case of discrimination against the plaintiff. It would likewise constitute a refusal upon the part of the defendant to discharge a plain legal duty it owed to him. Under such circumstances, the court could require the defendant to discharge its duty by a writ of mandate. But, as we have seen, we are not dealing with such a case, but are dealing with a case where the defendant at a particular place treats all alike who live or are at that place, but does not treat them the same as it does others who live or are at some other places which are surrounded by somewhat different condi-

tions and circumstances. To compel the defendant to treat all of the settlements or communities along its line of railroad alike is, as we have shown, a matter for legislative, and not for judicial, regulation.

We do not wish to be understood as holding that conditions and circumstances may not arise under which a court, even in the absence of a statute, would not be authorized to interfere as against the arbitrary acts of a common carrier in failing to provide facilities and conveniences for the public. When and under what conditions the courts might have power to interfere upon equitable or other grounds is not before us, and upon that question we express no opinion. All that we decide at this time is that, under the undisputed facts and circumstances of this case, the district court was not justified in issuing the writ.

The judgment is therefore reversed and the cause remanded to the district court, with directions to dismiss the proceedings. Appellant to recover costs.

STRAUP, C. J., and McCARTY, J., concur.

(18 Idaho, 642)

VILLAGE OF ILO et al. v. RAMEY et al.
(Supreme Court of Idaho. Nov. 18, 1910.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS (§ 12*)—INCORPORATION—APPEAL FROM DECISION.

Under the provisions of section 1950, Rev. Codes, an appeal may be taken from any act, order, or proceeding of the board of county commissioners by any person aggrieved thereby, or by any taxpayer of the county when he deems any such act, order, or proceeding illegal or prejudicial to public interest.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 12.*]

2. MUNICIPAL CORPORATIONS (§ 12*)—INCORPORATION—APPEAL FROM DECISION.

Held, under the provisions of said section 1950, that appellants had the right to appeal from an order of the board of county commissioners incorporating the village of Ilo.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 32; Dec. Dig. § 12.*]

3. COUNTIES (§ 58*)—GOVERNMENT—DECISION OF BOARD OF COUNTY COMMISSIONERS—APPEAL.

Under the provisions of section 1951, Rev. Codes, an appeal may be taken to the district court or a judge thereof, and such appeal may be tried either by the court or the judge.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 76-80; Dec. Dig. § 58.*]

4. MUNICIPAL CORPORATIONS (§ 12*)—PROCEEDINGS FOR INCORPORATION—EVIDENCE—POPULATION.

Held, that the evidence is not sufficient to sustain the finding of the court that there were not 200 actual residents within the corporate limits of said village at the time of filing the petition for incorporation and at the time of making the order of the board incorporating said town.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 12.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

5. DOMICILE (§ 4*)—ACTUAL RESIDENCE—EFFECT OF TEMPORARY ABSENCE.

If a person has established an actual residence in a town or village, his temporary absence therefrom would not forfeit such residence.

[Ed. Note.—For other cases, see Domicile, Cent. Dig. §§ 6-23; Dec. Dig. § 4.*]

6. MUNICIPAL CORPORATIONS (§ 11*)—INCORPORATION—CONSTRUCTION OF STATUTE.

The provisions of section 2222, Rev. Codes, authorizing the incorporation of a village must be liberally construed.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 20, 21; Dec. Dig. § 11.*]

(Additional Syllabus by Editorial Staff.)

7. DOMICILE (§ 5*) — MARRIED WOMAN AND MINOR CHILD.

The domicile of a married woman and of her minor child follows that of her husband.

[Ed. Note.—For other cases, see Domicile, Cent. Dig. §§ 24-35; Dec. Dig. § 5.*]

Appeal from District Court, Nez Perce County; Edgar C. Steele, Judge.

Proceedings for incorporation of the Village of Ilo. From an order incorporating the village, W. J. Ramey and others appealed to the District Court where the order was reversed, and the village and others appeal. Reversed and remanded, with instructions.

G. Orr McMinimy and Ben F. Tweedy, for appellants. Chas. L. McDonald, for respondents.

SULLIVAN, C. J. This proceeding involves the action of the board of county commissioners of Nez Perce county in the incorporation of the village of Ilo. The proceedings for the incorporation of said village were commenced under the provisions of section 2222, Rev. Codes, which provides, among other things, as follows: "That whenever a majority of the taxable inhabitants of any town or village, not heretofore incorporated under any law of this state, shall present a petition to the county board of the county in which said petitioners reside, praying that they may be incorporated as a village, designating the name they wish to assume and the metes and bounds of the proposed village, and if such county board, or a majority of the members thereof, shall be satisfied that a majority of the taxable inhabitants of the proposed village have signed such petition, and that inhabitants to the number of two hundred or more are actual residents of the territory described in the petition, the said board shall declare the said proposed village incorporated, entering the order of incorporation upon their records, and designating the metes and bounds thereof." The proceedings were instituted by filing a proper petition with the said board of county commissioners, containing the signatures of a majority of the taxable inhabitants of said village, and praying for an order incorporating said village as a municipal cor-

poration. The prayer of the petition was granted and an order entered incorporating said village. From that order the respondents, who were not residents of the territory included within the limits of said village, but were residents of a rival town nearby in the same county, appealed from said order to the judge of the district court of the Second judicial district for Nez Perce county. At the hearing on the appeal, a demurrer to the notice of appeal and a motion to dismiss were filed and overruled by the court. Thereafter an answer was filed by the petitioners for the incorporation of said village and the main issue presented to the trial court was whether on the 15th day of April, 1909, there were 200 or more actual residents in the territory described in the petition for incorporation. After hearing the evidence the court reversed the order of the board incorporating said village, on the ground that there were not 200 actual residents within the territory described in said petition, and this appeal is from the order reversing the action of said board.

Appellants assign a number of errors which may be considered under four heads. The first is, that no appeal lies from the order of the board of county commissioners establishing a municipal corporation. There is nothing in that contention, for under the provisions of section 1950, Rev. Codes, "an appeal may be taken from any act, order or proceeding of the board, by any person aggrieved thereby, or by any taxpayer of the county when any demand is allowed against the county or when he deems any such act, order or proceeding illegal or prejudicial to the public interests." That section gives the right of appeal to any person who deems any order or proceeding of the board illegal or prejudicial to the public interest. The respondents are taxpayers of Nez Perce county and they declare that they deem the act incorporating said village illegal and prejudicial to the public interests. As a general rule, no person except one aggrieved or having some interest in litigation has any right to appeal. That section of the statute, however, authorizes an appeal to be taken by a taxpayer in the county from any order which he may deem prejudicial to the public interest. The wisdom of permitting a person to appeal from an order incorporating a village by one who is not a resident within the territory of such village is a matter to be determined by the Legislature, and they have determined it by the provisions of said section 1950, and this court cannot question the wisdom of the Legislature in that matter, but must declare the law as it is written. *Reynolds v. Board of County Com'rs*, 6 Idaho, 787, 59 Pac. 730; *School Dist. v. Rice*, 11 Idaho, 99, 81 Pac. 155. See, also, *Gardner v. Blaine County*, 15 Idaho, 698, 99 Pac. 826.

The next error assigned is to the effect that

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the appeal was taken to the judge of the district court instead of the district court, and no right existed to hear evidence on the facts or to reverse the order of the board. Section 1951, referring to appeals that may be taken under said section 1950, provides that such appeals may be taken to the district court or a judge thereof and under that provision, if the appeal is taken to the judge instead of the court, either the judge or the court may try the matter *de novo*, in case a determination thereof requires a trial. Such assignment is without merit.

The next error assigned is that the court erred in finding from the evidence submitted that there were not 200 actual residents within the corporate limits of said village at the time of filing the petition and making said order by the board. The determination of that question involves a review of the evidence, and it is contended by counsel for respondent that the specification of error in regard to the insufficiency of the evidence is not sufficient to authorize this court to review the evidence. We cannot agree with that contention. Nearly all of the evidence introduced at the hearing was in regard to the number of inhabitants residing within the limits of said village, and the court based its decision upon the ground that said territory did not contain 200 actual residents at the time said order was made, and held, for that reason, said board was without jurisdiction to make said order. The assignment of error is sufficient to authorize the court to review the evidence upon that question. One witness on behalf of respondents testified that "he thought" he was acquainted with all of the people in Ilo; that he did not know definitely that he was and that a number of the persons claimed by appellants to have been actual residents of Ilo on the 15th of April, 1909, were not such residents. In response to the question, "What do you consider residence?" he testified as follows: "Well, I consider when a person moves to a place with the intention of making that place their home, and lived there long enough to be a qualified voter, a qualified elector of that precinct, that they have established their residence." The answer to that question clearly indicates upon what theory the witness testified that certain persons were not residents of said town and that he clearly misinterpreted the term "actual residents," as used in said section 2222. Another wit-

ness testified that he worked in a store in Vollmer and that his occupation caused him to go around the town of Ilo, and that he delivered merchandise around that town, and stated: "From my knowledge of the town, there were not 200 actual residents in these boundaries on April 15th." Taking his evidence as a whole, it clearly shows that this witness was guessing at the number of inhabitants there; whereas, three witnesses on behalf of the village testified that the territory included in said town of Ilo had exceeded 200 "actual residents" on the 15th of April, 1909, and also presented a census list giving the names and the number of inhabitants. We do not think a mere guess by a witness is sufficient to make a substantial conflict in the evidence where three witnesses testify positively that there were more than 200 actual residents within the confines of the territory sought to be incorporated. *Idaho Mercantile Co. v. Kalanquin*, 8 Idaho, 101, 66 Pac. 933; *Wilson v. Vogeler*, 10 Idaho, 599, 79 Pac. 508; *Branson v. Caruthers*, 49 Cal. 374; *Field v. Shorb*, 99 Cal. 661, 34 Pac. 504.

The fourth assignment of error is to the effect that the court erred in finding that there were not 200 actual residents within the corporate limits of said village. Considerable testimony was taken whereby it was attempted to show that certain persons were not "actual" residents within the corporate limits of the town on April 15, 1909, but if a person were an inhabitant—an actual resident—of the town of Ilo on April 15, 1909, his temporary absence would not change his residence. It is a well-recognized rule of law that the domicile of a married woman follows that of her husband, as well as the domicile of the minor child, and a temporary absence would not be sufficient to cause them to lose their actual residence in a town.

The provisions of said section 2222 authorizing the incorporation of villages should be liberally construed, and we are satisfied from the whole record that the decision of the court setting aside the order of the board incorporating said village must be set aside, and it is so ordered, and the cause remanded to the trial court, with instructions to affirm the order of said board incorporating said village of Ilo. Costs of this appeal are awarded to the appellants.

AILSHIE, J., concur.

(33 Kan. 618)

ROLENS et al. v. CITY OF HUTCHINSON.

(Supreme Court of Kansas. Dec. 10, 1910.)

(Syllabus by the Court.)

1. EMINENT DOMAIN (§ 118*)—RIGHTS OF WAY—CHANGE OF USE.

A city was granted an easement to lay three or more 24-inch pipes in a certain strip of the grantor's land 25 feet wide, which extended from a creek to a canal for the passage of water, and the city subsequently finding it to be inadequate for the purpose undertook to dig and substitute an open ditch 25 feet wide instead of the drainage pipes, without the consent of the grantor, and without condemning a right of way for the ditch. *Held*, that the easement granted measured the rights of the parties, and that it did not give the city the right to an open ditch along the strip where the pipes were laid, and, further, that the additional servitude cannot be imposed against the will of the grantor without a condemnation proceeding.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 803; Dec. Dig. § 118.*]

2. EMINENT DOMAIN (§ 118*)—RIGHTS OF WAY—CHANGE OF USE.

The fact that the open ditch might result in benefit to the grantor's land does not warrant the city in making a substantial change in the easement or in enlarging the use granted without the consent of the grantor.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 803; Dec. Dig. § 118.*]

3. EMINENT DOMAIN (§ 275*)—IMPROPER USE—INJUNCTION—GROUNDS.

The attempt to make and use the open waterway in place of the drainage pipes without obtaining the consent of the grantor or the legal right to do so may be restrained by injunction.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 769; Dec. Dig. § 275.*]

Appeal from District Court, Reno County.

Action by James M. Rolens and others against the City of Hutchinson. Judgment for defendant, and plaintiffs appeal. Reversed and remanded, with directions.

Taylor & Neeley, for appellants. A. W. Tyler and F. L. Martin, for appellee.

JOHNSTON, C. J. This is an appeal from a judgment refusing to grant a temporary injunction against the city of Hutchinson in which the court was asked to restrain the city from the construction of an open drainage ditch across the appellants' lands. The appellants are the grantees of A. J. Mallick, who owned a small tract of land in the city of Hutchinson, across which Cow creek, a tortuous stream carrying considerable water, flows. On the west side of appellants' lands a drainage canal had been built by the city for the purpose of carrying off the flood waters of Cow creek. In 1908 the city undertook to straighten the course of Cow creek running through appellants' lands, and thus prevent an overflow upon the grounds by damming up Cow creek at a point near its entrance upon appellants' lands, and causing the water to flow through the drainage canal west of appellants' lands for some distance. By an agreement entered into by the city

of Hutchinson and Mallick, he granted to the city the right to conduct the waters from the drainage canal into Cow creek at a point several hundred feet below the dam by laying drainage pipes in and across the lands of appellants to the bed of Cow creek. Under this agreement the city laid three 24-inch pipes in and through the Mallick land for a distance of 267 feet. The extent of the easement and the right of the city under it is the main controversy in this action. The purpose of the city in damming the creek and turning the water into the canal and then back into and through drainage pipes was to eliminate several curves or bends in the creek on appellants' lands, thus straightening the stream and preventing overflows. The material part of the instrument creating the easement is "a right of way or easement for the purpose of laying 3 or more lines of 24-inch pipe in and across the land of grantors from the drainage canal to Cow creek. Said right of way and easement to be 25 feet wide and located as follows," describing the location of the line which was 267 feet long. The instrument conveying the easement is formal and complete. The city claimed the right and had begun to dig up the three drainage pipes laid across the appellants' lands by virtue of the easement because of their inadequacy for drainage purposes, and to substitute and maintain an open ditch 25 feet wide along the strip of land in which the city had been given the right to lay the pipes. The city admits that in the digging of such open ditch the dirt will be piled temporarily on the lands of appellants, but insists that the city has the right under the easement granted to maintain in the place of the pipes an open ditch, and thus prevent the appellants from the use of the surface of their lands over the drainage pipes. The injunction was refused, and appellants are here contending that they were entitled to an order enjoining the appellee from proceeding with the construction of an open ditch without their consent, or without condemning the interest proposed to be taken in excess of that granted, and the making of compensation therefor in the manner prescribed by law. The easement in controversy was created by an express grant, and it must be held to be the measure of the rights of the parties. The city was granted the right to lay 3 or more 24-inch pipes in a certain 25-foot strip extending from the canal to the creek a distance of 267 feet. Under this easement the city is entitled to lay as many 24-inch pipes as can be placed in the strip, but the easement to lay pipes in the ground differs greatly from one to construct and maintain an open canal across the land. An open waterway dividing an owner's land, and depriving him of all benefit of the use of the surface under which the pipes were laid would constitute

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes
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an increase of the burden imposed and an enlargement of the use actually granted. In *Darlington v. Painter*, 7 Pa. 473, it was decided that "the grantee of a water course cannot use it for any purpose that would increase the flow, enlarge the ditch, or affect the water in any way different from that use for which the water course was granted." The city can claim no more under the grant than the right to lay and maintain pipes, and incidentally to this it probably has the right to enter upon the land for the purpose of making necessary repairs, while the owner who granted the easement, and in whom the title to the land remains, is entitled to make any and every use of the land, and to the profits derivable from such use, providing they are not inconsistent with the enjoyment of the easement. In *Burnham v. Nevins*, 144 Mass. 88, 10 N. E. 494, 59 Am. Rep. 61, it was said: "These general principles are that a man who owns land subject to an easement has the right to use his land in any way which is not inconsistent with the easement; and that the extent of the easement claimed must be determined by the true construction of the grant or reservation by which it is created, aided by any circumstances surrounding the estate, and the parties which have a legitimate tendency to show the intention of the parties." In behalf of the city it is argued that there is no recital in the deed specifically reserving to the grantor the right to use the surface of the land, but there was no necessity to reserve that which was not granted. The specific grant plainly implies that everything not granted is reserved to the owner of the fee. In a Massachusetts case where something was claimed because of the lack of such a reservation it was said: "The fact that there is no clause reserving to the grantor what is not granted is equally without significance. A proper way of limiting an easement is to specify the purposes for which it is to be used. If an easement is so limited, the land subjected thereto cannot be used by the grantee of the easement for any other than the purposes named. As well might it be argued that when a life estate is carved out of a fee it is not enough that all that is granted is a life estate, in order that the reversion should be preserved to the original owner. For the same reason it is of no importance that the words 'for no other purpose whatsoever' found in the grant of 1856 are omitted from the grant in question. It is enough if an easement is limited to a specific purpose." *Gray v. Cambridge*, 189 Mass. 405, 76 N. E. 195, 2 L. R. A. (N. S.) 976. The contention is that the pipe drainage plan is inadequate, and that public interest and safety requires an open waterway. If the present plan endangers the health and safety of the city, it devolves on the authorities to devise and carry out a more effective one, and the law points out a method by which the city may obtain an open waterway, but the necessity,

however pressing, does not warrant the taking of private property for that purpose without compensation. If an additional easement is required, and private property is necessary, cities of the class in which Hutchinson belongs may acquire it by a condemnation proceeding, but such property cannot be appropriated until adequate compensation is provided for or made. Gen. St. 1909, § 1410. It is contended that the straightening of the stream and the making of a new waterway was beneficial to the landowner, but this may have been one of the considerations that entered into the original grant of the easement. If a condemnation proceeding is had for an open waterway which is of benefit to the landowner, that benefit may be considered in determining the compensation to be awarded him, but the mere fact that an appropriation of private property may result in benefit or that a change of an easement granted might improve the landowner's property is no reason why the city may change the easement or enlarge the use against his will. The city cannot take more than was granted without consent or compensation whether it is productive of either benefit or injury. It has been said that: "No one has a right to compel another to have his property improved in any particular manner; it is as illegal to force him to receive a benefit as to submit to an injury." *Merritt v. Parker*, 1 N. J. Law, 460. In *Jaqui v. Johnson*, 27 N. J. Eq. 526, it was held that a proposed change in an easement for conducting water which it was said would cause no more injury than the easement actually granted could be enjoined. The court said: "It seems to me to be quite clear, also, that the right is wanting in the appellant, against the objection of the appellee, to bed the water pipes beneath the surface of the ground, where, before, they were above, or to make any substantial change in the relation of the pipe to the surface of the appellee's lands, from the manner of its use and position at the time of the conveyance. It is no proper answer to his objection, in such case, to say that it will injure him no more or less than the others, or benefit him. One may not invade the property of another, and justify or excuse the legal wrong because attended by no actual injury to such property, and especially so when the question of whether injurious or not rests only on the opinion of the trespasser." In *Dickenson v. Grand Junction Canal Company*, 15 Beav. 260, on an application for an injunction for the violation of an agreement as to the use of a waterway, it was held to be no answer to say that the alterations would not be injurious, or to even prove that they were beneficial to the complainants. Likewise it has been held that an owner of a flume across another's land has no right on its decay to erect a large one even if it should turn out to be more advantageous to the owner of the land. *Dewey v. Bellows*, 9 N. H. 282. So, also, it was

held in *Johnston v. Hyde*, 32 N. J. Eq. 446, that the grantee of an easement for an open raceway over the lands of another could not without his consent be compelled to accept the substitution of a covered aqueduct or any other conduit in lieu of the original open one. See, also, *Allen v. San Jose Land & W. Co.*, 92 Cal. 138, 23 Pac. 215, 15 L. R. A. 93; *Hulme et al. v. Shreve*, 4 N. J. Eq. 116.

Reference is made by appellee to the obligations of the parties to the lower riparian owners on the creek. Whatever these obligations may be, and whether the riparian owners can require the opening of the old creek bed from which the water was diverted and compel its flow through the natural channel are questions not involved in this controversy. The litigation is confined to the rights of the city and appellants under the granted easement. It is not proposed to turn the water back into the dry channel of Cow creek, but the city is undertaking to make a substantial change in the easement, and to impose burdens upon appellants' lands without their consent that are not warranted by the deed granting it a right to a waterway through their lands.

There is no doubt that appellants are entitled to the remedy invoked. Injunction is a proper remedy to prevent a party from trespassing upon and using a way over the land of another without his consent, where such trespass or use, if continued, would ripen into an easement. *Kirkendall v. Hunt*, 4 Kan. 514; *City of Kansas v. K. P. Ry.*, 18 Kan. 331; *Poirier v. Fetter*, 20 Kan. 47; *Hanselman v. Born*, 71 Kan. 573, 81 Pac. 192; *Council Grove Township v. Bowman*, 76 Kan. 563, 92 Pac. 550; *Winslow v. City of Vallejo*, 148 Cal. 723, 84 Pac. 191, 5 L. R. A. (N. S.) 851, 113 Am. St. Rep. 349; *High on Injunctions*, § 622.

Under the pleadings appellants were entitled to an injunction, and therefore the judgment will be reversed and the cause remanded, with directions to grant the injunction applied for. All the Justices concurring.

(32 Kan. 476)

DOBSON v. HOLMES.

(Supreme Court of Kansas. Dec. 10, 1910.)

(*Syllabus by the Court.*)

EXECUTORS AND ADMINISTRATORS (§ 71*)—INVENTORY—APPEALABLE ORDERS—"DECISION."

A decision of a probate court denying the application of an interested party for an order requiring the administrator to make an additional inventory of property, claimed to belong to the estate, but omitted from the inventory on file, is a final "decision" of a matter arising under the jurisdiction of that court, and an appeal may be taken therefrom.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 320; Dec. Dig. § 71.*

For other definitions, see *Words and Phrases*, vol. 2, pp. 1897-1902; vol. 8, p. 7629.]

Appeal from District Court, Barber County. Action by Cora Dobson against J. E. Holmes, administrator. The probate court rendered judgment for defendant, and plaintiff appeals from a judgment of the district court dismissing her appeal. Reversed and remanded, with directions.

G. M. Martin and A. M. Appelget, for appellant. Noble & Tincher, for appellee.

BENSON, J. The district court dismissed an appeal from the following decision of the probate court, holding that it was not an appealable order: "The above matter came on for hearing upon the affidavit of Cora Dobson, the widow, * * * and upon the administrator's oral answer to the court's citation, which said answer was under oath. * * * And the court having heard the evidence, * * * does hereby overrule the said motion and affidavit of the said Cora Dobson, and holds that said property, to wit, the horse and wagon, are not the property of the said estate, and that they have not been converted by the administrator to his own use, and the court further finds that the gross appraisement of the stock of merchandise and fixtures that came into the hands of the administrator were not at the time of greater value than \$1,450, as shown by the aggregate inventory filed herein by the administrator on the 21st day of January, A. D. 1909. It is ordered that the administrator make no further accounting to the estate and to the heirs of the said estate than as herein already made except for such other property as may hereafter come to his hands, as is provided by law."

The citation referred to was issued upon an affidavit charging that certain property belonging to the estate, and described therein, had been omitted from the inventory, and that other property mentioned therein had not been properly inventoried, and asking that the administrator be required to appear and answer such questions as might be asked touching the effects of the decedent and the disposition made of them.

The proceeding was treated by the probate court and the parties as an application for an order requiring the administrator to return an additional inventory of the property described in the affidavit, and will be so considered here. The order denied the application. If it is a final decision, within the meaning of the statute, the appeal should not have been dismissed. The statute provides that appeals may be taken "where there shall be a final decision of any matter arising under the jurisdiction of the probate court, except in cases of habeas corpus and injunction." Gen. St. 1909, § 3624.

It is contended that the decision was not final, because the title to the property in question could not be finally determined in

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

that proceeding. But this is not the test of a final decision, as that term is used in the statute. It was said in *Hartwig v. Flynn*, 79 Kan. 595, 100 Pac. 642, upon which the appellee seems to rely, that "the probate court * * * has jurisdiction incidentally to determine the title to property apparently belonging to the estate, but to which the administrator or some third party makes claim; but such determination is merely for the purpose of facilitating the orderly progress of business in that court, and does not determine the ultimate rights of the parties."

Original jurisdiction is vested in probate courts to determine what property should be placed upon an inventory. If that authority did not exist, orderly administration would be obstructed. But such determination is not a final adjudication of the title to the property as against adverse claimants. The inventory furnishes the basis upon which the administrator must account. If the title to any of the property so inventoried is shown to be in another, the administrator may have a proper credit for its value. If other property comes to his hands, he may be charged therewith upon an additional inventory.

It was held in *Swayze v. Wade*, 25 Kan. 551, that an order withdrawing property from an inventory on the ground that it was exempt from the payment of debts of the decedent was a decision from which an appeal could be taken. The court said: "The appeal was taken from the order making an allowance to the widow of the sum of \$2,340.57, absolutely for the use of herself and children. By the terms of the order, this sum was withdrawn from the assets of the estate as property exempt by law from the payment of any of the debts of the deceased, and the administratrix was allowed credit for such sum. * * * Therefore, as the order appealed from was in the nature of an allowance to the widow, and a final decision of the probate court, the appeal was properly taken, and the district court rightly denied the motion to dismiss the action."

In *Wolfley v. McPherson*, 61 Kan. 492, 59 Pac. 1054, it was held that an order classifying a demand allowed against an estate is a decision, and that a subsequent order vacating such classification is likewise a decision, from which an appeal may be taken.

In a proceeding in a probate court in Missouri, commenced by an administrator of the estate of a deceased partner in which the surviving partner was cited to show cause why he should not turn over certain property to the administrator, it was held that an order denying the relief prayed for was appealable. The court said: "We think the concluding clause of the first section of the eighth article of our administration law, which allows an appeal 'in all cases where there shall be a final decision of any matter arising under the provisions of this law,' is sufficiently broad to allow the appeal in this case. The decree was final, so far as the ci-

tation was concerned, and although its results did not prevent the institution and prosecution of other proceedings in the probate court, the judgment of the probate court was final as to the one instituted." *McCrary, Adm'r, v. Mentee*, 58 Mo. 446.

In the same state it is held that an appeal lies from a final order of a probate court, made in a proceeding against a party charged with concealing or embezzling the property of the estate of a deceased person, under a statute allowing an appeal, "when there shall be a final decision of any matter arising under this law" (the act relating to administrators, Wag. St. c. 2, art. 8, § 1). *Ruff v. Doyle, Adm'r of Doyle*, 56 Mo. 301. An appeal was taken in this state in such a proceeding (under Gen. St. 1909, §§ 3632-6), and the judgment was reviewed in this court; but the question whether the order was appealable was not presented. *Vaughan v. Brown*, 81 Kan. 1, 105 Pac. 30. Titles, however, are not finally adjudicated in a proceeding under this statute. *Ex parte Moran*, 112 Pac. 94; *Humbarger v. Humbarger*, 72 Kan. 412, 83 Pac. 1095, 115 Am. St. Rep. 204.

The word, "decision," used in this statute, is one of broader signification than "judgment." *Wolfley v. McPherson*, 61 Kan. 492, 59 Pac. 1054. An order which disposes of property the subject-matter of an action or proceeding in which it is made, so far as the court which made it is concerned, is a final order, although the title to such property may be litigated in some other action or proceeding. In discussing the meaning of the term, "a final judgment or decree," used in the federal judiciary act, providing for a review of the judgments of state courts, Chief Justice Marshall, speaking of a judgment denying a writ of prohibition, said: "We think, also, that it was a final judgment in the sense in which that term is used in the twenty-fifth section of the judicial act. If it were applicable to those judgments and decrees only in which the right was finally decided, and could never again be litigated between the parties, the provisions of the section would be confined within much narrower limits than the words import, or than Congress could have intended." *Weston et al. v. City Council of Charleston*, 2 Pet. 449, 464, 7 L. Ed. 481.

The effect of the order made by the probate court was to deprive the estate, for the purposes of administration, of property which interested parties claimed belonged to it. The proceeding was one within the jurisdiction of the probate court. It involved property of substantial value, and the decision marked the end of the proceeding. If it be possible, as suggested, that by some other proceeding by creditors or heirs, the claim can be again asserted and litigated, it does not change the nature of the order which judicially determined that the administrator should not be charged with the property in question. It was therefore an appealable or-

der. *Barry v. Briggs*, 22 Mich. 201; *Lalande v. McDonald*, 2 Idaho (Hasb.) 307, 13 Pac. 347; *Belt v. Davis*, 1 Cal. 134; *Martin v. Martin*, 170 Ill. 18, 48 N. E. 694.

The judgment is reversed, and the cause remanded, with directions to overrule the motion to dismiss, and to hear the appeal. All the Justices concurring.

(33 Kan. 597)

BULL et al. v. KELLEY et al.

(Supreme Court of Kansas. Dec. 10, 1910.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS (§ 966*)—TAXES—PROPERTY SUBJECT.

Section 15 of chapter 261 of the Laws of 1889, vacating certain specified blocks in the city of Cimarron, and section 67 of the same act, vacating the streets and alleys within the boundaries of vacated blocks, when read together had the effect of vacating solid portions of the town site, more than five acres in extent. Section 1 of chapter 66 of the Laws of 1893, excluding from any town site portions thereof more than five acres in extent theretofore vacated by the Legislature, applied to such portions of the city of Cimarron, and operated to exclude them from the corporate limits of the city.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 2045-2061; Dec. Dig. § 966.*]

2. STATUTES (§ 90*)—COURTS (§ 93*)—SPECIAL LAWS—STARE DECISIS.

If the question were a new one, section 1 of chapter 66 of the Laws of 1893, as applied to the facts of this case, would doubtless be held to confer corporate power by special act, and consequently to be unconstitutional. Since, however, the section was held to be constitutional in 1899, in the case of *Allen v. Town Co.*, 60 Kan. 857, 56 Pac. 1131, affirming *Town Co. v. City of Smith Center*, 6 Kan. App. 252, 51 Pac. 801, the doctrine of stare decisis applies, and the former decision will not be disturbed.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 98-100; Dec. Dig. § 90.* *Courts*, Cent. Dig. §§ 336-339; Dec. Dig. § 93.*]

Appeal from District Court, Gray County.

Action by John Bull and others against W. R. Kelley and others. From the judgment, plaintiffs appeal. Reversed and remanded, with directions.

James B. Naylor and B. F. Milton, for appellants. Harry Brice and Scates & Watkins, for appellees.

BURCH, J. The appellants, Naylor and Hollembeak, sought to enjoin the collection of taxes levied by the city of Cimarron upon tracts of land owned by them and claimed to be outside the city limits. Some of the land affected was discharged from the levy, and this appeal is taken from the judgment of the district court holding the remainder to be within the city limits and therefore subject to city taxes.

The initial question is one of statutory interpretation.

In 1889 the Legislature, by an omnibus act, vacated portions of more than 60 town sites. Laws 1889, c. 261.

Section 15 of the act relates to the town of Cimarron and reads as follows:

"Sec. 15. That all that part of the town of Cimarron, Gray county, Kansas, lying west of the west line of Eighth street; also blocks thirty, thirty-one, forty-three, forty-four, forty-nine, fifty-four, fifty-seven, fifty-eight, sixty-two, sixty-three, sixty-four, sixty-five, sixty-six, sixty-seven, seventy, seventy-one, seventy-two, seventy-four, seventy-seven, seventy-eight, eighty-two, eighty-three, eighty-four, and one hundred and three, is hereby vacated."

By section 67 of the same act, streets and alleys in the vacated portions of the various town sites affected were also vacated and became the property of the adjacent owners.

In 1893 the Legislature passed an act which reads as follows:

"Section 1. Where any townsite, or portion of a townsite containing more than five acres, has been heretofore vacated by the board of county commissioners or by act of the Legislature, and such townsite, or a portion of a townsite, is a part of a city of the first, second or third class, and included within the corporate limits of such municipal corporation, then, from and after the passage of this act, the townsite or portion of a townsite containing more than five acres, thus vacated, shall no longer be a part of such municipal corporation, nor included in the corporate limits thereof.

"Sec. 2. If any townsite, or portion of a townsite containing more than five acres, shall hereafter be vacated by the board of county commissioners or by act of the Legislature, and such townsite, or portion of a townsite, is at the time a part of a city of the first, second or third class, the act of vacation thereof shall of itself detach the same from such municipal corporation, and it shall no longer be a part of such city, nor included within the corporate limits thereof." Laws 1893, c. 66; Gen. St. 1901, §§ 635, 636.

The judgment from which the appeal is taken affects 10 blocks of those enumerated in section 15 of the act of 1889, owned by appellant Naylor and located as follows: Commencing at the southwest and running east are blocks 67, 66, 65, and 103. North of them, beginning at the west, are 62, 63, 64, and 71. North of 64 and 71 are 49 and 72. The judgment likewise affects five other blocks mentioned in section 15 of the act of 1889, owned by appellant Hollembeak and located as follows: At the northeast is block 43. South of 43 is 44. West of 44 is 57. South of 57 is 58. East of 58 is a block not included in the statute, and south of it is 70. All the blocks referred to were 300 feet square. Streets running north and south were 80 feet wide,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

and streets running east and west were 60 feet wide. Because no single block vacated by the act of 1889 contained as much as five acres, the district court held that none of them was excluded from the town site by the act of 1893.

Section 15 of the act of 1889, vacating blocks, and section 67, vacating streets and alleys within the boundaries of vacated blocks, should be read together. So considered, they did in fact completely vacate a distinct portion of the town of Cimarron, compact in form, containing much more than five acres of land, and composed of blocks 67, 66, 65, 103, 62, 63, 64, 71, 49, and 72, and the streets and alleys within the boundaries of those blocks. The result accomplished by the statute was the same as if it had read "all that portion of the town of Cimarron composed of blocks (naming them), and of the streets and alleys within the boundaries of such blocks, is hereby vacated."

The act of 1893 was intended to apply to conditions as they existed at the time of its passage. It exactly fitted the Naylor tract. That tract constituted a solid portion of the town site of Cimarron, much more than five acres in extent, which theretofore had been vacated by the Legislature. Consequently the tract was excluded from the corporate limits. The same is true of the Hollembek land, unless block 70 should be excepted. The act of 1893 looks only to units of five acres or more, and not to detached tracts containing a smaller area. Therefore block 70 cannot be considered in connection with any land from which it is separated. It is inferable from the abstract, however, that block 70 is attached to other land containing the required quantity, which the court held to be excluded from the town site. If this be the fact, block 70 ought also to be excluded.

The next question is whether section 1 of the act of 1893, so far as it relates to previous special acts vacating portions of town sites, is essentially a special act conferring corporate power within the meaning of section 1 of article 12 of the Constitution. In 1897 the Court of Appeals of the Northern department held this section to be constitutional and valid. *Town Co. v. City of Smith Center*, 6 Kan. App. 252, 51 Pac. 801. The judgment was affirmed by this court for the reasons stated by the Court of Appeals. *Allen v. Town Co.*, 60 Kan. 857, 56 Pac. 1131.¹ The material portion of the opinion delivered by the Court of Appeals reads as follows: "This act is general, applies to all cities in the state—there being none other than cities of the first, second, and third class—and has a uniform operation. This act is general in form, and may be made applicable to all cities when a certain condition of things ex-

ists. It is not necessary that the law should operate upon all cities of the state, to be constitutional. If it is general and uniform throughout the state, operating upon all who are brought within the relations and circumstances provided for in the act, it is not obnoxious to the limitation against special legislation. This act is general in form and operates not only upon all cities brought within the relations and circumstances specified therein at the time of its passage, but it is prospective in its operation, and operates generally and uniformly throughout the state, upon all cities which may at any time in the future come within its provisions. It is sufficient if it applies to all of a certain class, and it belongs to the Legislature to make the classification."

The prop afforded this decision by a consideration of section 2 of the act of 1893 (section 636, Gen. St. 1901) was removed by the decision of this court in the case of *Davenport v. Ham*, 72 Kan. 179, 83 Pac. 398. By a special act (chapter 326, Laws 1895) a portion of the town site of the city of Stockton was vacated. It was claimed that section 2 of the act of 1893 (Gen. St. 1901, § 636) operated to exclude the vacated territory from the corporate limits of the city. The court said: "Chapter 326 of the Laws of 1895 is a special act, and could not change the limits of the city of Stockton. It could only have such effect in conjunction with section 636 of the General Statutes of 1901. There can be no doubt that it was the intention of the Legislature that section 636 should operate to detach from the corporate limits of any city in Kansas all territory in which the lots, blocks, streets, and alleys should thereafter be vacated. It is a rule of construction that where several statutes have been enacted relating to the same subject they should be construed together and harmonized, and each given the meaning intended by the Legislature. The two statutes under consideration should be so construed. If section 636 (Gen. St. 1901) should be given the force intended, the Legislature could change the boundaries of a city by special act. It would thus accomplish by indirection that which the Constitution has imperatively forbidden. The Legislature cannot enact a law that will give to it the power subsequently to violate the Constitution. It cannot, without violating this provision of the Constitution, enact a law the purpose and effect of which is to give to special acts subsequently passed the force and effect of changing the corporate limits of cities. Chapter 326, Laws 1895, being special, cannot be broadened nor converted into a general law conferring corporate powers by the provisions of any previously existing law. It has just been held in *Levitt v. Wilson*, 72 Kan. 160, 83 Pac. 397, that section 109 of chapter 529 of the Laws of 1903, which undertook to withdraw certain lands from the corporate limits of the

¹ Reported in full in the Pacific Reporter; reported as a memorandum decision without opinion in 60 Kan. 857.

city of Wilson, violated sections 1 and 5 of article 12 of the Constitution, because it was a special act and contemplated the change of the corporate limits of a city. Section 636 of the General Statutes of 1901 is a plain attempt to evade this constitutional provision by providing that its provisions shall be read into all special acts subsequently passed vacating streets and alleys. It is therefore unconstitutional, so far as it attempts to confer upon special acts of the Legislature subsequently passed the effect of a general law granting corporate powers."

This reasoning is obviously sound. But it applies to section 1 of the act of 1893 (Gen. St. 1901, § 635), when that section is brought to bear upon special acts of vacation like the act of 1889, as well as to section 2 (Gen. St. 1901, § 636). In either case a special act is employed to effect a grant of corporate power, which is not permissible. Such a grant must be accomplished wholly by general law. *Levitt v. Wilson*, 72 Kan. 160, 163, 83 Pac. 397. Besides this, a statute like section 1 of the act of 1893, which confers corporate power upon an unchangeably fixed number of corporations, is itself usually regarded as special and therefore unconstitutional. *City of Topeka v. Gillett*, 32 Kan. 431, 4 Pac. 800; *Cole v. Dorr*, 80 Kan. 251, 250, 101 Pac. 1016, 22 L. R. A. (N. S.) 534. It follows that, if the question were a new one, the court would hold that section 1 of chapter 66 of the Laws of 1893 (Gen. St. 1901, § 635) is unconstitutional as applied to the facts of this case.

The court is confronted, however, with the decision in *Allen v. Town Co.*, 60 Kan. 857, 56 Pac. 1131, rendered March 11, 1899. The evidence shows that the Naylor and Hollembeck tracts, and others affected by the act of 1889, have been separately fenced and farmed as rural lands, that the voting places of electors have been determined accordingly and that township and city finances and other municipal affairs have been adjusted for years upon the supposition that such lands are outside the city limits. No doubt the same conditions obtain in a multitude of localities affected by the numerous acts of vacation passed prior to 1893. This being true the doctrine of *stare decisis*, which is based upon the necessity for stability and uniformity in the interpretation of laws, applies, and in the interest of public and private right the former decision will not be disturbed.

There is no dispute about the facts of this case. The only questions involved are questions of law, and there is no necessity for another trial.

Therefore the judgment of the district court is reversed, and the cause is remanded, with direction to render judgment according to the views which have been expressed. All the Justices concurring.

(83 Kan. 473)

OZORKIEWICZ v. CARR COAL MINING & MFG. CO.

(Supreme Court of Kansas. Dec. 10, 1910.)

(Syllabus by the Court.)

1. MASTER AND SERVANT (§ 286*)—INJURIES TO SERVANT—ACTIONS—QUESTIONS OF FACT.

Where, in an action by an employé of a coal company to recover damages for personal injuries received by him in the coal mine, the issue in controversy being whether or not the operators of the mine violated the law by neglecting to furnish the plaintiff with suitable props as required by the statute, and the evidence is conflicting, a question of fact is presented which ought to be submitted to the jury, and not decided upon a demurrer to the evidence.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 1026; Dec. Dig. § 286.*]

2. MASTER AND SERVANT (§ 286*)—INJURIES TO SERVANT—ACTIONS—QUESTIONS OF FACT.

When in such a case it is claimed that such failure to comply with the law was willful, which claim is denied, this also presents a question of fact which ought to be submitted to a jury; and held that, under the evidence produced in this case, it was error to decide these questions upon a demurrer to the evidence.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 1026; Dec. Dig. § 286.*]

Appeal from District Court, Leavenworth County.

Action by Anton Ozorkiewicz against the Carr Coal Mining & Manufacturing Company. Judgment for defendant, and plaintiff appeals. Reversed, and new trial ordered.

F. P. Fitzwilliams, for appellant. A. E. Dempsey, for appellee.

GRAVES, J. This is an action to recover damages for personal injuries received while engaged as an employé in the coal mine of the appellee. The trial was had in the district court of Leavenworth county, where a demurrer to the evidence of the plaintiff was sustained, and he brings the case here. While the appellant was at work, the roof of his room fell upon him and inflicted serious injuries. In that mine the roof is composed of slate and loose stone which, unless securely propped, are liable to fall and injure the miners. The roof is propped with timbers cut the proper length and size, which the miners place under the roof to hold it in position. These props are placed within convenient reach of the miner, so that he can get them and put them in proper place when needed without unreasonable loss of time. At the time of the injury and for several years prior thereto, there was a statute for the purpose of regulating the operation of mines prescribing the duty of the operators in regard to the protection of employes.

This statute reads in part as follows:

"In order to better secure the proper ventilation of every coal mine and promote the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

health and safety of the persons employed therein, the owner, agent or operator shall employ a competent and practical inside overseer, to be called 'mining boss' who shall keep a careful watch over the ventilating apparatus, the air-ways, traveling-ways, pumps and pump timbers and drainage, and shall see that as the miners advance their excavations, all loose coal, slate and rock overhead are carefully secured against falling in upon the traveling-ways. And every mine shall be supplied with sufficient prop timber of suitable length and size for the places where it is to be used, and kept in easy access to." Gen. St. 1909, § 4987.

"For any injury to person or property occasioned by any violation of this act, or any willful failure to comply with its provisions by any owner, lessee or operator of any coal mine or opening, a right of action against the party at default shall accrue to the party injured for the direct damage sustained thereby; and in any case of loss of life by reason of such violation or willful failure a right of action against the party at fault shall accrue to the widow and lineal heirs of the person whose life shall be lost for like recovery or damages for the injury they shall have sustained." Gen. St. 1909, § 4992.

The negligence as set forth in the petition reads: "And then and there willfully, wrongfully, carelessly, and negligently failed to provide the said coal mine, and the roofing of said coal mine, and this plaintiff, with sufficient prop timber of suitable length and size for the place where the plaintiff was to use the same, and to keep such prop timber in easy access to for the use, safety, and care of this plaintiff."

The coal shaft was from 700 to 800 feet deep. About 150 miners were at work in the mine. The mines were so extensive that an underground 'boss' was necessary to see that the requirements of the law were obeyed. Among these requirements was that the men mining coal should be supplied with props such as were suitable and sufficient in kind and easy of access. This was manifestly a question of fact and should have been submitted to the jury. It was error to decide it upon a demurrer to the evidence. It cannot be said that there was no evidence tending to support the allegations of the petition. The plaintiff repeatedly requested the 'boss' to furnish props, which he did not do. There was abundant evidence upon which this question might have been submitted to a jury.

The question of willfulness as presented here was also a question of fact. The cases are not entirely harmonious as to what the word, "willfully," as used in the statute, means, and it does not appear what view the trial court took, and we therefore do not express an opinion upon it; but, because of

the error already mentioned, the judgment of the district court is reversed, and a new trial ordered. All the Justices concurring.

(83 Kan. 562)

DOWELL v. CHICAGO, R. I. & P. RY. CO.
et al.

(Supreme Court of Kansas. Dec. 10, 1910.)

(Syllabus by the Court.)

1. MASTER AND SERVANT (§ 313*)—INJURIES TO SERVANT—ACTIONS.

An averment that an engineer of a railway company negligently and recklessly ran the engine of which he was in charge against an employé at work upon the track without signal or warning of any kind and thus seriously injured him alleges a misfeasance, a violation of the duty of the engineer to the track worker, and for the wrongful act he and the railway company may be sued jointly by the injured employé.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1238; Dec. Dig. § 313.*]

2. REMOVAL OF CAUSES (§ 50*)—CITIZENSHIP AND ALIENAGE OF PARTIES—SEPARABLE CONTROVERSIES.

Where the injured employé may proceed jointly or severally against the nonresident railway company and the resident engineer liable for the injury, and where he elects in good faith to proceed against them jointly, the action does not become a separable controversy for the purpose of removal because the liability of one of the defendants arises under the statute, and the other under the common law, nor because different lines of proof may be necessary to establish the negligence of each, nor yet because the plaintiff may have misconceived his right of action or may be unable ultimately to sustain it.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 100; Dec. Dig. § 50.*]

3. REMOVAL OF CAUSES (§ 36*)—DIVERSE CITIZENSHIP—FRAUDULENT JOINDER.

Since the plaintiff had the legal right to sue the tort-feasors jointly for the wrong done, the allegation that the resident and nonresident tort-feasors were sued together for the purpose of preventing a removal of the case to the federal court does not of itself state a fraudulent joinder.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 79; Dec. Dig. § 36.*]

4. FRAUD (§ 43*)—PLEADING.

A general averment of fraud without stating the facts upon which the charge is based is insufficient to raise an issue for the determination of the court.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 37; Dec. Dig. § 43.*]

5. REMOVAL OF CAUSES (§ 36*)—DIVERSE CITIZENSHIP—FRAUDULENT JOINDER.

A showing that the resident defendant is a man of little means and has no property that could be seized to satisfy a judgment rendered against him does not establish that he is a sham party nor that the joinder was fraudulent.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 79; Dec. Dig. § 36.*]

6. MASTER AND SERVANT (§ 236*)—CARE REQUIRED OF SERVANT.

An employé at work on a railroad track being in a place of great danger must take reasonable precautions for his safety in such a situation, but the degree of care exacted of travelers or persons about to cross a track is

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

not required of one whose duty requires his presence on the track.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 681, 723-742; Dec. Dig. § 236.*]

7. RAILROADS (§ 21*)—CLAIM FOR INJURIES—SERVICE OF NOTICE ON RAILROAD COMPANY.

The notice required to be given to a railroad company in order to fix its liability for an injury to an employé resulting from the negligence of coemployes, or agents of the railroad company, as provided for in chapter 341 of the Laws of 1905, may be served by leaving it, or a copy thereof, with the person in charge of any depot or station of the company. This will be effectual without regard to whether or not the railroad company has previously designated a person in the county upon whom service may be made.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 21.*]

8. REVIEW ON APPEAL.

The evidence examined, and found to be sufficient to sustain the findings and verdict of the jury.

(Additional Syllabus by Editorial Staff.)

9. REMOVAL OF CAUSES (§ 89*)—DETERMINATION OF QUESTION.

The removability of a cause to the federal court is to be determined from the pleadings and record as they existed when the application to remove was made, independently of what is alleged in the petition for removal, unless it is made to appear that defendants were fraudulently joined to prevent a removal.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 189, 192-197, 200, 201; Dec. Dig. § 89.*]

10. MASTER AND SERVANT (§ 289*)—INJURY TO SERVANT—ACTION—QUESTION FOR JURY—CONTRIBUTORY NEGLIGENCE.

In an injury action by an employé against a railroad company, whether the employé was guilty of contributory negligence, *held*, under the facts, to be for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089-1132; Dec. Dig. § 289.*]

Appeal from District Court, Seward County.

Action by Albert M. Dowell against the Chicago, Rock Island & Pacific Railway Company and another. Judgment for plaintiff, and defendants appeal. Affirmed.

M. A. Low, Paul E. Walker, and V. H. Grinstead, for appellants. Houston & Brooks and F. S. Macy (Ed Hyde, of counsel), for appellee.

JOHNSTON, C. J. Albert M. Dowell brought this action against the Chicago, Rock Island & Pacific Railway Company and Ed Johnson to recover damages for personal injuries alleged to have been sustained by him through the negligence of the railway company and of Johnson an engineer of the company. Dowell was a yardman at the station of Liberal, and on January 21, 1907, was engaged in removing clinders and other debris from a track of the company, and while doing so Johnson, it is alleged, negligently backed an engine against him injuring him so that it became necessary to amputate his right leg above the knee and his left leg be-

low the knee. It was alleged that the engine was backed upon him without warning or signal of any kind. There was an averment that Johnson was incompetent and unfit to act as engineer and was known to be so by the railway company, and it was also stated that the engine was old and defective and lacked the appliances necessary to control the starting and stopping of the engine, and that this, too, was well known to the railway company. It is further alleged that the injury resulted from the incompetency of Johnson and from his act in carelessly, needlessly, and recklessly running upon and injuring Dowell, and that Johnson's acts and that of the railway company concurred in inflicting the injury for which the action was brought. Shortly after the filing of the petition and before answer was due, the railway company filed its petition for a removal to the federal court which, after stating the nature of the controversy and that the amount claimed was \$40,000, recited that Dowell was a citizen of Kansas, and that the railway company was a corporation duly organized under the laws of Illinois and Iowa, and is a citizen of those states and not of Kansas. It was further alleged that the cause of action set up by Dowell against the railway company was a separable controversy capable of being finally determined between those parties without the presence of Johnson, and it was also charged that "Johnson was joined as defendant in this action by the plaintiff for the sole and fraudulent purpose of defeating and preventing this defendant, your petitioner, from removing this action from the state court in which it is now pending to the United States Circuit Court, and for the sole and fraudulent purpose of defeating said jurisdiction of the said United States Circuit Court in this action." Further along in the petition it is alleged that plaintiff did not have a cause of action against Johnson or any reasonable grounds upon which to base a recovery from him, and that there was no joint cause of action against both defendants. It was also alleged that Johnson was a man of small means with little if any property from which a judgment against him could be satisfied, while the railway company is solvent, with a large amount of property within the jurisdiction of the court to meet any recovery that might be obtained against it. An adequate removal bond was offered which the court approved, but the petition for removal was denied. Afterward the railway company answered in the case denying generally and alleging that the injury resulted from the want of ordinary care by Dowell. It was averred that in consideration of the payment of \$922.45 he released the railway company from all liability because of the injury, and like averments were made by Johnson in his separate answer. In the reply, the circumstances accompanying the signing of the release and a

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

certain receipt were set forth, and it is alleged that the releases were without validity because they were signed when Dowell was mentally and physically incapable of making a contract. The jury made special findings and returned a general verdict against both defendants awarding Dowell damages in the sum of \$15,000. The defendants appeal, and the first error assigned is upon the denial of the petition for removal.

The contention is that no cause of action was stated against Johnson, and no joint cause of action alleged against both appellants, but that as the petition did state a distinct and separable controversy between Dowell and the railway company—citizens of different states—the petition for removal should have been granted. It is argued that Johnson, being the agent and servant of the railway company, is not liable for mere acts of nonfeasance, and this appears to be based on the theory that agents are responsible only to their principals, and while they may be held for misfeasance they are not liable to third parties for mere omission of duty. This contention overlooks the theory that a servant owes duties to third persons as well as to his master. A servant or employé of a corporation cannot well escape liability for the nonperformance of a duty which he owes to an injured third party. The distinctions between liabilities of agents and servants for acts of nonfeasance and misfeasance as well as their liability for the omission of their duties to persons other than their principals and masters are fully discussed, and the authorities cited in case notes appended to *Mayer v. Thompson-Hutchison Building Co.*, 104 Ala. 611, 16 South. 620, 28 L. R. A. 433, 53 Am. St. Rep. 88; *Ward v. Pullman Co.*, 131 Ky. 142, 114 S. W. 754, 25 L. R. A. (N. S.) 343; *Hagerty v. Wilson*, 38 Mont. 69, 98 Pac. 643, 25 L. R. A. (N. S.) 356.

If it were granted that Johnson was not liable for mere nonfeasance, he would nevertheless be liable for the negligence charged against him in appellee's petition. The allegation is that he carelessly and recklessly ran down and injured appellee with an engine of which he was in charge. This amounts to a charge of violating his duty to appellee and of doing something to his injury. Johnson's act was something more than a breach of contract with his master or an omission of duty to the railway company. It was a positive wrong to appellee—a misfeasance—and he cannot be relieved from liability for it because of his contract relation with his master. *Mechem on Agency*, § 572; 1 A. & E. Encycl. of L. (2d Ed.) 1132; 31 Cyc. 1359. Appellee's petition sets up the negligence of the company and direct negligent acts of Johnson which concurred with that of the railway company in producing an injury for which a joint action may be brought. The removability of the case is to be determined from the pleadings and the record as they existed when the application to remove was made inde-

pendent of what is alleged in the petition for removal unless it is made to appear that the defendants were fraudulently joined in order to prevent a removal to the federal court. *Louisville & Nashville R. Co. v. Wangelin*, 132 U. S. 599, 10 Sup. Ct. 203, 33 L. Ed. 474. There is some conflict in the authorities relating to the right of removal, but under the later decisions of the controlling authority on these questions, it must be held that the denial of the petition for removal was not error. A person against whom a joint tort has been committed, as is alleged here, has the right to sue those who inflicted the injury jointly, and "a defendant has no right to say that an action shall be several which the plaintiff elects to make joint." *Louisville, etc., Railroad Co. v. Ide*, 114 U. S. 52, 5 Sup. Ct. 735, 29 L. Ed. 63. In *Powers v. Chesapeake & Ohio Railway*, 169 U. S. 92, 18 Sup. Ct. 264, 42 L. Ed. 673, it was said: "A separable defense may defeat a joint recovery, but it cannot deprive a plaintiff of his right to prosecute his suit to final decision in his own way. The cause of action is the subject-matter of the controversy, and that is, for all the purposes of the suit, whatever the plaintiff declares it to be in his pleadings." In *Alabama Southern Ry. Co. v. Thompson*, 200 U. S. 206, 26 Sup. Ct. 161, 50 L. Ed. 441, it was decided that: "It has been too frequently decided to be now questioned that the plaintiff may elect his own method of attack, and the case which he makes in his declaration, bill, or complaint, that being the only pleading in the case, is to determine the separable character of the controversy for the purpose of deciding the right of removal." A case brought against a master and servant for the joint negligence of both does not become a separable controversy because the plaintiff has misconceived his cause of action or because he may be unable to establish it, and his motive in joining them is not material if he is acting within his right. *Powers v. Chesapeake & Ohio Railway*, supra; *Alabama Southern Ry. Co. v. Thompson*, supra; *Cincinnati & Texas Pacific Ry. v. Bohon*, 200 U. S. 221, 28 Sup. Ct. 166, 50 L. Ed. 448; *Chesapeake & Ohio Ry. Co. v. Dixon*, 179 U. S. 131, 21 Sup. Ct. 67, 45 L. Ed. 121; *Jacobson v. Chicago, R. I. & P. Ry. Co. (C. C.)* 176 Fed. 1004; *Welch v. Cincinnati, N. O. & T. P. Ry. Co. (C. C.)* 177 Fed. 760. The fact that the liability of one of the joint tort-feasors was statutory, and that of the other arose under the common law, does not preclude the joinder of both as defendants or make the controversy separable, nor that different lines of proof may be necessary to establish the negligence of each. It is enough if the concurrent acts of negligence of each contributed to the injury inflicted upon the appellant. *Southern Ry. Co. v. Miller*, 217 U. S. 209, 30 Sup. Ct. 450, 54 L. Ed. 732; *Charman v. Lake Erie & W. R.*

Co. (C. C.) 105 Fed. 449; *Painter v. Chicago, B. & Q. R. Co.* (C. C.) 177 Fed. 517.

In its petition for removal the railway company attacks the good faith of the joinder. Under some of the cases its averments although general would raise the issue of fraudulent joinder, and if it were properly raised the trial of the issue would be in the federal court. *Bank v. Fritzlen*, 75 Kan. 479, 89 Pac. 915, 22 L. R. A. (N. S.) 1235. In the recent case of the Illinois Central R. R. Co. v. Sheegog, 215 U. S. 308, 30 Sup. Ct. 101, 54 L. Ed. 208, where several tortfeasors were joined as defendants, a non-resident defendant asking for removal alleged that the joinder of the defendants was made only for the purpose of preventing removal, and was fraudulent and knowingly false. The Supreme Court of the United States in an opinion against which there was a vigorous dissent held the general averments to be insufficient to warrant removal. After stating that a removal could not be prevented where a showing of a fraudulent joinder was made, the court proceeded: "On the other hand, the mere epithet 'fraudulent' in a petition does not end the matter. In the case of a tort which gives rise to a joint and several liability, the plaintiff has an absolute right to elect, and to sue the tort-feasors jointly if he sees fit, no matter what his motive, and therefore an allegation that the joinder of one of the defendants was fraudulent, without other ground for the charge than that its only purpose was to prevent removal, would be bad on its face. *Alabama Southern Ry. v. Thompson*, 200 U. S. 208 [28 Sup. Ct. 161, 50 L. Ed. 441]; *Cincinnati & Texas Pacific Ry. v. Bohon*, 200 U. S. 221 [28 Sup. Ct. 166, 50 L. Ed. 448]. If the legal effect of the declaration in this case is that the Illinois Central Railroad Company was guilty of certain acts and omissions by reason of which a joint liability was imposed upon it and its lessor, the joinder could not be fraudulent in a legal sense on any ground except that the charge against the alleged immediate wrongdoer, the Illinois Central Railroad itself, was fraudulent and false." In *Hukill v. Maysville & B. S. R. Co.* (C. C.) 72 Fed. 745, it was held that, if a person had a good cause of action for a joint tort against several defendants, it could not be a fraud to join them, although the plaintiff would not have brought in the resident defendant except to avoid the jurisdiction of the federal court, and it was added: "Where he has reasonable ground for a bona fide belief in the facts upon which the liability of all the defendants depends, his motive in joining them cannot be questioned. It is only where he has not, in fact, any cause of action against the defendants, and has no reasonable ground for supposing that he has, and yet joins them, in order to avoid the jurisdiction of the federal court, that the joinder can be said to be fraudulent,

entitling the real defendant to a removal." Under these rulings the fact stated in the petition did not warrant a removal for fraudulent joinder. A general allegation of fraudulent purpose without averments of supporting facts is insufficient. The joinder here could not well be fraudulent unless the charge that Johnson himself was negligent was fraudulent and false. If it were made to appear that Johnson was not in charge of the engine when it was run against appellee, or that he had no connection whatever with the tort, and that the appellee had joined him as defendant knowing that he had no ground for an action against him, but had included him for the purpose of defeating jurisdiction, there would be no ground for appellants' contention. Here, however, the appellee stated a cause of action, and had reasonable grounds for believing that he had a cause of action against both defendants, and whether both were negligent was one of the issues to be tried on the merits of the case. No attempt was made to show that appellee's statements of facts as to the participation of defendants in the wrongful injury were false and without foundation, and it has been often decided that a general averment of fraud without stating the facts upon which the charge is based presents no issue for determination. *State ex rel. v. Williams*, 39 Kan. 517, 18 Pac. 727; *K. P. & W. Rld. Co. v. Quinn*, 45 Kan. 477, 25 Pac. 1068; *Ladd v. Nystol*, 63 Kan. 23, 64 Pac. 985; *Warax v. Cincinnati, N. O. & T. P. Ry. Co.* (C. C.) 72 Fed. 637; *Offner v. Chicago & E. R. Co.*, 148 Fed. 201, 78 C. C. A. 359; *Jacobson v. Chicago, R. I. & P. Ry. Co.*, supra.

It is alleged it is true that Johnson is a man of small means who has little property subject to application upon a judgment obtained against him, but it has been decided that "a defendant who is legally liable together with another, and whose presence defeats the right of removal is neither a nominal nor a sham party merely because he is peculiarly irresponsible, so that a judgment against him would be of no value." *Deere, Wells & Co. v. Chicago, M. & St. P. Ry. Co.* (C. C.) 85 Fed. 876; *Welch v. Cincinnati, N. O. & T. P. Ry. Co.*, supra.

The questions presented on the merits relate mostly to the sufficiency of the evidence to sustain the findings and judgment. It is contended that the demurrers to the evidence of appellee should have been sustained and a verdict for appellants directed. It is argued that the release signed by appellee operated to discharge the railway company from any liability because of the injury to him. While he was in the hospital, and on March 7, 1907, appellee signed a paper at the instance of an agent of the railway company which purported to release the company from any liability for any loss or damage because of his injury for a consideration of \$800. After leaving the hospital, and on

April 26, 1907, he executed a receipt for \$122.45 which recited that it was a completion of the former agreement of settlement, and it also purported to be a full release and discharge of the railway company for appellee's injury. This amount is said to have been given to pay for a wheel chair and for transportation to bring appellee's parents to him. Evidence was offered to prove that appellee was mentally incapable of making contracts or of executing releases when the papers were signed. The jury made special findings that appellee was "mentally incompetent to understand the nature and character of his act when he signed the alleged release in question in this action," and also that he was "weak minded and incapable mentally of understanding or transacting ordinary business transactions at the time he signed the alleged release in question." The sufficiency of the testimony to sustain these findings is challenged. Some of that offered was of little weight or force because of the lack of opportunity that witnesses had for learning and judging of appellee's mental condition, and also because of the lapse of time between the execution of the release and the examination of appellee by those witnesses. However, considerable testimony was offered which did tend to show incapacity, and which is deemed to be sufficient to uphold the findings. There were findings to the effect that appellee's signatures to the release and receipt were obtained by fraudulent representations, and it is claimed that these findings, too, are unwarranted, but if appellee did not understand the nature of his acts, and was mentally incapable of executing releases, this feature of the case is not important. It is further argued that, if appellee was an imbecile and incapable of making a settlement or contract, he necessarily lacked capacity to bring and maintain the action. The findings of the jury relate to the time the release was executed, and his capacity to maintain an action when it was begun or afterwards was not involved. While there was testimony tending to show that he was weak minded when the trial was had, the condition at that time was not an issue, and the findings of the jury did not relate to that time.

Although contended for, it cannot be held as a matter of law that appellee's contributory negligence precludes a recovery. He was injured while working on a track in the daytime. When the engineer ran the engine down the track appellee stepped aside to let it pass. After going a short distance the engine stopped near a water tank, and appellee understood those on the engine to say that they were going to take water. He stepped back on the track and resumed his work a few feet at the rear of the engine. The engine only stopped a minute or so when it was suddenly started backwards, one witness saying that the engineer appeared to throw it wide open, and he did run it

against appellee without ringing the bell or the giving of any signal. Appellee, of course, knew the engine was likely to be moved again soon, but if his testimony was true he had some reason to think that it would not be moved until water was taken, and he had some reason to expect that it would not be moved without ringing the bell as that was the rule and practice of the yard. Those on the engine either saw or should have seen appellee working on the track as they approached him on the way to the stopping place, and, knowing he was at work there, ordinary prudence would seem to require a ringing of the bell or the giving of some signal before starting the engine backwards. While an employe working on the track is in a place of great danger, and is required to take reasonable precautions for his safety, the degree of care exacted of travelers or persons about to cross a track is not required of one whose duty requires his presence on the track. *Comstock v. U. P. Ry. Co.*, 56 Kan. 228, 42 Pac. 724; *Railroad Co. v. Bentley*, 78 Kan. 221, 93 Pac. 150. If he fails to take the precautions which the perils of the situation and reasonable prudence require, his negligence would defeat a recovery. As appellee had reason to think that some time would be consumed in taking water, and that those in control of the engine knew of his presence on the track and would give a warning before moving the engine backwards, the question whether he was guilty of contributory negligence was for the jury, and could not be determined by the court as a matter of law.

There is a contention that the railway company was not given the notice required by statute. Laws 1905, c. 341. A notice was served on the agent of the railway company in charge of the station at Liberal in due time. The claim is that the appellee was required to serve notice on the person designated by the company in pursuance of the provisions of section 4499 of the General Statutes of 1901, and that notice could not be made upon other representatives of the company unless the company had failed to designate or appoint a person in the county upon whom process should be served. Nothing in the record is found to show whether the railway company has made a designation or not. Section 2 of the act referred to does provide that notice may be served on the person designated by the company, and that if no one is designated then it may be served on a local superintendent, a freight agent, an agent to sell tickets, or a station keeper. This alone might indicate that service on the superintendent or other agents would be unavailing unless it was made to appear that no one had been designated by the railway company in the county to accept such service, and that one relying on such a notice must show that the designation had not been made. In the latter part of the section, however, is a further provision that an effec-

tual service may be made "by leaving a copy thereof at any depot or station of such company or corporation in such county with the person in charge thereof or in the employ of such company or corporation." It appears that compliance was made with this alternative provision, as it was shown that a written notice was given to or left with the agent in charge of the station or depot at Liberal, and this was sufficient.

There were objections to testimony, some of which may have been inadmissible, but, in view of the special findings which fixed the cause and the time of the injury, the objections are deemed to be immaterial, and do not furnish any grounds of reversal.

Finding no prejudicial error, the judgment of the district court will be affirmed. All the Justices concurring.

(83 Kan. 456)

STATE ex rel. JACKSON, Atty. Gen., v.
PAULEY, County Treasurer.

(Supreme Court of Kansas. Dec. 10, 1910.)

(Syllabus by the Court.)

1. SCHOOLS AND SCHOOL DISTRICTS (§ 10*)—ESTABLISHMENT OF HIGH SCHOOL—CONSTRUCTION OF STATUTE.

Chapters 210 and 215 of the Laws of 1909 are curative statutes, designed to validate the action taken in counties where a majority of those voting on the proposition had voted to adopt the Barnes high school law (chapter 397, Laws 1905), and where high schools had been established and maintained in accordance with that law for one year, although such law was not adopted by a majority of all those voting at the election, as the law at that time required.

[Ed. Note.—For other cases, see *Schools and Schools Districts*, Dec. Dig. § 10.*]

2. STATUTES (§§ 74, 138*)—TAXATION (§ 38*)—UNIFORMITY OF LAWS—AMENDATORY STATUTES—TAXATION.

Chapters 210 and 215 of the Laws of 1909 are not in conflict with section 17 of article 2 of the Constitution declaring that laws of a general nature shall have a uniform operation and restricting enactment of special laws, nor with section 16 of the same article relating to amendatory statutes, nor with section 4 of article 11 of the Constitution forbidding the levy of taxes, unless in pursuance of a law stating the object of the same. The reasons urged against the validity of these statutes are not sustained, and they are held to be valid laws.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 76, 205, 206; Dec. Dig. §§ 74, 138;* *Taxation*, Dec. Dig. § 38.*]

Graves, J., dissenting.

Mandamus by the State on the relation of Fred S. Jackson, Attorney General, against B. S. Pauley, County Treasurer of Marshall County. Writ allowed.

Fred S. Jackson, Atty. Gen., W. P. Montgomery, and Gregg & Gregg, for plaintiff. Frank Doster and W. W. Redmond, for defendant.

BFNSON, J. This is an original action to compel a county treasurer to pay to offi-

cers of a school district money arising from taxation for the support of a high school.

The answer avers that the taxes in question were levied under the supposed authority of chapter 397 of the Laws of 1905, known as the Barnes high school law, alleges that the law was never adopted in the county, and that other acts relating to the same subject and under which the district claims the fund are unconstitutional, and that no authority exists for its disbursement.

The acts affecting this controversy are (1) the Barnes law, passed in the year 1905, which provided for a referendum and adoption by a majority of the voters voting in any county before it became operative therein; (2) chapter 333 of the Laws of 1907, providing for a levy to raise the necessary funds for schools existing under the former act; (3) chapter 69 of the Laws of 1908, providing that the Barnes law should be operative in any county when a majority of the votes cast upon that proposition should be for such adoption; (4) chapter 210 of the Laws of 1909, providing: "That in all counties of this state in which high schools have been established and maintained for one year, and which said high schools have been established and maintained under the provisions of chapter 397 of the Laws of 1905, as amended by chapter 333 of the Laws of 1907 and chapter 69 of the Laws of 1908, by a majority of all the votes cast on said proposition, said chapter 397 of the Laws of 1905, as amended by chapter 333 of the Laws of 1907 and by chapter 69 of the Laws of 1908, shall be in full force and effect from and after the publication of this act in all such counties without again submitting the question to a vote of the electors; provided, however, this act shall not apply to counties where the proposition was resubmitted under chapter 69 of the Session Laws of 1908 and rejected"; (5) chapter 215 of the Laws of 1909, which declared that: "It shall be the duty of the county treasurer of every county in the state of Kansas to promptly pay over and distribute on demand all moneys now in his hands, or which may hereafter come into his hands by reason of any tax levy made by any county, city, township or school district, for the use and benefit of which it was collected, under the provisions of chapter 397 of the Laws of 1905, as amended by chapter 333 of the Laws of 1907 and by chapter 69 of the Laws of 1908."

It is contended that the high school, for the support of which this tax was levied, was in existence before the passage of the Barnes law, and so was not established and maintained under the provisions of that act, as required to bring it within the terms of chapter 210 of the Laws of 1909. Concerning this matter the answer alleges: "High schools were not being maintained in Mar-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

shall county under the provisions of said law at the time house bill No. 313, entitled, 'An act concerning high schools,' was enacted by the Legislature of the state of Kansas at the session of 1909, for the reason that said law was never adopted in said county." This allegation conveys an implication that while high schools may in fact have been maintained in accordance with the provisions of that law, they were not as a legal proposition maintained under it, because it was not in effect in that county. Referring to the agreed statement of facts (paragraphs 8 and 14), it appears that the county commissioners assuming to act under and by virtue of the Barnes law levied the taxes in question for the support of this high school, and that the district did maintain the school for one year prior to the passage of chapter 210 of the Laws of 1909, with courses of instruction as provided in the Barnes law. It is therefore found that this school, with others in that county, named in the agreed statement, are within the purview of that chapter.

The question of adopting the provisions of the Barnes law was submitted to the voters of Marshall county at the general election of 1906, and a majority of the votes cast upon the proposition were for the adoption, but not a majority of all the votes cast at the election, and so the proposition failed. *Humboldt v. Klein*, 79 Kan. 209, 99 Pac. 222. The local authorities in that county, however, and in several other counties where the same result had occurred, supposing that the Barnes law had been adopted by such a vote, and assuming to act under its provisions, levied and collected taxes for high schools accordingly. In this situation, with the taxes in the treasury, and the schools in operation relying upon this revenue, the Legislature, at the session of 1909, passed the two acts, chapters 210 and 215 of that year. The purpose of these enactments is plain; it was to relieve the situation; they were curative in their nature, and were designed to make available the funds raised by taxation to support the schools established and maintained in reliance upon the Barnes law, upon the supposition that it had been adopted. That the authorities of Marshall county believed the Barnes law to be in force, and levied the taxes upon that assumption appears, as we have seen, from the agreed statement, and it is a matter of common knowledge, that by an erroneous interpretation of the section providing for a vote upon the adoption of the law, the same action was taken in other counties, which action, it appears, was supported by an opinion of the superintendent of instruction.

Two main questions are presented: (1) Whether the Legislature had power to make the funds so levied for the support of high schools available for the use for which they were collected; and (2) whether chapters 210 and 215 of the Laws of 1909 accomplish this

purpose. The act of 1907, referred to in chapter 210, only amends one section relating to the manner of making the levy, and does not affect the questions. The act of 1908, also referred to in chapter 210, provided that the vote of a majority voting upon the proposition, should be sufficient to adopt the Barnes law in any county. Now it is argued that as chapter 210 refers to action taken under the original act of 1905, as amended by the act of 1908, it is not in force in counties where an election had not been held under the last-named act. If this interpretation be correct, chapter 210 has no effect, for the act of 1908 secured the only end which it is claimed chapter 210 accomplishes. Counsel for defendant say that their interpretation "gives effect to chapter 210 and makes it a definite, validating act of any elections that might have been irregularly held after the amendment of the law in 1908," but there is no suggestion that any such situation existed. On the other hand, the embarrassment arising from proceedings taken upon the supposition that the Barnes law had been adopted by a majority of those voting upon the proposition was generally known, and we are bound to suppose that it was this condition, rather than the supposition that an irregular election might possibly have been held under the act of 1908, which stimulated legislative action. This view is confirmed by the passage soon after at the same session, of chapter 215, which provides that moneys collected under the Barnes law, as amended in 1907 and 1908, shall be paid over to the districts for which it was collected. If this refers only to moneys collected for high schools in counties where the law had been adopted after the act of 1908 took effect, it is also useless, for in such case the duty of disbursement could not be doubted and further legislation was not needed. Chapters 210 and 215 relate to the same subject, arise out of the same general situation, were designed to reach the same general end, and should be construed together as one law. In *re Hall*, Petitioner, 38 Kan. 670, 17 Pac. 649; *Telegraph Co. v. Austin*, 67 Kan. 208, 72 Pac. 850.

The legislative purpose in the passage of chapters 210 and 215 to make the provisions of the Barnes law effective in the counties where a majority of those voting upon the proposition had voted for its adoption is apparent. This intent when ascertained is the cardinal canon of construction to which all mere rules of interpretation are subordinate. *State v. Bancroft*, 22 Kan. 170. The recital in these chapters of the later acts amending the original act of 1905 is descriptive, and does not limit the application of these laws to elections held subsequent to the last amendment. To so hold would defeat the clear and obvious legislative purpose in their enactment.

It is contended that chapter 210 violates section 17 of article 2 of the Constitution

requiring the uniform operation of general laws, and forbidding the enactment of a special law where a general law can be made applicable. The argument is, that if the act be construed to apply to elections held before the amendment of 1908, it will result in an arbitrary and capricious classification. The act includes the counties wherein the Barnes law had been adopted by a majority of those voting upon the proposition, in which high schools had been maintained for one year. Counties which had adopted the law by a majority vote of all the electors are not within its terms, and counties which had rejected the proposition to adopt were excluded by the proviso. The conditions of this classification were, the adoption of the Barnes law by a majority vote of those voting on the proposition, and the maintenance of a high school for one year. These conditions applied to a large number of counties, resulting in the maintenance of high schools, and the exercise of the power of taxation upon the county therefor, upon the assumption that the law had been duly adopted. The conditions were real and not fictitious, and the classification was not arbitrary, but reasonable.

It is competent for the Legislature to adapt a law, general in its nature, to a class, but such classification must be natural and not an arbitrary or fictitious one. An act to have uniform operation throughout the state need not affect every individual, every class, or every community alike. *Rambo v. Larrabee*, 67 Kan. 634, 73 Pac. 915. It is true that construing chapter 210, as applying to counties where elections had already been held, other counties cannot come into the class, and this, it is said, prevents the uniform operation required by the Constitution. This objection, however, is met by the opinion in *Cole v. Dorr*, 80 Kan. 251, 101 Pac. 1016, 22 L. R. A. (N. S.) 534, wherein the language of the Supreme Court of Minnesota was quoted with approval holding that when a statute is remedial or curative the classification is legal if it includes all the subjects which are affected by the condition which it is sought to remedy, or the evils it is sought to cure.

Curative legislation necessarily forms an exception to the general rule that classifications cannot be based solely on conditions already existing, for the object of such a statute is to effect a remedy for present conditions. *Leavenworth v. Water Co.*, 69 Kan. 82, 76 Pac. 451; *Cole v. Dorr*, supra. A curative act of the Legislature may validate any action of the voters of a county or of its authorities which the Legislature had power under the Constitution to authorize in the first instance. *Shepherd v. Kansas City*, 81 Kan. 369, 105 Pac. 531. If the conditions are such as to warrant legislative action and the statute is made to apply whenever the conditions exist, the Constitution interposes no barrier to the passage of a curative act, pro-

vided the action validated thereby might have been previously authorized by the Legislature. *Iowa Railroad Land Co. v. Soper*, 39 Iowa, 112; *Kimball v. Town of Rosendale*, 42 Wis. 407, 24 Am. Rep. 421; *State, Bonney v. Collector of Bridgewater*, 31 N. J. Law, 134; *Hewitt's Appeal*, 88 Pa. 55.

In *State ex rel. v. Brown*, 97 Minn. 402, 106 N. W. 477, 5 L. R. A. (N. S.) 327, it appeared that successive statutes had been passed at the same legislative session, legalizing the issuance of bonds for building schoolhouses. The original enabling act required a two-thirds majority of all the voters of the city voting at the election. This majority was not given at the election, although there was a majority of two-thirds of the voters voting upon the proposition. The curative acts provided that the bonds should be issued and sold. In an action of mandamus to compel the issuance of the bonds as provided in the curative acts, the court said: "The Legislature of 1905, influenced undoubtedly by the fact that the wishes of the people of Minneapolis had been clearly expressed in favor of the issuance of the bonds, and with full knowledge of the conditions which rendered the issue of such bonds desirable and necessary, removed the restriction imposed by the act of 1903, and legalized and authorized the issue of the bonds without compliance with one of the conditions imposed by the original enabling statute. * * * Neither upon principle nor precedent should these statutes be treated as special legislation. They are remedial, curative acts, and apply to all subjects of legislation which are within the conditions and subject to the evils sought to be remedied."

It was within the power of the Legislature to provide for high schools and their maintenance by taxes to be levied in the various counties without submitting the question to a vote. *State v. Freeman*, 61 Kan. 90, 58 Pac. 959, 47 L. R. A. 67. It also had the right to make the establishment of such schools conditional upon a vote. *State v. Bentley*, 80 Kan. 227, 101 Pac. 1073. It could require a majority of all the votes cast at an election as a condition precedent to the operation of the law in any county, or it could make it effective upon a different condition. Having the power in the first instance to establish such schools and to enforce taxation to maintain them with or without such preliminary vote, the Legislature could, within the principle already stated, by the enactment of curative statutes after such schools had been established, require that they should be so maintained, although the majority of votes at the referendum was less than the original enabling act required.

It is also insisted that chapter 210 of the Laws of 1909 violates section 16 of article 2 of the Constitution forbidding amendments, unless the new act contain the section amended. It is said that the Barnes law was

amended because the condition prescribed by its terms for its adoption in any county was changed by the new law. The purpose of this constitutional restriction was to prevent uncertainty and confusion which might arise from adding or striking out words and making additions or substitutions, without rewriting the section as amended. *State ex rel. v. Cross*, 38 Kan. 696, 17 Pac. 190; 1 Lewis' *Suth. Stat. Const.* (2d Ed.) § 230. It does not apply to amendments by implication. *Parker-Washington Co. v. Kansas City*, 73 Kan. 722, 85 Pac. 781; *Bank v. Pearce*, 76 Kan. 408, 92 Pac. 53. Nor where the later act declares the meaning of the earlier one, or where by reference a former act is extended to cover subjects not within its terms. *State v. Shawnee County*, 83 Kan. 199, 110 Pac. 92. And it has no application when the new statute is complete in itself. The objection now made might have been urged with equal force to the curative act under consideration in *Cole v. Dorr*, supra. The statute providing for a commission form of government had not been adopted in Wichita in the manner provided by its terms, and yet it was held that the remedial statute was effective, and that the law was thereby in force. So in other cases where curative acts have been considered in this court. It is difficult to see how statutes of this nature, when designed to validate proceedings taken under the assumed authority of a statute, but where its provisions have not been followed, can be made effective if this contention is to prevail. Considering the nature and purpose of curative legislation, and the reason for the constitutional inhibition, it is held that it does not apply to statutes like those now under consideration. 1 Lewis' *Suth. Stat. Const.* (2d Ed.) §§ 239-240.

The further claim is made that chapter 215 of the Laws of 1909 is unconstitutional, because it confiscates the taxpayers' money. It is said that payments of this tax were made without any authority of law for their collection, that some were made under protest, and that the money remains that of the taxpayer, and in this situation the attempted legislative appropriation is without due process of law. In considering this question it must be remembered, as before stated, that this chapter is only a part of the legislation, and is to be considered with chapter 210, of the same session, as part of one act to accomplish a proper legislative purpose. If legislation is effective to legalize actions which might have been authorized in the first instance, the curative power may validate it afterwards, if vested rights are not disturbed. If the statute can be made operative to validate and enforce proceedings to compel the payment of taxes, it can be made effectual to distribute taxes already paid.

In Iowa Railroad Land Co. v. Soper, supra it was held: "But the legalizing of a which but for the legalizing act was in-

valid and not capable of being enforced, does not interfere with any vested right of the taxpayer. It is argued that before the passage of the curative act, the plaintiff had a right of action to recover back the illegal taxes paid, and that this is a vested right. It is no more a vested right than in case the plaintiff had not paid the taxes. He would in such case have as good grounds for resisting payment, as, after payment, he could have to recover the money paid. * * * The statute has created a liability to pay where none existed before its passage, and this is so whether the act authorizing the tax levies be passed prior thereto or is an act legalizing a tax previously levied. In either case the power of the General Assembly to pass the law is the same. If it has no power to legalize a tax already levied without authority, it has no power to confer the authority in the first instance."

Reference is made in the brief of counsel to the opinion in *Atchison, Topeka & Santa Fé Railroad Co. v. Woodcock*, Treasurer, 18 Kan. 20. That decision was based mainly upon the fact that the tax in question there had not been levied in pursuance to a law stating the object of the tax, as the Constitution requires. Article 11, § 4. It was said that the tax was sustained only by the curative act which failed to state the object. No such infirmity appears here. The original act clearly states the object; chapter 210 declared the conditions upon which that act became effective in any county, and chapter 215 required the application of the taxes to the object specified. Some expressions in that opinion and in the opinion in *Atchison & N. R. Co. v. Maquiklin*, 12 Kan. 301, considered apart from the facts involved, indicate a possible view of legislative power in relation to curative statutes not apparent in recent decisions of this court, and not controlling in the situation now presented.

Other questions suggested in the briefs appear to be only incidental to the propositions decided herein and in *Cole v. Dorr*, supra, and other opinions of this court which have been cited.

A peremptory writ of mandamus is allowed.

JOHNSTON, C. J., and BURCH, MASON, SMITH, and PORTER, JJ., concur.

GRAVES, J. (dissenting). I am unable to concur in the foregoing opinion. Chapter 210 of the Laws of 1909, which is claimed to make the tax in question valid, has never in my view applied to Marshall county. That statute by its terms limits the counties to which, and the conditions under which, it shall apply. It does not apply except in counties where the original Barnes law was voted upon and lost, for the reason that although it received a majority of the votes cast upon that proposition, it did not receive a majority of the votes cast at the

election, which was necessary; and it only applies to such counties when the people under the erroneous belief that the law was legally adopted by such vote, proceeded to establish and maintain high schools under the provision of such law for one year. Chapter 210 can have no force or effect in any county where these conditions do not exist, and yet none of them appear to have existed in Marshall county at the time this tax was levied. If high schools were in existence in that county, it does not appear that they were either established or maintained under the provisions of this Barnes law, but rather in spite of them, and in accordance with an educational plan adopted by the people before the Barnes act was voted upon. The people rejected the Barnes act when it was fairly before them, and they had an opportunity to adopt it.

The Legislature evidently intended to submit this tax to the people for their acceptance or rejection. So far as Marshall county is concerned, they have declined to accept it. In my judgment, the action of the county commissioners in making this levy was without authority, and the taxpayers should not be compelled to pay it by mandamus. The writ should be denied.

(33 Kan. 533)

**CASTEEL v. PITTSBURG VITRIFIED
PAVING & BUILDING BRICK CO.**
(Supreme Court of Kansas. Dec. 10, 1910.)

(Syllabus by the Court.)

1. MASTER AND SERVANT (§ 95*)—INJURIES TO MINOR—ACTION FOR DAMAGES.

Under the statute (Gen. St. 1909, §§ 5095, 5098), providing that "no person under sixteen years of age shall be employed at any occupation nor at any place dangerous or injurious to life, limb, health or morals," and providing a penalty for a violation of such provision, an employé less than 16 years old who is injured at such an occupation may recover damages against his employer, although the statute does not in terms give him a right of action.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 141, 160; Dec. Dig. § 95.*]

2. MASTER AND SERVANT (§ 265*)—INJURY TO MINOR—ACTION FOR SERVICES.

In such an action it is not necessary for the plaintiff to prove that the defendant knew that his occupation was dangerous.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 265.*]

3. MASTER AND SERVANT (§ 286*)—DANGEROUS OCCUPATION—QUESTION OF FACT.

Ordinarily whether a particular occupation is dangerous, within the meaning of the statute, is a question of fact.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 286.*]

4. MASTER AND SERVANT (§ 95*)—INJURY TO SERVANT—"DANGEROUS OCCUPATION."

An occupation is "dangerous," within the meaning of the statute, whenever there is reason to anticipate injury to the person engaged in it, whether the risk arises from the inherent

character of the work or the manner in which it is carried on, even although the danger may be eliminated by the exercise of due care and skill on the part of the employé.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 95.*]

For other definitions, see Words and Phrases, vol. 2, p. 1827.]

5. MASTER AND SERVANT (§ 96*)—INJURY TO SERVANT—PROXIMATE CAUSE.

Where the employment of a person under 16 years of age is unlawful because his occupation exposes him to danger, and in the course of his work he is injured in consequence of such exposure, the violation of the law is the proximate cause of the injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 157, 158, 162; Dec. Dig. § 96.*]

6. MASTER AND SERVANT (§ 276*)—INJURY TO MINOR—DANGEROUS OCCUPATION—EVIDENCE.

In an action under the statute, the evidence tended to show these facts: The plaintiff was required to ride upon a dumping car drawn by a horse over a rough track abounding in curves and running close to a steep bank of shale; the car often jumped the track; the box, the top of which was five feet from the ground, was arranged so as to empty to either side, and had a lateral play of several inches; he was instructed to keep the car in balance by shifting his position; a wheel struck a lump of shale near the track and the car stopped, throwing him out and breaking his arm. *Held*, that the jury were justified in finding that the plaintiff's occupation was dangerous, and that his injury was the proximate result of the violation of the statute.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 276.*]

Appeal from District Court, Crawford County.

Action by Jesse Casteel against the Pittsburg Vitrified Paving & Building Brick Company. Judgment for plaintiff. Defendant appeals. Affirmed.

Warner, Dean, McLeod & Timmonds, for appellant. F. B. Wheeler and Keene & Gates, for appellee.

MASON, J. Jesse Casteel, between 15 and 16 years old, was injured while in the employ of the Pittsburg Vitrified Paving & Building Brick Company. He sued the company and recovered, upon the theory that his employment was in violation of the statute providing that "no person under sixteen years of age shall be employed at any occupation nor at any place dangerous or injurious to life, limb, health, or morals," and making it a misdemeanor to employ such person in violation of that provision. Laws 1905, c. 278, §§ 1, 4; Gen. St. 1909, §§ 5095, 5098. The defendant appeals; its principal contention being that the evidence was insufficient to show that the plaintiff was employed at any occupation or at any place that was "dangerous," within the meaning of the statute.

The evidence tended to show, and therefore for the present purpose may be regarded as having shown, these facts: The defend-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes
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ant was engaged in the manufacture of brick. Shale for use in the process was excavated by a steam shovel and loaded into dumping cars, which were drawn by a horse along a track for a distance of about 800 feet, and then hoisted up an incline by machinery to the brick plant. The plaintiff's employment required him to ride upon the loaded cars from the shale pit to the incline and upon empty cars on the return trip, driving the horse, which, however, was so well trained that no lines were used or needed. The car was not provided with a brake. The track was of uneven height and curved often. For a part of the distance it ran so close to a perpendicular bank of shale, about 20 feet high, that the cars frequently scraped it in passing. The rails were about two feet and a half apart. The wheels were 14 inches in diameter; the distance between the front and rear pair was two feet. The box was 7 feet long, 5 feet wide, and 15 inches deep; its top being 5 feet above the track. Each corner was fastened to the truck below it by a chain, and the car was emptied to either side by unfastening the chains on the other. The chains were loose, having about three or four inches slack, allowing that amount of play to the box, which swayed from one side to the other according to the inclination of the track and the disposition of the load. The plaintiff was directed so to ride the car as to keep it in balance by the weight of his body—to shift his position in going around curves to keep the car from jumping the track, which it did quite often, sometimes four or five times a day, more often when it was empty. Pieces of shale would sometimes fall to the track from the bank or from the cars. These were usually soon removed by other employes. On the day of his injury he was riding in the front end of an empty car on the side opposite the high bank, in accordance with his instructions. A lump of shale about 14 inches long and 4 or 5 inches thick each way had become wedged between the bank and the nearer rail. The horse was walking fast, when the hub of the forward wheel struck the shale, stopping the car and throwing the plaintiff to the ground, his arm being broken in the fall.

The statute provides a penalty for its violation, but does not in terms give a right of action to any one injured thereby. Nevertheless, by the weight of authority and the better reason such right exists. *Harrod v. Latham*, 77 Kan. 466, 95 Pac. 11. See notes in 7 L. R. A. (N. S.) 335, and 9 L. R. A. (N. S.) 385; 2 Labatt, Master and Servant, §§ 799, 800.

The defendant maintains that the plaintiff's occupation was not dangerous, but safe, since he had merely to drive a gentle horse a short distance back and forth, hitching and unhitching it to the cars, having no loading or unloading, or lifting or carrying to do, and not being engaged about any machinery; that if he became exposed to any risk in the

course of his employment through the failure of his employer to take proper precautions for his safety, his remedy was in an action for common law negligence, and not under the statute. Ordinarily, whether an occupation is dangerous, within the meaning of such a statute, is a question of fact for the jury. *Hickey v. Taaffe*, 32 Hun, 7; *Gallenkamp v. Garvin Machine Co.*, 91 App. Div. 141, 86 N. Y. Supp. 378; *Braasch v. Michigan Stove Co.*, 153 Mich. 652, 655, 118 N. W. 366, 20 L. R. A. (N. S.) 500; *Hankins v. Reimers*, 86 Neb. 307, 309, 125 N. W. 516. Both New York cases cited were reversed by the Court of Appeals (99 N. Y. 204, 1 N. E. 685, 52 Am. Rep. 19; 179 N. Y. 588, 72 N. E. 1142), the first upon a different question. In the latter case the court of last resort adopted a dissenting opinion, which seems to support the theory that a statute forbidding the employment of children at dangerous machinery has no application to a machine which is safe when carefully and skillfully handled. We do not accept that view. We think that an occupation is dangerous, within the meaning of the Kansas act, whenever there is reason to anticipate injury to the person engaged in it, whether the risk arises from the inherent character of the work or the manner in which it is in fact carried on, even although the danger may be reduced or eliminated by the exercise of due care and skill on the part of the employe. See *Frank Unnewehr Co. v. Standard Life & A. Ins. Co.*, 176 Fed. 16, 99 C. C. A. 490, and cases there cited. A contrary view would defeat one of the manifest objects of the statute, which is to give a peculiar protection to children because they have peculiar need of it—to prevent their being so placed that their inexperience and immaturity would expose them to peril. In the present case it makes no difference whether the plaintiff was set at a task which was safe when he was employed but became dangerous by reason of subsequent acts of the employer, or whether it was unsafe from the beginning. The defendant's liability depends upon whether the plaintiff's occupation, as it was carried on at the time of the accident, was such as to give reasonable ground to anticipate an injury, and we think that was a fair question for the determination of the jury. We cannot say, as a matter of law, that the defendant could not reasonably have expected such an accident as happened, or some similar one. The likelihood of the plaintiff's being jolted from the car was suggested by the roughness of the track, the frequent curves, the nearness of the wall of shale, the readiness with which the car left the rails, and especially by the unstable poise of the box, and the duty assigned the plaintiff to keep it in balance by shifting his own position.

The contention is also made that there was no evidence that the violation of the statute was the proximate cause of the plaintiff's injury. The jury were justified in finding, and

must be deemed to have found, that the defendant unlawfully employed the plaintiff at an occupation that placed him in peril; that he was injured in the course of his employment in consequence of that peril; that what happened was one of the very things the statute was intended to prevent. Such findings establish the necessary casual relation between the disobedience of the statute and the plaintiff's injury. 21 A. & E. Ency. Law, 480-482; *Leathers v. Tobacco Co.*, 144 N. C. 330, 57 S. E. 11, 9 L. R. A. (N. S.) 349; *Starnes v. Manufacturing Co.*, 147 N. C. 556, 61 S. E. 525, 17 L. R. A. (N. S.) 602; *Synesewski v. Schmidt*, 153 Mich. 438, 116 N. W. 1107; *Perry v. Tozer*, 90 Minn. 431, 437, 97 N. W. 137, 101 Am. St. Rep. 416; 7 L. R. A. (N. S.) 337, second column of the note. In *Roberts v. Taylor*, 31 Ont. 10, it is held, in effect, that the violation of the statute is not shown to be the proximate cause of the injury, unless there is proof that the immaturity of the child contributed to the injury. We think this too rigorous a requirement. There is always at least this much connection between the youth of the employé and his injury—if he had been older he might have refused the dangerous employment.

A part of the defendant's argument is based upon the theory that whatever danger there was in the plaintiff's employment originated with the lodging of the lump of shale against the track. But the evidence warranted the view that a similar situation was likely to arise at any time, and that the plaintiff was in constant peril of being thrown from the car in the same or some similar way.

Complaint is made of the admission of evidence showing all of the circumstances surrounding the incident. Some of it may have been unnecessary, but none of it was prejudicial. The contention is made that no recovery could be had unless the defendant knew the plaintiff's occupation to be dangerous. The statute, however, bases liability upon the fact of danger, not upon the employer's knowledge of it. Even a mistaken belief that the employé is over the prescribed age is held not to be a defense. *City of New York v. Chelsea Jute Mills*, 43 Misc. Rep. 266, 88 N. Y. Supp. 1085; see note in 20 L. R. A. (N. S.) 500. *Koester v. Rochester Candy Works*, 194 N. Y. 92, 87 N. E. 77, 19 L. R. A. (N. S.) 783, is to the contrary.

The judgment is affirmed. All the Justices concurring.

(83 Kan. 574)

BROWN v. MISSOURI, K. & T. RY. CO.

(Supreme Court of Kansas. Dec. 10, 1910.)

(Syllabus by the Court.)

1. REFERENCE (§ 99*)—FINDINGS BY REFEREE—AMENDMENT.

Findings of fact returned by a referee may be amended by the court, at least in any case

where the changes merely reflect the different views of the court as to the effect of testimony accepted by the referee as truthful.

[Ed. Note.—For other cases, see Reference, Cent. Dig. §§ 148-156; Dec. Dig. § 99.*]

2. CARRIERS (§ 52*)—FREIGHT SHIPMENTS—BILLS OF LADING—CONCLUSIVENESS.

Where coal is shipped by rail in bulk, the weights stated in the bill of lading are prima facie evidence of the amount received, in favor of the consignee, against the initial carrier or a connecting carrier that collects charges upon the basis of such statement, notwithstanding such weights were reported by the consignor to the carrier, and adopted by it without verification, and notwithstanding the bill of lading contains the words, "Weights subject to correction."

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 150-161; Dec. Dig. § 52.*]

3. CARRIERS (§ 134*)—LOSS OF FREIGHT—ACTION BY CONSIGNEE—EVIDENCE.

In an action by a consignee to recover for coal lost in transit, the plaintiff's evidence held insufficient to show that such losses occurred before delivery to him.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 588-592; Dec. Dig. § 134.*]

Appeal from District Court, Geary County.

Action by George T. Brown against the Missouri, Kansas & Texas Railway Company. Judgment for plaintiff. Defendant appeals. Reversed and remanded.

John Madden and W. W. Brown, for appellant. William W. Pease and John F. Brown, for appellee.

MASON, J. George T. Brown sued the Missouri, Kansas & Texas Railway Company on account of coal alleged to have been lost by it in the course of shipments made to him over its line. The court appointed a referee to report on the facts. The referee, among other findings, reported that no competent evidence had been introduced to show either the quantity of coal shipped to the plaintiff or the quantity actually received by him. The court, being of the opinion that there was competent evidence on both points, modified these findings accordingly, found the amount of shortage shown, and gave judgment for the plaintiff. The defendant appeals, and urges two grounds of error: First, that the court had no authority to change the referee's findings of fact; and, second, that the evidence did not support the judgment.

In 34 Cyc. 885, it is said: "While in some jurisdictions the court may disregard the findings of fact of the referee, and make new findings on the evidence reported, or modify or change the facts as found, the general rule is that the court has no such power." This difference in practice exists, but the preponderance of authority in favor of what is stated as the general rule is not so great as might seem from the number of cases cited. Some of them involve a different phase of the subject, some are affected by

statute, and one turns upon the fact that the reference was authorized only by the agreement of the parties. In Missouri, as shown by the note to the text quoted, the court may modify the referee's findings of facts, where the reference is or might be compulsory, but not where no referee could have been appointed except by consent. *Boatman's Bank v. Trover Bros. Co.* (C. C. A.) 181 Fed. 804, is based upon that distinction. See, also, 17 Dec. Dig. p. 1218, tit. "Reference," § 106. Here the reference was by order of the court and not by consent of the parties. In this state the tendency is to a liberal view of the control of the trial court over the referee's findings. *Kelley v. Schreiber*, 82 Kan. 403, 108 Pac. 816, and cases there cited; *Bethell v. Lumber Co.*, 39 Kan. 230, 236, 17 Pac. 813. In the present case the findings of the referee, which the court changed, were not based upon conflicting oral evidence. There was nothing in the report of the referee to suggest a doubt of the truthfulness of any witness. On the contrary, it fairly appeared that the testimony given was accepted as true. The referee found that the evidence had no tendency to prove certain facts; the court thought it sufficient to establish them. The difference of opinion was not whether the statements in evidence were to be believed, but what inferences were to be drawn from them (a question of fact, which the court had as fair an opportunity to decide as the referee) and what they tended to prove (a question of law). In this situation there was no occasion for a new trial. The evidence was before the court, not only without conflict of testimony, but practically with a finding that it was all true. It remained only for the court to make the inferences of fact and conclusions of law, and render judgment.

Some of the coal shipments originated on the defendant's line, and some on that of another company. The referee found that there was no evidence as to the weight of any shipment. The court changed this finding, so that it read in effect that there was no evidence on this point except the weights given by the consignor to the carrier, which were adopted as a basis for freight charges and inserted in the bills of lading. Ordinarily bills of lading are prima facie evidence against the carrier issuing them of the amount of goods received. 4 A. & E. Encycl. of L. 522; 1 *Hutchinson on Carriers*, § 158. The defendant maintains that here they have not that effect, because of the insertion of the qualifying words, "in apparent good order" and "weights subject to correction." It is doubtful whether the first phrase can apply to material shipped in bulk (6 Cyc. 418, 419), but in any event it does not change the effect of the instrument as prima facie evidence. (4 A. & E. Encycl. of L. 522, 523, note 7; 6 Cyc. 422). The ex-

pression, "weights subject to correction," has an important function. It avoids the estoppel which would otherwise under some circumstances preclude the carrier from disputing the weight. 6 Cyc. 418. It does not destroy the prima facie effect of the recital as to quantity. It merely leaves the matter open to further inquiry, instead of being absolutely concluded. Its insertion in a bill of lading has been held, where other rights have intervened, not even to prevent the statement of weight from being conclusive, except as to minor errors. *Tibbits v. R. I. & P. Ry. Co.*, 49 Ill. App. 567, 572.

The question whether the recital of a bill of lading as to quantity is competent evidence against a connecting carrier is more difficult. In 3 *Hutchinson on Carriers*, p. 1594, § 1348, it is said: "The receiving carrier will be regarded as the agent of the succeeding connecting carriers for the purpose of accepting the goods for transportation over the connecting lines, and the receipt or bill of lading given by such receiving carrier will be competent evidence in an action against any of the succeeding carriers, into whose possession the goods may have come, to show the delivery for transportation, the condition of the goods at the time of such delivery, and the terms of the shipment." The only case cited in support of this text is *Southern Express Co. v. Hess*, 53 Ala. 19, where exceptional circumstances were relied upon as making the company receiving the goods the agent of the connecting carrier. In the present case we think that the act of the defendant in collecting freight charges upon the basis of the weights stated in the bills of lading was an adoption by it of such weights, which thereby became prima facie evidence against it of the amount of coal shipped. The connecting carrier is presumed to have received the quantity of goods shown to have been delivered to the initial carrier. 3 *Hutchinson on Carriers*, § 1348, second paragraph of note 6; *Cooper & Co. v. Geo. Pacific Railway Co.*, 92 Ala. 329, 9 South. 159, 25 Am. St. Rep. 59; *S. F. & W. Ry. Co. v. George L. Harris*, 26 Fla. 148, 7 South. 544, 23 Am. St. Rep. 551.

The remaining question, therefore, is whether the plaintiff showed that he received a less quantity of coal than the bills of lading described. The plaintiff testified that the custom was for the railroad company to place a car of coal on the side track and notify him; that he would then notify his teamsters and have them unload it, hauling the coal to his scales, where it was weighed. The company's liability as a carrier, therefore, ceased upon his assuming control. 6 Cyc. 457. The referee found that the plaintiff correctly weighed the coal that was transferred from the cars to his scales, but that there was no competent evidence that all the coal in any car was so transferred. The court changed this finding concerning the

(83 Kan. 613)

lack of evidence, and held that, as the plaintiff had shown due care in the handling of the coal, there was no presumption of any loss after he took charge. The plaintiff further testified in general terms that he always exercised supervision over the drivers; that he was careful to see that they unloaded the coal as he ordered it; that he oversaw them in the performance of their duties; that he had a general supervision of everything that went on, and a knowledge of the shortage of every car. But, upon being asked how he knew that the teamsters brought all of the coal from the cars to the scales, he answered: "There is a railroad law that requires us to do certain things, and when they were not done we find it out instantly." No explanation was given as to what he meant by this. He also said, in answer to the same question, that the teamsters were paid by the ton for hauling, and would not be apt to throw any of it away. At another time he said he was testifying on the record of the system he used, and that that was the knowledge he had of the transaction. It seems clear, therefore, that he did not profess to be speaking from personal knowledge. Again, he testified that there was some little stealing of coal during the unloading at the yards; that most of the coal cars were covered, and were sealed on their arrival; that his effort was to unload the cars so far as practicable on the day they were delivered, so as to lessen his loss; that sometimes, when a night intervened before a car was emptied, he had sealed it, but not always. None of the teamsters was produced, nor was any witness who had inspected this part of their work, or who knew that all of the coal, or substantially all of it, was transferred from the cars to the plaintiff's scales. Of course, it was not necessary to have produced witnesses who had watched the operation of unloading throughout; but no one who testified in behalf of the plaintiff seemed to have known anything personally about the coal until it reached his scales. The loss for which recovery was had was distributed among 36 cars, and averaged about a ton to a car. On one car it was over 5 tons, but with this exception it ran approximately from half a ton to 2½ tons. It seems unlikely that the loss could have occurred wholly after the arrival of the cars, but some considerable portion of it may. The plaintiff had the burden of showing how much of it had taken place before delivery to him, and, having failed to produce any evidence from which that can be ascertained, must be held to have failed in his proof.

The judgment is reversed, and the cause remanded, with directions to enter judgment for the defendant. All the Justices concurring.

STATE v. HATCH.†

(Supreme Court of Kansas. Dec. 10, 1910.)

(Syllabus by the Court.)

1. HOMICIDE (§ 208*)—MANSLAUGHTER—ABORTION—SUFFICIENCY OF EVIDENCE.

The evidence in this case, direct and circumstantial, was sufficient to justify the submission of the case, under the proper instructions, to the jury.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 562; Dec. Dig. § 268.*]

2. CRIMINAL LAW (§ 473*)—MANSLAUGHTER—ABORTION—ADMISSIBILITY OF EVIDENCE.

Where physicians testify, as experts, to the measurements and appearance of a fetus found by them in the body of a deceased woman, and that from such measurements and appearance they each had an opinion as to the age of the fetus and as to whether the woman at her death was quick with child, it is competent to allow such witnesses to testify each to his opinion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1060; Dec. Dig. § 473.*]

Appeal from District Court, Reno County.

Emeline Hatch was convicted of performing an abortion resulting in the death of mother and child, and she appeals. Affirmed.

W. H. Lewis and Prigg & Williams, for appellant. F. S. Jackson, Atty. Gen., and James Hettinger, for the State.

SMITH, J. The appellant was charged, tried, and convicted under section 15 of the crimes and punishment act (Gen. St. 1909, § 2503). A large number of assignments of error were made, but only two are urged. In appellant's brief it is alleged, that the principal point relied upon for a reversal of the judgment is the insufficiency of the evidence to establish the charge. The evidence tending to establish the guilt of the defendant is practically all circumstantial. One woman was present, but not in the same room, although, if her testimony is true, she was in a position to see the deceased at the time of the supposed act which resulted in the death of the deceased and her unborn child. If her evidence had been believed by the jury, an acquittal must have resulted. It is conceded, however, by the defense that, although the state offered this woman as a witness, the prosecution was not concluded by her evidence, and that the jury might believe the circumstantial evidence tending to establish guilt, even in opposition to the direct and positive evidence of the witness.

The evidence of a number of physicians, who held a post mortem examination on the body, on the day following the death, indicates that the deceased died of shock, and that there was no apparent physical injury upon the body which would account for the death; that shock may result from nervous excitation, possibly caused by a very slight physical injury, which causes the heart to empty itself of blood, the brain to become

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

† Rehearing denied.

anaemic and to engorge nearly all the other internal organs with an excess of blood; that the accused exhibited to one or more of the physicians very soon after the death a catheter smeared with vaseline, indicating that it had been recently used; that the underclothing and body were wet; that around the armpits and on the waist the clothing was slightly smeared with blood, indicating that an attempt had been made to wash off the blood. The accused stated to the coroner, in effect, that she was in the business, to some extent, of procuring abortions for women and charging a fee therefor. The woman testified that the deceased had called upon the accused for the second time for the purpose of having the accused procure an abortion for her, and that the accused had been for some time alone with the deceased immediately before and following the death.

Again it is urged that the court erred in admitting in evidence the opinions of some of the physicians, who conducted the post mortem examination, as to whether the fetus was quick. It is urged that only the mother or persons who have placed their hands upon her body and felt the independent motion of the fetus can know whether or not it is quick. If this were adopted as the iron-clad rule of evidence in such cases, the statute defining the crime would be practically impossible of enforcement after the death of the mother. The evidence given by the physicians of the measurements made of the fetus, and its appearance, their means of knowing from measurements and appearance its age and of the time of quickening, we think, was properly admitted; also the opinion of each as to whether the deceased was quick with child. It was for the jury to say, after considering all the evidence, what weight they would give to such opinions.

The court properly instructed the jury that they must acquit the accused, unless they were satisfied by the evidence beyond a reasonable doubt of her guilt.

After fully considering all of the evidence, all of the objections thereto, and the arguments of counsel, we think that the case was fairly submitted to the jury and cannot say that the jury could not conscientiously, after a full consideration of all the circumstances, find beyond a reasonable doubt that the accused was guilty of the crime charged. All the Justices concurring.

(83 Kan. 606)

STATE v. ROACH et al.

(Supreme Court of Kansas. Dec. 10, 1910.)

(Syllabus by the Court.)

1. JUDGMENT (§ 559*)—RES JUDICATA—ACQUITTAL OF CRIMINAL OFFENSE.

An acquittal upon a criminal charge is not a bar to a civil action brought against the defendant by the state, although in order to re-

cover it must prove him to have been guilty of the offense.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1077, 1078; Dec. Dig. § 559.*]

2. JUDGMENT (§ 559*)—RES JUDICATA—ACQUITTAL OF CRIMINAL CHARGE.

In an action by the state to enjoin the maintenance of a place where intoxicating liquors are unlawfully sold, it is error to render judgment for the defendant upon the ground that under the same evidence he had already been acquitted of a criminal charge of maintaining such a place.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1077, 1078; Dec. Dig. § 559.*]

Appeal from District Court, Atchison County.

Action by the State against M. L. Roach and others to enjoin the maintenance of a common nuisance. Judgment for defendants, and the state appeals. Reversed and remanded.

F. S. Jackson, Atty. Gen., John Marshall, Chas. D. Shukers, and Thomas A. Moxcey, for the State. James M. Challis and W. P. Waggener, for appellees.

MASON, J. M. L. and J. N. Roach were charged with the commission of a misdemeanor by keeping a place where intoxicating liquors were unlawfully sold. At the same time an action was brought against them in the name of the state to enjoin the maintenance of such place as a common nuisance. Gen. St. 1909, §§ 4387, 4388. They were acquitted on the criminal charge by the verdict of a jury. The injunction action was afterward submitted to the court upon the same evidence, and a judgment was rendered for the defendants expressly upon the ground that the acquittal constituted an adjudication of the controversy involved in the civil case.

In order to obtain an injunction it was necessary for the state to prove that the defendants had committed the precise offense of which, upon the same evidence, they had been found not guilty. In the two actions the parties were the same, and the acts complained of were the same and were made illegal by the same statute. There was identity of parties and identity of issues. A final judgment in one was necessarily conclusive in the other, unless this result is prevented by the fact that one action was criminal and the other civil. In order to procure a conviction on the criminal charge the state was required to establish beyond a reasonable doubt that the defendants had violated the law, while to obtain an injunction it needed only to show this by a preponderance of the evidence. This difference in the degree of proof required has generally been thought sufficient to prevent the application of the doctrine of res judicata. *Cowdery v. State*, 71 Kan. 450, 80 Pac. 953; *People v. Snyder*, 90 App. Div. (N. Y.) 422, 86 N. Y. Supp. 415; *People v. Rohrs*, 49 Hun, 150, 1 N. Y. Supp.

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672; *United States v. Schneider* (C. C.) 35 Fed. 107; *Micks v. Mason*, 145 Mich. 212, 108 N. W. 707, 11 L. R. A. (N. S.) 653; *State v. Corron*, 73 N. H. 434, 62 Atl. 1044; *Myers v. Casualty Co.*, 123 Mo. App. 682, 690, 101 S. W. 124; *Riker v. Hooper*, 35 Vt. 457, 82 Am. Dec. 646; *State v. Sargood*, 90 Vt. 415, 68 Atl. 49, 130 Am. St. Rep. 995; *State v. Well*, 83 S. C. 478, 65 S. E. 634, 26 L. R. A. (N. S.) 461; *Busby v. State*, 51 Tex. Cr. R. 289, 307, 103 S. W. 638; *Freeman on Judgments*, §§ 319, 319a; 2 *Van Fleet's Former Adjudication*, § 488; 24 A. & E. Ency. Law, 831-832.

In the opinion in *Coffey v. United States*, 116 U. S. 436, 445, 6 Sup. Ct. 437, 29 L. Ed. 684, language was used seemingly of a contrary tendency, and some of the state courts have on that account refused to follow the decision. *People v. Snyder*, 90 App. Div. (N. Y.) 422, 86 N. Y. Supp. 415; *Micks v. Mason*, 145 Mich. 212, 108 N. W. 707, 11 L. R. A. (N. S.) 653. What was there decided, however, was that after an acquittal upon a criminal charge the facts involved cannot be again litigated between the same parties, "as the basis of any statutory punishment denounced as a consequence of the existence of the facts."

In *Stone v. United States*, 167 U. S. 178, 17 Sup. Ct. 778, 42 L. Ed. 127, it was pointed out that this was the controlling feature of the earlier case, the court saying: "The judgment in that case was placed distinctly upon the ground that the facts ascertained in the criminal case, as between the United States and the claimant, could not be again litigated between them, as the basis of any statutory punishment denounced as a consequence of the existence of the facts." In the *Coffey* Case there was no claim of the United States to property, except as the result of forfeiture. In support of its conclusions, the court referred to *United States v. McKee*, 4 Dill. 128,¹ observing that the decision in that case was put on the ground "that the defendant could not be twice punished for the same crime, and that the former conviction and judgment was a bar to the suit for the penalty." The rule established in *Coffey's* Case can have no application in a civil case not involving any question of criminal intent or of forfeiture for prohibited acts, but turning wholly upon an issue as to the ownership of property. In the criminal case the government sought to punish a criminal offense, while in the civil case it only seeks, in its capacity as owner of property, illegally converted, to recover its value. In the criminal case his acquittal may have been due to the fact that the government failed to show, beyond a reasonable doubt, the existence of some fact essential to establish the offense charged, while the same evidence in a civil action brought to recover the value of the property illegally converted might have been sufficient to entitle the government to a ver-

dict." Pages 186, 187, 188, of 167 U. S., and page 782 of 17 Sup. Ct. (42 L. Ed. 127).

The decision in the *Coffey* Case seems to have been based rather upon the rule against a second jeopardy, than upon the doctrine of *res judicata*; the court apparently treating a civil action to recover a penalty for a violation of the law as in effect a criminal prosecution, although the state courts have generally taken the other view. 17 A. & E. Ency. Law, 582; 12 Cyc. 260.

In *State of Iowa v. Meek*, 112 Iowa, 338, 347, 84 N. W. 3, 51 L. R. A. 414, 84 Am. St. Rep. 342, the rule was stated to be that, after an acquittal the state cannot maintain any proceeding against the defendant to enforce a punishment that might have been included in the judgment in the criminal case, if a conviction had resulted. The court said: "It is further contended by appellant that an acquittal in a criminal action is not a bar to a subsequent civil proceeding founded on the same facts. That is the general rule. * * * One reason for this, even where the parties are the same, is the difference in the degree of proof necessary to make a case in the two instances. In the criminal proceeding the state can secure judgment only on proof which excludes all reasonable doubt; while in the civil action its case is made by a preponderance of the evidence. But to this rule there is one notable exception. Where the civil action is to secure a forfeiture, which would have been part of the penalty to be imposed in the criminal proceeding, and is between the same parties, the previous acquittal is a bar."

In *State of Iowa v. Cobb*, 123 Iowa, 626, 99 N. W. 299, and, also, in *State v. Adams*, 72 Vt. 253, 47 Atl. 779, 82 Am. St. Rep. 937, an acquittal on the charge of keeping liquors for unlawful sale was held to be a bar to a subsequent action to condemn the liquors, but the different degrees of proof required in the two proceedings were not discussed. The Vermont case may be accounted for by the rule existing in that jurisdiction, as in some others, that in penal actions, although civil in form, the defendant's liability must be established beyond a reasonable doubt. 16 Enc. of Pl. & Pr. 295, 296. In *State v. Corron*, 73 N. H. 434, 448, 62 Atl. 1044, 1047, it was said: "It is only where the object of both proceedings is punishment that any well-considered authorities are to be found holding that a judgment in one case is an estoppel in the other." Cases bearing upon various aspects of the matter are collected in a note in 11 L. R. A. (N. S.) 653.

In a note in 103 Am. St. Rep. 21, it is said: "A judgment in a civil case is not ordinarily *res judicata* in a subsequent criminal prosecution. * * * When the previous judgment arose in a case in which the state or commonwealth was the prosecutor or plaintiff, and the defendant in the case at bar was also the defendant, and the judgment was

¹ Fed. Cas. No. 15,683.

with reference to a subject which is material to the case at bar, the doctrine of *res judicata* applies." This cannot be regarded as a denial by the editor of the force of the argument based on the heavier burden of proof borne by the state in a criminal action, for the note (page 23) adopts this language from his work on Judgments: "A judgment in a civil case must generally be excluded from evidence in a criminal prosecution, because the parties are not the same, and were they the same, it would be improper to receive a judgment in a civil case as evidence of the commission of a crime of which the defendant is accused, for the reason that such judgment may be founded on a mere preponderance of evidence not sufficient to satisfy the jury beyond a reasonable doubt." Freeman on Judgments, § 319a.

In the preceding section the author indicated his view that on principle the rule should work both ways, saying: "Even where the parties are the same, there seems to be an injustice in admitting an acquittal in a criminal prosecution in evidence in a civil action, because to procure a conviction in a criminal prosecution the jury must be convinced beyond a reasonable doubt; while in a civil action it is their duty to find according to the preponderance of evidence." Freeman on Judgments, § 319.

The cases cited in support of the second sentence quoted from the note, aside from a few that have already been commented upon, either involve the use in one criminal action of a judgment obtained in another, or announce the doctrine, which this court has already repudiated (*State v. Beville*, 79 Kan. 524, 100 Pac. 476, 131 Am. St. Rep. 345), that perjury cannot be punished if committed by the defendant in a criminal action in a successful attempt to procure an acquittal.

The higher standard of proof required of the plaintiff in a criminal action is so frequently mentioned in discussions of the doctrine of *res judicata*, that its bearing on the subject may be said to be generally recognized. True, its mention is often associated with other matters that would alone be controlling. But this difference between civil and criminal litigation is either without any significance at all in this connection, or it is decisive, and of itself prevents either party to an action from being concluded therein by a previous judgment obtained in a proceeding where the rule of evidence was less favorable to him. We think upon principle and authority an acquittal in a criminal case does not for all purposes amount to an adjudication against the state, that the defendant did not commit the acts charged against him. What a verdict of not guilty really decides is, that the evidence does not exclude every reasonable doubt of the defendant's guilt. If in the present case the injunction action had been tried first, it would hardly

be seriously contended that a judgment for the plaintiff would bar a defense in the criminal action. A sufficient reason why the defendant would not be concluded by the result in the civil case is that his guilt would not have been established beyond a reasonable doubt. The consideration that protects him against the plea of *res judicata* in the one case deprives him of its benefit in the other.

The purpose of the injunction action against the defendants is not to punish them for having violated the law, but to place them under an added obligation to refrain from its violation in the future. It is a civil, not a criminal or even quasi-criminal, proceeding. The state is entitled to a judgment, if it establishes its case by a preponderance of the evidence. The acquittal in the criminal action is therefore not a bar.

The suggestion is made that the judgment appealed from is not subject to review, because the trial court found against the plaintiff on conflicting testimony. The decision, however, is expressly based upon the result of the criminal prosecution, and not upon the court's view of the weight of the evidence.

The judgment is reversed, and the cause remanded for further proceedings in accordance herewith. All the Justices concurring.

(83 Kan. 553)

HANSON v. CHICAGO, R. I. & P. RY. CO.
(Supreme Court of Kansas. Dec. 10, 1910.)

(Syllabus by the Court.)

CARRIERS (§ 320*)—INJURY TO PASSENGERS—
DEMURRER TO EVIDENCE.

In an action for damages for the death of a passenger, evidence was adduced to show that it was the custom on the defendant's night trains to turn down the lights and furnish pillows for passengers who would pay for their use; that a passenger who was asleep on such a train when it reached the place of his destination at 1 o'clock in the morning, was awakened immediately after it left the station; that, assisted by the porter, he went forward in an apparently drowsy condition, and stepped off the train, and was killed; that the conductor was nearby, and observed his departure; and that the train was not stopped nor its speed slackened, nor the passenger restrained, although the danger was apparent to the trainmen. It is held that a demurrer to the evidence was properly overruled, and that there was no error in refusing a request for an instruction to find for the defendant.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 320.*]

Appeal from District Court, Marion County.

Action by Nettle Hanson against the Chicago, Rock Island & Pacific Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

M. A. Low, Paul E. Walker, and J. S. Dean, for appellant. W. H. Carpenter and D. W. Wheeler, for appellee.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

BENSON, J. This appeal is from a judgment awarding damages for alleged negligence of the appellant in permitting, advising, and directing a drowsy passenger to alight from a rapidly moving train in the nighttime at a place where there was no platform or light, whereby the passenger was killed.

The deceased, who was 36 years of age, took passage at Bison, Okl., about 5 o'clock p. m., holding a ticket to Lost Springs, Kan., where the train arrived at about 1 o'clock a. m. It was the custom on defendant's trains over this route to turn down the lights in passenger coaches about 10 o'clock p. m., and passengers who paid the charge therefore were furnished pillows by the train porter, and this was done on the night of the accident. Tickets were taken up by a train auditor and checks given to the passengers, and it was the custom of the porter on these night trains to awaken passengers who were sleeping on approaching their destination, and take up their checks. Announcement of the station was given, and the train made the usual stop at Lost Springs, where one passenger left the train, and two others entered it. After the train left the station, and while moving with rapid and increasing speed, the deceased was observed with the porter having hold of his shoulder, walking toward the platform. He appeared drowsy, and fell on or brushed against another passenger as he went by. The porter removed the check from his hat, and went with him to the platform, where they disappeared down the steps together, and then the porter returned into the car alone. The body was found about 250 yards from the depot. The deceased had been over this route on defendant's trains running on the same schedule on four previous occasions.

In answer to special questions, the jury found that the custom of taking up checks and awakening sleepy passengers on night trains had existed for a long time prior to the injury; that the deceased was acquainted with this custom; that he was sleeping when the train reached Lost Springs; that he was taken out of his seat by the employees of the company and taken to the platform for the purpose of getting him to leave the train while it was in motion if they could get him off before it gained too much speed; that they knew he was in a sleepy, drowsy condition; that the night was dark; that the deceased was unfamiliar with the place; that the train was running rapidly; that there was no conversation between the porter and the deceased with respect to his waiting until the train stopped; and that he did not leave the train voluntarily.

The porter testified that the vestibule was not closed after leaving the station until after the deceased left the car. Before reaching Lost Springs, he had been informed that this passenger was destined for that place. There is some conflict in the testimony concern-

cerning the occurrences just before the deceased left the train. The porter testified that, when he announced the station, the deceased was talking with another gentleman in the seat; that, returning into the car after the train started, and when it had proceeded 50 to 100 feet, he saw the deceased coming out toward the vestibule, and understood him to say that the conductor told him to get off; and that the conductor said "Stop," and pulled the bell rope. He also testified: "Q. Why didn't he stop? You knew that train was going at a rapid rate? A. Yes, sir; I presume it was. Q. Didn't you know that it was impossible for a man to get off or on that train when going at a rapid rate? A. I didn't know what he could do. Q. You thought that there was a great possibility that he would be injured? A. No, sir; I never gave it a thought. Q. Although the train was running rapidly? A. I didn't. Q. Notwithstanding the fact that he got off in the dark there that night, the train running rapidly, you never undertook to stop that train after the man got off, or to pull that cord once? A. I don't remember whether or not I did. Q. You know as a matter of fact you didn't, don't you? A. I don't think the train did stop any more. * * * Well, it didn't stop."

The conductor testified: "I started into a high-backed coach, the first car back of the smoker. * * * This gentleman came down towards me. I asked him if he wanted to get off there. He said, 'Yes,' he did. I said, 'Well, wait a minute, and I'll stop the train.' With that I reached up and pulled the cord, and at that he passed me, and I did not see him any more. This air didn't sound very loud, and, when I got out into the vestibule, the porter was standing there. I said, 'Did he get off?' He said, 'Yes.' That ended it with me. I turned and went back. That was all that I knew about it. Q. Did you see him get off? A. No, sir. Q. Did you have any other conversation with him except that you have already detailed? A. No, sir." On cross-examination he said: "Q. You did not stop that train. The train was going rapidly, was it not? A. It was gaining speed right along. Q. It was going fast when this man was there at the door, was it not? A. Yes, sir. Q. You knew that it was dangerous to get off, didn't you? A. I would not have got off. Q. You know as a trainman that it was dangerous for that man to get off? A. Yes, sir; he passed me in the alleyway. Q. That is where you pulled the cord? A. Yes, sir. * * * Q. When the porter told you a man got off there in the dark, and the train was running rapidly, why didn't you stop the train when the porter told you? A. He told me the man was gone. Q. Both of you knew it was dangerous to get off, and, although the train was running fast and it was dark there, you just went on and paid no further attention to it, that is the way you done it, was it? A. Yes, sir."

A passenger in another coach opening up on the same platform testified that he saw a man who seemed to be sleepy go to the platform, followed by the porter, and heard one of the employes say, "Let him get off if he will"; that the train was going rapidly at the time; and that the trainmen did not pull the bell cord, and made no effort to stop it. Another witness testified that as the train started out of Lost Springs he saw some one shake another man and take him out of the coach just back of the smoker. This was the coach in which the deceased was riding.

The only errors specified are the decision overruling the demurrer to the evidence, and the refusal to instruct the jury to find for the defendant, and the question now to be decided is whether the evidence is sufficient to sustain the verdict. It is contended that it is not the duty of a carrier to awaken sleeping passengers in a day coach on arrival at his destination, if due announcement of the station is made, and a reasonable opportunity is given for him to alight. This is the general rule, although it is said that exceptional circumstances might impose the duty. 2 Hutch. on Carriers, § 1128. It is also insisted that the custom shown by the evidence of turning down the lights and furnishing pillows on night trains that passengers may sleep more comfortably does not impose the duty. The defendant also contends that the proper announcement of the station having been made, and sufficient opportunity given for the egress of passengers, the deceased, by remaining in the coach until the train started, became a trespasser to whom the company owed no duty except to refrain from willfully or wantonly injuring him.

The district court did not instruct the jury that the custom, if proven, imposed the duty on the trainmen to awaken a sleeping passenger on arrival at his destination, but did instruct, in substance, that if they found the custom existed as alleged, and that it was known to the decedent, and that he was asleep on arrival at his destination to the knowledge of the trainmen, and they failed to awaken him in proper time to leave the train, and that immediately after leaving the station they discovered that he had not left the train because of being asleep, he should be considered as a passenger, and if the trainmen were negligent in commanding or directing him to leave the train, which negligence caused his death, then the plaintiff might recover. But if the deceased voluntarily left the train without being ordered or directed to do so, or if he was advised to wait and told that the train would be stopped so that he might leave it, and that notwithstanding this advice he left the train without waiting for it to stop, there could be no recovery.

Cases are cited in support of the proposition that when a passenger fails to leave a train when his destination is reached, after

a reasonable opportunity to do so, the relation of passenger and carrier is terminated, and he then becomes a trespasser. This is not true, however, in all cases. If one in such a situation offers to pay fare to a station beyond, the relation continues unbroken. *Forbes v. Railway Co.*, 135 Iowa, 679, 113 N. W. 477. It would be a harsh rule that would hold every person a trespasser who remains upon a train after it reaches the place designated in his ticket. Whether he is a trespasser must depend on the circumstances of each case, which may present questions for a jury. It is held that a person who goes aboard the wrong train or one upon which his ticket does not entitle him to ride is nevertheless a passenger, and while he may be ejected it must be done with all proper care. In such a case it was said: "Although he has no right to a passage, he cannot be expelled from the train as a trespasser, but must be treated as a passenger who by mistake has got upon a train on which by his contract he is not entitled to ride." *Lake Shore & Michigan Southern Railroad Company v. Rosenzweig*, 113 Pa. 519, 6 Atl. 545; *Arnold v. Pennsylvania Railroad Co.*, 115 Pa. 135, 8 Atl. 213, 2 Am. St. Rep. 542.

In a case in Michigan where a sleeping passenger delayed leaving the train after a full opportunity to do so had been given, and was afterward injured by the alleged negligent act of the conductor, it was held that the claim of the company that the relation of passenger and carrier had ceased, and that the company owed him no duty of protection, could not be sustained as matter of law, but was properly left to the jury. *Bass v. Cleveland, etc., R. Co.*, 142 Mich. 177, 105 N. W. 151, 2 L. R. A. (N. S.) 875. In a note following a report of that case in 7 Am. & Eng. Ann. Cas. 720, it is said that the rule that no obligation to arouse a sleeping passenger and to see that he gets off at his destination "had been laid down in cases where passengers have sought to recover damages for being carried beyond their destinations, and is not in conflict with the holding of the reported case."

It was held in *Railway Co. v. Wimmer*, 72 Kan. 566, 84 Pac. 378, that: "The duty which a railway company owes to a passenger to exercise the highest degree of care for his safety which is reasonably practicable does not cease until the passenger has reached his destination and left the train." (Syl. 3.)

It is probably true that if a passenger should unreasonably delay his departure from a train in such circumstances as to indicate a willful or wanton disregard for the rights of the carrier or the traveling public, thereby intending to compel a stop for his benefit, or because of ill will, or to secure further passage without pay, or like wrongful purpose, he would thereby forfeit his right to the high degree of care due to a

passenger, and might, if the circumstances warranted the inference, be considered a trespasser, but the question in case of any doubt or uncertainty of the facts would be for a jury. Here it is not claimed, and the circumstances do not indicate, that the delay of the deceased was caused otherwise than by his being asleep, or bewildered because of sleepiness. In this situation the court could not arbitrarily declare that he had forfeited the ordinary rights of a passenger, and did not err in submitting that matter to the jury.

The case of *O. K. & W. Rd. Co. v. Frazer*, 55 Kan. 582, 40 Pac. 923, cited by the appellant, is not in conflict with these views. It appeared there that passage had been taken upon a construction train on an unfinished road. At the end of the road, after nearly half an hour had elapsed and all others had left the caboose, a passenger who without any apparent cause remained upon it was killed in switching; his presence being unknown to the trainmen. It was held that instructions to the effect that he was entitled at the time of the injury to the extraordinary care due to a passenger were erroneous. The language of the opinion was correct as applied to the facts of that case, but is not an authority for the contention that it should be held as matter of law that Hanson had forfeited his right to such care before he was killed.

The facts concerning the custom to turn down the lights, furnish pillows for the comfort of those desiring to sleep, and to awaken sleeping passengers and take up their checks were circumstances for the jury explanatory of the delay of the passenger and proper to be considered in deciding whether the relation of passenger and carrier had terminated before he stepped from the train.

It is also contended that the evidence shows such contributory negligence as to defeat a recovery. It is said that the night was dark, the train was running rapidly, the place was unfamiliar, and the departure from the train voluntary. The force of this argument is greatly diminished by the finding of the jury that the deceased did not leave the train voluntarily, and this finding we think is supported by the evidence. He was awakened while upon a moving train which had just left the station where he desired to stop. The rate of speed could hardly be determined by him on the instant, especially in his drowsy condition. Those upon whom he had a right to rely did not oppose, but one at least actually assisted him down the steps, according to the testimony. It is true the conductor says he told him to stop and that he pulled the cord, but it is significant that the train did not stop, nor was its speed slackened, and the fact that the conductor pulled the cord is disputed by other testimony. The porter who was in the vestibule

with the passenger testified that he, (the porter) did not pull the cord, and according to testimony, which the jury had a right to believe, although contradicted, one of the employes said: "Let him get off if he will." It cannot be said as a matter of law that a man of ordinary prudence in that situation would not have stepped off the train as he essayed to do. Happily for the traveling public the care, patience, and fidelity of trainmen generally are such that passengers are accustomed to, and ordinarily may, safely rely upon their judgment, knowledge, and skill in such matters, and one should not be held guilty of contributory negligence when he does so merely because it is determined by a fatal result that his confidence was misplaced. It appears that, while the danger was obvious to the porter and conductor, it was not necessarily so to this passenger. *St. Louis, I. M. & S. R. R. Co. v. Cantrell*, 37 Ark. 519, 40 Am. Rep. 105; *Jones v. Chicago, Milwaukee & St. Paul Ry. Co.*, 42 Minn. 183, 43 N. W. 1114; *McCaslin v. Railway Co.*, 93 Mich. 553, 53 N. W. 724; *Waller v. Hannibal & St. Joseph R. R. Co.*, 83 Mo. 608; *Haug v. Great Northern Ry. Co.*, 8 N. D. 23, 77 N. W. 97, 42 L. R. A. 664, 73 Am. St. Rep. 727; *S. K. Ry. Co. v. Pavey*, 48 Kan. 452, 29 Pac. 593. A passenger who, because of drowsiness, or confusion caused by no wrongful act on his part, attempts to jump from a rapidly moving train in the darkness, while apparently unaware of the danger, is we believe entitled to the restraining care of those in whose protection he has placed himself, who fully understood the danger, and are in a situation to prevent it. The fact that he slept longer than he ought to have done, if that be a fact, ought not to deprive him of reasonable protection.

The evidence was sufficient to go to the jury, and sustains the verdict. Evidence explanatory of the conduct of the trainmen and to some extent excusing it is not further referred to; the only question here being whether there was competent evidence for the consideration of the jury sufficient to support their findings.

The judgment is affirmed. All the Justices concurring.

(83 Kan. 491)

FERRELL v. STANLEY et al.

(Supreme Court of Kansas. Dec. 10, 1910.)

(Syllabus by the Court.)

1. FRAUDS, STATUTE OF (§ 139*)—AGREEMENT IN CONSIDERATION OF MARRIAGE—EXECUTED PAROL ANTENUPTIAL CONTRACT.

In an action by a widow to maintain her rights derived through the execution of a parol antenuptial contract of marriage, the contract being executed by both parties thereto, the statute of frauds has no application. Such executed contract is valid.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. § 335; Dec. Dig. § 139.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

2. INSURANCE (§ 783*)—CHANGE OF BENEFICIARY—VIOLATION OF ANTENUPTIAL CONTRACT.

Where, in the part performance of an antenuptial contract, a husband procures a change in a certificate of insurance, in which his children were the sole beneficiaries, so as to make his wife an equal beneficiary with the children, and where she has fully executed the antenuptial contract on her part, she thereby obtains an equitable interest in the certificate, and he cannot thereafter, without her consent, surrender the certificate and obtain the issuance of a new one in which a third party is named as the sole beneficiary, and thus divest her of her interest in the certificate which was procured pursuant to such contract.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1949; Dec. Dig. § 783.*]

3. INSURANCE (§ 766*)—RIGHTS OF BENEFICIARIES—POSSESSION OF CERTIFICATE.

The rights of a beneficiary named in a certificate of insurance in no wise depend upon the possession thereof by the beneficiary.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1928; Dec. Dig. § 766.*]

Appeal from District Court, Sedgwick County.

Interpleader by the Supreme Lodge of the Knights of Pythias against Lloyd B. Ferrell, Edith M. Stanley, formerly Edith M. Ferrell, and others. There was judgment for Edith M. Stanley, and Lloyd B. Ferrell appeals. Affirmed.

Kos Harris and V. Harris, for appellant. Matson & Potts, for appellees.

SMITH, J. The Supreme Lodge of the Knights of Pythias, a fraternal insurance corporation, commenced this action, and in its petition alleged that one George Ferrell, deceased, at the time of his death was a member in good standing of the organization; that he had a benefit certificate for \$3,000; that the amount was due upon the certificate, and that the corporation was ready to pay, but that there was a dispute, as to who was entitled to receive payment, between the parties whom it made defendants in the action, namely, Lloyd B. Ferrell, Edith M. Stanley, formerly Ferrell, Adele C. Ferrell, and Paul H. Ferrell. Lloyd B. Ferrell answered and alleged that he was entitled to the entire sum of \$3,000 under the certificate. Edith M. Stanley answered, and alleged that she was entitled to the sum of \$1,000 of the amount of the certificate. The defendants Adele C. Ferrell and Paul H. Ferrell did not appear.

The undisputed facts are that about May, 1885, George Ferrell became a member of the association and took out a certificate for \$3,000 payable to his then wife, Mary E. Ferrell; that some time prior to the 14th day of June, 1899, Mary E. Ferrell died, leaving two children, Adele C. Ferrell and Paul H. Ferrell; that on June 14, 1899, George Ferrell surrendered the former certificate and took out a new one, naming his two children as the beneficiaries; that on the 10th

day of January, 1901, he in turn surrendered this certificate and took out a new one for the same amount payable to Edith M. Ferrell, his then wife, and to his two children, in the sum of \$1,000 to each; and that the last-named certificate remained in force until about the 5th of December, 1907, when George Ferrell surrendered it and took out a new certificate for the same amount, making Lloyd B. Ferrell, his brother, the sole beneficiary, and that shortly thereafter and before the commencement of this action George Ferrell died.

In her answer, Edith M. Stanley alleges that, prior to her marriage to George Ferrell and at a time when his two children stood as the beneficiaries of the certificate, George Ferrell proposed to her that, if she would marry him and care for his children, he would provide her a home and care for her, and would have the certificate changed so that she should receive \$1,000 from the benefit certificate and each of the children \$1,000 in case of his death before her death; that in consideration of such promise she consented to marry him and did marry him, and that he executed the antenuptial contract by surrendering the old certificate and procuring a new one to be issued in accordance with the terms of his agreement; and that the subsequent change of the certificate, making it payable entirely to Lloyd B. Ferrell, was without her consent, and in violation of her rights under the contract. This claim Lloyd B. Ferrell denied, and a trial of the issue thus formed was had to the court and a jury. Until Edith M. Stanley had offered her evidence, Lloyd B. Ferrell had demurred thereto, and the court had overruled the demurrer, whereupon the parties agreed that the jury be discharged and the case be decided by the court, Lloyd B. Ferrell reserving his exceptions to the ruling on the demurrer to the evidence. The court rendered judgment in favor of Edith M. Stanley as to the amount claimed. To reverse this judgment, Lloyd B. Ferrell brings the case here.

Edith M. Stanley being called as a witness in her own behalf was asked to relate the conversation by which the alleged antenuptial contract was made. An objection was made thereto on the ground that the contract not being in writing was void. The objection was overruled and the ruling is assigned as an error. Section 3838, Gen. St. 1909, being a portion of the statutes to prevent frauds and perjuries, reads in part: "No action shall be brought whereby * * * to charge any person upon any agreement made upon a consideration of marriage." It is urged that this provision makes the contract absolutely void, and for that reason proof of it should not be allowed. The statute does not render the contract void, but to prevent the perpetration of frauds and perjuries to which the nature of the transac-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

tion lends great inducement and facility, it is provided that no action shall be maintained on such a contract unless it is in writing. The reason that the statutory provision fails where the antenuptial contract has been fully executed is that proof of the rights of the parties under the contract no longer rests upon the testimony of the party asserting it, or upon the statements of others who may have heard it or claimed to have heard it. Where the contract has been fully executed, as it is claimed to have been in this case, the action is not upon the original antenuptial contract, but is usually to retain the benefits which have accrued therefrom. The original contract in such an action is immaterial except to explain the consideration for which the benefits were received. In some states it has been held that an antenuptial contract is no consideration for a marriage, but that has never been held by this court. *Hafer v. Hafer*, 33 Kan. 449, 6 Pac. 537; *Neddo v. Neddo*, 56 Kan. 507, 44 Pac. 1.

In *Weld v. Weld*, 71 Kan. 622, 81 Pac. 183, 114 Am. St. Rep. 517, it is said: "An oral agreement made in consideration of marriage that after the marriage a debt of one of the contracting parties to the other shall mutually be regarded as paid is fully performed when the marriage takes place, and is not thereafter affected by the statute of frauds." (Syllabus.) In the opinion it is said: "The statute of frauds does not render void the verbal contracts to which it refers. They are valid for all purposes except that of suit. *Stout v. Ennis*, 28 Kan. 706. The parties may perform them if they desire, and when performed the statute has no application to them. 29 A. & E. Ency. of L. 829, 941." The objection was properly overruled.

Again, it is contended that the court erred in permitting this witness to testify, referring to her husband and the policy, "He gave it to me." It is contended that this was a transaction between the witness and her husband during the time that the marriage relation existed, and that the opposing party, Lloyd B. Ferrell, was the legal representative of the deceased. The provision of the statute invoked to sustain this objection is a part of section 5914, Gen. St. 1909, and reads: "No party shall be allowed to testify in his own behalf in regard to any transaction or communication had personally by such party with a deceased person, when the adverse party is the executor, administrator, heir at law, next of kin, surviving partner or assignee of such deceased person, where they have acquired title to the cause of action immediately from such deceased person." On the other hand, it is contended that Lloyd B. Ferrell did not acquire title to the cause of action immediately from the deceased; that the deceased had no title to the certificate, and could derive no benefit therefrom; that he had only the naked power under the certificate of designating or

appointing the beneficiary under the rules of the corporation; that the certificate did not pass from the deceased to Lloyd B. Ferrell by assignment or for any consideration paid or agreed to be paid therefor by Lloyd B. Ferrell. We are inclined in favor of the latter contention, but regard this controversy as quite immaterial. The objection that the witness should not have been allowed to testify to this statement on the ground that she was the wife of the deceased at the time it is said to have been made should probably have been sustained, but, if erroneous to allow the statement, it was likewise immaterial. If the deceased contracted in consideration of marriage to change the certificate as claimed, and Edith M. Stanley performed her part of the contract relying upon such agreement, and thereafter her husband performed his part of the contract, by having the certificate changed as he agreed to do, the contract thereby became fully executed, and the wife had a vested interest in that policy of which her husband could not divest her without her consent. *Stronge v. Supreme Lodge, K. of P.*, 189 N. Y. 346, 82 N. E. 433, 12 L. R. A. (N. S.) 1206, 121 Am. St. Rep. 902, and cases cited in the footnote; *Bunnell v. Shilling*, 17 Can. L. T. 121. It is immaterial whether he gave her the policy or whether she ever saw it. Probably three-fourths of the beneficiaries in insurance policies never even see, much less have in their possession, the policies which are made for their benefit. Indeed, under the circumstances of that case, it is held in *Weld v. Weld*, supra, in substance, that where an antenuptial contract is made, and the marriage is celebrated in reliance thereon, that the marriage ipso facto discharged the previously existing indebtedness between the contracting parties in accordance with the antenuptial agreement.

In this case Edith M. Stanley produced in court and introduced in evidence the certificate which she claimed was made in execution of the contract, and which designated herself and the two children as beneficiaries. How she came by that certificate is quite immaterial. The presumption would probably be that she came by it lawfully. But, as before stated, the material fact in determining whether George Ferrell executed the antenuptial contract on his part is whether he procured the issuance of the certificate in accordance with the terms of the contract. The marriage on her part and procuring of the certificate in accordance with the terms of the agreement by him executed the contract entirely.

The order of the court overruling the demurrer to the evidence of Edith M. Stanley is also assigned as error, but it follows from what we have said that no error can be predicated thereon.

We find no error in the proceedings, and the judgment is affirmed. All the Justices concurring.

(83 Kan. 531)

BRUSH v. RICH.

(Supreme Court of Kansas. Dec. 10, 1910.)

*(Syllabus by the Court.)***JUDGMENT (§ 585*)—RES JUDICATA.**

Under the facts stated in the opinion, it is held that a cause of action sued upon did not arise until a former suit between the same parties had been determined, is different from the causes of action involved in the former suit, and was not in fact adjudicated in the former suit, and consequently that the defense of res judicata is not sustained.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1079; Dec. Dig. § 585.*]

Appeal from District Court, Wilson County.

Action by A. L. Brush against George Rich. Judgment for defendant, and plaintiff appeals. Reversed and remanded, with direction.

P. C. Young, for appellant.

BURCH, J. In February, 1904, Nancy J. Higgins deeded a tract of land to her son, George Rich. Rich sold the land to R. A. McWilliams, who was the agent of the appellant, A. L. Brush. In March, 1904, Nancy J. Higgins deeded to McWilliams, and later in the same month died. Rich brought an action against the other heirs of Nancy J. Higgins to quiet his title. The defendants answered that the deeds from Nancy J. Higgins had been procured by the fraud and undue influence of Rich, and that she lacked mental capacity to convey, and prayed that they be set aside and for partition.

In July, 1904, Rich and McWilliams entered into a contract whereby McWilliams was to pay \$2,300 in cash, and the balance of the purchase price of the land not later than October, 1904, when Rich should produce a decree establishing his title as a result of the pending suit. The cash payment was made, and a general warranty deed from Rich to McWilliams was placed in escrow, to await the production of the expected decree. McWilliams was made a party to the suit answered, setting up his contract with Rich, and prayed that he be subrogated to the rights of Rich, should the deeds be set aside. In October the deeds were set aside, Rich was given one-seventh of the land, and McWilliams was awarded that share only, subject, however, to a lien. The \$2,300 which Rich had received more than paid for one-seventh of the land, and Brush, as the real party in interest, then sued Rich for the overpayment. A demurrer was sustained to Brush's evidence on the ground that the matter was res judicata, and he appeals.

The district court probably had in mind the general statement, frequently made, that any matter which might have been litigated in a former suit is res judicata in a subsequent action between the same parties. The

true rule was stated and illustrated in the case of *Stroup v. Pepper*, 69 Kan. 241, 76 Pac. 825. The first paragraph of the syllabus of that decision reads as follows: "The rule that a judgment in bar, or as evidence in estoppel, is binding not only as to every question actually presented and considered, and on which the court rested its decision, but also as to every question that might have been presented and decided, does not apply to a different cause of action between the same parties, except as to questions shown to have been actually decided in the former action."

Rich had until the rendition of judgment in October to make his contract good, and it could not be known whether Brush had a cause of action against Rich, or the extent of a possible cause of action, until the former suit was determined. Consequently such a cause of action had no rightful place in the former suit. The former suit was one to quiet title on one side and to set aside conveyances and for partition on the other. McWilliams merely asked the equitable relief of subrogation to whatever Rich might receive as the fruit of the litigation. Therefore there is no semblance of identity between the causes of action involved in the former suit and the one now presented. The facts necessary to entitle McWilliams (for Brush) to subrogation were adjudicated; but the liability of Rich to Brush, depending upon and arising in consequence of the judgment in the former suit, was not adjudicated. Therefore, from every point of view, the demurrer to the plaintiff's evidence was wrongfully sustained.

The judgment of the district court is reversed, and the cause is remanded, with direction to overrule the demurrer and proceed with the trial from the point at which it halted. All the Justices concurring.

(83 Kan. 544)

WILEY v. HELEN et al.

(Supreme Court of Kansas. Dec. 10, 1910.)

*(Syllabus by the Court.)***1. FRAUDS, STATUTE OF (§ 115*)—SPECIFIC PERFORMANCE (§ 32*)—STATUTE OF FRAUDS.**

The signing of a contract to convey real estate by the party to be charged in a suit for specific performance satisfies the statute of frauds; and want of mutuality in the contract, because the party suing did not sign, is not a defense to the action.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. § 245; Dec. Dig. § 115;* *Specific Performance*, Cent. Dig. §§ 89-90; Dec. Dig. § 32.*]

2. VENDOR AND PURCHASER (§ 78*)—CONTRACT—TIME OF ESSENCE.

The mere naming of a day on or before which a contract for the conveyance of real estate shall be consummated does not make time of the essence of the contract, and if an abstract showing marketable title is to be produced it may be perfected, and title even may

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep't Indexes

be perfected, within a reasonable time beyond the day named.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 121-125; Dec. Dig. § 73.*]

3. APPEAL AND ERROR (§ 1177*) — REVIEW — REMAND—NEW TRIAL.

At the close of the plaintiff's evidence in a suit for specific performance, a demurrer to the evidence was interposed which the court took under consideration while the trial proceeded. When both parties had rested, the court reverted to the demurrer to the plaintiff's evidence and erroneously sustained it. *Held*, another trial is not necessary, and that the cause will be remanded for judgment according to the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4597-4620; Dec. Dig. § 1177.*]

Appeal from District Court, Lyon County. Action by H. C. Wiley against John Helen and others. Judgment for defendants, and plaintiff appeals. Reversed and remanded.

Hamer & Harris and Smith & Malloy, for appellant. L. B. Kellogg, G. W. Hurley, and W. S. Kretsinger, for appellees.

BURCH, J. Wiley and Knight agreed to exchange farms upon certain terms. Wiley's farm lies in Iowa and that of Knight in Lyon county, Kan. Knight went to Iowa to see the Wiley land and the contract was signed there. Knight signed personally and Wiley by an agent authorized to do so, but not in writing. The contract provided that each party was to furnish an abstract of title to his land showing merchantable title, and that the trade should be consummated on or before April 1, 1908, at the Emporia State Bank in Emporia. Wiley agreed to convey by a good and sufficient warranty deed. Knight held a bond for a deed to his land which he agreed to assign. On April 1st Wiley appeared at the appointed place and waited throughout the day for Knight, who did not appear. Subsequently Wiley brought suit for specific performance against Knight and the obligor in the bond for deed, alleging compliance with all conditions precedent on his part and readiness and ability to perform. Knight answered by a general denial and by pleading several defenses. He alleged that Wiley's agent was not duly authorized to sign the contract, that Wiley misrepresented the character and quantity of his land, and that the contract was signed by Knight while mentally incapacitated by intoxication purposely induced by Wiley's agent.

At the trial it appeared that on April 1st Wiley had with him at the bank an abstract which disclosed that title was to come to him from the devisee and heirs of L. Schoonover, deceased, whose estate had not been finally settled. Also, the abstract showed no patent from the United States for one portion of the land although the tract had

been duly entered at the proper land office by John S. Weaver in 1851, and had passed by proper mesne conveyances from him to Schoonover. It further appeared that on April 1st Wiley had in the bank a special warranty deed from the devisee and heirs of Schoonover, blank as to the grantee, and that the bank had written authority from the grantors to fill the blank with the name of Wiley or Wiley's vendee. Wiley testified that he was ready and willing to have his own name inserted in the Schoonover deed and then execute a warranty deed to Knight. In all other respects a case for specific performance was duly established as of April 1st. The proof, however, went further, in that the abstract showed the final settlement of the Schoonover estate, the required patent and title in Wiley, all before the suit was commenced. A demurrer to the plaintiff's evidence was interposed, which the court took under consideration while the trial proceeded. The defenses to the action, except the want of written authority for Wiley's agent, were fairly disproved, and at the close of the case the court reverted to the demurrer to the plaintiff's evidence and sustained it. Judgment was rendered for the defendants, and Wiley appeals.

The judgment is erroneous. The contract was signed by the party to be charged, which satisfies the statute of frauds. *Becker v. Mason*, 30 Kan. 697, 2 Pac. 850; *Guthrie v. Anderson*, 47 Kan. 383, 386, 28 Pac. 164; *Guthrie v. Anderson*, 49 Kan. 416, 419, 30 Pac. 459.

It was not essential that the contract should be capable of enforcement against both parties at the time it was concluded (*Zelleken v. Lynch*, 80 Kan. 746†), and want of mutuality, because both parties did not sign, is not available as a defense to a suit for specific performance brought against the party who did sign. *Guthrie v. Anderson*, 47 Kan. 383, 386, 28 Pac. 164; *Schneider v. Anderson*, 75 Kan. 11, 18, 88 Pac. 523, 8 L. R. A. (N. S.) 1043.

It is likely, although the point is not decided, that on April 1st the abstract failed to show a marketable title to the Iowa land because, under the circumstances, it still might be subject to appropriation for the payment of the deceased owner's debts. *Chauncey v. Leominster*, 172 Mass. 340, 52 N. E. 719. The omission to record and abstract the patent was inconsequential, and the special form of the Schoonover deed was inconsequential because appellant stood ready to comply with the contract by giving his own general warranty deed. But the condition of the abstract on April 1st is not now material. By failing to keep his appointment Knight waived performance on that day (*Painter v. Fletcher*, 81 Kan. 195, 105 Pac. 500). Time was not of the essence of the contract, and the appointment of a day to complete the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

†104 Pac. 563.

purchase meant no more than that it should be completed within a reasonable time. *Maupin, Marketable Title to Real Estate*, 794. Appellant could complete the abstract, and even his title, at any time before decree if his adversary suffered no special injury by the delay, and none is claimed. *Bell v. Sternberg*, 53 Kan. 571, 36 Pac. 986; *McNutt v. Nellans*, 82 Kan. 424, 426, 108 Pac. 834.

On the trial the appellant was denied leave to amend his petition to conform to proof which it is claimed tended to show that Knight had partially performed on his side. The materiality of the evidence to other issues in the case was not affected by the ruling, and, since the appellant does not need to rely upon part performance to take the case out of the statute of frauds, the error, if any was committed, is harmless now.

The parties have had what the law intends to secure to them—a full trial; and there is no occasion for another trial. Therefore the judgment is reversed and the cause is remanded, with direction to overrule the demurrer to the plaintiff's evidence, and to decide the case upon all the evidence received, applying the rules of law recognized by this opinion. All the Justices concurring.

(83 Kan. 585)

AMES v. FREEMAN et al.†

(Supreme Court of Kansas. Dec. 10, 1910.)

(Syllabus by the Court.)

1. JUSTICES OF THE PEACE (§ 84*)—VOID SUMMONS—EFFECT.

Where a defendant is served with a void summons issued by a justice of the peace, but at the time named in the summons appears before the justice of the peace and submits himself to be sworn as a witness by the plaintiff, and testifies as to the merits of the case in response to questions propounded by the attorney for the plaintiff in the presence of the justice, such conduct amounts to a voluntary appearance to the action, and is as binding as the valid service of a legal summons would have been; and a judgment entered upon such trial will not be enjoined as void.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 266-278; Dec. Dig. § 84.*]

2. JUSTICES OF THE PEACE (§ 128*)—INJUNCTION.

Where in such a case an application is made to the district court to enjoin the collection of such a judgment, and the court finds that the conduct of the defendant before the justice of the peace amounted to a voluntary appearance to the action, and for that reason refuses to allow the injunction, such refusal will not be deemed erroneous.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 402-407; Dec. Dig. § 128.*]

Appeal from District Court, Sumner County.

Action by E. W. Ames against W. E. Freeman and H. O. Goldridge. Judgment for defendants, and plaintiff appeals. Affirmed.

F. A. Dinsmoor and Lawrence & Ferguson, for appellant. J. A. Burnett, for appellees.

GRAVES, J. This is a case wherein the district court of Sumner county refused to enjoin the collection of a judgment rendered by a justice of the peace, which refusal is here presented as error.

It is claimed that the judgment is void for want of jurisdiction; no legal summons having been served upon the defendant. The justice of the peace issued a summons and delivered it to the constable. The writ was issued on the 17th day of February, 1909, and made returnable on the 25th day of February, 1909. The constable did not find the defendant until February 26th, when he changed the dates so as to show that the writ was issued February 22, 1909, and returnable March 5, 1909, and served it upon the defendant as changed and made the return accordingly. On the 5th day of March the defendant appeared before the justice of the peace and inquired why he was sued and what it was about. He denied ever having had any business transaction with the plaintiff. He was sworn and testified concerning the claim and was interrogated by the attorney for the plaintiff about the cause of action in detail. The justice of the peace, the attorney for the plaintiff, and the defendant were present and had considerable talk about the suit. When they were through, the defendant left, and the justice entered a formal judgment for the plaintiff. The defendant gave the matter no further attention, and on March 17th the justice issued an execution which was levied upon the property of the defendant, when this action to enjoin the collection of the judgment was commenced. A restraining order was issued at the commencement of the action, but upon trial for a permanent injunction the restraining order was set aside and an injunction refused.

The application for injunction was made upon the theory that the court was without jurisdiction and the judgment void. The district court refused the injunction, we suppose, for the reason that the want of jurisdiction had been waived by the defendant in appearing in court voluntarily on the day of the trial and participating in the proceedings and then neglecting to appeal or otherwise question the validity of the judgment until after an execution had been issued.

The method adopted to get jurisdiction of this defendant is not to be commended, but deserves to be severely censured. We regret that we cannot make our disapproval of it more emphatic, but while the conduct of the plaintiff is highly reprehensible, in this respect, we cannot overlook the want of ordinary caution amounting to indifference shown by the defendant. When he was first served with summons he knew that steps were being taken for the purpose of obtaining a judgment against him and went to the office of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

† Rehearing denied December 24, 1910.

the justice of the peace at the time stated in the summons to see what was being done, and while at the justice's office he saw and heard enough to convince a man of ordinary intelligence that a judgment would be entered against him. If in doubt as to the legal effect of what had been done, he should have ascertained, at least, before the time for appeal had expired. Whether he fully understood the purport of the proceedings before the justice of the peace or not is a question of fact which was determined by the district court, and if understood by him, his conduct amounted to a waiver and a voluntary appearance, which was as binding as the service of a valid summons would have been.

We are unable to say that the court erred in so finding, and therefore the judgment is affirmed. All the Justices concurring.

(83 Kan. 603)

STATE v. TAWNEY.[†]

(Supreme Court of Kansas. Dec. 10, 1910.)

(Syllabus by the Court.)

1. REVIEW ON APPEAL.

The evidence warranted a finding that there existed no such prejudice in the community as would prevent the defendant from having a fair trial.

2. CRIMINAL LAW (§ 125*)—CHANGE OF VENUE—PREJUDICE OF JUDGE.

Unfavorable comment by the court in denying a new trial and other adverse rulings, and errors of judgment in former trials, held insufficient to reverse a decision denying a change of venue.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 242; Dec. Dig. § 125.*]

3. JURY (§ 67*)—SUMMONING—BIAS OF OFFICER—CHALLENGE TO ARRAY.

Mere expression of an opinion by the sheriff, as to the guilt or innocence of a defendant in a criminal action, held not to warrant the quashing of a panel summoned by him.

[Ed. Note.—For other cases, see Jury, Dec. Dig. § 67.*]

4. WITNESSES (§§ 254, 352*)—LARCENY—ADMISSIBILITY OF EVIDENCE—CONVICTION OF RELATIVES OF PROSECUTING WITNESS—EXAMINATION—REFRESHING MEMORY.

On appeal by one convicted of larceny the appellant claimed the trial court erred in admitting and excluding testimony. Held: (a) It was within the discretion of the court to permit questions to be asked a witness tending to refresh his recollection. (b) Testimony that certain relatives of the prosecuting witness had been convicted of crime and sentenced to the penitentiary was properly excluded.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. §§ 254, 352.*]

Appeal from District Court, Franklin County.

Bert Tawney was convicted of larceny, and he appeals. Affirmed.

W. J. Costigan, F. A. Waddle, and Ralph E. Page, for appellant. F. S. Jackson, Atty. Gen., and W. B. Pleasant, for the State.

PER CURIAM. For a statement of the facts in this case see State v. Tawney, 78 Kan. 355, 99 Pac. 268, and the same case, 81 Kan. 162, 105 Pac. 218. We find no error in the ruling of the court denying a change of venue.

As to the first ground, there was sufficient rebutting evidence in the form of affidavits to warrant a finding that there existed no such prejudice in the community as would prevent the appellant from having a fair trial. The court doubtless took into consideration the fact that Franklin is a large, populous county, and that little difficulty would be experienced in finding unprejudiced jurors in portions of the county remote from where the appellant lived and where the crime charged was committed.

To show prejudice on the part of the judge the appellant filed his affidavit and that of his attorney, relying largely upon unfavorable comments of the court in overruling a motion for a new trial and other adverse rulings, and errors of judgment in former trials. These have been held insufficient as grounds for reversing a decision refusing a change of venue. State v. Bohan, 19 Kan. 28. Weight and consideration should always be given to the decision of the trial judge. State v. Tawney, 81 Kan. 162, 105 Pac. 218. The trial court must exercise some discretion in passing upon applications for a change of venue. State v. Knadler, 40 Kan. 359, 19 Pac. 923. We are unable to say that the court abused its discretion in this respect.

The challenge to the array was rightly overruled. The mere expression of an opinion by the sheriff as to the guilt or innocence of a defendant in a criminal action is not sufficient ground for quashing a panel summoned by him, in the absence of any testimony showing an attempt to influence or prejudice the jurors.

Complaint is made of errors in the admission of testimony. It was clearly within the discretion of the court to permit questions to be asked of Joe Lockwood directing his attention to portions of a conversation which occurred almost three years before. It is urged that the court erred in excluding the offer of a letter in connection with the cross-examination of Lockwood. The letter was an anonymous one written to him years before the offense for which the appellant was being tried was committed, and was properly excluded. It had no bearing on the case. There was no error in sustaining an objection to questions tending to show that certain relatives of the prosecuting witness had been convicted of crime and sentenced to the penitentiary. As testimony was admitted showing that the witness, Beecher Day, had been declared of unsound mind, appellant was not prejudiced by the refusal to permit a transcript of the lunacy proceedings in the probate court to be introduced. The appel-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

lant offered to prove that prior to the time the pigs were stolen he had advised his wife to leave them alone. This was a self-serving declaration and was properly excluded. *State v. Hinkley*, 81 Kan. 838, 846, 106 Pac. 1088. There was no error in refusing to permit appellant's wife to testify as to conversations she had with Lockwood, as her answers would have called for hearsay evidence.

The only complaint of the instructions is the refusal to give one asked with respect to reasonable doubt. The court in an instruction given fully stated the law on that subject, and the instruction asked was therefore properly refused.

The complaint of misconduct of the court and jury does not possess sufficient merit to warrant comment. The record fails to disclose that the verdict is the result of passion or prejudice as claimed, or that it is not sustained by sufficient evidence.

Finding no prejudicial error in the record, the judgment will be affirmed.

BENSON, J., not sitting.

(83-Kan. 453)

ROBERTSON et al. v. HOWARD (two cases).
(Supreme Court of Kansas. Dec. 10, 1910.)

(Syllabus by the Court.)

1. ACTION (§ 65*)—ACTIONS AND DEFENSES AFTER COMMENCEMENT.

Except as to the computation of interest and some other exceptional cases, the rights of the parties on a trial, in the absence of supplemental pleadings, are fixed as of the time of the commencement of the action.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 735, 736; Dec. Dig. § 65.*]

2. EJECTMENT (§ 17*)—RIGHT TO POSSESSION.

As between two parties, neither of whom has a right to the possession of real estate, of which one is in possession, the other cannot oust him therefrom.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 63, 64; Dec. Dig. § 17.*]

On rehearing. Reversed and remanded.

For former opinion, see 82 Kan. 588, 109 Pac. 696.

SMITH, J. To the opinion filed on the former hearing of this case (*Robertson v. Howard*, 82 Kan. 588, 109 Pac. 696) is appended a copy of the findings of fact and conclusions of law of the court below. The time of the commencement of the action with reference to the discharge of the trustee in bankruptcy and the discharge of the bankrupt from his debts was not called to the attention of the court, and was overlooked in the decision. This fact seems to be very important; indeed, determinative of the case. A transfer of the certificates was attempted to be made by Henry Trauman, the purchaser of the certificates at the trustee's sale, on July 19, 1905. This sale was held to

be invalid, and to convey to Trauman no interest in the real estate in Kansas; hence his attempted assignments of the certificates was invalid, and we adhere to that view.

On June 19, 1907, the bankrupt, Hagener, and his wife, executed to one of the appellees a quitclaim deed to the land and an assignment of the certificates and of their rights to the rents and profits. This grantee about the same time assigned a one-half interest therein to his coappellee. This action, to recover possession of the land, was commenced July 12, 1907, while the trustee in the bankruptcy proceedings was in full control of the estate of the bankrupt, including this land, and continued so to be until November 20, 1907, when he was discharged. On this date the bankrupt was also discharged from all of his debts. A trial was had some time after the last-mentioned date, but no supplemental petitions were filed.

It was said in *Reynolds v. Thomas*, 28 Kan. 810: "But the rights of the parties, in the absence of supplemental pleadings, are fixed as of the time of the commencement of the actions" (syllabus, pt. 3). See, also, 1 A. & E. Enc. L. & P. 1079, art. XII. This rule seems especially applicable to this case. In the matter of the computation of interest on a debt sued on, we believe it is the general rule to allow interest in case of recovery to the time of trial. There are probably other exceptional cases where equity would adjust subsequently accruing rights; also where the parties to an action have, without objection, tried out and thereby submitted to the court subsequently accruing claims for adjudication. In this case, however, no reason appears for departing from the general rule.

The United States bankrupt act of 1898 (Act July 1, 1898, c. 541, § 70, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451]) provides, in substance, that the trustee of the estate of a bankrupt, upon his appointment and qualification, shall be vested by operation of law with the title to the property of the bankrupt as of the date he was adjudged a bankrupt, except as to property which is exempt. Hence the title and right of possession to this property was in the trustee at the time of the execution of the quitclaim deed and assignment to the appellees, and also at the time of the beginning of this action, and the trustee had the power for more than four months thereafter, under the orders of the court, to sell the property and convey the right of possession thereof. It follows that neither the bankrupt nor the appellees had any right to the possession of the property at the time of the commencement of this action. If, therefore, the appellees' rights are to be determined, as we hold they should be, upon the facts existing at the time of the commencement of the action, they were not entitled to recover the possession of the property, even against one who had simply

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the naked possession thereof. As between two parties, neither of whom has a right to the possession of real estate, of which one is in possession, the other cannot oust him therefrom.

The proposition of law stated in the fifth paragraph of the syllabus in the former decision is seriously questioned, and it is also contended that *Bird v. Philpott*, 69 L. J. N. S. Ch. Div. 487, and *In re Evelyn*, 63 L. J. N. S. Q. B. Div. 658, which were followed in the former decision, were based upon the English bankruptcy act of 1883, and not upon the common law as in force in this country. While we are inclined to believe the proposition correct as stated in the syllabus, it can only be so regarded with this limitation, at least: That the grantee of the bankrupt cannot make his acquired right the basis of a cause of action until after the trustee in bankruptcy is discharged, the bankrupt is discharged of his debts, and the bankruptcy proceedings are closed. It would be an intolerable interference with the administration of justice in a bankruptcy court to allow the bankrupt, who had divested himself of the title to his property, to be dickering in regard to a possible reversionary interest in such a manner as to embarrass the trustee in selling the property and conveying the right of possession thereto.

For the reasons stated, the judgment of the court below is reversed, and the case is remanded, with directions to render judgment in favor of the appellants. All the Justices concurring.

(82 Kan. 539)

ARNOLD et al. v. ARNOLD et al.†
(Supreme Court of Kansas. Dec. 10, 1910.)

(Syllabus by the Court.)

1. DIVORCE (§ 254*)—DECREE—CONSTRUCTION.

A judgment for divorce gave the custody of minor children to their mother, and provided that the legal title to the homestead should be vested in her for the use and benefit of the children, or the survivor of them until the youngest should come to the age of majority, to be held and used as the home of the mother and children until that time. It is held that the judgment did not give to the mother the title in fee simple, but only the use of it for the purpose declared, and for the time limited therein.

[Ed. Note.—For other cases, see Divorce, Dec. Dig. § 254.*]

2. PRINCIPAL AND AGENT (§§ 85, 90*)—ADVANCES.

After the youngest child became of age, the father claimed to own the land referred to in the decree above mentioned, having obtained the patent therefor, and the mother, still being in possession, claimed to own it absolutely under the decree. In this situation the mother sought the assistance of her son to procure for her a conveyance from his father as a compromise of the conflicting claims. The son procured the conveyance to himself, according to the agreement with his mother, and offered to make a conveyance to her for the sum she had authorized him to give, although he had in fact paid less, but she refused to pay and repudiated the agreement. The son then brought an action of

ejectment against the mother. It is held that a judgment for the mother is erroneous, and that the son, upon delivery of a proper conveyance, should recover whatever sum is found to be equitably due to him, and, if not paid, should have a lien upon the land therefor.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 224-228, 240-244; Dec. Dig. §§ 85, 90.*]

Appeal from District Court, Marion County.

Action by C. L. Arnold and others against Matilda Arnold and others. Judgment for defendants and plaintiffs appeal. Reversed and remanded.

Jackson & Noble, for appellants. Keller & Dean, for appellees.

BENSON, J. This action is in ejectment to recover 80 acres of land. The controversy is between C. L. Arnold, the plaintiff, and Matilda Arnold, his mother, one of the defendants. This tract was school land for which a certificate was issued in the year 1881, which was assigned to J. G. Arnold, the father of the plaintiff, in the year 1887. He occupied the land with his family until an action for divorce was commenced by his wife, Matilda, in which a judgment was rendered on June 8, 1889, as follows: "That the plaintiff be, and is hereby, divorced from the said defendant, and that she do have the complete, absolute, and full control of said minor children during their minority, and that the legal title to said above-described homestead real estate be vested in the plaintiff in trust for and to the use and benefit of said children and any that may be hereafter born unto the plaintiff and defendant, or the survivors of them until the youngest of said children of the survivor shall come to the age of maturity, to be held and used as the home of the plaintiff and the said children until said children or the youngest survivor of them shall come to his majority, and it is further ordered that said plaintiff do have all of the aforesaid personal property, including all growing crops on said farm, and that plaintiff do have the control of the contract of purchase of said land, and is authorized to perfect and complete the said purchase." The judgment also provided that J. G. Arnold should pay the taxes on the land.

After the divorce, Mrs. Arnold and her children continued to reside upon the land as their home. She still occupies it with two of her children, all of whom became of full age before this action was commenced. She has made nine payments to the state of \$8.64 each on the land, paid taxes for four years amounting to \$57.02, and has made improvements upon the land. On January 30, 1901, J. C. Arnold paid the balance due on the certificate, and a patent was then issued to him, and he afterwards claimed to be the owner of the land. In consequence of this claim Mrs. Arnold wrote to her son, the plaintiff, the following letter: "Marion, Kans., February 1st, 1909. Dear Less: As I wrote

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes
† Rehearing denied December 12, 1910.

you a few days ago, I will not write much this time. I hope you are all well. We are well except colds. We had the worst blizzard Friday of snow and dirt. It has been pretty cold to-day and yesterday, but is growing warmer this evening. Ruth and Ellery has gone to church to Youngstown this evening. I am alone and thought I would write you a few lines to pass off the time. The snow looks like large banks of dirt. I expect we will have some bad roads when this snow leaves. I did not go to Sunday School to-day. I thought it pretty cold to go out. Well Less, this business concerning the home here will soon have to be settled. I am going to give your Pa his choice one way or the other to come to settlement. I don't know anything of his whereabouts and take this plan in sending this word in writing to you. If \$1100.00 will satisfy him, I will give that amount. \$1100.00 was what we paid for the eighty. Let me know and hear from you what he says about it. I put \$1200.00 improvements on the place, and will fight for my rights if settled by law. So let me hear soon. With love to Georgia and little ones, Your Mother." After receiving this letter, the plaintiff had an interview with his mother concerning the matter, and thereupon he made an arrangement with his father for a conveyance of the land for \$900, paying \$100 down, and then entered into an agreement with his mother as follows: "Marion, Kansas, February 13th, 1909. Contract—Chas. L. Arnold and Matilda Arnold. This agreement entered into this 13th day of February, 1909, by and between mother and son as follows: Charles L. Arnold of Winfield, Kansas, of the first part hereby covenants and agrees to procure from his father, J. G. Arnold, an abstract of title and a quitclaim deed to the S. $\frac{1}{2}$ S. W. $\frac{1}{4}$ (south half southwest quarter) of section thirty six (36), township nineteen (19), range four (4) east of the Sixth principal meridian, containing eighty acres more or less according to the U. S. Government survey. And after such acquirement, to then in turn furnish said abstract and a quitclaim deed to said property to his mother Mrs. Matilda Arnold. The consideration of this quitclaim deed from Charles L. Arnold and wife to his said mother Mrs. Matilda Arnold is eleven hundred dollars, to wit: one hundred dollars upon the execution of this contract and one thousand dollars upon the delivery to said Mrs. Matilda Arnold of the quitclaim deed to said south half southwest quarter of section thirty-six, township nineteen, range four in Marion county, Kansas. It is distinctly understood that these transactions are for the sole purpose of transferring the father's interest in this land and vesting it in the mother without affecting in any degree the interest of this son as an heir. C. L. Arnold, Mrs. Matilda Arnold."

After this agreement had been made, the plaintiff obtained from J. G. Arnold, his fa-

ther, a conveyance to himself of the land in question for a consideration of \$900, and at the same time a previous agreement for the support of the father by the son in consideration of a conveyance of forty acres of this land, which had been made on February 2, 1901, was canceled. Afterward the plaintiff, with his wife, executed a conveyance of this 80-acre tract to the defendant, Matilda Arnold, expressing a consideration of \$1,100, and offered to deliver it to her on payment by her of \$1,000, the balance of the sum named in the contract. Mrs. Arnold refused to accept the deed or make the payment and appears to have repudiated the contract. Mrs. Arnold testified that her son had offered her the deed, and that she did not accept it because "It was all a false pretense." She further said: "Q. What was your purpose in carrying on these negotiations with your son? A. For the purpose of compromising the matter in settlement. Q. What is the fact in regard to your husband, has he been claiming all these years that he still owned the land? A. Yes, sir; he claimed it all these years, and tried to get it from me for several years. Q. State whether there has been a controversy between you and your husband ever since the divorce was granted? A. Yes, sir; he claimed it was all his. Q. What did you claim? A. That I had a right there and that it belonged to me. Q. What was the object of this controversy between you and your son? A. For the purpose of settling and stopping all controversy between us about it."

Matilda Arnold claimed to own the land under the decree. J. G. Arnold also claimed to own it under the certificate of purchase and the patent. It appears that Mrs. Arnold desired to have the controversy settled, and for that purpose entered into the contract with her son, who obtained the title accordingly. The contention of the defendant now is that the land was hers absolutely by the terms of the decree of divorce. The claim of J. G. Arnold was that she held it in trust until the youngest child became of age, and that all her interest terminated at that time. The language of the decree is clear, and leaves no room for construction. It vests the legal title in her as trustee for the use and benefit of the children until the youngest shall come to the age of maturity, to be used as a home for her and her children until that time. The trust, the use, and the limitation are clearly stated. It is said that this was an inequitable provision for the wife who had the burden of supporting the family, but the court on the trial of this action could not re-examine the equities of a decree made more than twenty years before, in which both parties had acquiesced and under which the defendant now claims, and, of course, did not attempt to do so; but construed the decree as vesting the fee in Mrs. Arnold. There was in any event a substantial controversy between the defendant and her former hus-

band as to the legal effect of the decree. In this situation the defendant sought the aid of her son to effect a settlement. He proceeded to do as requested, and, so far as the evidence shows, carried out the agreement with his mother. He paid \$900 to his father, and obtained the title as he had agreed. It may be that he is not entitled to more than he actually paid, but that is a matter that should be determined in a further proceeding.

The judgment given for the defendant must be reversed, but, in view of the fact that the plaintiff acted as agent for his mother in procuring the title from his father, judgment cannot be entered in his favor for the recovery of the land; neither should he be left without relief, but should have whatever is found to be equitably due to him upon the delivery of a proper conveyance to his mother. If the amount found to be due to the plaintiff is not paid at a time to be fixed, he should have a lien upon the land therefore to be enforced by sale in the usual way. That all the rights and equities of the parties may be fully adjusted, leave should be given to amend pleadings if found necessary.

The judgment is reversed and the cause remanded for further proceedings in accordance with the views expressed in this opinion. All the Justices concurring.

(52 Kan. 588)

ILIFF v. CUDAHY PACKING CO.

(Supreme Court of Kansas. Dec. 10, 1910.)

(Syllabus by the Court.)

MASTER AND SERVANT (§ 190*)—INJURY TO SERVANT—SAFE PLACE OF WORK.

A laborer, who as a part of his regular duties was ordered to keep the elevator pit in a packing house clean of refuse, was directed to notify the elevator operator whenever he entered the pit to do this work, and was told that the operator would warn him of the descent of the elevator. This was regularly done for some time, after which, when the laborer again entered the pit and notified the operator accordingly, the latter neglected to give the warning, in consequence of which neglect the elevator descended upon the laborer and injured him. It is held (1) that the ordinary rule relieving a master from liability to a servant for injuries caused by the negligence of a fellow servant does not apply; (2) the master was not relieved from the consequences of neglect to make the place of service reasonably safe by delegating the duty of giving the necessary warning to the operator, who failed to give it.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 471, 472; Dec. Dig. § 190.*]

Appeal from District Court, Sedgwick County.

Action by Howard Iliff against the Cudahy Packing Company. Judgment for plaintiff, and defendant appeals. Affirmed.

H. M. Langworthy, Houston & Brooks, and Warner, Dean, McLeod & Timmonds, for appellant. Adams & Adams, for appellee.

BENSON, J. This is an action to recover damages for personal injuries. The plaintiff, Iliff, was employed as a janitor in the packing house of the defendant company. His duties were to keep the floors clean and to clear out the refuse from the elevator pit. He was directed to notify the elevator operator whenever he entered the pit for the purpose of cleaning it, and was told that the operator would warn him when the elevator was about to come down. The plaintiff performed this duty for two months or more before he was injured, giving the notice and receiving the warning as indicated. At the time of the injury he had entered the elevator pit, after giving notice to the operator as usual, and was using a scraper and shovel in cleaning out the refuse and filth therein, when, without warning, the elevator descended upon him while thus at work, inflicting the injuries of which he complains. The operator had received the notice, but neglected to give the warning. It was claimed by the defendant that the plaintiff was ordered to clean out the pit only when the elevator was locked at noon, or after the close of the regular work of the day, but the general verdict for the plaintiff determines the issues in his favor, and, evidence having been given to prove the facts as above stated, they must be taken as true.

Errors are assigned upon the order overruling the demurrer to the evidence and in the instructions given. In support of the demurrer it is contended that the plaintiff and the operator of the elevator were fellow servants, and, as the injury was caused solely by the negligence of the operator, the plaintiff cannot recover under the rule relating to fellow servants. On the other hand, the plaintiff insists that, where the negligent act of one fellow servant which injures another violates a nondelegable duty which the master owes to the injured servant, the rule that a master is not liable to one servant for the negligence of a fellow servant has no application.

In Kelley v. Ryus, 48 Kan. 120, 29 Pac. 144, it was said: "It is the duty of an employer in all cases to furnish his employes with a reasonably safe place at which to work, and with reasonably safe instruments or tools with which to work; and if he delegates these duties to another, such other becomes a vice principal, for whose acts the principal is responsible."

It was said in Crist v. Light Co., 72 Kan. 135, 83 Pac. 199: "If the master sends a servant to work in a place of danger, however temporary, and the danger arises from acts or omissions of other servants against which the servant has no means of protecting himself, it is the duty of the master to provide such warnings or to take such other steps as may be reasonably necessary

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

to safeguard the servant so employed; and if another servant of higher or lower degree is delegated by the master to attend to such safeguarding he is performing the functions of the master, and if guilty of negligence the master is responsible."

The defendant concedes the rule, but urges that, while ordinarily a master cannot delegate the performance of the personal duties which he owes to his employes so as to relieve himself from liability, yet this rule is subject to the exception that where the duty relates to a mere detail of the work it may be delegated to a fellow servant and the master be relieved from the negligence of the latter. It is urged that this claim is supported by the opinion in *Brick Co. v. Shanks*, 69 Kan. 306, 76 Pac. 856. But in that case it was held that shovelers in a mine were not required to watch for shale thrown down by the drillers, of which warning was required, but was negligently omitted. It was said that "The shovelers were hired to work; not to dodge the drillers." It was also said (page 310 of 69 Kan., page 857 of 76 Pac.): "But whenever a negligent act violates any duty which the master himself owes to the servant, as, for example, the duty to make the service and the place in which it is performed reasonably safe, that fact controls, irrespective of the rank or grade of service between employes, and notwithstanding the circumstance that they are engaged in a common employment directed to a common end; and if, in the discharge of the master's duty, a warning be necessary, it is not enough for him to say that he has provided a competent person to give it; the warning must be given."

In *Brice-Nash v. Salt Co.*, 79 Kan. 110, 98 Pac. 768, 19 L. R. A. (N. S.) 749, 131 Am. St. Rep. 284, where the method of carrying on the work involved the occasional dislodgement of masses of salt with such force as to expose employes to danger, and it became necessary to give warning of such dislodgement, it was held that the giving of such warning was a nondelegable duty of the master, and that its omission imposed liability for consequent injuries regardless of the question of coservice.

It is argued that the danger to which the plaintiff was exposed was not permanent, or constantly recurring, and that for this reason the rule requiring the company to make the place reasonably safe for the service does not apply. It will be observed from the quotation given that this view is not approved in this court in the *Crist Case*. It was also said in that case, in immediate connection with the language quoted, that the rule "has no iron-bound limitations as to whether the place be a permanent or a temporary one." Authorities on this and other closely related subjects are collated in

a note in 26 L. R. A. (N. S.) 624-651. The assurance given to the plaintiff that he would be warned when the elevator was about to descend implied that he was expected to continue at his work until the warning was given. It was therefore not only his right, but his duty, to give attention to that work. While doing this he was injured without his fault through the failure of the company to give the warning it had undertaken to give. These facts afforded a cause of action.

It is also contended that the plaintiff should be held guilty of contributory negligence, because his work in the elevator pit was so intrinsically and plainly dangerous that he ought not to have undertaken it at all while the elevator was in use. The service however must be regarded in the light of the provisions for safety promised by the company; that is, upon the supposition that the warning would be given. When so considered, it cannot be said as a matter of law that the work was so glaringly dangerous that none but a reckless person would have undertaken it. The question of contributory negligence was for the jury.

The instructions complained of are in harmony with the interpretation of law as given in this opinion, and are not deemed erroneous.

Finally, it is urged that the verdict, which was for \$2,000, is so excessive as to show passion and prejudice on the part of the jury. After reading the evidence, it is found sufficient to warrant the award.

The judgment is affirmed. All the Justices concurring.

(83 Kan. 629)

WENDORFF v. DILL

(Supreme Court of Kansas. Dec. 10, 1910.)

Quo warranto by J. H. Wendorff against William Dill. Judgment for plaintiff.

L. S. Ferry, T. F. Doran, and C. A. Magaw, for plaintiff. F. B. Dawes and R. C. Miller, for defendant.

PER CURIAM. In October, 1909, William Dill was appointed judge of the district court to fill a vacancy, and continues to act in that capacity, claiming that the appointment holds good until the election of 1912. J. H. Wendorff claims title to the office under the election of last month, and brings action for its possession.

The legal question involved has been presented upon both sides with the utmost fairness and courtesy. The court sustains the view of the plaintiff, and announces that conclusion now, inasmuch as an early decision is desirable upon public grounds, and is asked by the parties. The reasons therefor will be stated in an opinion to be filed later. To give opportunity for the settlement of any unfinished business pending before Judge Dill, the order of this court will be made effective December 24, 1910. His acts as a de facto officer are, of course, as valid as though he held by a perfect title, and that status will continue until the date named.

(83 Kan. 809)

INTERNATIONAL DRUG CO. v. GRECIAN.

(Supreme Court of Kansas. Dec. 10, 1910.)

Appeal from District Court, Graham County. Action by the International Drug Company, Consolidated, against Frank Grecian. Judgment for plaintiff, and defendant appeals. Affirmed.

John L. Crank, for appellant. W. L. Sayers, for appellee.

PER CURIAM. The only ground urged for reversal is that the decision is not sustained by sufficient evidence and is contrary to law. Very little evidence was necessary. In view of defendant's admission that he executed the order for the goods, received and retained them, and refused to pay for them. The only principle of law discussed relates to the necessity for the performance of a condition precedent; but the agreement of the plaintiff to advertise the goods was not such a condition. The court allowed defendant to recoup his damages sustained by reason of the failure of the plaintiff to advertise the goods, and the defendant has no just complaint of the decision.

The judgment is affirmed.

(83 Kan. 812)

KRAUSE v. NICKEY.

(Supreme Court of Kansas. Dec. 10, 1910.)

Appeal from District Court, Sumner County. Action by E. A. Krause against John Nickey. Judgment for plaintiff, and defendant appeals. Affirmed.

F. A. Dinsmoor, for appellant. J. A. Burnette, for appellee.

PER CURIAM. As all the assignments of error are argued together, and especially since none of them possess merit, they will not be separately mentioned. The appellant was not prejudiced by the slight variance in the proof and the allegations in the bill of particulars upon which the case was tried on appeal from the justice court.

A very substantial foundation was laid for the introduction of secondary evidence of the contents of the written contract. The testimony was undisputed that the appellee brought about the sale of appellant's farm, and that his compensation was fixed by the written agreement. All the questions were fairly submitted to the jury, and no substantial reason is suggested why the judgment should be disturbed.

The judgment will be affirmed.

(83 Kan. 811)

WESTCOTT v. MORTON-SIMMONS HARDWARE CO.†

(Supreme Court of Kansas. Dec. 10, 1910.)

Appeal from District Court, Sedgwick County. Action by A. B. Westcott against the Morton-Simmons Hardware Company. Judgment for defendant. Plaintiff appeals. Affirmed.

Holmes & Yankey, for appellant. Dale & Amidon and Jean Madalene, for appellee.

PER CURIAM. Special findings 1, 2, 3, 4, and 7 give the situation of the parties for 1906. The letter of November 24, 1906, had but one purpose—to fix the relations of the parties after 1906 if there were to be any. The letter and the reply altogether eliminated the notion of a yearly or other time contract after 1906 and of any "velvet" except as the result of a full year's work. Their legal effect was

that if the plaintiff went to work in 1907 he did so subject to the defendant's right to terminate the employment at any time and without the payment of velvet if a year's work was not performed. Such being the express conditions under which the plaintiff went to work in 1907, there is no room for the implication upon which he stands. In March, 1907, the plaintiff was notified that the terms of 1906 would not govern for 1907, and the employment was by mutual agreement established upon a new basis, as shown by findings 8, 9, and 10. Under this agreement the discharge of the defendant before the end of the year and without velvet was rightful. These facts compel a judgment for the defendant, whatever the instructions to the jury may have been.

The judgment is just, and is affirmed.

(83 Kan. 812)

GIBSON v. WILKINS.

(Supreme Court of Kansas. Dec. 10, 1910.)

Appeal from District Court, Hamilton County. Action by Charles E. Gibson against S. N. Wilkins. Judgment for plaintiff. Defendant appeals. Reversed.

Wheeler & Switzer, for appellant.

PER CURIAM. The sole question involved in this case is whether the district court erred in setting aside a tax deed that had been of record more than five years. The only objections made to the deed have recently been held to be unavailing under substantially similar circumstances. *Kessler v. Polkosky*, 81 Kan. 69, 105 Pac. 7; *Van Hall v. Goertz*, 82 Kan. 142, 107 Pac. 534; *Nesbit v. Bearman*, 83 Kan. 122, 109 Pac. 1085.

The judgment is therefore reversed.

(83 Kan. 813)

GIBSON v. BROWN.

(Supreme Court of Kansas. Dec. 10, 1910.)

Appeal from District Court, Hamilton County. Action by Charles E. Gibson against Joseph A. Brown. Judgment for plaintiff, and defendant appeals. Reversed.

Wheeler & Switzer, for appellant. Scates & Watkins, for appellee.

PER CURIAM. This case is in all respects like *Gibson v. Wilkins*, supra, just decided, and is reversed for the reasons stated in the opinion filed therein.

(38 Utah, 281)

In re MANNING.

(Supreme Court of Utah. Nov. 29, 1910.)

INSANE PERSONS (§ 33*)—GUARDIANSHIP—PROBATE PROCEEDINGS—NECESSITY OF FINDING.

Comp. Laws 1907, §§ 4041, 4042, provide that all issues of fact joined in probate and guardianship proceedings must be tried in conformity with the Code of Civil Procedure, and, if no jury is demanded, the court or judge must try the issues joined, etc. Section 3168 requires the court on trial of a question of fact to give its decision in writing, and to file the same with the clerk, and section 3169 provides that in giving the decision the facts found and the conclusions of law must be separately stated, and judgment must thereupon be entered accordingly. Held that where an application was made by a son to have his father placed under guardianship because mentally and physically

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

† Rehearing denied.

infirm, and incompetent to manage his property, and, such allegations being denied, many witnesses were examined on both sides, on a trial before the court, findings of fact were essential to precede the court's judgment placing the alleged incompetent under guardianship.

[Ed. Note.—For other cases, see *Insane Persons*, Cent. Dig. §§ 44-59; Dec. Dig. § 33.*]

Appeal from District Court, Weber County; J. A. Howell, Judge.

Petition by E. J. Manning for the appointment of a guardian of the person and estate of his father John R. Manning, an alleged incompetent. From a judgment appointing Sarah Roylance as such guardian, John R. Manning appeals. Reversed and remanded.

Richards & Boyd, for appellant. Halverston & Pratt and T. D. Johnson, for petitioner.

STRAUP, C. J. This is an action or proceeding brought for the appointment of a guardian of the person and estate of John R. Manning, the defendant and appellant. A petition was filed in the district court of Weber county by E. J. Manning, a son of the defendant, in which it was alleged that the defendant was 86 years of age, physically infirm, and by reason of old age, disease, and weakness of mind was unable, unassisted, to properly "manage and take care of himself and his property," and was likely, by reason thereof, to be deceived and imposed upon by artful and designing persons, and, upon information and belief, it was alleged that he was imposed upon by artful and designing persons, and was induced, "without any consideration to convey to Louise Neal all his property of every kind and description, and left himself entirely penniless and without means of any sort," and that such conveyance was made through the fraudulent representations and undue influence of Louise Neal and Alfred Neal, her husband, with whom the defendant then resided. It was further alleged that the next of kin of the defendant were the petitioner, who is 54 years of age, William Henry Manning, a son 61 years of age, and Mrs. Sarah Roylance, a daughter 49 years of age. The petitioner prayed that he be appointed guardian of the person and estate of the defendant. To this complaint or petition the defendant appeared and answered, denying the material allegations thereof, and alleged that for some years past he had been a widower, and made his home with Louise and Alfred Neal, who assisted and cared for him, and gave him such attention as his needs demanded, and that in consideration of such service, and of the further agreement that they care for him and attend him during the rest of his natural life, he conveyed to them in fee the real property upon which he resided, but that in such deed of conveyance he reserved unto himself a life estate in and to the property so conveyed, with "full power over the same and with full power as to the rents,

issues and profits thereof," and that such conveyance was freely made with full knowledge of the import and effect thereof, and without undue influence, or fraud, or deceit, or imposition. Upon such issues the case was tried to the court, who rendered a judgment appointing Sarah E. Roylance guardian of the person and estate of the defendant, and thereupon letters of guardianship were issued to her. From such judgment the defendant has prosecuted this appeal.

It is made to appear by the bill of exceptions that, at the beginning of the trial, the defendant objected to the introduction of any evidence on the ground that sufficient facts were not alleged in the complaint to constitute a cause of action, or to entitle the petitioner to the relief prayed for, and especially for the reason that it was not averred that the defendant was insane or mentally incompetent to manage his property. The objection was overruled. It is further recited in the bill of exceptions that the trial of the cause continued from May 14th to the 18th, both inclusive, and that 14 witnesses were sworn and examined in behalf of the petitioner and 10 in behalf of the defendant. None of the evidence adduced, however, is contained in the bill or record. After both parties rested, the cause was continued for argument and final disposition until the 12th day of August. At that time the petitioner proposed an amendment to the complaint, as stated by his counsel, "in order to make the complaint or petition correspond to the proof," by alleging that the defendant was insane and mentally incompetent to manage his property. The amendment, over the defendant's objection, was allowed, but the court offered to grant the defendant such time as he desired for the purpose of preparing any further pleading or introducing further evidence. The defendant declined the offer, and thereupon the cause was argued and submitted. It is further recited in the bill "that no findings of fact, nor conclusions of law, either separately stated or otherwise, were made or filed by the court in said cause; and no other proceedings or decision upon the merits was had, made, entered, or found therein other than as contained in" the order or judgment appointing Sarah E. Roylance guardian of the person and estate of the defendant.

The errors assigned relate to the rulings overruling the objection to the introduction of evidence, permitting the amendment to the complaint, and in failing to make findings. We think the judgment cannot be supported for want of findings. By statute (sections 4041, 4042, Comp. Laws 1907) it is provided:

"All issues of fact joined in probate and guardianship proceedings must be tried in conformity with the requirements of the Code of Civil Procedure, and in all such proceedings the party affirming is the plaintiff,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

and the one denying or avoiding is defendant. Judgments therein, on the issues joined, as well as for costs, may be entered and enforced by execution or otherwise by the court as in civil actions."

"If no jury is demanded, the court or judge must try the issues joined. If on written demand a jury is called by either party, and the issues are not sufficiently made up by the written pleadings on file, the court may direct the preparation of more specific pleadings, or, on due notice to the opposite party, may settle and frame the issues to be tried, and submit the same, together with the evidence of each party, to the jury. If the trial of the issues joined requires the examination of an account the court or judge must try the matter or refer it, and no jury can be called."

By the Code of Civil Procedure, § 3167, it is provided that "all issues in a civil action shall be tried by the court, unless in cases where a jury may be had," and demanded as by the statute provided; and, by section 3168, that "upon a trial of a question of fact by the court its decision must be given in writing, and filed with the clerk," etc., and by section 3169 that, "in giving the decision, the facts found and the conclusions of law must be separately stated, and judgment must thereupon be entered accordingly." The respondent contends that "in probate and guardianship matters findings are neither necessary nor required"; that "it was not even necessary to find that" the defendant "is an incompetent person," as defined by the statute; and that "all that was necessary was that an order be made appointing a guardian for his person and estate." It is not necessary to decide whether findings are required in all contested cases or controverted issues relating to probate and guardianship proceedings. All that we are called upon to decide, and all that we can here properly decide, is whether or not findings are required upon such a contested proceeding and upon such controverted issues as are presented by the record. The proceeding is one involving both the rights of person and property. Issues of fact with respect thereto were raised, and tried by the court. The trial undoubtedly involved "issues of fact joined." As the result of the trial upon such issues, rights were taken from the defendant and given to another. All the reasons generally existing and usually stated why findings are required in a case tried by a court upon controverted and material issues of fact are here present. We think findings were as essential to precede and support the judgment rendered by the court on the particular issues tried by him as is a verdict in a case tried by a jury.

We have been referred to the cases of *In re Levinson's Estate*, 108 Cal. 450, 41 Pac. 483, 42 Pac. 479, *In re Averill's Estate*, 66

Pac. 14,¹ and *In re Schandoney's Estate*, 133 Cal. 387, 65 Pac. 877, where it was held that specific or express findings were not essential to support an order allowing a settlement of a final account of an administrator, executor, or guardian. Such rulings, however, are based upon the theory, and as stated in the first case, that the manner in which an account of an executor or administrator is usually made up and the manner in which objections thereto are usually presented do not at all conduce to the development of issues such as arise upon the pleadings in a civil action and to which findings are required to be responsive, and, as stated in the case of *In re Sanderson's Estate*, 74 Cal. 199, 15 Pac. 753, that exceptions to an account do not create "issues of fact joined," such as must be submitted to a jury on demand of a party interested. And to that effect is also our statute. Section 4042, *supra*. But in the case of *In re Well's Estate*, 140 Cal. 349, 73 Pac. 1065, in a proceeding upon a petition filed by the ward to set aside an order theretofore made settling the guardian's account and to reopen the account, on the ground of alleged fraud and wrongful overcharges, and an answer filed by the guardian denying the allegations of the petition, it was held that upon such issues of fact joined by the parties "the lower court properly made findings thereon which must be reviewed on this appeal."

Having reached the conclusion that findings were essential to support the judgment, that the right of a party to have the court make findings is a substantial right, and that a failure of the court to make findings requires a reversal of the judgment, we do not deem it necessary to pass upon the other questions presented, for on a retrial of the case it is not probable that they will again arise.

It is therefore ordered that the judgment of the court below be reversed and the case remanded to the district court, with directions to grant a new trial. Cost to appellant.

FRICK and McCARTY, JJ., concur.

(33 Utah, 234)

STATE ex rel. BISHOP v. MOREHOUSE et al., Trustees of Fish Springs School
Dist. No. 13, Juab County.

(Supreme Court of Utah. Nov. 25, 1910.)

1. MANDAMUS (§ 10*)—PURPOSES OF RELIEF—PERFORMANCE OF OFFICIAL DUTY.

To authorize a writ of mandamus against a public officer, relator must show a clear right to the performance of the act demanded with the corresponding duty upon the officer to perform such act.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. § 37; Dec. Dig. § 10.*]

¹Reported in full in the *Pacific Reporter*; reported as a memorandum decision without opinion in 133 Cal. xix.

2. MANDAMUS (§ 72*)—PURPOSES OF RELIEF—ACTS OF PUBLIC OFFICERS—DISCRETIONARY ACTS.

The action of a public officer which requires the exercise of discretion will not be reviewed by mandamus, unless he is guilty of a clear and willful disregard of duty or acts capriciously or with partiality.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. § 134; Dec. Dig. § 72.*]

3. MANDAMUS (§ 79*)—SUBJECTS OF RELIEF—ACTS OF PUBLIC BOARDS—SCHOOL TRUSTEES.

Comp. Laws 1907, § 1816, requires the trustees of a school district to maintain schools or change or discontinue. Section 1824 provides that, if a petition is signed by persons charged with the support of 15 or more children of school age, the trustees may maintain a school, and section 1825 requires them to fix the terms of the school, and so arrange the terms as to furnish school privileges equally to all pupils of school age, and permits the discontinuance of any school when the average attendance for 20 consecutive days is less than 8. A school district which was situated upon a desert was, in order to procure a sufficient number of pupils, divided into three divisions, each of which was so far from the other that the children in one division could not attend school in either of the other divisions. The number of pupils in the smallest division hardly exceeded three, those in relator's division numbered nine, while the third division had as many pupils as both of the others. Heretofore a term of school was held each year in each division, but the trustees only required school to be held in the largest division during the current year, and refused to hold a term in relator's division, though sufficient funds were available for that purpose. *Held*, that the circumstances stated did not authorize the granting of mandamus to compel the trustees to hold a term of school in relator's district.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 170-176; Dec. Dig. § 79.*]

Application for mandamus by the State, on the relation of Alfred J. Bishop, against George W. Morehouse and others as trustees of the Fish Springs school district No. 13, Juab county, state of Utah. Application dismissed.

J. W. Thompson, for plaintiff. A. R. Barnes, for defendants.

FRICK, J. Plaintiff applied for an alternative writ of mandate against the defendants as trustees of the Fish Springs school district in Juab county, Utah. After alleging the official capacity of the defendants and other jurisdictional facts, the plaintiff, in substance, alleges that said Fish Springs school district, for the convenience of the school children residing therein, was divided into three divisions, which are known as "Callao," "Trout Creek," and "Ragan" divisions, respectively; that the plaintiff is a resident and taxpayer of said Trout Creek division in said Fish Springs district, is the father of two children of school age, both of whom live with him, and are desirous of attending school in said division; that, in addition to plaintiff's said children, there are "at the present time" seven other children of

school age residents of said division and whose parents are taxpayers therein; that the children last named "are accustomed to and entitled to the right of attending school in said division," and, if a peremptory writ be granted, will attend school in said division; that said Fish Springs school district is situated in the extreme westerly portion of Juab county, and is practically within the Great Salt Lake Desert, where there are but few residents, all of whom live widely apart from one another; that the divisions aforesaid are so located that the town of Callao, in Callao division, is about 20 miles north of the town of Trout Creek, in Trout Creek division, and the town of Ragan, in Ragan division, is about 20 miles south of Trout Creek; that it is impracticable, if not impossible, for the children of the three divisions, or of any two of them, to attend school at the same place; that, by reason of that fact, Fish Springs school district was divided into divisions as aforesaid, and, while three terms of school have heretofore been held annually in said district, one of said terms in each year was held in one of said divisions for the convenience of the children resident therein; that there are not 15 children of school age resident within any one of the divisions aforesaid; that, since the beginning of the current year, school has been held only in Callao division, and the defendants as the trustees of said school district declare it as their intention and purpose and will continue the school in said Callao division, and refuse to hold a term of school in said Trout Creek division, although they have been requested to do so; that there are sufficient funds available for school purposes derived from taxes levied and paid in said Fish Springs district to hold school for a period of nine months in said district, and thus to hold a term of school in each one of said divisions, and that a place to hold such school can be obtained in each one of said divisions, and that it is entirely practicable to hold a term of school in each one of said divisions; that said defendants as the trustees of said school district, arbitrarily and capriciously refuse to do their duty in providing proper facilities and conveniences for holding school in all of said divisions, and arbitrarily refuse to cause a term of school to be held in any division except said Callao division, by reason of which the children of plaintiff and those of other parents similarly situated are wrongfully deprived of school privileges. For the foregoing reasons, it is contended that this court should issue a peremptory writ of mandate requiring said defendants as the trustees of Fish Springs school district to cause a term of school to be taught in said Trout Creek division.

The Attorney General appeared for the defendants, and in their behalf has filed a general demurrer to the petition. The case

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

was submitted upon the demurrer by both parties. The only question for solution is, Does the law when applied to the facts stated in the petition authorize this court to direct the defendants by a writ of mandate to do what the petitioner demands from them? The solution of this question, to some extent, depends upon the duties that the statute imposes upon the defendants. Section 1816, Comp. Laws 1907, provides that the trustees "shall organize, maintain and conveniently locate schools for the education of the children of school age within the district, or change or discontinue any of them according to law." Section 1824, in substance, provides that, if a petition is presented to the trustees which is signed by persons who are charged with the support and who have the custody and care of 15 or more children of school age, the trustees may organize, locate, and maintain a school and employ a teacher for such children. By section 1825 it is provided that the trustees shall determine and fix the length of time that school shall be taught in the district in each year and when each term shall begin and end; that the trustees "shall so arrange such terms as to accommodate and furnish school privileges equally and equitably to pupils of school age. * * * And, further, that "any school may be discontinued when the average attendance of pupils therein for twenty consecutive days shall be less than eight." From what is contained in the foregoing sections no one can doubt that it was the intention of the Legislature to vest the trustees with the power of exercising at least some judgment and discretion in discharging their official duties. If this be so, then our inquiry must be (1) whether the plaintiff is clearly entitled to what he demands; and (2) whether it is clearly the duty of the defendants to act, or if in granting the writ we would not be merely substituting our judgment for that of the trustees in so far as they have refused to comply with plaintiff's demands. Of course, if the trustees had refused to act at all, instead of refusing to act in a particular way, or in doing a particular thing, the case might be different.

Upon the question of how and under what circumstances courts ought to grant the writ of mandate against public officers, the law is well and tersely stated by Mr. High in his excellent work entitled *High's Extraordinary Legal Remedies* (3d Ed.) § 32, in the following language: "And, to warrant a court in granting the writ against a public officer, such a state of facts must be presented as to show that the relator has a clear right to the performance of the thing demanded, and that a corresponding duty rests upon the officer to perform that particular thing. And when substantial doubt exists as to the duty whose performance it is sought to coerce or as to the right or power of the officer to perform such duty, the relief will be withheld." Where there is a discretion vested in

the officer, the rule generally applied is stated by the author in section 41 of Merrill on *Mandamus* in the following words: "But the action of an officer in a matter which calls for the exercise of his discretion or judgment will not be reviewed by the writ of mandamus unless he has been guilty of a clear and willful disregard of his duty, or such action is shown to be extremely wrong or flagrantly improper and unjust, so that the decision can only be explained as the result of caprice, passion or partiality." In speaking of the general rule which is ordinarily applied by the courts in passing on the question whether the writ should be granted or withheld, Wood on *Mandamus*, etc., at page 51 of his work, says: "And generally it may be said that a mandamus will not be issued unless the duty it is sought to enforce is a legal duty, clear and free from doubt, and the right of the party seeking redress through this summary remedy is equally clear."

In view of the facts stated in the petition when applied to the provisions of our statutes to which we have referred, and in the light of the law as contained in the foregoing quotations, can we say that it is clearly the legal duty of the defendants to comply with the demands of the petitioner? Again, if in our judgment as reasonable men the defendants, under the conditions stated in the petition, should have continued to hold a term of school in each one of the divisions, or in any two of them, is their refusal to do so, in view of all the facts and circumstances, of that character as will make such refusal "extremely wrong, or flagrantly improper and unjust?" And, further, can it be in reason said that their refusal is clearly "the result of caprice, passion, or partiality? The conditions confronting defendants were, to say the least, extraordinary, if not unique. In our judgment it requires but slight reflection to perceive that in view of all the circumstances different men equally honest and equally desirous of discharging their duty might nevertheless arrive at different conclusions with respect to what was the best, if not the wisest, course to pursue in maintaining a school in a district situated like the Fish Springs district. Here are three settlements situated upon a desert. All three must unite in order to have the legal number of pupils to authorize the organization and maintenance of a school. One of these settlements, Callao, has at least as many pupils of school age as the other two combined, if not more. Each one of the settlements is so far distant from the other that the children in any one cannot attend school in either of the other settlements. The number of pupils in the smallest settlement, Ragan, is not shown, but it was conceded at the hearing to be a small number, perhaps not to exceed three. In Tront Creek division, which is the next in order with respect to the number of pupils, it is alleged that "at the time" of the application the number in that division

was nine. The manner in which this statement was made is significant, for the reason that in the first petition the number was not stated with any degree of certainty, and the Attorney General objected upon that ground. The petitioner then amended his statement, and in the amended statement the qualification is made as above stated. From this statement it cannot be determined with certainty how long there have been nine pupils in Trout Creek, nor how long that number will probably remain therein. As we have seen, the trustees may discontinue a school if the "average attendance of pupils therein for twenty consecutive days shall be less than eight." If the trustees, therefore, may legally discontinue a school in an entire district when there are less than that number of pupils attending school therein, how can the trustees be compelled to provide a school in an independent settlement of a district, unless it is clearly made to appear that there will be at least the average number of pupils required by the statute that will attend the proposed school? In the other division, as we have seen, the number of pupils is conceded to be below the statutory requirement. If it be assumed that in case a school district is divided like the Fish Springs district, the courts may, by mandamus, require the trustees of the district to provide a school in each division if the number of pupils in each comes up to the statutory requirement; yet, in view that a school may be discontinued unless that number of pupils do attend, how can it be said that it is the legal duty of the trustees in this case to provide a school for each division of the district, or for two divisions, when it is conceded that in one of the divisions the number is less than the statute requires and in the other the question, to say the least, is left in doubt? Moreover, the statutory requirement that the trustees "shall arrange such terms as to accommodate and furnish school privileges equally and equitably to pupils of school age" cannot be given literal application. This provision was intended to apply to ordinary school districts, when conducted under normal conditions. In the ratio that we depart from such conditions, in that ratio must the good judgment and sound discretion of the trustees in conducting the school be given force and effect. It is obvious that under such conditions absolute equality with respect to school facilities is an impossibility. Indeed, that ideal standard can only be approached under normal conditions. When the pupils can and do attend school, no doubt they must be given equal privileges in the school, and, where it is a large district and there are young pupils, the terms of school, in a rigorous winter climate, should be so regulated as to afford those of tender years as well as the older ones an opportunity to attend school by keeping a summer as

well as a winter term in the district. In this regard much must be left to the sound discretion and judgment of the trustees on whom the duty to regulate such matters is placed. Courts should not interfere by mandamus unless it is clear that the school trustees are refusing to discharge a plain legal duty or that they are arbitrarily, capriciously, or unjustly refusing to exercise their powers to the injury of a complainant. Assuming, therefore, that all of the facts well pleaded in the petition are true, as we must do, yet we are clearly of the opinion that they are insufficient to authorize us to interfere, and thus control the defendants in their judgment of what should be done in the premises.

We remark in closing that no doubt the petitioner, and others similarly situated, if practicable, should be provided with school facilities for their children, if for no other reason than that, if the children are deprived of the advantages of education, they may suffer irreparable injury, while their parents are denied the ordinary rights of taxpayers. To prevent such results, the law has wisely placed the arrangement for and the conduct of district schools in the hands of local officers who are on the ground, and, as a general rule, are both taxpayers and patrons of the school, and thus they usually possess both the opportunity and the inclination to do what is best for all concerned under all circumstances. While the control of these officers is not absolute, yet courts should be slow in interfering with their management of the schools, lest long range interference might result in greater injustice than that which the courts are seeking to cure.

From what has been said it follows that the demurrer ought to be, and it accordingly is, sustained; and, in view that the defects in the petition cannot be cured by further amendment, the application is hereby dismissed.

STRAUP, O. J., and McCARTY, J., concur.

(57 Or. 378)

LONEY et al. v. SCOTT.

(Supreme Court of Oregon. Dec. 13, 1910.)

1. MINES AND MINERALS (§ 9*)—LANDS OPEN TO LOCATION—WITHDRAWALS.

Under Act Cong. June 17, 1902, c. 1093, § 3, 32 Stat. 388 (U. S. Comp. St. Supp. 1909, p. 597), directing the Secretary of the Interior (1) to withdraw from entry the lands for any irrigation works contemplated by the act, and (2) authorizing him to withdraw any lands believed to be susceptible of irrigation from such works, withdrawals under the first clause are not subject to location for mining purposes, being reserved for government use, while lands withdrawn under the second clause are disposed of only for homesteads, and as all lands open to homestead entry are subject to mining location,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

lands withdrawn under the second clause are so subject.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 9-13; Dec. Dig. § 9.*]

2 MINES AND MINERALS (§ 47*)—PATENTS—OPERATION—MINERAL DEPOSITS.

A patent to government land transfers to the patentee all veins, lodes, or other minerals within its boundaries, unless such mineral deposits were known to exist at the time of the issuance of the patent, in which case the known mineral deposits do not pass by the patent.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 47.*]

3. MINES AND MINERALS (§ 9*)—PUBLIC MINERAL LANDS—STATUTES—BUILDING SAND AND "MINERAL."

Under Rev. St. § 2329 (U. S. Comp. St. 1901, p. 1432), by which claims usually called placers, including all forms of deposits excepting veins of quartz or other rock in place, shall be subject to entry, building sand is a mineral; and, hence, land more valuable for the building sand it contains than for agriculture is mineral land, subject to placer locations.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 9-13; Dec. Dig. § 9.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4513-4515; vol. 8, p. 7722.]

4. MINES AND MINERALS (§ 29*)—LOCATIONS—PATENTS—RELIEF FROM CLOUD ON LAND.

The plaintiff had located placer claims upon public land while it was suspended from entry and had remained in possession working the claims, and when the land was reopened to entry, defendant's grantor, a railroad company, obtained a patent for the land as lieu land under its grant. *Held* that, if a patent to lands to which one is entitled has been improperly issued by the government to another, the state courts will quiet the title by adjudging the patentee a trustee of the title for him, but to warrant such a decree, plaintiff must show that he is entitled to the patent or that the title should have been awarded to him; and hence, the plaintiff was without right to have the defendant adjudged a trustee for him.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 29.*]

5. PUBLIC LANDS (§ 29*)—MINERAL DEPOSITS—LOCATION OF PLACER CLAIMS—RIGHT TO POSSESSION.

The plaintiffs made placer locations upon public lands while they were withdrawn from entry and gave the notices as required by law. After the reopening of the land to entry, the defendant's grantor, a railroad company, obtained a patent to the land as lieu land under its land grant, defendant making the nonmineral affidavit, which showed the land to be in fact mineral in character and that it was claimed under placer filings, and after conveyance to him defendant sued the placer claimants for possession. *Held*, that the possession of the plaintiffs as placer claimants at the time of the application of the defendant for a patent was sufficient to defeat defendant's action for possession, and that plaintiffs might enjoin defendant's action.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 68; Dec. Dig. § 29.*]

Appeal from Circuit Court, Umatilla County; H. J. Bean, Judge.

Suit by Samuel Loney and others against Joseph C. Scott. Decree for plaintiffs, and defendant appeals. Decree modified.

The N. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$, and the N. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$, section 8, Tp. 5 N.,

R. 30 E., W. M., in Umatilla county, which includes the land in controversy in this suit, together with 183 sections of adjacent lands, was by the Secretary of the Interior, on August 16, 1905, temporarily withdrawn "from any form of disposition whatever under the first form of withdrawal" for irrigation works in connection with the Umatilla project, as provided in section 3 of the act of June 17, 1902, c. 1003, 32 Stat. 388 (U. S. Comp. St. Supp. 1909, p. 597). Section 3 of that act provides for two classes of withdrawals: (1) "The Secretary of the Interior shall * * * withdraw from public entry the lands required for any irrigation works contemplated under the provisions of this act." (2) He is authorized to "withdraw from entry * * * any public lands believed to be susceptible of irrigation from said works." Those withdrawn under the first form are lands that may possibly be needed in the construction and maintenance of irrigation works, while those included in the second form are lands which may possibly be irrigated from such works.

The land in controversy here was by order of the Secretary of the Interior restored to public entry on March 2, 1907. On January 7, 1907, the plaintiffs, the Knights, attempted to locate three placer mining claims in section 8, Tp. 5 N., R. 30 E., W. M., in Umatilla county, Or., adjacent to and parallel with the right of way of the Oregon Railway & Navigation Company through that section; these claims being the land in controversy. They posted a notice of location upon each of the claims and staked the same in the manner required by law—1500 by 600 feet. Placer claim No. 1 is described as in section 8, Tp. 5, range 30 N., W. M., "commencing at corner stake No. 1 at the south boundary line of the right of way of the O. R. & N. Co., thence," etc. The other two claims are described by reference to No. 1. The notices were duly recorded in the records of Umatilla county, Or.

Plaintiffs also allege the performance of assessment work each year on each claim, as required by law, and the conveyance by the Knights to plaintiff Loney of an undivided one-third interest in the claims. It is further alleged that the claims are valuable for the mineral they contain, viz., large deposits of building sand and placer deposits of gold. It also appears that, under the provisions of certain acts of Congress, passed in the years 1864 and 1870, a patent was issued by the United States to the Northern Pacific Railway Company, dated March 19, 1908, for the N. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$, and the N. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$, section 8, Tp. 5 N., R. 30 E., W. M., as a lieu land selection, and on May 15, 1908, the railway company conveyed the same to defendant; that about one-half of placer claim No. 2, and about two-thirds of claim No. 3 are situated upon the 80 acres

above described. Defendant relies upon the United States patent to the railway company and his deed from the railway company as evidencing his title, and further contends that plaintiff could not make a valid location of the mining claim while the land was withdrawn from entry; also, that sand is not such a mineral as can be the subject of a mining location; that, conceding all that plaintiffs claim, they have no standing in equity, for the reason that defendant's patent cannot be attacked by them, unless they have a right to the title from the United States.

Defendant Joseph Scott on June 8, 1907, made the nonmineral affidavit, required under the United States statute, upon the application of the railway company for the land, in which he says: "That there is not, within the limits of said land, any known vein or lode of quartz or other rock in place bearing gold, silver, * * *; that there is not, within the limits of said land, any known deposit of coal, or any known placer deposit, oil, or other valuable mineral; * * * that no portion of said land is claimed for mining purposes under the local customs or rules of miners or otherwise, except that part of said land is claimed under placer filings, which said filings do not state what minerals said lands contain; that said land is essentially nonmineral in character, unless sand suitable to be used in building constitutes a mineral." The railway company made its application to the United States Land Office for the land on June 12, 1907, being the first day on which such application could be made after the land was restored to entry.

The defendant brought an action against plaintiffs for the possession of the land, and they filed this complaint as a cross-bill in such action, in which they ask that the law action be permanently stayed, and that the legal title which defendant has to that portion of the premises embraced in the mining claims be decreed to be held by him in trust for plaintiffs herein. Decree was rendered for plaintiffs, and defendant appeals.

C. C. Gose and C. H. Carter, for appellant. S. A. Lowell and G. W. Phelps, for respondents.

EAKIN, J. (after stating the facts as above). There are several important questions involved in determining plaintiff's right to relief in this suit. First: It is contended by defendant that plaintiffs could not make a valid location upon land withdrawn from settlement. Withdrawals for forest reserves expressly reserve to the prospector all mineral deposits for mining exploration and location; but withdrawals made by the Secretary of the Interior, under the act of June 17, 1902, c. 1093, 32 Stat. 388 (U. S. Comp. St. Supp. 1909, p. 597), providing for irrigation projects, if made under the first form,

that is, for "irrigation works," are not subject to mining locations, as they are intended, as permanent reservations for governmental use, and amount to a legislative withdrawal. *Frisbie v. Whitney*, 9 Wall. 187, 19 L. Ed. 668; *Yosemite Valley Case*, 15 Wall. 77, 21 L. Ed. 82; *Shepley et al. v. Cowan et al.*, 91 U. S. 330, 338, 23 L. Ed. 424. While lands withdrawn under the second form, viz., for irrigation purposes under such project, are disposed of thereunder only for homesteads, and all lands open to homestead settlement are also open to exploration and location for mineral deposits. 35 Land Dec. Dep. Int. 216; *Albert M. Crafts*, 36 Land Dec. Dep. Int. 138. The language of section 3 of the act under consideration, relating to withdrawals under the first form, provides that the Secretary of the Interior "shall restore to public entry any of the lands so withdrawn when in his judgment such lands are not required for the purposes of this act." There were withdrawn, under this provision, for irrigation works, about 183 sections, which may be reasonably presumed to be far in excess of what may be required for that purpose, and portions thereof, including the land above described, were, in fact, soon thereafter restored to the public domain, while plaintiffs were in possession of the placer claims. It appears that the Interior Department, under a former statute, providing for withdrawals for irrigation projects, which provides that the reservoir shall be restricted to and contain only so much land as is actually necessary for its construction, held that a mineral entry, based on a location made after withdrawal of the land for a reservoir site, conferred no right, but may be suspended, and, if subsequently restored to entry, the location may proceed to patent. See, also, *Prescott & Arizona Central Ry. Co.*, 13 Land Dec. Dep. Int. 47; *Newton F. Austin*, 18 Land Dec. Dep. Int. 4; *Noonan v. Caledonia Min. Co.*, 121 U. S. 393, 7 Sup. Ct. 911, 30 L. Ed. 1061. But we do not deem it necessary to determine that question as, under the view we take of the case, the possession by plaintiffs of the ground as mining claims, at the time of the application by the railway company for a patent therefor, is sufficient to defeat its action for possession. The rule is, that a patent to government land transfers to the patentee all veins, lodes, or other minerals, within its boundaries, unless such mineral deposits were known to exist at the time of the issuance of the patent, in which latter case the known mineral deposits do not pass by the patent. *Reynolds v. Iron Silver Mining Co.*, 116 U. S. 687, 6 Sup. Ct. 601, 29 L. Ed. 774; *Davis' Adm'r v. Weibbold*, 139 U. S. 507, 11 Sup. Ct. 628, 35 L. Ed. 238; *Kansas City Mining & Milling Co. v. Clay*, 3 Ariz. 326, 29 Pac. 9; *State of Colorado*, 6 Land Dec. Dep. Int. 412; *Abraham L. Miner*, 9 Land Dec. Dep. Int. 408; *Virginia Lode*, 7 Land Dec. Dep. Int. 459.

In *Reynolds v. Iron Silver Mining Co.*, a case in which a patent had issued for a placer mine upon which there was a quartz ledge, known at the time to the patentee, it is said, that the title to the quartz mine remained in the United States and no title passed to the patentee. "He takes his surface land and his placer mine, and such lodes or veins of mineral matter within it as were unknown, but to such as were known to exist he gets by that patent no right whatever. The title remaining in his grantor, the United States, to this vein, the existence of which was known, he has no such interest in it as authorizes him to disturb any one else in the peaceable possession and mining of that vein. When it is once shown that the vein was known to exist at the time he acquired title to the placer, it is shown that he acquired no title or interest in that vein by his patent. Whether the defendant has title, or is a mere trespasser, it is certain that he is in possession, and that is a sufficient defense against one who has no title at all and never had any." The same language is used in *Davis' Adm'r v. Weibbold*, 139 U. S. 516, 11 Sup. Ct. 628, 35 L. Ed. 238, where it is held that the patent does not pass the title to known mineral land.

In the case before us it is conceded that, if building sand is mineral, within the meaning of section 2329 of the U. S. Rev. St. (U. S. Comp. St. 1901, p. 1432), the railway company and defendant knew, at the time the patent was applied for, that the land contained mineral. This is shown by the non-mineral affidavit of Scott, quoted above, expressly referring to the fact that part of the ground is claimed under placer filings, and, therefore, the title to the mineral ground did not pass by the patent, and defendant Scott has no standing to maintain ejectment against plaintiffs.

The question arises whether building sand is a mineral, within the mineral laws of the United States. The language of section 2329 is: "Claims usually called 'placers,' including all forms of deposits, excepting veins of quartz, or other rock in place, shall be subject to entry." Plaintiffs' proof tends to show that building sand is a valuable mineral, viz., worth 50 cents per cubic yard, and is marketable in large quantities. George Otis Smith, the director of the United States Geological Survey, in volume 2 of his Report of the Mineral Resources of the United States, for 1907, at page 563, by a tabulated statement shows that more than \$5,000,000 worth of building sand had been produced in the United States in 1906, and as great a value in 1907.

In *Northern Pac. Ry. Co. v. Soderberg*, 188 U. S. 526, 534, 23 Sup. Ct. 365, 368 (47 L. Ed. 575), the court, in discussing whether granite comes within the term, "mineral deposit," say: "The words, 'valuable mineral deposits' (as used in section 2319, U. S. Rev. St. [U. S. Comp. St. 1901, p. 1424]) should be

construed as including all lands chiefly valuable for other than agricultural purposes, and particularly as including nonmetallic substances [naming a list, and continuing]. We do not deem it necessary to attempt an exact definition of the word 'mineral lands' as used in the act of July 2, 1864 [Act June 2, 1864, c. 217, 13 Stat. 365]. With our present light upon the subject it might be difficult to do so. * * * Indeed, we are of the opinion that this legislation consists with, rather than opposes, the overwhelming weight of authority to the effect that mineral lands include, not merely metalliferous lands, but all such as are chiefly valuable for their deposits of a mineral character, which are useful in the arts or valuable for purposes of manufacture." This definition seems broad enough to include building sand, and we are of the opinion that land more valuable for the building sand it contains than for agriculture is subject to placer location, and is mineral within the meaning of the United States mining statutes.

The decree of the lower court, however, in addition to restraining defendant from prosecuting the law action, adjudges "that the legal title which the defendant herein has to said portion of said premises embraced within the said three mining claims is held by the defendant in trust for the plaintiffs herein." This evidently is intended to be an adjudication that plaintiffs have established a right to the title to the claims, but they have not shown themselves entitled to this relief.

If a patent to land to which one is entitled, has been improperly issued by the United States to another, the state courts will quiet the title of the former or adjudge the other a trustee of the title for him. *Wardwell v. Paige*, 9 Or. 517; *Bohall v. Dilla*, 114 U. S. 47, 5 Sup. Ct. 782, 29 L. Ed. 61; *Hartman v. Warren*, 76 Fed. 157, 22 C. C. A. 30; *Baldwin v. Keith*, 13 Okl. 624, 75 Pac. 1124; *Graham v. Great Falls, W. P. & T. Co.*, 30 Mont. 393, 76 Pac. 808; *Sparks v. Pierce*, 115 U. S. 408, 6 Sup. Ct. 102, 29 L. Ed. 428. But to entitle one to a decree, adjudging another who holds under a patent from the United States to be a trustee for the former, he must show that he, himself, is entitled to it, or show that, by the law properly administered, the title should have been awarded to him. See the cases cited last above.

The result of these conclusions is, that the lands included in the placer claims are mineral and subject to location as such; that defendant and his grantor knew of its mineral character at the time the patent was applied for; that they acquired no title thereto, but the title remained in the United States; that, at the time the action of ejectment was commenced by defendant, plaintiffs were in possession of the placer claims, working the same as a mine and seeking to acquire title thereto as such from the United

States; that defendant, having no title thereto, cannot maintain an action of ejectment therefor, against plaintiffs, who are rightfully in possession thereof. *Morrison v. Stalnaker*, 104 U. S. 213, 26 L. Ed. 741; *Johnson v. Drew*, 34 Fla. 130, 15 South. 780, 43 Am. St. Rep. 172, 173; that equity will enjoin the action; and that plaintiffs, having failed to allege or prove that they are entitled to a patent from the government, cannot have defendant adjudged a trustee of the title for them, even if the title were in him.

The decree of the lower court will, therefore, be modified, and the defendant enjoined from prosecuting the action at law. Neither party shall recover costs.

(158 Cal. 638)

HALL v. BARTLETT et al. (L. A. 2,113.)
(Supreme Court of California. Nov. 25, 1910.
Rehearing Denied Dec. 22, 1910.)

1. DEEDS (§ 38*) — EVIDENCE (§ 451*) — DESCRIPTION — UNCERTAINTY.

A deed, which on its face contains two inconsistent descriptions, either of which will identify a different piece of property, discloses a patent ambiguity which, as a general rule, cannot be removed by parol evidence, and the deed is void for uncertainty.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 65-79; Dec. Dig. § 38;* *Evidence*, Cent. Dig. §§ 2085-2092; Dec. Dig. § 451.*]

2. DEEDS (§ 111*) — DESCRIPTION — UNCERTAINTY.

Whether the description in a deed is uncertain must be determined from a construction of the entire deed, and the construction to be put on it must be reasonable, as required by Civ. Code, § 3542, and, as required by section 3541, such an interpretation must be indulged in as will give effect to the deed rather than defeat it.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 309-315; Dec. Dig. § 111.*]

3. DEEDS (§ 42*) — DESCRIPTION — UNCERTAINTY.

Where, from the description in a deed, taking into consideration all its calls, it is possible by rejecting calls which are apparently false to ascertain its application to a particular tract as embraced within the description, the false call will be rejected and the deed sustained, as required by Code Civ. Proc. § 2077, subd. 1, declaring that where there are certain definite and ascertained particulars in the description, the addition of others which are indefinite does not frustrate the conveyance, which must be construed by the first-mentioned particulars.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 85-87; Dec. Dig. § 42.*]

4. DEEDS (§ 38*) — DESCRIPTION — SUFFICIENCY.

A deed described the land as lot 10, of block V of the Mott tract, "the same being the lot on the corner of First street on the east side of F. street, being 65 feet front by 165 feet deep." A map of the Mott tract showed lot 10 of block V, as a lot fronting 60 feet on F. street with a depth of 165 feet, and as located 60 feet from First street, and lot 9 of the same dimensions lying between it and First street, and fronting on F. street. *Held*, that the quoted words did not render the description uncertain as inconsistent with the other description, for the word

"on" in the quoted description might be construed as equivalent to "near to" or "at," as simply denoting proximity.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 65-79; Dec. Dig. § 38.*]

For other definitions, see *Words and Phrases*, vol. 6, pp. 4960-4966; vol. 8, p. 7737.]

5. DEEDS (§ 38*) — DESCRIPTION — SUFFICIENCY.

A deed described the land as lot 10 of block V of the Mott tract, the same being the lot on the corner of First street on the east side of F. street, being 65 feet front by 165 feet deep, "and a two-story frame house situate thereon." A map of the Mott tract showed lot 10 of block V and lot 9 lying between it and First street, both fronting on F. street. A two-story frame house was situated on lot 10. *Held*, that the deed was not void for uncertainty, but the description applied only to lot 10, since the reference to the house as situated on the lot was a part of the description and made it certain, there being no lot other than lot 10 to which it could possibly apply.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 65-79; Dec. Dig. § 38.*]

6. DEEDS (§ 38*) — DESCRIPTION — SUFFICIENCY.

Where a deed calls for a part of a larger tract of land, and there is no identification of the part intended to be conveyed by measurement or quantity, and nothing further in the deed by which the part may be identified, there is an uncertainty vitiating the deed.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 65-79; Dec. Dig. § 38.*]

7. DEEDS (§ 114*) — DESCRIPTION — SUFFICIENCY.

A deed which called for all of a certain lot, being a part of lot 10 of block V of a tract, and being 65 feet front by 165 feet deep, sufficiently described the tract, and embraced the entire lot according to its boundaries on the map of the tract disclosing a lot of the dimensions specified in the deed.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 316-322, 326-329; Dec. Dig. § 114.*]

Beatty, C. J., and Sloss and Angellotti, JJ., dissenting.

In Bank. Appeal from Superior Court, Los Angeles County; Walter Bordwell, Judge.

Action by H. E. Hall against Cornelius Bartlett and others. From a judgment for defendants, plaintiff appeals. Reversed.

George H. Moore, for appellant. Lucius M. Fall, for respondents.

LORIGAN, J. This is an action in ejectment in which judgment went for defendants, and plaintiff appeals therefrom on a bill of exceptions. The complaint alleged ownership in the plaintiff, and right of possession to "all that certain lot and parcel of land situate in the city of Los Angeles, county of Los Angeles, and state of California, and described as follows, to wit: Lot ten (10) of block 'V' of the Mott tract as per map of said tract recorded in book 14, page 7, miscellaneous records of said county, excepting therefrom any portion thereof included in Figueroa street, formerly Pearl street, as indicated upon a plat of block 'V' of the said Mott tract recorded in book 53, page 21, mis-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

cellaneous records of said Los Angeles county." The answer denied title or right of possession in plaintiff, and set up that defendants were tenants of one E. R. Fox, whom they allege was the owner of the property and entitled to its possession.

On the trial plaintiff in support of his title introduced a judgment roll in an action entitled William M. Peckham et al. v. E. R. Fox in the superior court of Los Angeles county, in which plaintiff was awarded a money judgment and a decree foreclosing a lien (its nature does not appear) on certain real property in the city of Los Angeles described in the judgment, which property was directed to be sold. The property so ordered to be sold was described as situated in the city of Los Angeles and described as follows: "Being part of lot ten of block 'V' of the Mott tract, the same being the lot on the corner of First street on the east side of Figueroa street, being sixty-five feet front by one hundred and sixty-five feet deep and a two-story frame house situate thereon." The return of the sheriff to an order of sale issued pursuant to the decree showed that the property as described in the judgment was sold to plaintiff. Two deeds made by the sheriff to the plaintiff as purchaser at the sale were also offered by counsel for plaintiff, but at this stage simply for the purposes of identification. In them the property sold was described as "all that certain lot, piece or parcel of land situate, lying and being in the city of Los Angeles, county of Los Angeles and state of California, and bounded and particularly described as follows, to wit:" (here follows the identical description contained in the judgment and heretofore quoted therefrom). The second deed was made simply to correct an error in the execution and acknowledgment of the first.

In aid of the deeds plaintiff then introduced in evidence both the map and plat referred to in his description of the property as set forth in his complaint. The map of the Mott tract showed a lot 10 of block V of that tract to be a lot fronting 60 feet on Grasshopper (now Figueroa street) with a depth of 165 feet, and being located 60 feet from First street; and a lot 9 of the same dimensions lying between it and First street and fronting on Figueroa and First streets. The plat of block V of said tract (referred to in the complaint as recorded in book 53, page 21) does not identify either of said lots 9 or 10, but shows the two lots nearest the corner of Pearl (now Figueroa) and First streets, fronting on Pearl street, to be each 60 feet wide and 163.28 feet deep. This offer of the plat and map was supplemented by testimony showing that there were no other plats, or maps of the Mott tract recorded in the office of the county recorder of Los Angeles county; that the name of Grasshopper street had been changed to Pearl, and this in turn to Figueroa, and plaintiff himself testified that there was no two-story frame house on

the lot at the corner of First and Figueroa, but that there was such a house on lot 10 of block "V" of the Mott tract; that is, on the lot next to the corner. After this proof plaintiff then offered in evidence the second deed executed by the sheriff (corrective of the first) and which had theretofore been marked for identification only, to which the defendants objected on the ground that the description in the sheriff's deed offered varied from the description in the complaint, and for the additional reason that the description in it was so uncertain that it did not describe any property, and the property could not be identified thereby. The trial court sustained these objections to the deed, and rendered judgment in favor of the defendant. The question in this appeal is as to the correctness of the ruling of the court in this respect.

The first objection urged to the introduction of the deed and sustained by the court, namely, that there was a variance between the description therein and that in the complaint, need be given no particular consideration. If the other and more serious ground of objection to the deed, namely, that it was void for uncertainty in its description, was erroneously sustained by the trial court, it is clear that the complaint and the rejected deed described the same property, though in a different form. So that the controlling point on this appeal is whether the rejected sheriff's deed was or was not void for uncertainty.

It is undoubtedly true that where a deed on its face contains two inconsistent descriptions, either of which would identify a different piece of property from that described by the other, there is disclosed a patent ambiguity which, as a general rule, parol evidence is not admissible to remove, and the instrument is void for uncertainty. *Brandon v. Leddy*, 67 Cal. 43, 7 Pac. 33; *Cadwalder v. Nash*, 73 Cal. 43, 14 Pac. 385. But whether the description is uncertain or not is to be determined from an inspection of the entire deed, and in considering it the construction to be put upon it must not only be a reasonable one (Civ. Code, § 3542) but such an interpretation must be indulged in as will give effect to the deed rather than defeat it. Civ. Code, § 3541. If from the description in the deed, taking into consideration all its calls, it is possible by rejecting calls which are apparently false to ascertain its application to a particular tract of land as embraced within the description, the false call will be rejected and the deed sustained. *Reed v. Spicer*, 27 Cal. 58; *Irving v. Cunningham*, 66 Cal. 16, 4 Pac. 706; 1 *Green. on Ev.* (15th Ed.) 301; 2 *Devlin on Deeds*, § 1016. In this respect and as declaring the rule for construing the descriptive parts of a conveyance of real property where the construction is doubtful, and there are no other sufficient circumstances for identifying it, the Code of Civil Procedure expressly provides in section

2077, subd. 1, that "where there are certain definite and ascertained particulars in the description, the addition of others which are indefinite, unknown or false, does not frustrate the conveyance, and it is to be construed by the first-mentioned particular."

Now to come to a consideration of the description in the deed in question. It refers to the Mott tract, and when we examine the plat of that tract we find lots 9 and 10 designated thereon. A portion of the description in the deed refers to the property as "part of lot 10 of block V in the Mott tract, the same being the lot on the corner of First street on the east side of Figueroa." It is this portion of the deed which it is claimed shows two inconsistent descriptions—a specific reference by number to lot 10, and also a description which embraces lot 9, because while the latter lot is not expressly mentioned, it is the one which answers the general call for a lot at the "corner of First street on the east side of Figueroa." Taking, however, this portion of the description as we find it, if there were nothing else in the deed, it does not necessarily follow that there was a patent ambiguity in the description. There being a definite reference to lot 10 of block V of the Mott tract, the words of further reference to the lot conveyed as "the same being the lot on the corner of First street on the east side of Figueroa," would not necessarily be construed as inflexibly locative, and hence a distinctively inconsistent description when compared with the special reference to lot 10. The word "on" in the description may be construed as the equivalent of "near to" or "at," as simply denoting contiguity, neighborhood or proximity. Be that as it may, however, and conceding that if the description above quoted constituted the entire description of the property in the deed, it would fall within the rule of *Brandon v. Leddy* and similar cases, and be void for uncertainty, still it is quite clear that when the whole description of the deed is considered that the call for a lot on the corner of First and Figueroa streets (which is what the second call in this particular description really amounts to) is really a false call, and should be rejected. That this is true needs no particular elaboration. Conceding that the description applied equally to lot 10 of block V of the Mott tract, and to block 9 thereof, as being on the corner of First and Figueroa streets, and, if this were all the description, it would be void for uncertainty, it is apparent that this uncertainty is removed, and the description attaches to lot 10 when we consider the additional terms of description of the lot intended to be conveyed as embraced within the terms "and the two-story house situated thereon." It is the lot, whether it be lot 10 or the lot on the corner of First and Figueroa streets (lot 9), with a two-story house situated thereon which was being conveyed. The evidence shows that a two-story house was situated

on lot 10 and that there was no house situated on the lot on the corner of First and Figueroa streets of the Mott tract—lot 9. In fact, it was shown that there was no lot on any of the corners of First and Figueroa streets which might by any possibility be embraced within the description in the deed upon which any house, two story or otherwise, was located. There was no lot which might by any construction be embraced within the calls and upon which any house was constructed except lot 10, and it was upon this lot that the house stood. There can be no question that this reference to the house as situated on the lot conveyed was a part of the description. *Burnham v. Stone*, 101 Cal. 164-170, 35 Pac. 627; *Chapman v. Zoberlein*, 152 Cal. 216, 92 Pac. 188. Counsel does not contend to the contrary, and this being true it would appear that the call for a lot on the corner of First and Figueroa streets when considered in connection with the entire description in the deed must be regarded as a false call. It may be said in this connection that if taking into consideration the reference to a two-story house as being situated on the lot conveyed, it does not apply to lot 10, there is no other lot to which it could possibly apply.

It is insisted, further, by respondent that the description is indefinite and uncertain because it calls for a "part of lot 10" without describing or designating what part. Of course, where a deed calls for a part of a larger tract of land, and there is no identification of the part intended to be conveyed by measurement or quantity, and nothing further in the deed by which the part may be identified, there is an uncertainty which vitiates the conveyance. But this is not the case here. The deed calls for "all that certain lot * * * being part of lot 10 of Block 'V' of the Mott tract * * * being sixty-five feet front by one hundred and sixty-five feet deep." Having determined from the description taken as a whole that the land which was intended to be conveyed was lot 10 of block V of the Mott tract, as distinguished from any other lot, it further appears that the dimensions of that lot intended to be conveyed were 65 feet front by 165 feet deep. While it is true that the deed opens the description by a call for a part of the lot, it designates the part as "being sixty-five feet front by one hundred and sixty-five feet deep." The measurement calls are sufficient to include all of lot 10, which appears to have a frontage of 60 feet by 165 feet deep, as delineated upon the map of the Mott tract. While the call for a "part of the lot" would have of itself been an indefinite call, still as it is followed by a reference to measurements which are sufficient to describe and embrace the entire tract according to the map referred to, under familiar rules of construction the indefinite description must give way to the definite one, and if the latter is sufficient to embrace the entire lot according

to its boundaries on the map it must control and be given effect; and that it is there can be no question.

This is all the consideration we feel necessary to give to this subject.

We are satisfied that under the proofs made the court should have admitted the sheriff's deed to plaintiff in evidence.

The judgment appealed from is reversed.

We concur: SHAW, J.; MELVIN, J.; HENSHAW, J.

We dissent: BEATTY, C. J.; SLOSS, J.; ANGELLOTTI, J.

BEATTY, C. J. I dissent. It is perhaps not very material, but it does sufficiently appear from the record that the demanded premises were sold to the plaintiff in execution of a decree foreclosing a mechanic's lien. The material point is that it was a sale under execution, a transaction in which the policy of the law and the rights of the judgment debtor require that nothing shall be done or omitted by the execution creditor or contrary to law which will have a tendency to prevent competition in the bidding. The law, among other things, requires a definite description of the property to be sold, and I can conceive of no more fatal defect of description than the offer for sale of a part of a lot without describing the part. Here there was no such description. The dimensions, 65 by 165 feet, contained in the description refer by proper grammatical construction to the lot—the whole lot—an undefined portion of which was to be sold, and this construction is corroborated by the fact that they include the whole lot and five feet of frontage more than the whole. In a voluntary sale upon terms satisfactory to the vendor a description as vague and ambiguous as this might justly be aided by a liberal and benevolent construction in favor of the vendee, but an execution sale requires the application of a stricter rule. *Cadwalder v. Nash*, 73 Cal. 48, 14 Pac. 385. "It is of the utmost importance that land to be sold at execution sale should be so definitely described as to inform the public what particular tract will be offered to purchasers, and each bidder what land he will get if his should be the best offer at the sale. Otherwise bidding would be discouraged instead of promoted, and the right of the defendant sacrificed. To find out what land is to be sold, purchasers look to the proceedings by virtue of which the sale is to take place, which are, in the present case, the levy, the judgment, and the order of sale. If from these an intended purchaser would be left in hopeless uncertainty as to where and what the land is, he will be deterred from buying, at least for anything like a reasonable price." *Pfeiffer v. Lindsay*, 66 Tex. 123, 1 S. W. 264.

It is a significant circumstance that the valuable house and lot here in question was purchased at the execution sale for five dollars.

(158 Cal. 632)

POLK v. SLEEPER. (S. F. 5,278.)

(Supreme Court of California. Nov. 22, 1910.)

1. PUBLIC LANDS (§ 144*)—STATE LANDS—RIGHTS OF PURCHASERS.

One who has merely filed an application to purchase state land, but who has not procured the approval thereof nor a certificate of purchase, and who has not paid any part of the price, has acquired only a personal right which does not survive him, and, on his death, his estate had no interest therein, and neither his administrator nor any person interested in his estate has any right to the land by virtue of the application.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 391-399; Dec. Dig. § 144.*]

2. CONSTITUTIONAL LAW (§ 93*) — VESTED RIGHTS—APPLICATION TO PURCHASE STATE LANDS.

One who has merely filed an application to purchase state land, and who has not procured the approval thereof, nor a certificate of purchase, and who has not paid any part of the price, has no such vested right as will prevent termination by the state of the opportunity to purchase by a repeal of the statute providing for a sale of the land.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 183; Dec. Dig. § 93.*]

3. PUBLIC LANDS (§ 144*)—RIGHTS OF PURCHASERS—STATUTES.

Under Pol. Code, §§ 3515, 3523, providing that certificates of purchase and the rights acquired thereunder are subject to sale, and declaring that, where a patent for lands is issued in the name of a decedent, the title vests in his heirs, an applicant for the purchase of state land who procures the approval of his application and a certificate of purchase, and who has paid a part of the price, acquires an interest in the land which is the subject of sale, and which survives his death, so that a patent can be issued in due course.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 391-399; Dec. Dig. § 144.*]

4. PUBLIC LANDS (§ 144*)—APPLICATION FOR PURCHASE—CONTESTS.

In an action to determine a contest for the purchase of state swamp land, originating in the state land office, and referred by the Surveyor General under Pol. Code, § 3414 et seq., to the superior court for adjudication, the contestant, failing to make out a case in favor of his own application, may have an adjudication as to the validity of defendant's claim, with the result that, if the defendant is also found to be without right, a decree shall be given that neither party is entitled to purchase, but the legal representative of an applicant who died before the approval of his application and the issuance of a certificate of purchase, and the payment of any part of the price, has no such interest in the land as will entitle him to an adjudication of the right of another applicant for the purchase of the same land.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 391-399; Dec. Dig. § 144.*]

5. PUBLIC LANDS (§ 144*)—APPLICATION FOR PURCHASE—CONTESTS.

Pol. Code, § 3414, authorizing a contest before the Surveyor General concerning the approval of a survey or location of state land, or

a certificate of purchase, etc., does not authorize the initiation of a contest by one who does not himself seek to purchase the land, or who has no interest in the land which he may protect in some action, but the contest authorized is one solely for the protection of some right of the party contesting which is entitled to protection.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 391-399; Dec. Dig. § 144.*]

6. PUBLIC LANDS (§ 144*)—APPLICATION FOR PURCHASE—CONTESTS.

Under Pol. Code, § 3414, authorizing contests before the Surveyor General concerning the approval of a survey or location of state land, or certificate of purchase, and providing for the transfer of the contest to the superior court, and section 3415, as amended in 1907 (St. 1907, c. 300), authorizing any person legally qualified to purchase public land to intervene in the action after the transfer thereof, the only questions involved in the action are those affecting the relative rights of the parties thereto, and the only person who can intervene is one legally qualified to purchase from the state, who, after the order of transfer, presents his own application of purchase, and a cause of action by an applicant who has merely filed his application to purchase, but who has not procured the approval thereof, nor a certificate of purchase, and who has not paid any part of the price, terminates on his death, and his personal representative may not prosecute the action, notwithstanding Code Civ. Proc. § 385, providing that an action does not abate by the death of a party where the cause of action survives.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 391-399; Dec. Dig. § 144.*]

In Bank. Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Action by Thomas W. Polk, prosecuted after his death by Robert T. Polk, as administrator, against Moreau Sleeper, prosecuted after his death against Ed. Sleeper, as administrator. From a judgment for defendant, plaintiff appeals. Affirmed.

Crawford & Crawford and Mannon & Mannon, for appellant. Herbert V. Keeling, for respondent.

ANGELOTTI, J. This is an appeal from a judgment that plaintiff take nothing, that the action be dismissed, and that defendant have and recover his costs taxed at \$2.25, in an action to determine a contest for the purchase from the state of certain swamp and overflowed land in Lake county, originating in the state land office between Thomas W. Polk and Moreau Sleeper, and referred by the Surveyor General on June 2, 1886, under section 3414 et seq., Pol. Code, to the superior court of said county for adjudication. The judgment was entered on sustaining a demurrer to plaintiff's fourth amended complaint. From the original complaint, which is brought up as a part of the judgment roll, it appears that this action was instituted by the contestant, Thomas W. Polk, by the filing of such complaint within 60 days after the order of reference, viz., on July 10, 1886. The fourth amended complaint was not filed until the 9th day of January, 1908. The demurrer having been

interposed, the action was transferred to the superior court of Mendocino county on account of the disqualification of the judge of Lake county, and on November 23, 1908, this demurrer was sustained, and the judgment appealed from thereupon entered.

Among other grounds of demurrer was that of want of facts to constitute a cause of action and want of legal capacity on the part of plaintiff's administrator to sue.

From the allegations of the fourth amended complaint it appears that this action has outlived both of the original parties. It is alleged that contestant, Thomas W. Polk, died on November 13, 1899, and that Moreau Sleeper died on December 15, 1889. The complaint shows that on November 18, 1885, the register of the state land office issued to said Moreau Sleeper a certificate of purchase for said land based upon an application therefor made by him on December 3, 1868, but it is stated that the same was illegally issued; the facts upon which the claim of illegality is based being alleged. The contestant presented his own application to purchase the said land on May 29, 1886, and this was followed by the order of reference of June 2, 1886. Because of Sleeper's prior application and certificate of purchase contestant's application was never approved. It is claimed that all of his rights in the matter abated with his death, and that consequently the fourth amended complaint states no cause of action, and shows the administrator to be without legal capacity to maintain the contest.

The claim of defendant's attorney that all rights of Thomas W. Polk to purchase this land under his application abated with his death and did not descend to his heirs, if he had any, or to the administrator of his estate, is not disputed by counsel for plaintiff. This claim appears to us to be well based. The effect of our statutes is that the right of one who has merely filed an application to purchase state land and whose application has never been approved and who has received no certificate of purchase or paid any part of the purchase price is purely a personal right, which does not survive him. The authorities in this state are clear upon the proposition that an applicant so situated has no such vested right as will prevent a termination by the state of the opportunity to purchase by a repeal of the law providing for a sale of the land. These authorities are fully discussed and the same conclusion reached in the case of *Messenger v. Kingsbury* (S. F. No. 5,252, decided November 21, 1910) 112 Pac. 65. We think it is clear that an applicant so situated has nothing more than a purely personal right to himself proceed with the purchase so long as the state does not change its laws relating to the sale of the land. It was held in *Cadlerque v. Duran*, 49 Cal. 356, that "a party who has

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

only filed an application to purchase has acquired no right which he can transfer to another." The same conclusion was reached in *People v. Blake*, 84 Cal. 611, 22 Pac. 1142, 24 Pac. 313, and these cases are approvingly cited in *Anderson v. Yonkum*, 94 Cal. 227, 29 Pac. 500, 23 Am. St. Rep. 121. A distinction has been made by this court between such cases and a case where the application has been approved and a portion of the purchase money paid and the applicant holds a certificate of location (*Stanway v. Rubio*, 51 Cal. 41), and also a case where the purchaser has received a certificate of purchase. *Wholey v. Cavanaugh*, 88 Cal. 132, 25 Pac. 1112. As to the latter class of cases there can be no question, of course, in view of the statutory provision that "certificates of purchase, and all rights acquired thereunder, are subject to sale, by deed or assignment," etc. Pol. Code, § 3515. And undoubtedly where an applicant has proceeded so far as to obtain an interest in the land that is capable of transfer his interest will survive his death, and a patent can be issued in due course. See section 3523, Pol. Code. But, as to the applicant whose application has not been approved and who has paid nothing, the effect of the decisions is that there is no such interest in the land as constitutes property capable of transfer. Our statutes relating to the sale of public lands make no provision the effect of which would be to enable any one to succeed to the right of an applicant so situated in the event of his death, as has been done by the United States in regard to pre-emption and homestead claims. The decisions as to pre-emption claims are to the effect that, in the absence of such a statute on the subject, the privilege given by the government would lapse with the death of the applicant so situated and the land be open to entry by any one, and that, where such a statute exists, the title subsequently acquired from the government comes to the persons taking it not through the applicant, but directly from the government by virtue of the privilege of purchase expressly given by the statute. It is also held that in such a case the land is not subject to devise by the pre-emptor, and cannot be sold in satisfaction of his debts or for the expenses of administration. See *Elliott v. Figg*, 39 Cal. 117; *Wittenbrock v. Wheadon*, 128 Cal. 150, 60 Pac. 664, 79 Am. St. Rep. 32. The same is well settled as to homestead claims. See 32 Cyc. 834. As said before, our statutes make no provision whatever for such cases. The situation here is exactly the same as it would be in regard to a pre-emption claimant from the United States similarly circumstanced, in the absence of any statutory provision for succession to the rights of the claimant. Thomas W. Polk at the time of his death had at most merely a purely personal privilege to purchase this land, which lapsed with his death, leaving the land so far as his applica-

tion was concerned open for acquirement by any other qualified purchaser. His estate could have no interest therein, and neither his administrator nor any person interested in his estate has any right in regard to this land by virtue of anything done by him.

As we have suggested, these conclusions are not disputed by counsel for appellant, but it is claimed that, the action having been originally commenced by the contestant under the order of reference made by the Surveyor General, it may be continued by the administrator of his estate for the sole purpose of protecting the state by obtaining an adjudication as to the validity of the certificate of purchase held by the original defendant. This claim is based, we suppose, upon the doctrine established by the decisions that in an action of this character it is the right of the contestant, notwithstanding he fails to make out a case in favor of his own application, to have an adjudication as to the validity of the defendant's claim, with the result that, if the defendant be also found to be without right, a decree shall be given that neither plaintiff nor defendant is entitled to purchase. See *Perri v. Beaumont*, 91 Cal. 30, 27 Pac. 534. The decisions in regard to this proposition may be based solely on the fact that the contestant, although he does not show himself entitled under his pending application, may nevertheless be aggrieved by the failure of the court to also adjudge the defendant's application void. For instance, in *Perri v. Beaumont*, supra, where *Perri*, the original contestant, was appealing from a judgment similar to the one here involved, it was said: "It cannot be said that the plaintiff is not aggrieved by the failure of the court to decide this part of the controversy, and adjudge defendant's application void. The plaintiff is an actual settler on the land, and has valuable improvements thereon. In addition to this, he is possessed of all the personal qualifications which would entitle him to purchase if the land were surveyed, and it is alleged that he desires to purchase it. It is clear, therefore, that he has an interest in preventing defendant from acquiring the legal title from the state." Of course, in view of what we have heretofore said, none of this can be true as to the deceased or his legal representative, who is the only existing claimant. It is settled by *Dollenmayer v. Pryor*, 150 Cal. 1, 87 Pac. 616, that the provisions of section 3414, Pol. Code, providing for the initiation of a contest before the Surveyor General and the reference of that contest to the superior court of the county in which the land is situated for determination, do not authorize the initiation of such a contest by one who does not himself seek to purchase the land or who has no interest in the land which he would be entitled to protect in some action or proceeding. In that case an order of reference made by the Surveyor General upon the protest of

Pryor, "who had neither possession, interest, nor claim," was held to be absolutely void and insufficient as a basis for any proceeding in the superior court. It was said that "a mere sentimental interest, or a general interest as a citizen in the protection of state property, * * * or even the particular interest which a qualified person, privileged to purchase state lands and expecting at some future time to apply for the particular tract in question, but who is not a settler thereon, might have in preventing or delaying a prior applicant, would not be a sufficient interest to authorize such a contest." The contest thus authorized is one solely for the protection of some right of the party contesting which is entitled to protection. It is this contest between contestant and contestee which may be initiated and referred under section 3414, Pol. Code, and it is this contest alone that is referred to in the succeeding sections (3415 to 3417). The only parties concerned in the action are the parties who properly become parties to the contest in the Surveyor General's office and whose rights have been referred by that officer to the courts for adjudication, and prior to the amendment of section 3416, Pol. Code, in 1907, no other person could intervene in the action commenced under said reference. This was definitely settled in *Youle v. Thomas*, 146 Cal. 537, 80 Pac. 714, and reaffirmed in *Youle v. Thomas*, 150 Cal. 676, 91 Pac. 584. The amendment of 1907 authorizes such an intervention only by one legally qualified to purchase from the state public lands of the same character, who, after the order of reference, presents his own application to purchase the land or a portion thereof, to the Surveyor General. The only questions involved in the action are those affecting the relative rights of the parties thereto. The state is in no sense a party to the action. Where all possible rights of the contestant and those claiming under him in regard to the land lapse by reason of his death, it would appear to necessarily follow that the particular contest referred must end, in the absence of the intervention, under section 3415, Pol. Code, as amended in 1907 (St. 1907, c. 300), of some person who had applied to the Surveyor General to purchase the land or a portion thereof. The contestant's cause of action does not survive him, and section 385, Code Civ. Proc., providing that "an action or proceeding does not abate by the death of a party * * * if the cause of action survive or continue," and providing for the substitution of the representative of the deceased, has no application. In the absence of statutory provision for its continuance, the action abated with the contestant's death. The question we have discussed does not appear to have been suggested upon the former appeal in this case (*Polk v. Sleeper*,

143 Cal. 70, 76 Pac. 819), and there is nothing in the opinion then filed that can be construed as purporting to decide it. In fact, all that is said therein as to the nature of the action and the rules applicable thereto is in line with the views we have discussed.

From what we have said it follows that, in view of the facts made known to the trial court by the fourth amended complaint, the judgment that the action be dismissed was correct. No point is made here as to the correctness of the judgment in so far as it awards respondent \$2.25 costs against appellant, and we have not considered that question and express no opinion thereon.

The judgment appealed from is affirmed.

We concur: SHAW, J.; LORIGAN, J.; MELVIN, J.; SLOSS, J.; HENSHAW, J.

(158 Cal. 626)

**SAN JOAQUIN & KINGS RIVER CANAL
& IRRIGATION CO. v. FRESNO
FLUME & IRRIGATION CO.**

MILLER & LUX v. FRESNO FLUME & IRRIGATION CO. (S. F. 4,922 and 4,923.)

(Supreme Court of California. Nov. 22, 1910.
Rehearing Denied Dec. 22, 1910.)

1. WATERS AND WATER COURSES (§ 53*)—RIPARIAN RIGHTS—DAMS.

A lower riparian owner must show some damage in order to restrain an upper owner from the beneficial use of the water, so that an upper riparian owner may dam the waters of a stream for the purpose of floating logs therein, if such use did not interfere with the water rights of the lower owner.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 45; Dec. Dig. § 53.*]

2. COMMON LAW (§ 14*)—OPERATION—CHANGE OF COMMON-LAW RULE.

If a rule of common law is unfitted to the changed conditions existing in this state, so that its application will work hardship, the Supreme Court will not follow it.

[Ed. Note.—For other cases, see *Common Law*, Cent. Dig. § 3; Dec. Dig. § 14.*]

3. WATERS AND WATER COURSES (§ 116*)—RIPARIAN RIGHTS.

The impounding and distribution of flood and storm waters is not prohibited by law, but rather encouraged, where it does not substantially damage the existing riparian rights of others.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. § 116.*]

In Bank. Appeals from Superior Court, Fresno County; H. Z. Austin, Judge.

Actions by the San Joaquin & Kings River Canal & Irrigation Company and by Miller & Lux, against the Fresno Flume & Irrigation Company. From judgments for defendant in each case, and orders denying motions for a new trial, plaintiffs appeal. Affirmed.

Houghton & Houghton, Frank H. Short, and Edward F. Treadwell, for appellants. L. L. Cory and Goodfellow & Eells, for respondent.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

HENSHAW, J. These appeals present the same questions, and may, therefore, be considered and decided together. Stevenson creek is a small stream tributary to the San Joaquin river. In dry seasons of the year its waters do not reach the latter. In its course through the mountains it flows into, through, and out of a flat tract of land—"a mountain meadow"—about 85 miles distant from plaintiffs' lands. Defendant constructed a dam across the cañon at the lower end of this mountain meadow impounding the rain, storm and flood waters of the adjacent hills, and converting the mountain meadow into a lake. Into this lake it brought timber from its forests, and out of this lake for several miles down the channel of Stevenson creek it conducted a V flume, and by the waters of the lake carried its timber down the V flume out of the watershed of the creek to its mills and factories below. Defendant has expended for these purposes exceeding \$500,000. Plaintiffs Miller & Lux are riparian proprietors of the San Joaquin river, and plaintiff San Joaquin & Kings River Canal & Irrigation Company is an appropriator of water therefrom. Their actions are to the same end—to enjoin the maintenance of defendant's dam and its alleged interference with and diminution of the natural flow of Stevenson creek. The trial court found, in brief, that the dam and operations of defendant did not diminish the flow of Stevenson creek to the San Joaquin river and did not interfere with any of plaintiffs' rights. It found that in a state of nature the flow of Stevenson creek into the mountain meadow was largely absorbed by the lands of that meadow so that comparatively little of the entering water flowed out. It found that by reason of the complete saturation and filling of this mountain meadow and the conversion of it into a lake more water actually flowed down Stevenson creek below the dam than had previously done so. This water came, first, from the overflow of the dam; second, from its leakage; and, third, from the leakage of the V flume by which the water was carried for some miles down the channel of Stevenson creek. Under these findings the relief asked by plaintiffs was denied, and they appeal. Upon appeal they contend (1) that the maintenance of the dam and works in the bed of Stevenson creek constitutes a nuisance which should have been enjoined regardless of any question of the injury to plaintiffs, and regardless of the question whether or not the dam and works did or did not perceptibly diminish the flow of Stevenson creek or of the San Joaquin river. They contend (2) that the findings show positive injury to plaintiffs' right entitling them to the relief sought.

Plaintiffs construe such cases as *Gould v. Eaton*, 117 Cal. 539, 49 Pac. 577, 38 L. R. A. 181, *Barneich v. Mercy*, 136 Cal. 205, 68 Pac. 589, and *Miller & Lux v. Madera Canal & Irrigation Co.*, 155 Cal. 61, 99 Pac. 502, 22

L. R. A. (N. S.) 391, as establishing the proposition that the riparian owner is entitled to the unobstructed flow of a stream at all times, including flood periods following the annual fall of rains and the melting of snow in the region about the head of the stream, and that, without regard to the damage itself, it is the right of every riparian proprietor to have the water come to his land through its natural channel undiminished in quantity and unimpaired in quality, save to the extent that results from a reasonable use of the water by other riparian owners upon the stream; that, as a necessary corollary to this doctrine the riparian owner is entitled to have the stream flow in its natural channel, and has a right to object to any change in the channel, or to any artificial work of any kind which tends to retard the flow or spread the stream over more surface, or to change its channel. For this reliance is placed, in addition to the cases above cited, on *Wood on Nuisances*, p. 348; *Ferrea v. Knipe*, 28 Cal. 340, 87 Am. Dec. 128; *Lux v. Hagglin*, 69 Cal. 255, 4 Pac. 919, 10 Pac. 674; *Bliss v. Johnson*, 76 Cal. 597, 16 Pac. 542, 18 Pac. 785. But the cases do not support the position which appellants take. Even if at common law or under the civil law it was a part of the usufructuary right of the riparian owner to have the water flow by for no purpose other than to afford him pleasure in its prospect, such is not the rule of decision in this state. The lower claimant must show damage to justify a court of equity in restraining an upper claimant from his beneficial use of the water. The fair apportionment and economic use of the waters of this state are of the utmost importance to its development and well-being. The problems presented never came within the purview of the common law. They have been of necessity, therefore, and must continue to be solved by this court as cases of first impression, and, as in the past, so in the future, if a rule of decision at common law shall be found unfitted to the radically changed conditions existing in this state, so that its application will work wrong and hardship rather than betterment and good, this court will refuse to approve and follow the doctrine.

It will be found, therefore, that the decisions of this state not only do not deny the right to the use of storm and flood waters, but encourage the impounding and distribution of those waters wherever it may be done without substantial damage to the existing rights of others. Thus, it is said in *Modoc L. & L. S. Co. v. Booth*, 102 Cal. 156, 36 Pac. 432: "In a state like this, where irrigation is greatly needed, and where large areas of land are comparatively worthless unless artificially irrigated, it is difficult to lay down a rule as to riparian rights which will be applicable to and cover all cases. It seems clear, however, that in no case should a riparian owner be permitted to demand, as of right, the intervention of a court of

equity to restrain all persons who are not riparian owners from diverting any water from the stream at points above him, simply because he wishes to see the stream flow by or through his land undiminished and unobstructed. In other words, a riparian owner ought not to be permitted to invoke the power of a court of equity to restrain the diversion of water above him by a nonriparian owner, when the amount diverted would not be used by him, and would cause no loss or injury to him or his land, present or prospective, but would greatly benefit the party diverting it. If this be not so, it would follow, for example, that an owner of land bordering on the Sacramento river in Yolo county could demand an injunction restraining the diversion of any water from that river for use in irrigating nonriparian lands in Glenn or Colusa county, and yet no one, probably, would expect such an injunction, if asked for, to be granted, or, if granted, to be sustained." In *Fifield v. Spring Valley Water Works*, 130 Cal. 552, 62 Pac. 1054, it was sought to enjoin defendant from arresting and diverting the waters of San Mateo creek. The court decreed that defendant should permit at all times all the ordinary flow of the creek to go down to plaintiff's lands, but that he could take and divert "the storm or freshet or flood waters that may flow in or into San Mateo creek above said lands during times of extraordinary high water or freshet in said creek or stream." The court further found that this diversion would not damage plaintiff's lands in any way nor interfere with his rights in the premises or with rights appurtenant to his lands. This court held that under these findings, which were supported, the plaintiff was not injured, and was not entitled to an injunction restraining the diversion of such storm or flood waters. In *Miller v. Bay Cities Water Co.*, 107 Pac. 115, 27 L. R. A. (N. S.) 772, the principle is clearly recognized and declared that an appropriator of water may divert for use to any point beyond the watershed any portion of the waters of the stream which serves no useful purpose either to the riparian owners, or in supplying the underground stratum, or such waters as are in excess of the quantity necessary for such purpose. In *Miller & Lux v. Madera Canal Co.*, 155 Cal. 61, 99 Pac. 502, 22 L. R. A. (N. S.) 391, this court treated the questions presented under the findings of the trial court. The contention of defendant was that it was diverting or proposed to divert extraordinary flood or storm waters without injury to plaintiff. The findings of the court were that the rise in the river level and the flooding of plaintiff's lands occurred in all ordinary years, and so constituted a part of the regular and annual and usual flow of the river; that these waters were valuable to the lands of plaintiff, because they both irrigated them and deposited upon them valuable sediment.

"Upon this showing," says this court, "it cannot be said that a flow of water occurring as these waters are shown to occur constitutes an extraordinary and unusual flow. In fact, their occurrence is usual and ordinary." And, further, it is said that our cases "decide that an injunction restraining the diversion of storm or flood waters will not be granted at the instance of a riparian owner, when it appears that he will not be injured in any way by such diversion." If the doctrine announced in *Gould v. Eaton*, supra, may be thought to confer upon a riparian proprietor greater rights than these, namely, the right to have all the water of the stream at all times flow past his land, without regard to the question as to whether or not any diminution of the flow does or could injure him, then it must be said that the doctrine of *Gould v. Eaton* is to this extent modified by the later decisions. Of course, the riparian proprietor's rights are not measured by the amount of water which he is actually using at the time of his action. In this sense the actual present damage ceases to be of great consequence, but its place is taken by the necessary and consequential damage which would follow to his land if the unauthorized act of the upper appropriator were allowed to ripen into prescriptive right. *Barneich v. Mercy*, supra, has no bearing upon this question, the court there deciding merely that a lower riparian proprietor may enjoin an upper riparian proprietor from maintaining a dam upon his land which entirely prevents the flow of the water of the stream to plaintiff's land and ditch. In *Byers v. Colonial Irr. Co.*, 134 Cal. 553, 66 Pac. 732, it is ruled that where the dam of the defendant is not found to be a nuisance in itself, but only a nuisance as used to interfere with plaintiffs' right, the trial court would not be justified in directing its total abatement or removal, but should limit its decree to modifying the use. Here, as has been said, the court finds upon sufficient evidence that the use of the dam actually increases, and certainly does not diminish, the waters of Stevenson creek, to the flow of which into the San Joaquin river plaintiffs are entitled. As riparian owner, which defendant is, it has the right, independent of these other considerations, to impound the waters of the stream for the purpose of floating logs. This is what it is doing, and this fact itself justifies the construction and maintenance of the dam, provided of course it be not so constructed and maintained as to interfere with plaintiffs' rights to the water of the stream. *Mentone Irr. Co. v. Redlands, etc., Co.*, 155 Cal. 323, 100 Pac. 1082, 22 L. R. A. (N. S.) 382. There is no such interference. The judgments and orders appealed from are therefore affirmed.

We concur: LORIGAN, J.; SHAW, J.; MELVIN, J.; ANGELLOTTI, J.; SLOSS, J.

(14 Cal. App. 377)

SISK v. CASWELL. (Civ. 735.)(Court of Appeal, Third District, California.
Oct. 22, 1910.)**1. WATERS AND WATER COURSES (§ 247*)—IRRIGATION DITCHES—SUIT TO QUIET TITLE—COMPLAINT—SUFFICIENCY.**

A complaint in an action to quiet title to an irrigation ditch, and to enjoin defendant, over whose land the ditch runs, from interfering with the exercise by plaintiff of his right to use the ditch, and for damages suffered by plaintiff from defendant's obstruction of the ditch, *held* sufficient as against a general demurrer.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. § 247.*]

2. WATERS AND WATER COURSES (§ 247*)—OBSTRUCTION OF IRRIGATION DITCH—COMPLAINT—PARTIES.

Where the complaint, in an action to quiet title to an irrigation ditch, and to enjoin interference therewith, and for damages for a wrongful interference, showed that the object of the suit was to prevent defendant from inflicting on plaintiff, irreparable injury, and to obtain compensation for damages already individually suffered by him from the acts of defendant, allegations of the complaint that plaintiff had conveyed to third persons tracts of land with a distinct agreement that the tracts were entitled to receive the benefits of irrigation by means of the ditch, and that defendant's obstruction of the ditch would subject plaintiff to litigation, did not require that the third persons be made parties, since such allegations merely disclosed the extent of the injury to plaintiff through the conduct of defendant, and plaintiff could obtain equitable relief and compensation for the damages suffered by him.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. § 247.*]

3. WATERS AND WATER COURSES (§ 247*)—IRRIGATION DITCHES—RESERVATIONS.

In a suit to quiet title to an irrigation ditch running on land conveyed by plaintiff to defendant and carrying water for the benefit of other land of plaintiff, evidence *held* to justify a finding that the reservation of the right of plaintiff in the irrigation ditch, was incorporated in the deed pursuant to agreement between the parties and was binding on defendant.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. § 247.*]

4. APPEAL AND ERROR (§ 1011*)—REVIEW—VERDICT—CONCLUSIVENESS.

A finding on conflicting evidence will not be disturbed on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3983; Dec. Dig. § 1011.*]

5. DEEDS (§ 94*)—CONSTRUCTION—MERGER OF PREVIOUS CONTRACT—RESERVATIONS.

That a contract for the sale of real estate called for a conveyance free from all incumbrances, without stipulating for a reservation in favor of the vendor, has but little bearing on the issue whether the vendor was entitled to a reservation, and the deed containing a reservation must be deemed the sole guide for measuring the rights of the parties thereunder, since all prior negotiations are merged in the deed.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. § 266; Dec. Dig. § 94.*]

6. VENDOR AND PURCHASER (§ 134*)—CONTRACTS—CONSTRUCTION—"INCUMBRANCES."

A contract for the sale of real estate, free from all incumbrances, ordinarily refers to incumbrances defined by Civ. Code, § 1114, de-

claring that the term "incumbrances," includes taxes, assessments, and liens, and a purchaser intending to make the term include an incumbrance affecting only the physical condition of the property, must have the agreement so declare.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Dec. Dig. § 134.*]

For other definitions, see *Words and Phrases*, vol. 4, pp. 3519-3527.]

7. VENDOR AND PURCHASER (§ 135*)—CONTRACTS—CONSTRUCTION—"INCUMBRANCES"—PHYSICAL CONDITION OF PROPERTY.

Where there is a physical burden on real estate which is visible, the presumption, in the absence of an express agreement, is that the burden is not an incumbrance, within a covenant against incumbrances.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 255-258; Dec. Dig. § 135.*]

8. VENDOR AND PURCHASER (§ 135*)—CONTRACTS—CONSTRUCTION—INCUMBRANCES—PHYSICAL CONDITION OF PROPERTY.

Where, at the time of the execution of a contract for the sale and purchase of real estate and the payment of a part of the price, a drainage ditch existed on the land, sufficient to run water through it, and it appeared that the value of the land retained by the vendor and his grantees rested largely on the fact that they could be given the benefit of the irrigation by an extension of the ditch on the land, the law would presume, in the absence of an express agreement to the contrary, that the ditch was not an incumbrance, within the contract against incumbrances, and a deed reserving irrigation rights in the ditch merely complied with the contract.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 255-258; Dec. Dig. § 135.*]

9. DEEDS (§ 69*)—CONTENTS—VALIDITY—MISTAKE.

A party may not plead ignorance of the covenants of a deed executed to him after it has been accepted and recorded, as a ground for defeating the force and effect of such covenants, in the absence of any fraud practiced by the grantor preventing the grantee from familiarizing himself with the deed.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. § 161; Dec. Dig. § 69.*]

10. DEEDS (§ 196*)—VALIDITY—PRESUMPTIONS.

The presumptions are in favor of the validity of a deed and its recitals.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. § 587; Dec. Dig. § 196.*]

11. DEEDS (§ 74*)—CONTENTS—PRESUMPTIONS.

A grantee in a deed, chargeable with constructive notice of the recitals therein, who remained indifferent as to its precise provisions for about two years after it was filed for record, may not defeat its covenants on the ground that he did not know the provisions thereof, and relied on the contract of sale and on the supposition that the deed corresponded therewith.

[Ed. Note.—For other cases, see *Deeds*, Dec. Dig. § 74.*]

Appeal from Superior Court, Stanislaus County; L. W. Fulkert, Judge.

Action by William H. Sisk against Thomas Caswell. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Maddux & Maddux, for appellant. P. H. Griffin, for respondent.

HART, J. This controversy arises over an alleged claim of right by plaintiff to the use, for the purpose of irrigation, of water carried through a certain irrigating ditch running through and upon the land of the defendant. The purpose of the suit is to quiet plaintiff's title to and interest in said ditch, to enjoin defendant from interfering with or obstructing the exercise of his right to use the same, and for damages alleged to have been suffered by plaintiff for defendant's wrongful obstruction thereof. The plaintiff obtained judgment as prayed for, and from said judgment and the order denying him a new trial the defendant has appealed.

It appears from the allegations of the complaint that, on the 2d day of April, 1904, the plaintiff was the owner in fee of a tract of land in Stanislaus county, described as the N. E. $\frac{1}{4}$ of section 18, the S. $\frac{1}{2}$ of said section 18, and, jointly with one W. F. Rose, of the N. E. $\frac{1}{4}$ of section 19, all said land being in township 4 S., R. 9 E., M. D. B. & M.; that on the 10th day of December, 1904, plaintiff sold and conveyed to defendant said N. E. $\frac{1}{4}$ of section 18, "reserving, as provided in said conveyance, 'the right to use the ditch now constructed on said premises to run water to other lands of plaintiff in the neighborhood, or to join onto said ditch and to extend the same for the same purpose,' which said right and interest in said land and ditch was, and was so stated in said conveyance, to extend to the heirs and assigns of plaintiff for any lands owned by him or which he had sold in the neighborhood which could be conveniently irrigated therefrom, and plaintiff ever since has been and now is the owner of and entitled to the rights and interest in said land so reserved, except that plaintiff had, on the said 2d day of April, 1904, * * * and on the 29th day of April, 1905, * * * and on the 9th day of May, 1905," sold and conveyed to a number of other parties (named in the complaint), respectively, certain parts, in separate and distinct tracts, of the described land remaining to him after the said sale and conveyance to the defendant. The said water ditch is described as being 10 feet wide on the bottom and 4 feet deep; that the beginning of the center line of said ditch was at a point a fraction over 24 feet west of the northeast corner of said section 18, and, by certain meanderings, ran to a point 455 feet west of the "east boundary of said section." The complaint further declares that "at all times herein mentioned all the lands herein described were within the Turlock irrigation district and entitled to receive therefrom their proportion of the water provided thereby under the laws pertaining thereto for irrigation purposes, and all of said lands were and are in the neighborhood of the land conveyed to defendant as aforesaid and of said water

ditch and could be conveniently irrigated therefrom, and said ditch was constructed for the purpose of such irrigation, and but for the acts of defendant herein alleged would have received such water, all of which was well known to defendant."

It is charged that the defendant has wrongfully destroyed "the northerly 522.4 feet of said ditch, to plaintiff's damage in the sum of \$75, the cost of reconstruction thereof," and that defendant has prevented plaintiff "from entering upon, and from having and using said ditch and making necessary repairs and improvements thereon, so as to use the same for irrigation of lands which he would have irrigated but for such acts of defendant, to plaintiff's damage in the further sum of \$500," and it is further alleged that such damage will continue in a much greater sum each year that plaintiff is so prevented by defendant from having and using said ditch. It is alleged that defendant claims some estate or interest, adverse to plaintiff, "in said ditch and interest in the lands conveyed by plaintiff to defendant as aforesaid, which claim is without right," and that defendant denies plaintiff's right in said ditch, "and has slandered and will, if not restrained, continue to slander plaintiff's title as aforesaid."

Paragraph 8 of the complaint contains the following averments: "That the lands aforesaid are of great value for irrigation, and are of little value without such irrigation; that the acts of defendant, done and threatened as aforesaid, have prevented and will if not restrained continue to prevent the same from being irrigated, and will cause great and irreparable injury, the amount of which cannot be determined; that a portion of the considerations for the various sales and conveyances from plaintiff to the third persons as hereinbefore alleged was the rights and privileges appertaining to the respective tracts by reason of the facts aforesaid, and the said acts of defendant herein complained of have rendered, and will, if not restrained, continue to render plaintiff liable to damage and litigation on account thereof; that plaintiff desires and intends to, and will, if not prevented by the wrongful acts of defendant herein complained of, irrigate his said lands remaining unsold as aforesaid, and will sell portions thereof, but by reason of the said acts of defendant, plaintiff has been prevented, and unless the same are restrained, plaintiff will be prevented, from so irrigating said land or selling any part thereof, which works and will continue to work, if continued, great and irreparable injury to plaintiff, the amount of which cannot be determined."

A general and a special demurrer were interposed to the complaint and overruled by the court.

The special demurrer is based upon the grounds: 1. "That there is a misjoinder of parties plaintiff," the point here involved being that, as the complaint alleges that parts

of the land described in said pleading were conveyed by plaintiff to other parties, and as the plaintiff thus "asks relief as to those parties similar to the relief that he asks himself," said other parties should have been made parties plaintiff. 2. That several causes of action have been improperly united, in that "plaintiff has alleged that the damage will arise to all his assignees, and that their cause of action is the same as his and specifies the names of the assignees in his complaint, * * * and also asks that the use to the ditch be quieted as to the rights of the assignees mentioned." 3. That there is a "misjoinder of defendants," in that, if the assignees refused to appear as plaintiffs, they should have been made defendants, "for the reasons stated in" subdivision 1 of the grounds of the special demurrer as they are herein given. 4. That the complaint is ambiguous, unintelligible, and uncertain for the alleged reason that "it cannot be determined whether or not the amount of damages claimed in the complaint is for the individual damage to plaintiff and his land or is the damage to his lands and those of his assignees in the aggregate; that it cannot be ascertained whether it is an action to quiet title or a suit for damages."

The demurrers having been overruled by the court, the defendant filed an answer to the complaint and also a cross-complaint.

The answer specifically denies all the important averments of the complaint, and, as separate defenses, in substance, alleges: That plaintiff agreed, at the time of the execution of the said conveyance to defendant, to construct a canal and deliver water on the land so sold and conveyed to defendant from the water system of the Turlock irrigation district; that, in view of said agreement, defendant "prepared, checked up, and planted 43 acres of said land to alfalfa; that plaintiff failed to deliver any water on said land as agreed, and that on account of said failure "the defendant was unable to plant more than 43 acres, and the land planted failed to make another crop, to the damage of defendant in the sum of \$250"; that plaintiff, since the sale of said land to defendant, "has gone upon said land without the consent of the defendant and dug up said land and attempted to construct a canal across said land and otherwise interfere with the possession of the defendant, in all to his damage in the sum of \$500."

The sum of the cross-complaint is that defendant bought the land from plaintiff on the 29th day of March, 1904; that on that day defendant delivered to plaintiff his check for \$200 as a payment thereon; that, on the 8th day of June, 1904, the plaintiff and the defendant entered into a written contract, by the terms of which the plaintiff agreed to sell to defendant and the defendant agreed to buy, for the sum of \$9,925.55, the land affected by this controversy; that the terms of payment as thus agreed upon were as fol-

lows: "\$200 heretofore paid, \$5,804.36 paid this day (including accrued interest), and the balance * * * \$4,000, on the delivery of conveyance and title to said property as hereinafter provided," etc.; that on the execution of said contract defendant paid to plaintiff the sum of \$5,804.36; that the deed to said property was, as to the terms thereof, to correspond with said contract—that is, that the plaintiff would execute and deliver to defendant a good and sufficient deed, conveying said land "free and clear of all incumbrances made, done, or suffered by said first parties"; that on the 10th day of December, 1904, said first parties executed a deed to defendant, conveying said land; that said deed was drawn by one George Perley, and delivered to the Stanislaus Abstract Company, by which company or its officers it was filed for record with the county recorder; that, without the knowledge and against the consent of defendant, the following reservation was incorporated in said deed, viz.: "Save and except therefrom the east twenty feet of the said north-east quarter of section 18, reserved for road purposes. The parties of the first part also reserve the right to use the ditch now constructed on said premises to run over the lands of the parties of the first part in the neighborhood, or to join onto said ditch and extend the same for the same purpose, such right to use said ditch to extend to the heirs or assigns of the parties hereto of the first part for any lands owned by them or which they or either of them have sold in the neighborhood, which can be conveniently irrigated therefrom." The cross-complaint declares that defendant was not present when said deed was prepared, executed, or delivered; that "said abstract company, nor any one else had any authority from defendant to accept any deed containing either or both of the aforesaid reservations"; that "at the time of the preparing of said deed plaintiff had in his possession a duplicate of the aforesaid agreement of June 8, 1904; that knowingly and fraudulently, and in fraud of the rights of defendant, plaintiff had said deed prepared and signed and acknowledged, and knew at all of said times that said reservations could not be a part of said deed."

The prayer of said cross-complaint is that plaintiff "take nothing by this action," and that the said deed be reformed by striking therefrom the reservations aforesaid, and for the sum of \$750 damages, etc. Plaintiff answered the cross-complaint, denying each material allegation thereof and reaffirming the vital averments of the complaint.

1. We see nothing erroneous in the court's order overruling the demurrers. It is not seriously urged that there are not sufficient facts stated in the complaint to entitle plaintiff to the relief asked for, and there can be no doubt that the general demurrer was properly overruled. Nor did the court err in its order overruling the special demurrer.

It may first be suggested that the ground that there is a "misjoinder" of parties plaintiff or parties defendant is, strictly speaking, inaccurate here. Obviously, if the complaint is faulty as to parties, it is because there is a defect or "nonjoinder" of parties, and not a misjoinder. But there would be even then no tenable reason for criticism of the complaint. The object of the suit, as very clearly appears from the averments of the complaint, is to prevent the defendant from inflicting upon plaintiff irreparable injury and to obtain compensation for damages already individually suffered by him from the alleged acts of the defendant. The averments with respect to the sale by plaintiff to the other parties named in the complaint of certain parts of his lands, and that the parts so conveyed were, in common with his own, entitled to the privilege of using the ditch for the purposes of irrigation, were, manifestly, inserted for no other purpose than to disclose the extent of the injury which would be suffered by plaintiff through the conduct of defendant in preventing the plaintiff and his grantees from using said ditch—that is, that the injury so inflicted would be irreparable. The complaint, as we have seen, declares that plaintiff had conveyed to said other parties certain tracts of land with a distinct agreement upon his part with said parties that the tracts thus conveyed were entitled to and would receive the benefit of irrigation by means of said ditch, and that defendant's obstruction of plaintiff's right to use the water carried by said ditch for the lands so conveyed will, by reason of said agreement, subject the latter to litigation and consequent expense and damage, in addition to the injury which he will sustain by being deprived, through the said acts of the defendant, of the privilege of thus irrigating his own land. There is, in other words, absolutely nothing in the averments which calls for any relief for the grantees of plaintiff. They are, therefore, neither necessary nor even proper parties.

The foregoing also disposes of the claim made under the third and fifth grounds of the special demurrer. It is very clear from the complaint that the plaintiff seeks damages for alleged injuries individually sustained by him, and does not claim the right to or ask for damages which the lands of his grantees have sustained through the alleged conduct of the defendant. The reference in the complaint to damage to the lands of his said grantees is, as before stated, for the sole purpose of showing, as an element of damages which he has himself sustained by reason of his promise to said grantees, at the time he executed the conveyances to them, that they should and would be entitled to the use of said ditch, to what extent, and in what way or manner he has sustained damage.

2. All the findings of the court—some in a general way and others specifically—are

assailed as being without sufficient support. Some of these assignments we shall specially notice. But it may be said generally that all the averments of the complaint essential to a statement of a cause of action are sustained by the proofs. The charge that the defendant prevented and threatens to continue to prevent the plaintiff and his grantees from using said ditch is amply supported. The plaintiff testified that when he went upon defendant's land for the purpose of extending the ditch so that he and his grantees could use the same, the defendant ordered him away and refused to allow him to proceed; that defendant covered up the ditch and in other ways obstructed plaintiff's use of the canal.

But the most important contention is that the evidence does not justify and support the finding that the plaintiff had the right or was authorized, under his agreement with defendant, to insert in the deed executed by him to said defendant the clause providing for the reservation referred to. The decision of this controversy, in our opinion, could well rest alone on the determination of this question, as it in reality, aside from the question of the alleged injury and threatened injury, involves the vital point in the case. But it will not be improper to consider other questions which are discussed in the brief.

The decree of the court limits its operation to the ditch, making no reference to the reservation so far as it relates to the roadway. The respondent does not complain of the judgment in any respect, and, therefore, that feature of the reservation pertaining to the road is not before us.

The second part of the reservation reserves, as before noted, to the plaintiff and to "his heirs and assigns" the right to use the ditch for the purpose of running water over their lands, and to extend said ditch for such purpose.

The undisputed evidence shows that, on the 29th day of March, 1904, the defendant entered into negotiations with the plaintiff, as the owner of the N. E. $\frac{1}{4}$ of section 18, Tp. 4 S., R. 9 E., and plaintiff and said William F. Rose, as the owners of the E. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of said section 18, for the purchase of the lands so described; that on said day the defendant gave to plaintiff his check for the sum of \$200, on the back of which was the following indorsement: "This check is to apply on payment of N. E. $\frac{1}{4}$ and E. $\frac{1}{2}$ of N. W. $\frac{1}{4}$ of section 18, township 4 S., range 9 Mt. Diablo base and meridian. \$42.50 for first description and \$40 on last named above, when abstract is examined, and charge interest on full amount of purchase money not before 30 days after this date. W. H. Sisk." On the 8th day of June, 1904, said W. F. Rose and plaintiff, as owners of said lands, and the defendant, entered into and executed the written agreement, already referred to, for the sale by the first

parties and the purchase by the defendant of said lands.

There is, in connection with this point, considerable discussion in the briefs of the proposition whether the transaction of March 24, 1904, in which the check mentioned was given by defendant to plaintiff, amounted to an agreement of sale or merely an option, tendered to defendant, to purchase the lands. The court found, in harmony with the theory of plaintiff on the proposition, that the transaction involved an option and not an agreement to sell and buy. We cannot see what material difference it would make, so far as it would affect the right of plaintiff to insert the reservation in the deed, whether the transaction amounted to a contract of sale or only an option. But counsel for appellant declares that if the sale was effected on "December 10th the plaintiff should recover," but that if it took place on "March 29th or June 8th, the defendant should recover." We are unable to perceive in the circumstance, on whatsoever date it might have occurred, any such importance or any particular probative significance. Indeed, if the circumstance ever possessed any weight in its bearing upon the principal question in this case, viz.: Whether the reservation was included in the deed fraudulently and in violation of the agreement of sale between the parties, its importance in that regard, like that of any other circumstance which was offered at the trial in support of the main issue, has been lost, so far as this court is concerned, in the fact that there is disclosed by the record before us ample evidence to support the finding, which in effect declares that the reservation was incorporated in the deed upon an agreement between the parties to the instrument and with the consent of the defendant. Indeed, if all of plaintiff's testimony was credited by the trial court, it justified a direct and unqualified finding that the reservation was inserted in the deed upon an express agreement of the parties.

The plaintiff testified that, on the occasion of the delivery of the check to him by defendant, a conversation occurred between them concerning the conditions of the sale and the covenants of the deed, wherein defendant "consented to have the reservation for the ditch and the road—the ditch that was then constructed on the land." "The deed," continued plaintiff, "was prepared in accordance with the understanding at that time. There was nothing in the deed, as far as I understood it, different from what was understood before the deed was drawn." Mr. W. F. Rose, to some extent, corroborated the testimony of plaintiff on this point.

The defendant, it is true, denied that there was any understanding that the reservation should be inserted in the deed, and declared that he knew nothing of said reservation until long after the deed had been recorded and shortly before the institution of this action. But the testimony introduced by de-

fendant on this point only presents a substantial conflict in the evidence, and, of course, this court cannot settle the issue of veracity between the parties.

It is contended, however, that the deed, with respect to the reservation, is obviously at variance with the terms of the written agreement of sale, in that said agreement not only made no provision for said reservation, but that therein, as before noted, the plaintiff agreed to execute and deliver to the defendant, upon the payment of the consideration, "a good and sufficient deed, conveying said land, *free and clear from all incumbrances, made, done or suffered by the said first parties.*" There is absolutely nothing in this point, and we are of opinion that it presents a question which can have little bearing on the determination here of the principal point in this case. All the prior negotiations and agreements of the parties relative to the sale and purchase of the lands involved here were, of course, merged in the deed of conveyance, and the deed itself must, as we shall presently see, be the sole guide for measuring and determining the rights of the parties thereunder. But the point is given considerable attention by counsel, and we shall therefore examine it to some extent. The argument is that, by the language of the agreement which we have italicized, the plaintiff agreed to convey the land to defendant free from all burdens of whatsoever kind or character, whether they be such as would affect the title or those which would affect only the physical condition of the property, as, for illustration, public roads or rights of way. We think that it is reasonably certain that the "incumbrances" referred to and contemplated by the agreement are of that class only that are defined by section 1114 of the Civil Code, viz.: "Taxes, assessments, and liens." See section 1180, Code Civ. Proc., and section 2872, Civ. Code, for definition of a "lien." If the vendee intended to include all incumbrances of the two general kinds, he should have taken the pains to have explicitly so declared in the agreement, and no doubt would have done so had that been his intention.

In *Memmert v. McKeen*, 112 Pa. 320, 4 Atl. 544, it is said: "Incumbrances are of two kinds, viz.: 1. Such as affect the title. 2. Those which affect only the physical condition of the property. A mortgage or other lien is a fair illustration of the former; a public road or right of way, of the latter. Where incumbrances of the former class exist, the covenant referred to, under all the authorities, is broken the instant it is made, and it is of no importance that the grantee had notice of them when he took the title. *Cathcart v. Bowman*, 5 Pa. 317; *Funk v. Vonelda*, 11 Serg. & R. [Pa.] 109 [14 Am. Dec. 617]. Such incumbrances are usually of a temporary character and capable of removal; the very object of the covenant is to protect the vendee against them; hence, knowl-

edge, actual or constructive, of their existence, is no answer to an action for breach of such covenant. Where, however, there is a servitude imposed upon the land which is visible to the eye, and which affects not title, but the physical condition of the property, a different rule prevails. Thus it was held in *Patterson v. Arthurs*, 9 Watts [Pa.] 152, that where the owner had covenanted to convey certain lots free from all incumbrances, a public road, which occupied a portion of such lots, was not an incumbrance within the meaning of the covenant." See *Kutz v. McCune*, 22 Wis. 628, 99 Am. Dec. 85; *Haldane v. Sweet*, 55 Mich. 199, 200, 20 N. W. 902; *Harwood v. Benton & Jones*, 32 Vt. 724; *Scribner v. Holmes*, 16 Ind. 142; *Burk v. Hill*, 48 Ind. 52, 17 Am. Rep. 731; *Smith v. Hughes*, 50 Wis. 620, 7 N. W. 653.

Speaking of that class of incumbrances that affect only the physical condition of the property, Brewster, in his work on Conveyancing, § 203, says: "In cases where there is a physical burden of this sort, which is visible, there is a fair and reasonable presumption, in the absence of an express agreement, that both parties act with reference to this plain, existing burden, and that the vendor on the one hand demands, and the vendee on the other pays, only the fair value of the land as visibly incumbered. Therefore, it is said such burdens, by way of open and notorious easements, are not really incumbrances within the meaning of this covenant, because the real subject-matter of the dealings between the grantor and the grantee is the land, subject to visible easements."

There is evidence in the record to the effect that, at the time of the check transaction, the ditch on the lands conveyed to defendant, while not fully completed, was "entirely V'd out"; that the defendant, at the time the deed was written and delivered to the abstract company for him, had seen said ditch. Plaintiff testified: "It was a ditch. I think it would have run water through it if run into the upper end." It further appears that the value of the lands owned by plaintiff and his grantees rested largely upon the fact that they could be given the benefit of irrigation by an extension of said ditch to said lands. Under all the authorities, the presumption is, therefore, there being no express agreement to the contrary, that the parties acted in this transaction, in so far, at least, as the ditch is concerned, "with reference to this plain, existing burden," and as so incumbered the land was purchased by defendant. The evidence not only utterly fails to overcome this presumption, but in fact confirms and strengthens it by proof abundantly sufficient to support the findings of the court in favor of said reservation, or, in other words, that the agreement of June 8, 1904, "was not, and was not intended by the parties, to be the full agreement of the parties, * * * and the reservation and agreement therein [the deed]

were not contrary to any agreement of the parties and was not in fraud of any right of the defendant," etc., and that plaintiff "had the right to include the reservation contained in the deed referred to in the pleadings herein in said deed," etc.

The foregoing observations virtually dispose of appellant's criticism of finding 10. The court therein found that the defendant "at all times had the means of knowledge of the contents of said deed, though he did not have the actual, personal knowledge thereof, till after its receipt and acceptance by him." The court elsewhere found that the reservation was included in said deed "with the implied knowledge and consent of defendant, but without his actual personal knowledge and consent," etc.

But it seems to us that there is another and conclusive answer to the defense interposed here, and that is, that a party will not be permitted to plead ignorance of the covenants of a deed executed to him, after it has been accepted and recorded, as a ground for defeating the force and effect of such covenants. The presumptions are always in favor of the validity of a deed and its recitals. It is not, of course, claimed that the plaintiff fraudulently or otherwise prevented the defendant from giving the deed personal inspection and thus fully familiarizing himself with its precise provisions and covenants before he accepted and recorded it. The deed, as has been seen, was delivered for the defendant to the Stanislaus Abstract Company, and was recorded by a Mr. Perley, president of said company, for the defendant. The defendant testified that he did not read the deed after it was written or before or after its recordation until a short time before the commencement of this action, and that he knew nothing, from a personal inspection of the instrument, of its contents; the claim being that he had supposed and had reason and right to rely upon the supposition that the contents of the deed corresponded with his interpretation of the terms of the written agreement as to incumbrances. He further denied that the abstract company or any other person had any right to cause to be recorded a deed containing the reservation objected to; but Perley testified that he recorded the deed for defendant, "and he paid me for it." This witness further testified: "While I don't know that Mr. Caswell knew the contents of the deed, he was present and had an opportunity."

It is, as declared, not only true that "the presumption is in favor of the validity of every grant issued in the forms prescribed by law, and that it is incumbent on him who controverts, to support his objections" (*Patterson v. Jenks et al.*, 2 Pet. 216, 7 L. Ed. 402; *Payne & Devey v. Treadwell*, 16 Cal. 228; *Latham v. City of Los Angeles*, 87 Cal. 518, 25 Pac. 673), but "every person is presumed to read the deed under which he holds, and a failure to read certain recitals

contained in the deed cannot avail him as a defense when it is sought to charge him with notice." *Devlin on Deeds*, § 1002; *Weisenberg v. Truman*, 58 Cal. 63; *Steez v. Kranz*, 32 Minn. 313, 20 N. W. 241; *Dargin v. Beeker*, 10 Iowa, 571; *Hamilton v. Nutt*, 34 Conn. 501.

It is said in the last of the cited cases: "Men of ordinary prudence will use all reasonable means to ascertain the state and condition of their own titles. Hence, we may lay it down as a rule, founded upon the experience of mankind, that one who has knowledge of the existence of a deed, to which he has access, and which affects the title to property in which he is interested, will, in equity, be presumed to have knowledge of the contents of the deed. * * * Under our recording system a deed duly recorded is constructive notice to all the world; and the law conclusively presumes that every person interested has knowledge not only of the deed, but of its precise language, where that is material. * * * If a man will, under certain circumstances, be presumed to have knowledge of the contents of the deed of another, how much more reasonable is it to presume that he has knowledge of the contents of his own deed." And it is said in *Wailles v. Cooper*, 24 Miss. 228, that "it is in consonance with reason, that if the title deeds under which a purchaser derives title recite an incumbrance, he will be bound by that recital, and presumed to have had notice of it, whether he has read it or not. For the law will not permit him to deny notice by insisting that he has not read the deed."

From the moment of the filing of the deed here for recordation, the defendant was charged with constructive notice of all its recitals, but, according to his own testimony, he remained supine and apparently indifferent as to its precise provisions from the time it was filed with the recorder—December 24, 1904—until about "a month or two" before the trial of this action, which was in January, 1906. It is therefore very clear that his want of personal knowledge of the precise contents of the deed, prior to its execution, delivery, acceptance, and recordation, if, in truth, he was without such knowledge, was entirely due to his own inexcusable negligence in not fully posting himself, beforehand, on the terms of an instrument to which he was about to bind himself. His excuse that he relied upon plaintiff's written agreement with him and supposed that the deed would correspond therewith is no excuse at all. He had no right, as we have shown, to rely for personal knowledge of the recitals of his deed upon his own interpretation of the scope of said agreement. If such an excuse were available as a defense against the recitals of a deed, many such instruments would rest on exceedingly frail

and insecure grounds and court calendars, as a consequence, would soon be congested with all manner of controversies arising out of the unmitigated ignorance of vendors and vendees as to exactly what covenants they intended should be included in the most solemn legal writings to which men may bind themselves—writings which the law, to avoid, as far as possible, future controversies in relation thereto, require and prescribe shall be executed under circumstances of the strictest circumspection, and the evidence thereof preserved in the most public and enduring form.

Other parts of the findings are challenged as not having sufficient support from the proofs, but to these assignments we have already, in effect, replied adversely to the contention of appellant. We have shown that the evidence sufficiently discloses that a ditch, constructed for irrigation purposes, was partly completed on the lands conveyed by plaintiff to defendant at the time of the conveyance. There is also enough support for the finding that "the lands mentioned in said complaint as conveyed to other parties could and can be conveniently irrigated from said ditch," and that "said lands and the land of plaintiff described in said complaint would have received water for such irrigation but for the acts of the defendant."

3. Some of the court's rulings on the evidence are objected to as erroneous and prejudicial. We have discovered no error in any of the challenged rulings, and see no reason for giving these assignments special consideration.

The judgment and order are affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

(14 Cal. App. 376)

In re JOHNSTON'S ESTATE. (Civ. 769.)
(Court of Appeal, Third District, California.
Oct. 22, 1910.)

APPEAL AND ERROR (§§ 786, 787*)—DISMISSAL—LACHES.

Where appellant was guilty of unwarranted laches in prosecuting an appeal and it appears that the appeal was taken for delay and has been abandoned, it will be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3128, 3129; Dec. Dig. §§ 786, 787.*]

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

In the matter of the Estate of William Johnston, deceased. From a decree of distribution, Josephine A. C. Johnston appeals. Appeal dismissed.

C. M. Beckwith, for appellant Josephine A. C. Johnston. White, Miller & McLaughlin, for respondent for estate.

BURNETT, J. A decree of distribution in the above-entitled estate was rendered in

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the superior court of Sacramento county on the 4th day of August, 1908. A notice of appeal therefrom was given October 3, 1908. A proposed bill of exceptions was filed September 14, 1908, and amendments thereto proposed by respondent, the administrator of said estate, and served upon appellant on the 13th day of October, 1908. No other step has been taken and no other proceeding had in the prosecution of said appeal. Appellant has manifestly been guilty of unwarranted laches and delay in the premises, and the conclusion is justified that the appeal was taken for delay, and that it has since been abandoned.

The motion to dismiss, based upon the foregoing and other grounds, is not contested. There was, indeed, no appearance by appellant at the hearing.

The appeal is dismissed.

We concur: CHIPMAN, P. J., HART, J.

(14 Cal. A. 349)

RIDEOUT v. NATIONAL HOMESTEAD ASS'N. (Civ. 802.)

(Court of Appeal, Second District, California. Oct. 18, 1910.)

1. EVIDENCE (§ 80*)—PRESUMPTIONS—FOREIGN LAWS.

In the absence of proof to the contrary, it will be presumed that the laws of Arizona are similar to those of this state.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 101; Dec. Dig. § 80.*]

2. CORPORATIONS (§ 281*)—OFFICERS—SELECTION.

The organizers of a corporation cannot select its officers; such being the duty of the board of directors.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1187; Dec. Dig. § 281.*]

3. CORPORATIONS (§ 448*)—RATIFICATION OF CONTRACT MADE BY ORGANIZERS—PRESUMPTION.

Since a person suing on an unauthorized contract must show actual ratification, or some affirmative act from which it may be inferred, ratification by a corporation of a contract made by its organizers will not be presumed, even where it has received benefits therefrom, unless it is shown that it had actual knowledge of the specific contract out of which the benefits arose.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1709, 1789-1792; Dec. Dig. § 448.*]

4. CORPORATIONS (§ 448*) — UNAUTHORIZED CONTRACT—ESTOPPEL.

A corporation will not be estopped to disaffirm an unauthorized contract of its organizers by receiving the benefits thereof, unless it had knowledge of the contract.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1709, 1789-1792; Dec. Dig. § 448.*]

5. CORPORATIONS (§ 407*)—PRESIDENT—POWER TO CONTRACT.

Where the minutes of the board of directors of a corporation authorized its president "to make any contract he saw fit, to employ whom he pleased," while such general authority could extend only to matters relating to the ordinary conduct of the corporate business, yet he could

authorize a person to sell corporate stock for which he should receive commissions, as the board could properly delegate such power to the president.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 407.*]

6. BROKERS (§ 43*)—CONTRACT AUTHORIZING SALE OF CORPORATE STOCK—NECESSITY OF WRITING.

A contract authorizing the sale of corporate stock, certain land to be given to purchasers as a bonus, is not within Civ. Code, § 1624, subd. 6, providing that an agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation or a commission, shall be invalid, unless made in writing, etc.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 44; Dec. Dig. § 43.*]

Appeal from Superior Court, Los Angeles County; George H. Hutton, Judge.

Action by E. G. Rideout against the National Homestead Association. Judgment for plaintiff, and defendant appeals. Affirmed upon condition that the plaintiff, within 30 days, file his written consent with the clerk of this court that a certain amount be deducted from the judgment; otherwise the judgment shall be reversed.

Edw. L. Payne, for appellant. L. R. Wharton and Louis W. Myers, for respondent.

ALLEN, P. J. Plaintiff sought to recover upon an alleged contract with defendant corporation through which he claimed \$389.50 on account of money paid out for the use and benefit of the corporation, and \$1,900, less a payment of \$525, on account of services rendered. The court found in favor of plaintiff for each of the amounts claimed; the judgment aggregating \$1,764.50. From the judgment and an order denying a new trial, defendant appeals upon a statement settled and allowed.

The record discloses that the defendant corporation was organized under the laws of Arizona April 10, 1908; that the first meeting of the board of directors was held April 30, 1908; that prior to the organization of the corporation the promoters thereof authorized plaintiff to incur an indebtedness of \$369.50; that after the filing of the articles of association, but before the first meeting of the board of directors, plaintiff personally paid the indebtedness so authorized by the promoters. There is nothing in the record tending to show any affirmative act by the board in connection with this indebtedness or its payment, nor any resolution or minutes in the meetings of the board from which ratification can be claimed. Nor is there anything in the record indicating that the corporation had any agents or any one authorized to transact business in its name, other than the board of directors, before the 30th of April. The evidence in the record to the effect that the articles of incorporation named the officers may be disregarded. In the absence of proof to the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

contrary, it will be presumed that the laws of Arizona are similar to our own, and in this state the selection of the corporate officers is not a matter within the power of the organizers, but is a duty devolving upon the board of directors.

Respondent's contention is that the services being for the benefit of the corporation, and the corporation having accepted such benefits, it is either estopped to deny the authorization, or that the acceptance of such benefits amounted to a ratification. It is incumbent upon a party claiming a resulting benefit to show actual ratification, or some affirmative act from which it may be inferred. Ratification will not be presumed, even when the corporation has received benefits, unless actual knowledge of the specific contract out of which the benefits arose is made to appear (*Pacific Bank v. Stone*, 121 Cal. 202, 53 Pac. 634), and the same knowledge is essential in considering the question of estoppel. *Gribble v. Columbus Brewing Co.*, 100 Cal. 71, 34 Pac. 527. The most that can be claimed in support of ratification or estoppel, from this record, is that two members of the board of directors had knowledge of the contract and the services, but nothing appears showing such knowledge upon the part of the other member of the board. In addition to this, the two members having notice were interested parties to the contract. We are of opinion, therefore, that neither ratification nor matter amounting to an estoppel as against the corporation appears in the record. The corporation, then, not having authorized the \$389.50 payment, nor having ratified the contract or payment, it must follow that there is no evidence in the record to support the finding of the court that this money was laid out and expended by plaintiff at the instance and request of the corporation, but, on the contrary, it affirmatively appears that the same was a debt of the promoters for which the corporation is not liable.

There is evidence in the record ample and sufficient in support of the findings of the court with reference to the indebtedness arising on account of the services rendered after June, 1908. The contract with reference to these services was made by the president, and it is shown that the minutes of the board authorized the president "to make any contract he saw fit, to employ whom he pleased." While such general authority could only extend to matters relating to the usual and ordinary conduct of the corporate business, yet the contract under consideration here was a contract the authority to make which could properly be delegated by the board to the president.

It is insisted by appellant that the contract with plaintiff, which was one for the payment of a weekly salary and commissions

on sale of corporate stock, was invalid under the provisions of subdivision 6 of section 1624, Civ. Code. This subdivision only relates to agreements authorizing or employing an agent or broker to purchase or sell real estate for compensation or commission. The mere fact of plaintiff being authorized to sell corporate stock under an agreement with the purchasers that certain land should be conveyed in the nature of a bonus to such purchasers does not bring the contract within the purview of the subdivision last cited. Plaintiff's employment was not to sell land, nor was he to receive any commissions or brokerage on account thereof; on the contrary he was to receive a commission on account of the sale of corporate stock as an incident to his general employment upon a salary as an agent of the corporation. We think this contract was such as might rest in parol, and that the judgment for the amount unpaid, with reference to the service under such contract, was warranted.

In our opinion, the entire judgment as rendered exceeded the amount which should properly have been awarded to plaintiff to the extent of \$389.50, and it is ordered that if the plaintiff, within 30 days from the filing hereof, shall file with the clerk of this court his written consent that the judgment of the superior court be modified by deducting the sum of \$389.50 therefrom, leaving the judgment to stand for \$1,375, together with interest thereon from August 4, 1909, and costs as therein provided, said judgment shall be modified accordingly and the judgment and order denying a new trial affirmed. Otherwise, and in case plaintiff fails to file such consent in writing, the judgment shall be reversed. In any event, it is ordered that the appellant recover its costs on this appeal.

We concur: SHAW, J; JAMES, J.

(14 Cal. App. 353)

McPHERSON v. ALTA IRR. DIST. et al.
(Civ. 729.)

(Court of Appeal, Third District, California.
Oct. 18, 1910.)

1. JUDGMENT (§ 618*) — RES JUDICATA — DEFENSES BARRED.

The defendant, an incorporated irrigation district, had been ordered in a former judgment to place a waste or weir of prescribed dimensions at the intersections of its ditch with a stream for the purpose of preventing an overflow, and had been enjoined from placing boards in the wasteway and from preventing their removal if so placed. The defendant failed to comply with the order of court, and plaintiff, who was a successor in interest of the previous plaintiff, brought action to recover for damages to his land and trees, caused by an overflow of the ditch. *Held*, that the previous judgment was res judicata as between parties in the later action as to the objection that the

enforcement of the injunction would impair or destroy the usefulness of the canal.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1131; Dec. Dig. § 618.*]

2. WATERS AND WATER COURSES (§ 247*)—IRRIGATION DISTRICTS — CONSTRUCTION AND MAINTENANCE OF WORKS — INJURIES — EVIDENCE.

In an action against an incorporated irrigation district for injuries resulting from the construction and maintenance of its works, evidence held sufficient to sustain findings that defendants had violated a previous injunction against obstructing a waste weir, and claimed the right to do so, and would continue so to do unless restrained.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 247.*]

3. APPEAL AND ERROR (§ 169*)—ISSUE NOT RAISED—REVIEW.

An issue raised for the first time in the appellate court will not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1018-1034; Dec. Dig. § 169.*]

Appeal from Superior Court, Tulare County; P. W. Bennett, Judge.

Action by J. W. McPherson against the Alta Irrigation District and others. Judgment for the plaintiff, and defendants appeal. Affirmed.

Bradley & Farnsworth and Power & McFadzean, for appellants. Lamberson & Lamberson, for respondent.

BURNETT, J. The defendant Alta irrigation district is a public corporation, organized under what is commonly known as the "Wright Act,"† and the other defendants were directors of said corporation during the time when the acts complained of were committed. As stated by respondent, the plaintiff is the successor in title and estate to the Visalia Savings Bank. By the latter an action was begun in 1897 in the superior court of Tulare county against the said district, in which a judgment was obtained by plaintiff, providing, among other things, that the defendant "forthwith place on the upper side of its said ditch at the intersection of said ditch with the principal channel of said creek (Sand creek) a suitable wasteway or weir for the reception of said waters of said stream which may flow down the same at times of high water, and that said wasteway be at least 100 feet in width, and that said defendant forthwith place on the lower side of its said ditch at said point a wasteway for the purpose of permitting the waters of said stream to escape from said ditch into the channel of said stream below said ditch and that said wasteway be at least 100 feet in width." It appears that the Alta irrigation district did not comply with the order of the court to the extent of placing a wasteway of sufficient width to enable the waters of the ditch to cross the canal. One was constructed of the width of 40 feet on the upper side and but 20 feet on the lower side of said canal. This was insufficient to carry

the water at times, and, besides, the flow was obstructed by boards placed in the lower opening. The result was that water and sand filled up the creek channel and the water overflowed the lands of plaintiff and killed a large number of his trees, to his damage in the sum of \$600, as found by the court. Plaintiff was also awarded an injunction restraining the defendants from putting or maintaining any boards in said wasteway "in the south bank of the ditch or canal of the defendant Alta irrigation district where the said ditch or canal intersects and crosses the channel of Sand creek near the south boundary line of the land of plaintiff and from keeping or maintaining the same therein, and from preventing the plaintiff, his agents and employes, from removing said boards from said wasteway should said boards at any time be placed therein, at all times when the waters flowing down the channel of said creek flow as far as to the said ditch or canal of said defendant the Alta irrigation district at the point of location of said wasteway."

There is evidence that the overflow of plaintiff's land and the damage to his trees was caused by the acts of defendants heretofore specified. We have therefore clearly a case of the violation of a valid order of the said superior court and also of a failure to comply with a statutory duty imposed by section 38 of said Wright act, providing that "the board of directors shall have power to construct the said works across any stream of water, water course, street, avenue * * * which the route of said canal or canals may intersect or cross, in such manner as to afford security for life and property; but said board shall restore the same when so crossed or intersected to its former state as nearly as may be, or in a sufficient manner not to have impaired unnecessarily its usefulness." The injury to plaintiff being the direct result of the breach of an obligation on the part of defendants and the evidence showing that the award was not excessive, the judgment is manifestly just and should be upheld, unless a reversal is demanded by some prejudicial error appearing in the record. Nothing of the kind is pointed out, and we cannot be expected, of course, to make an independent investigation to discover some ground not designated by counsel for interference with the action of the court below.

Appellants complain that the enforcement of the injunction will impair or destroy the usefulness of the canal, but that question was determined by the former adjudication, and said judgment is conclusive between the parties here. Besides, no reference is made to any part of the transcript disclosing any evidence to support the contention.

The nearest approach to any definite assignment of error in the brief of appellants

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

† St. 1887, p. 29; St. 1891, p. 244.

is the specification that finding 1, to the effect that the board of directors of the district maintained boards in the wasteway by force of arms from February 17 to May 20, 1907, and that they refused to permit these boards to be removed, and finding 3, that they believed that they had a right to keep the boards in the wasteway at all times, that they would continue to do so, and would continue to prevent the plaintiff from taking them out at all times when there was water in the channel of said creek, unless restrained by injunction, are unsupported by the evidence. Reference is made to the testimony of plaintiff that Mr. Toler, the ditch tender, took the boards out on each occasion when the waters of Sand creek rose to a great height, that he was there to take them out when the waters got so high in Sand creek that the Alta canal would not carry it, and that it was plaintiff's understanding that Mr. Toler was acting under instructions from the managers of the Alta in doing what he did. It is manifest, however, that some of these particular findings may be disregarded, as it is clear that defendants were maintaining said boards in said wasteway, and that they intended to maintain them in the future, and that plaintiff's rights were thereby invaded and his property injured. These latter considerations found by the court are sufficient to support the judgment. But the findings assailed are entirely justified by certain facts detailed by the witnesses as follows: The plaintiff removed the boards on several different occasions and they were put back by the defendants, and guards were stationed there day and night, relieving each other, from April 18th to March 20th. On April 19th plaintiff attempted to take the boards out, but was prevented from doing so by the said Toler. The attitude of the board is further shown by the testimony of one of the defendants, H. R. McGee, that "nobody was ever injured by keeping the boards in the wasteway either. I know Mr. McPherson complained about that. He complained that injury was done by keeping those in the wasteway, but I know it was not a fact. We could very easily have obviated that difficulty and put him in the wrong by opening the wasteway. I didn't do it because I didn't want to. I don't understand that is the law." There is evidence also that Mr. McGee said he would keep the waters of Sand creek in the ditch if one-half the men in Orosi lay in jail while the other half kept it there. The whole conduct of defendants, indeed, shows that they claimed the right to remove and replace the boards at their own volition and in accordance with their own judgment as to the necessities of the case. The findings of the court, however, amply supported by the evidence, were opposed to this view.

The suggestion of appellants that as the

ditch had been permitted to remain across the channel of Sand creek for a great number of years, plaintiff must be deemed to have acquiesced in the existing condition of things, is satisfactorily answered by respondent as follows: "This contention cannot prevail for the reason that there is no evidence upon this subject as to whether or not the ditch had been permitted peacefully to remain in its condition as shown by the evidence at the time the injuries were committed or otherwise. It is shown by the record that an action had been commenced some years ago by the Visalia Savings Bank to compel the district to place a wasteway through the canal for the purpose of permitting the waters of Sand creek to flow through the same, but there was no evidence by either side as to whether the keeping of the ditch and its banks across said channel had been permitted in a peaceful manner for any length of time whatever. Evidence of interruption by cutting the banks of the ditch for the purpose of allowing the waters of Sand creek to flow through the same could not have been introduced by the plaintiff in this case in chief, nor could it have been introduced in rebuttal, because the defendants offered no evidence upon that subject, and there was neither plea in the answer, nor evidence tending to show the quiet or peaceable possession by the defendants of the canal in the condition in which it was found by the evidence in this case." If defendants had desired to rely upon such consideration, they should, of course, have put it in issue.

There is apparently no reason why we should disturb the conclusion of the trial court, and the judgment and order denying the motion for a new trial are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

(14 Cal. App. 363)

MACLAY CO. v. MEADS et al. (Civ. 720.)
(Court of Appeal, Third District, California.
Oct. 20, 1910. Rehearing Denied Nov.
19, 1910.)

1. APPEARANCE (§§ 9, 24*)—OBJECTIONS TO COMPLAINT—OBJECTIONS TO JURISDICTION—WAIVER.

Where defendants objected to a default judgment because it was unsupported by the complaint, they thereby appeared generally and waived any objection to the service.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. §§ 52, 118-143; Dec. Dig. §§ 9, 24.*]

2. JUDGMENT (§ 158*)—DEFAULT—APPLICATION TO VACATE—AFFIDAVIT OF MERITS.

Where defendants applied to vacate a default judgment and filed a demurrer to the complaint, it was not necessary that an affidavit of merits be filed; the motion not being based on Code Civ. Proc. § 473, permitting amendments, and authorizing the court to relieve defendants not personally served from certain judgments, etc.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 311; Dec. Dig. § 158.*]

3. PARTNERSHIP (§ 213*)—ACTION AGAINST FIRM—COMPLAINT.

The caption of a complaint described the defendants by name, with the addition, "individually and as copartners under the firm name and style of Petaluma Transportation Company," etc. The complaint did not allege that the transportation company was a partnership, except as stated in the caption, and by implication from a paragraph which charged that defendants were using the rented premises for wharfage purposes, either as agents of certain of the defendants named or some of them or others unknown to plaintiff constituting the Petaluma Transportation Company or as members of said partnership under the firm name and style of Petaluma Transportation Company. Other parts of the complaint alleged that defendants named were acting under the name of Petaluma Transportation Company, but whether such company was a partnership, association, or corporation did not appear. *Held*, that the reference to defendants as members of such transportation company was mere descriptive personæ, and hence the complaint stated no cause of action against the firm.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 408, 409; Dec. Dig. § 213.*]

4. PARTNERSHIP (§ 219*)—JUDGMENT—PROCESS—SERVICE.

Where an action was brought against the members of a firm in their individual capacity only, service of summons on one member or on all does not constitute service on the firm, and, in order to bind all the members by any judgment obtained, service must have been made on all.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 429-445; Dec. Dig. § 219.*]

5. PARTNERSHIP (§ 219*)—ACTION—SERVICE—JUDGMENT.

Where an action is against a firm, service on one or more of the members is sufficient to bind the firm, and the judgment obtained therein is binding not only on the joint property of all the associates, but also on the individual property of the party or parties served with process, as provided by Code Civ. Proc. § 388.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 429-445; Dec. Dig. § 219.*]

6. JUDGMENT (§ 18*)—APPLICABILITY TO PLEADINGS.

A judgment in favor of plaintiff is unsustainable, where it has no primary support in the complaint.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 34-37; Dec. Dig. § 18.*]

7. JUDGMENT (§ 147*)—VACATION—PERFORMANCE.

Where a judgment by default in an unlawful detainer proceeding providing for surrender of the premises and payment of treble the amount of rent found due against a firm and the partners individually was unsustainable by the complaint in so far as it constituted a judgment against the firm, the fact that it had been performed in so far as it required a surrender of the premises did not constitute such a total extinguishment and performance thereof as would prevent the firm from maintaining a motion to have it set aside as to it.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 147.*]

Appeal from Superior Court, Sonoma County; Emmett Seawell, Judge.

Action by the Maclay Company against N. L. Meads and others, individuals and as copartners under the name of the Petaluma Transportation Company, and others. From

an order setting aside a default judgment, plaintiff appeals. Affirmed.

Lippitt & Lippitt, for appellant. W. H. Early, for respondents.

HART, J. This is an appeal from an order setting aside the judgment and default entered in favor of the plaintiff.

The action is for unlawful detainer, and was instituted on the 23d day of November, 1909, for the purpose of securing restitution of certain premises, situated in the city of Petaluma, Sonoma county, which were, by an instrument in writing, leased by the plaintiff to N. L. Meads, one of the defendants herein, for the term of one year, from the 1st day of July, 1908, at the monthly rental of \$75, payable in advance on the 1st day of each and every month during said term, and for judgment for treble the amount of rent found by the court to be due. Section 1174, Code Civ. Proc.

The complaint alleges that said Meads "assigned said written agreement and lease to the Petaluma Transportation Company"; that "said defendants N. L. Meads, Chas. P. Doe, G. L. Ray, and H. G. Cox, or some of said defendants, or others to this plaintiff unknown, constituted, and, at the time of said assignment of said lease constituted, the Petaluma Transportation Company," and that said defendants, or some of them, or others unknown to the plaintiff, "acting and assuming to act under the name and style of Petaluma Transportation Company, continue to hold possession of said premises as tenants of this plaintiff." It is further alleged that, although the right of said defendants to the possession of the premises expired under the terms of said lease on the 30th day of June, 1909, they "have continued and are now in the possession of said premises, as tenants of this plaintiff." The complaint further declares that "on the 27th day of September, 1909, and more than 30 days before the expiration of the month of October, 1909, the plaintiff gave notice in writing to the defendants, changing the terms of said tenancy, to take effect at the expiration of the month of October, 1909, increasing the rental of said premises to the sum of three hundred dollars for the month of November, 1909, payable on the 1st day of November, 1909." The defendants, so the complaint further avers, failed and refused to pay to the plaintiff the said sum of \$300 on the 1st day of November, 1909, then due for rent of said premises, "pursuant to the lease from month to month between the plaintiff and defendants, as hereinbefore alleged, and pursuant to the said notice in writing changing the terms thereof," and that, by reason of the said default in the payment of said rent, there is due plaintiff from defendants the sum of \$300, etc.

The ninth paragraph of the complaint reads as follows: "That the premises hereinbefore described and leased by the plaintiff to the defendants as aforesaid, at all the times hereinbefore mentioned, have been used by the steamer *Resolute* and the owners thereof for wharfage purposes; said steamer *Resolute* and the owners thereof so acting and using said premises for wharfage purposes, either as agents of the defendants, N. L. Meads, Charles P. Doe, G. L. Ray, and H. G. Cox, or some of them, or others unknown to the plaintiff constituting *Petaluma Transportation Company*, or as members of said partnership under the firm name and style of *Petaluma Transportation Company*." Immediately upon the filing of the complaint, a summons, addressed to all the defendants named in the title of the action, was caused to be issued, and on the same day said summons was served on the defendants Meads and Ray. There also appears in the record before us an affidavit of a purported service of said summons on the *Petaluma Transportation Company*. This affidavit was by one Reuben G. Hunt, who alleged therein that on the 23d day of November, 1909, he "personally served a summons in the above-entitled action hereto annexed and made part hereof, on the *Petaluma Transportation Company*, one of the defendants therein named, by delivering to N. L. Meads, personally known to me to be a member of said partnership, a copy of said summons," etc. The summons, as the statute requires to be done in such case (section 1167, Code Civ. Proc.), commanded the defendants to appear and answer the complaint within three days after the service of said summons upon them, and notified them that, unless they did so appear and answer, the plaintiff would apply for the relief asked for in the complaint. None of the defendants thus served answered the complaint or otherwise appeared in the action within the time named in the summons and as prescribed by the statute, and accordingly, on the 27th day of November, 1909, the plaintiff applied for a default, which application was granted and judgment thereupon entered against the defendants Meads, Ray, and the *Petaluma Transportation Company*, adjudging plaintiff to be entitled to the possession of the demanded premises, annulling and forfeiting the lease, and for treble the amount of the rent (\$300) alleged to be due.

On the 29th day of November, 1909, the defendants appeared and served and filed a notice of motion to set aside the default entered against them, and at the same time served and filed a general demurrer to the complaint. This motion was made upon the grounds: (1) That said default was entered by the clerk of the court contrary to section 1169 of the Code of Civil Procedure; (2) that the defendant *Petaluma Transportation Company* was not served with summons. On the 3d day of December, 1909, the plaintiff

caused to be issued a writ of restitution, directed to the sheriff of Sonoma county, who executed said writ by placing the appellant in possession of the premises concerned here, and on the 6th day of December, 1909, said officer made a return to that effect on said writ to the court. On the last-mentioned date the motion of defendants to set aside the default was heard and denied by the court; permission, however, being granted defendants to notice and file a motion to vacate and set aside the judgment. Thereafter defendants served and filed a motion to vacate the judgment on the following grounds: (1) That the court was without jurisdiction to enter the judgment; (2) that the judgment is not supported by the pleadings; (3) that the defaults of the defendants herein were not entered. This motion was heard by the court on the 13th day of December, 1909, and an order made granting the same on the 20th day of December, 1909. With the notice of the last-mentioned motion the defendants filed an affidavit of merits, made by the defendant Cox, in which it is alleged, among other things, that affiant is a member of the "copartnership in the *Petaluma Transportation Company*; * * * that this affiant was not served with summons and had no notice of said action served on him either by way of summons and complaint or otherwise; that affiant has consulted his attorney, W. H. Early, and is informed by his said attorney that he has a good and perfect defense to the said action on the merits which said defense is based on a certain indenture of lease, a copy of which said lease is hereto attached and made a part of this affidavit; * * * that affiant is informed by his said attorney that the said lease is in full force and virtue and a good and perfect defense to each and every part of said action on its merits." The lease so referred to appears to have been executed by plaintiff and the *Petaluma Transportation Company*, "by N. L. Meads, Mgr.," in the month of July, 1909, and purports to lease to the *Petaluma Transportation Company* the premises in dispute for the term of four years, "from and after July 1st, 1909, at the rent of \$3,600.00, payable in monthly installments of \$75.00, * * * in advance on the first day of each and every month during the term hereof."

1. By objecting to the judgment on the ground that it was unsupported by the allegations of the complaint, the defendants undoubtedly made a general appearance, and thus waived the objection that the court was without jurisdiction to render and enter the judgment because the defendants were not or might not have been served with summons. In *Burdette v. Corgan*, 28 Kan. 102, it is said: "The motion to vacate the judgment recited that the parties specially appeared and moved to set aside the judgment as void for several reasons—among them that the petition of the plaintiff did not state

facts sufficient to uphold the judgment. * * * In the first place, we remark that this appearance by the motion, though called special, was in fact a general appearance, and by it this defendant appeared so far as she could appear. The motion challenged the judgment, not merely on jurisdictional, but also on nonjurisdictional, grounds, and, whenever such a motion is made, the appearance is general, no matter what the parties may call it in their motion." The rule as thus stated is expressly approved by our Supreme Court in the case of *Security, etc., Co. v. Boston, etc., Co.*, 126 Cal. 418-423, 58 Pac. 941, 59 Pac. 296. See, also, *Lowe v. Stringham*, 14 Wis. 222; *Gilbert-Arnold Land Co. v. O'Hare*, 93 Wis. 194, 67 N. W. 38; *In re Clarke*, 125 Cal. 388, 58 Pac. 22; 2 *Ency. of Plead. & Prac.* 625, notes and cases cited. The filing of a demurrer and an affidavit of merits—the latter unnecessary, since, obviously, the motion is not based on section 473 of the Code of Civil Procedure (*De la Montanya v. De la Montanya*, 112 Cal. 101, 44 Pac. 345, 32 L. R. A. 82, 53 Am. St. Rep. 165)—is a move addressed to the merits by the defendants here, and is additional evidence of a general appearance, if, indeed, more evidence is necessary to show a general appearance than is disclosed by the objection to the judgment on the ground that it is not "supported by the pleadings." Indeed, said objection is itself, in effect, a demurrer to the complaint, and it is therefore very clear that the defendants thus challenge the judgment on a ground other than that of want of jurisdiction of the persons of the defendants.

2. But we think the complaint fails to state a cause of action against the defendant Petaluma Transportation Company, or, in other words, the action is not against said company. The caption of the complaint reads: "*Maclay Company, a Corporation, v. N. L. Meads, Charles P. Doe, H. G. Cox and G. L. Ray, Individually and as Co-partners Under the Firm Name and Style of Petaluma Transportation Company,*" etc. From an examination of the complaint it is to be noted that nowhere therein does it even appear that the Petaluma Transportation Company is a partnership, except in the caption and by implication only in paragraph 9 thereof, heretofore quoted herein. The third paragraph declares that Meads, one of the defendants, and to whom the premises were originally leased, subsequently assigned said lease to the "Petaluma Transportation Company," without alleging the character of said company, whether a partnership, association, or corporation. Paragraph 4 alleges that the persons named as defendants in the caption of the complaint, "or some of them, or other persons unknown to plaintiff," constituted at the time of said assignment of said lease, the Petaluma Transportation Company, and that they still "have possession of said premises as tenants of this plaintiff."

In other parts of the complaint it is averred that the defendants, Meads, Doe, Ray, and Cox, etc., are acting under the name of Petaluma Transportation Company, but whether said transportation company is a partnership or an association or a corporation is not therein made to appear. The caption of the summons is, we infer from the record, the same as the caption of the complaint. The summons is directed to the defendants named in the caption of the complaint in the following language: "The people of the state of California send greeting to N. L. Meads, Charles P. Doe, H. G. Cox and G. L. Ray, individually and as copartners under the firm name and style of Petaluma Transportation Company," etc., and directs them to appear and answer the complaint. The person who served the summons, as we have seen, made a return as to the Petaluma Transportation Company that he had personally served said summons on said company "by delivering to N. L. Meads, personally known to me to be a member of said partnership, a copy of said summons," etc.

The judgment is against "the said defendants, composing said partnership under the firm name and style of Petaluma Transportation Company for the sum of three hundred dollars, trebled as provided by statute, to wit, nine hundred dollars," together with costs, and for annulment and forfeiture of said lease and for restitution of said premises. It will be observed that, so far as the caption of the complaint is concerned, the action is not against the Petaluma Transportation Company, a partnership, but against the persons expressly named as individuals and members of said partnership and others fictitiously named. The words "and as copartners under the firm name and style of the Petaluma Transportation Company" do not, and cannot, make the said partnership a party defendant to the action. The words referred to are merely descriptive—that is, they do no more than unnecessarily describe or identify the particular persons proceeded against, in their individual capacities, whatever may have been the intention of the pleader in so using them. They, in other words, amount to no more than would the following language if employed in the caption of the complaint: "*Maclay Company, etc., v. John Jones and William Smith, Individually and as Residents of the City of Petaluma.*" Surely, no one would for a moment contend, even if such a thing were possible, that such allegation even in the charging part of a complaint would or could be construed to include the city of Petaluma as a party defendant. Nor does it appear from the averments of the complaint that the transportation company was or is made a party. The nearest the complaint even comes to alleging that said transportation company is a partnership is, as seen, in paragraph 9 thereof. But this allegation, while perhaps sufficient, as against a general de-

murrer, to indicate that the transportation company is a partnership, does not make the action one against such partnership.

The case of *Davidson v. Knox*, 67 Cal. 143, 7 Pac. 413, bears a striking resemblance to the one at bar in all particulars. There the caption of the complaint contained the names of certain persons, "copartners doing business under the firm name of Knox & Osborne." The complaint alleged that said persons (naming them) "now are, * * * and have been, partners and associates, doing business under the firm name of Knox & Osborne, and as such partners and associates, owning, working and operating a certain quartz mine and quartz mill," etc. The prayer of the complaint, as here, asked for judgment against "said defendants." The caption of the summons was, as here, in the words of the caption of the complaint. The direction and notification to the defendants in the summons were the same as in the summons here. The judgment rendered and entered was against all the defendants, two of whom were not served with summons. The court said: "We are of opinion that this is an action against the individual partners doing business under the firm name of Knox & Osborne, on partnership contracts," etc. See sections 414, 388, Code Civ. Proc.

In *Feder v. Epstein et al.*, 69 Cal. 456, 10 Pac. 785, the title of the action in the complaint was: "Moses M. Feder, Plaintiff, v. Samuel Epstein and Wolf Epstein, Partners, Under the Firm Name of Epstein Brothers, Defendants." The complaint alleged that the defendants "have been and now are partners under the firm name aforesaid." The prayer was for "judgment against said defendants," etc. The summons contained the same title as the complaint, and then followed: "The people of the state of California send greeting to Samuel Epstein and Wolf Epstein, defendants," and "concluded with a notice that, if the defendants failed to appear and answer the complaint, the 'plaintiff will take judgment against you,' etc. The sheriff returned that he served the summons 'on Epstein Brothers, by delivering to Samuel Epstein, one of said defendants, personally in the county of Ventura, a copy of said summons,' etc." Samuel Epstein failed to appear and answer, and a judgment of default was entered against him. Thereafter the plaintiff filed a motion for permission to so amend the judgment as to "make it a judgment against the firm of Epstein Bros., and to be enforced against the joint property of the firm as well as against Samuel Epstein and his separate property." The motion was denied, and the Supreme Court, sustaining this ruling, said: "We see no error in the ruling. The associates were not sued by their common name, but by their individual names, and the case was therefore not within the provisions of section 388 of the Code of Civil Procedure"—citing *Davidson v. Knox*, supra.

In the investigation of this proposition the

case of *Peabody v. Oleson*, 15 Colo. App. 348, 62 Pac. 235 (not cited by either of the parties here), has come under our observation. The suit was against the individual members of the partnership and not against the partnership by name. The contention there was that under a section of the Colorado Code, in all respects similar to section 388 of our Code of Civil Procedure, the suit should have been brought against the partnership by its name, and that "there was no authority for a judgment against the individuals composing the firm." It was there held that, under the law of Colorado, a party had the right, in case of a partnership liability, either to sue all the members of the partnership by their individual names, thus binding them all to any judgment which might be obtained, or sue the partnership by the partnership name. And we do not say that either course may not be pursued in this state. But where, as here, the action is against the members of the partnership in their individual character, and not against the partnership by its partnership name, the effect of service of process or summons on one member, or on all the members, is not to summons the partnership but only the member or members upon whom such service is had and, in such case, in order to bind all the members of the firm by any judgment which may be obtained in the action, service of summons must be made on all. Of course, where the action is against the partnership, then, by the terms of section 388, supra, service of summons on one or more of the members of the partnership is sufficient, and thereby the judgment in the action is binding not only upon "the joint property of all the associates," but also upon "the individual property of the party or parties served with process." We entertain no doubt that, tested by the provisions of section 388 of the Code of Civil Procedure and the decisions to which we have directed attention, the complaint here falls far short of disclosing that plaintiff, however much it may have intended to do so, proceeded against the Petaluma Transportation Company. As in *Davidson v. Knox*, supra, and *Feder v. Epstein*, supra, so it is true here, that the defendants, though constituting, according to the averments of the complaint, the partnership named the Petaluma Transportation Company, "were not sued by their common name, but by their individual names," and the action was therefore against each member of said partnership in his personal, and not in his partnership, character.

It requires the citation of no authorities to show that a judgment in favor of plaintiff must have for its primary support a complaint which states a cause of action against the defendant. To undertake to rest a judgment upon an alleged complaint which is bad for want of sufficient facts would, of course, be no less an act of futility than at attempted defiance of the inexorable law of gravita-

tion. The complaint here is, it is true, sufficient as against those individuals that are proceeded against, but it is no complaint against the transportation company, as to which a judgment rendered and entered thereupon would obviously be *coram non jure*.

But the point is made that the judgment cannot be vacated because it has been executed in part as to all the parties, including the transportation company, and upon this proposition our attention is invited to cases cited in the footnotes of 23 Cyc. 893. See *Penfold v. Singleton*, 36 Ga. 556; *Skillings v. Mass. Ben. Ass'n*, 151 Mass. 321, 23 N. E. 1136; *Davis v. Blair*, 88 Mo. App. 372; *Foster v. Hauswirth*, 5 Mont. 568, 6 Pac. 19; *Galbraith v. Cooper*, 24 N. J. Law, 219; *Alverson v. Alverson*, 2 R. I. 27; *Enders v. Burch*, 15 Grat. (Va.) 64. But an examination of these authorities will show that in each case there was, before the motion was made, a "total extinguishment of the judgment by a full and complete performance of its mandates and directions" (*Davis v. Blair*, *supra*), and therefore the judgment, which in each case was for money, became *functus officio*. It cannot be said that there has been "a full and complete performance of the mandates and directions" of the judgment here. According to the record only that portion of the mandates of the judgment restoring the premises to the plaintiff has been performed, while that portion awarding to plaintiff rent in the sum of \$300, trebled, is "very much alive."

We think the court made no error in granting the motion as to the Petaluma Transportation Company, and the order is therefore affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

(14 Cal. App. 347)

MULLER et al. v. MULLER et al. (Civ. 849.)
(Court of Appeal, First District, California.
Oct. 18, 1910.)

1. PARTITION (§ 77*)—PARTITION IN KIND—DISCRETION OF COURT.

In partition, the land should be partitioned in kind, unless such partition cannot be made without great prejudice to the owners; the matter of a sale being in most cases one of discretion in the trial court.

[Ed. Note.—For other cases, see *Partition*, Cent. Dig. §§ 211-223; Dec. Dig. § 77.*]

2. PARTITION (§ 77*)—SALE.

In partition of a city lot fronting 90 feet on one street and 57½ feet on another, wherein the three plaintiffs owned an undivided five-eighths interest, incumbered by various mortgages and liens, and the three defendants owned an undivided three-eighths, and several witnesses testified that the lot could be sold as a whole

for a much better price than if subdivided, and that, if subdivided into two lots, their combined value would not equal the value of the lot as a whole, there was no abuse of discretion in ordering a sale.

[Ed. Note.—For other cases, see *Partition*, Cent. Dig. §§ 211-223; Dec. Dig. § 77.*]

Appeal from Superior Court, City and County of San Francisco; E. P. Mogan, Judge.

Partition action by John H. W. Muller and others against George A. Muller and others. From an interlocutory decree ordering a sale of the real estate, defendants appeal. Affirmed.

Garber, Creswell & Garber, for appellants. E. J. Talbott and Wm. J. Herrin, for respondents.

COOPER, P. J. This appeal is from an interlocutory decree in partition by which a sale of the real estate described therein is ordered. The trial court found "that the real estate described in the complaint and hereinafter is so situated that actual partition thereof cannot be made without great prejudice to the plaintiffs and the defendants, the owners of said real property." The only question raised is as to the sufficiency of the evidence to sustain this finding.

We have examined the evidence, and conclude that it is sufficient to support the finding. The land is a lot in the city and county of San Francisco, fronting 90 feet on Mission street and 57½ feet on Eleventh street. The plaintiffs own an undivided five-eighths interest, incumbered by various mortgages and liens, and the defendants own an undivided three-eighths interest therein. Several witnesses testified that the lot would sell much more readily and for a much better price if sold as a whole than if it were subdivided, and that if it were subdivided into two lots the combined value of the two lots would not be as great as the value of the lot as a whole. The rule is that the land should be partitioned in kind, unless such partition cannot be made without great prejudice to the owners. The courts favor a partition in kind where it is practicable, and this for the reason that the owners of real estate should not be deprived of their title thereto through a sale, unless such sale is necessary to prevent great prejudice to the owners. In most cases the matter is one of discretion in the trial court. Considering the size of the lot, the number of owners, and the testimony of real estate experts, we cannot hold that the court abused its discretion.

The decree is affirmed.

We concur: HALL, J.; KERRIGAN, J.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

(14 Cal. App. 342)

BILICKE v. JANSS. (Civ. 774.)(Court of Appeal, Second District, California.
Oct. 17, 1910.)**1. LANDLORD AND TENANT (§ 173*)—PREMISES—POSSESSION—DISTURBANCE OF POSSESSION—ACTS OF THIRD PERSONS.**

Where a lease contained a covenant that the landlord should not be liable for damages to the lessee by the acts of other tenants and occupants, there was no constructive eviction because the acts of another tenant rendered the leased premises unfit for the purpose for which they were engaged.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 705-707; Dec. Dig. § 173.*]

2. LANDLORD AND TENANT (§ 172*)—PREMISES—POSSESSION—DISTURBANCE OF POSSESSION.

The mere fact that a landlord rents premises to a tenant whose occupancy disturbs the other tenants does not amount to an eviction in the absence of appropriate covenants in the lease. Thus a landlord who let part of his premises to a butcher who smoked meat upon them, to the annoyance of another tenant who engaged his premises for a physicians' institute, did not evict the latter, where the lease specifically provided that the landlord should not be liable for the acts of other tenants, etc.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 695-703; Dec. Dig. § 172.*]

3. LANDLORD AND TENANT (§ 172*)—PREMISES—POSSESSION—DISTURBANCE—USE OF OTHER PREMISES OF THE LANDLORD.

In the absence of a covenant to that effect, a tenant has no right to dictate the landlord's possession of other portions of his premises, save that he shall not maintain a nuisance, nor let the same for a business which, notwithstanding reasonable care on the part of the tenant, would constitute a nuisance, so that a landlord who lets premises to a butcher, the smoke from whose shop annoys others, is not liable to other tenants, where there is no covenant to that effect.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 695-703; Dec. Dig. § 172.*]

4. LANDLORD AND TENANT (§ 180*)—REVIEW—FINDINGS—IMMATERIALITY.

As a tenant cannot maintain a claim of constructive eviction because of the acts of another tenant unless the landlord is responsible for what the tenant does, a finding of the trial court that the lessor could reasonably have remedied the evil caused by the objectionable practices of another tenant, of which the first tenant complained, is immaterial, where there is no covenant or legal duty imposed on the landlord to remedy.

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. § 180.*]

Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by A. C. Bilicke against P. Janss. From a judgment for defendant, plaintiff appeals. Affirmed.

Foster C. Wright, for appellant. Ward Chapman and L. M. Chapman, for respondent.

SHAW, J. Action to recover monthly installments of rent for July and August, 1907, upon a lease of a storeroom. Judgment went

for plaintiff, from which defendant appeals upon the judgment roll alone, claiming the judgment is not supported by the findings.

The lease was made to one E. W. Raymond, and in consideration of its execution defendant agreed that if the lessee should not pay the rent specified in the lease in accordance with the terms and provisions thereof, he would pay the same on demand therefor. The suit is against defendant upon this guaranty. While several defenses are set up in the answer, the only one urged on the appeal is the alleged constructive eviction of the lessee from the leased premises by plaintiff. The question therefore presented is whether or not the facts found by the court, considered with the admitted covenants of the written lease made on the part of the lessee, show his eviction by plaintiff. The premises, which were leased for the period of 30 months, commencing July 1, 1906, and for the purpose of conducting the business of a physicians' institute, are situated in Los Angeles and described in the lease as "That certain storeroom known as and numbered 504 South Main street, comprising the space about seventeen feet wide and about sixty-seven feet in depth from the easterly line of said Main street, together with a space in the rear of these premises and on an elevation of about seven feet above the same, said rear space being approximately thirty-five feet wide, six feet deep to an alley." By the terms of the lease the tenant covenanted and agreed that the landlord should not be liable or accountable for "any damage arising from any act or neglect of any co-tenant or other occupants of the same building, or of any owners or occupants of adjacent or contiguous property."

These facts, omitting certain conclusions of law embodied in the findings, are, in substance, as follows: That underneath the premises covered by the lease, and forming a part of the building owned by plaintiff and under his control, was at all of the times mentioned a covered driveway, extending from a public alley in the rear of the building into and under the leased premises for a distance of about 50 feet; that said covered driveway was covered by the floor of a portion of the premises leased to Raymond; that abutting on and opening into said driveway were several storerooms forming a part of the same building so owned by plaintiff, and fronting on Fifth street; that at all of said times one of said storerooms was occupied as a meat market and butcher shop, the occupant thereof holding as a tenant of plaintiff under a lease of the same; that for a considerable period of time prior to January 1, 1907, and continuing to July 10, 1907, the lessee discovered that said leased storeroom was filled and permeated with a stench, foul odors and offensive smoke, which came from said covered driveway,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

seeping through the floor of said leased storeroom into said premises; that up to April 1, 1907, said odors and offensive smoke were caused by the acts of the tenant of said butcher shop due to the killing of poultry in the driveway and the trying out of lard in the room occupied as a meat market and butcher shop; that about April 1, 1907, upon complaint being made to the landlord, said butcher tenant, under instructions from the landlord, discontinued the killing of chickens in said driveway and the rendering of lard upon his premises, but from said date to the date of the abandonment of the premises by the lessee the tenant of said butcher shop "continued the smoking of meat on his own premises, erecting certain hoods and smoke pipes and vent pipes extending into and through said private alley or driveway; * * * that from time to time smoke and smells escaped therefrom into said driveway and continued to exude and go through the floor of said leased premises involved herein"; that said condition was reported to and known by plaintiff, who failed to remedy the evil conditions when he could reasonably have remedied them; that at the time of the execution of the lease the lessee, Raymond, examined the premises and found no foul odors or offensive smoke therein; that by reason of said offensive smoke and smells permeating the leased premises the same were rendered unfit for the uses specified in the lease and were, early in July, 1907, abandoned by the lessee, who removed his property therefrom.

Not only was there no covenant on the part of the landlord that the premises were fit and suitable for the purpose for which they were leased, but the storeroom was in use as a butcher shop and meat market at the time the lease was executed to Raymond, and he must be deemed to have accepted the lease with full knowledge of the conditions existing by reason of conducting a meat market and butcher shop in close proximity to the premises so leased by him. The lease imposed no duty upon the landlord to keep and maintain either the leased or other premises in a condition fit and suitable for carrying on the business of a physicians' institute. On the contrary, it expressly provided that, in so far as other tenants and occupants of the building were concerned, the landlord should not be accountable for any damages sustained by the lessee by reason of the acts of such other tenants and occupants. Hence, the finding that the leased premises were rendered unfit for the purposes for which they were leased did not in itself constitute an ouster. *Kistler v. Wilson et al.*, 77 Ill. App. 149; *Cogle v. Densmore*, 57 Ill. App. 591. "The mere fact that the landlord rents premises to a tenant who carries on a busi-

ness there incompatible with the convenient occupation of adjoining premises, also rented by the same landlord, does not amount to an eviction, and, in the absence of a provision to that effect in the lease, does not relieve the tenant who suffers from the nuisance from the obligation of paying rent under his lease." *Gray v. Gaff*, 8 Mo. App. 329. Clearly, the landlord was not responsible for the acts of the tenant smoking meat upon his own premises. If such acts of the butcher tenant constituted a substantial grievance, redress should have been had against the offending tenant, and not against the landlord. *Seaboard Realty Co. v. Fuller*, 33 Misc. Rep. 109, 67 N. Y. Supp. 146.

The court found that the private driveway extending under the leased premises was in the control of plaintiff. A fair interpretation of this finding is that plaintiff exercised like dominion over this private driveway that he did over one of the storerooms of the building. It was not appurtenant to the leased premises and was no part thereof. As against the lessor, in the absence of any express covenant in the lease touching the subject, the lessee had no right other than to insist that the landlord should not maintain a nuisance therein himself, nor let the same for some business which, notwithstanding the exercise of reasonable care on the part of the tenant in the conduct thereof, would, nevertheless, constitute a nuisance. *Gray v. Gaff*, supra; *French v. Pettingill*, 128 Mo. App. 156, 106 S. W. 575; *McKinny v. Browning*, 126 App. Div. 370, 110 N. Y. Supp. 562. Obviously, offensive smoke and odors could not have escaped from a properly constructed line of pipe extending through this driveway. That they did escape is conceded by appellant to have been due to the fact that the pipes and appliances were defective. It does not appear, however, that the landlord authorized the use of such defective means for carrying off the smoke and odors.

The facts as disclosed by the record fail to show that plaintiff was responsible for the evil conditions found to exist. "A constructive eviction from a leasehold cannot be claimed by a tenant because of the acts of another tenant of a portion of the premises, unless the landlord is responsible for what the tenant does." *French v. Pettingill*, supra. If not responsible, then the fact, as found by the court, that the lessor could reasonably have remedied the evil, is immaterial, for the reason that neither the law nor the covenants of the lease imposed upon him any duty to remedy it.

The judgment is affirmed.

We concur: ALLEN, P. J.; JAMES, J.

(14 Cal. App. 359)

WOLFE v. LANGFORD et al. (Civ. 844.)

(Court of Appeal, First District, California.
Oct. 19, 1910.)**1. ADVERSE POSSESSION (§ 12*)—SUFFICIENCY TO GIVE TITLE—ACTUAL POSSESSION.**

Actual possession of land under a claim of ownership without any paper title is sufficient to give title as against one having no right or title in himself.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 65, 66; Dec. Dig. § 12.*]

2. MORTGAGES (§ 304*)—RELEASE—EFFECT—RELEASE BY ABSOLUTE DEED.

A deed executed by a grantee in a prior deed, which was in fact a mortgage, to the grantor therein, and intended to operate as a release of the mortgage, conveys no title.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 872; Dec. Dig. § 304.*]

3. ATTACHMENT (§ 180*)—JUDGMENT (§ 788*)—PRIORITIES—UNRECORDED DEED—"INSTRUMENT."

Neither an attachment nor a judgment is an "instrument," within the meaning of Civ. Code, § 1107, making a grant conclusive against the grantor and all subsequently claiming under him except a purchaser or incumbrancer, who in good faith and for value acquired a title or lien by an instrument that is first duly recorded, so that one taking under an unrecorded deed held by a title superior to the right of one claiming under a subsequent attachment and judgment against the grantor.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 563-575; Dec. Dig. § 180;* Judgment, Cent. Dig. §§ 1368, 1369; Dec. Dig. § 788.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3665-3668.]

Appeal from Superior Court, Santa Clara County; John E. Richards, Judge.

Action by H. M. Wolfe against Arthur B. Langford and another, in which the unnamed defendant filed a cross-complaint. From a judgment for plaintiff and against cross-complainant, and from an order denying their motion for new trial, defendants appeal. Affirmed.

Will M. Beggs and R. C. McComish, for appellants. Wm. A. Bowden, for respondent.

HALL, J. Plaintiff brought this action to obtain a decree, enjoining defendants from enforcing a writ of execution against a certain piece of real estate alleged to belong to plaintiff. Defendant, Fidelity & Deposit Company of Maryland, besides answering the complaint, filed a cross-complaint for a decree establishing that a certain judgment obtained by it against one George T. Dunlap is a valid lien against the said property. Plaintiff obtained judgment as prayed for, and the court denied any relief to defendants, who have appealed from the judgment and order denying their motion for a new trial.

Appellants insist that their general demurrer to plaintiff's complaint should have been sustained. It is insisted that although plaintiff alleges ownership in fee of the land from

which it is sought to remove a cloud, yet as the complaint shows the specific facts showing the chain of plaintiff's title, the general allegation of ownership must be considered only as a conclusion of law, and the specific facts alleged must be looked to only. In this connection it is claimed that plaintiff, by the allegations of his complaint, derails title from George T. Dunlap, but does not allege any title in said Dunlap. But if we concede everything claimed by appellants as to want of title in Dunlap the complaint otherwise states facts to show a good title in plaintiff. Besides stating a chain of title from Dunlap, plaintiff also pleads facts that make a good title in him by prescription. The demurrer was properly overruled.

The defendant, the Fidelity & Deposit Company of Maryland, obtained a money judgment against George T. Dunlap, which was duly docketed on the 3d day of June, 1903. It is by virtue of this judgment that said defendant claims a lien against the land described in the complaint, and it is the cloud caused by the levy of execution under such judgment that plaintiff seeks to have removed.

In regard to the title of plaintiff the court found that on the 3d day of June, 1905, said plaintiff entered into the exclusive possession of the said premises in said complaint described and of all thereof, and from said date up to the present time has continuously held and yet holds the open, notorious, continuous, uninterrupted, and exclusive possession of the said premises and of all thereof, claiming the same and all thereof in good faith and in his own right, and exclusive and adverse to the said defendant and to all the world. This finding is supported by the evidence, and is the only finding as to the title of plaintiff. According to the findings of the court plaintiff did not connect himself with any paper title at all. He simply had actual possession under claim of ownership. But such is a sufficient showing of title in a plaintiff as against one who establishes no title or right in himself. *Morris v. Clarkin*, 156 Cal. 16, 103 Pac. 180. As before stated, the only claim defendant asserts against the premises is by virtue of a judgment obtained and docketed against George T. Dunlap June 3, 1903. The court, however, found that defendant had no such lien.

The property in question was conveyed to Dunlap by one Godfrey May 15, 1897, and the deed duly recorded. On December 31, 1898, Dunlap, by deed of grant, bargain, and sale in terms conveyed to one Friant, who in turn by a similar deed, dated February 14, 1899, conveyed to the Bank of Gilroy, which in turn, on April 6, 1903, conveyed to Dunlap. The deed from Dunlap to Friant and the deed from Friant to the Bank of Gilroy were given as security for money loaned to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Dunlap, and the deed from the bank to Dunlap was the result of the payment of such loans by Dunlap. These deeds were all duly recorded, but as the deeds from Dunlap to Friant and from Friant to the bank were in fact mortgages no legal title passed thereby. Likewise the deed from the bank to Dunlap, though in form a conveyance, in fact operated simply as a release of the mortgage. It conveyed no title to Dunlap.

On October 15, 1901, Dunlap, for a valuable consideration, conveyed the premises to one House, who went into possession under the deed, but the deed was never recorded. Defendant's judgment against Dunlap was docketed June 3, 1903, over two years after Dunlap had conveyed to House by the unrecorded deed. At the time of the docketing of the judgment Dunlap did not own the property in question. He had conveyed it by a grant perfectly good as against the grantor and every one subsequently claiming under him except a purchaser or incumbrancer who, in good faith and for a valuable consideration, acquires a title or lien by an instrument that is first duly recorded. Section 1107, Civ. Code. Neither an attachment nor a judgment is an instrument within the meaning of the section, and an unrecorded deed takes precedence over an attachment or judgment. *Hoag v. Howard*, 55 Cal. 564; *Bank of Ukiah v. Petaluma S. B.*, 100 Cal. 590, 35 Pac. 170. The judgment only becomes a lien upon the real property of the judgment debtor owned by him at the time of the docketing of the judgment, or afterwards and before expiration of the lien acquired. Code Civ. Proc. § 671. Dunlap did not own the premises in question when the judgment was docketed, for he had previously conveyed them to House. Neither did he afterwards acquire title by the deed from the Bank of Gilroy, for this deed was but a release of a mortgage and conveyed no title. The court thus correctly found that the defendant, Fidelity & Deposit Company of Maryland, had no lien or claim upon the property described in the complaint.

The judgment and order are affirmed.

We concur: COOPER, P. J.; KERRIGAN, J.

(18 Idaho, 654)

DOYLE v. CITY OF SANDPOINT.

(Supreme Court of Idaho. Nov. 21, 1910.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS (§ 1032*)—ISSUANCE—BONDS BY MUNICIPALITY.

Under the statute of this state, section 4291, Rev. Codes, a municipal corporation is not required to give an undertaking on the issuance of an injunction, and there is no liability upon the part of a municipal corporation for damages sustained in consequence of the is-

suance of an injunction sued out by such municipal corporation.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 2202; Dec. Dig. § 1032.*]

2. INJUNCTION (§ 257*)—LIABILITY FOR DAMAGES.

Where no bond or undertaking is required on the issuance of an injunction, there can be no liability for damages sustained on account of the injunction, unless the injunction was obtained maliciously and without probable cause.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. § 606; Dec. Dig. § 257.*]

3. MUNICIPAL CORPORATIONS (§ 732*)—INJUNCTION—MALICIOUS SUING OUT—DAMAGES.

A municipal corporation cannot be held for the malicious suing out of a writ of injunction without probable cause, for the reason that such an act would be ultra vires and beyond and without the scope of authority of the municipal officers, and would become the personal and individual act of the officers so acting.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1546; Dec. Dig. § 732.*]

Appeal from District Court, Bonner County; Robert N. Dunn, Judge.

Action by William Doyle against the City of Sandpoint. Judgment for defendant, and plaintiff appeals. Affirmed.

W. C. Jones and E. W. Wheelan, for appellant. B. S. Bennett and Herman H. Taylor, for respondent.

AILSHIE, J. This action was commenced by appellant against the city of Sandpoint to recover damages for the issuance and wrongful continuance of an injunction, preventing the use of a certain building owned by him situated in the corporate limits of the defendant city. The original action in which the injunction issued was instituted by the city against Doyle to enjoin and restrain him from connecting his building with a bridge constructed and maintained by the city along and over the street in front of the building. That case was finally determined by this court adversely to the city. *Village of Sandpoint v. Doyle*, 14 Idaho, 749, 95 Pac. 945, 17 L. R. A. (N. S.) 497. Under the provisions of the statute, section 4291, Rev. Codes, "On granting an injunction, the court or judge must require, except when the state, a county, or municipal corporation, or a married woman in a suit against her husband, is a party plaintiff, a written undertaking on the part of the plaintiff, with sufficient sureties to the effect that the plaintiff will pay to the party enjoined such costs, damages, and reasonable counsel fees, not exceeding an amount to be specified, as such party may incur or sustain by reason of the injunction, if the court finally decide that the plaintiff was not entitled thereto."

It will be observed from the provisions of the foregoing section that the city comes within the excepted class and was not re-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

quired to give an undertaking on the issuance of an injunction, and so no undertaking was required or given by the city on the suing out of the injunction in the case of *Sandpoint v. Doyle*.

The question with which we are confronted in this case is whether a municipal corporation is liable for damages for wrongfully suing out a writ of injunction or wrongfully causing the same to be continued in force. It is clear to us that as to any party specifically excepted from the operation of the statute, there can be no liability for damages, unless it be alleged and proven that the injunction was procured maliciously and without probable cause. 22 Cyc. 1061. It is well established by the authorities that damages caused by an injunction erroneously granted in the exercise of jurisdiction, where the proceedings have been regular, cannot be recovered from the party who obtained the writ in the absence of a bond or undertaking, unless it be shown that the transaction was malicious and without probable cause. *Mark v. Hyatt*, 135 N. Y. 306, 31 N. E. 1099, 18 L. R. A. 275; *Asevado v. Orr*, 100 Cal. 293, 34 Pac. 777; *Hess v. German Baking Co.*, 37 Or. 297, 30 Pac. 1011; *Columbus, Hocking Valley, etc., Co. v. Burke*, 54 Ohio St. 98, 43 N. E. 282, 32 L. R. A. 329; *Cox v. Taylor*, 10 B. Mon. (Ky.) 17.

In note to *Mark v. Hyatt*, 18 L. R. A. 275, the editor says: "The law is well settled that no right of action exists for damages sustained in consequence of an injunction except when founded upon an injunction bond or undertaking, unless the injunction was obtained maliciously and without probable cause." A large number of authorities are cited in support of that statement. In *Robinson v. Kellum*, 6 Cal. 399, the court says: "An action on the case will not lie for improperly suing out an injunction, unless it is charged in the declaration as an abuse of the process of the court through malice, and without probable cause. If the act complained of is destitute of these ingredients, then the only remedy of the injured party is an action upon the injunction bond, which is specially provided by the statute as a protection against injury, even without malice." This case is cited and quoted from with approval in *Asevado v. Orr*, *supra*.

It will be observed that where the statute requires an undertaking on the issuance of an injunction that it obligates the plaintiff and sureties "to the effect that the plaintiff will pay to the party enjoined such costs, damages, and reasonable counsel fees, not exceeding an amount to be specified, as such party may incur or sustain by reason of the injunction, if the court finally decide that the plaintiff was not entitled thereto." The statute therefore provides in those cases for the recovery of damages by the defendant irrespective of the question of "malice" or "probable cause," in the event "the court

finally decide that the plaintiff was not entitled" to the injunction. On the other hand, as may be seen from an examination of the authorities, it is firmly established that in the absence of an undertaking the only liability against the party suing out the injunction is for damages caused, where the injunction was procured through malice and without probable cause. In the present case, the action is not prosecuted on the grounds of malice, but the suing out of the writ of injunction and continuing it in force from the time of its issuance is alleged as the cause of the damage, and the damages demanded are the usual damages allowed and recoverable under the statutory undertaking. It is clear that such an action cannot be maintained.

It is argued by counsel for appellant that the state, a county, municipal corporation, or married woman, is, under the provisions of that section, just as liable for damages resulting from the wrongful or erroneous issuance of an injunction as is any one who gives an undertaking under the provisions of the statute, and that the only purpose of the exception was to avoid the inconvenience and annoyance that might be entailed on the state, county, or city officer, or a married woman, in case they were required to secure an undertaking before the writ would issue. It is further contended by counsel that an undertaking on the part of the excepted classes would not add anything to the security. We cannot agree to this line of reasoning. In the entire absence of this statute, there would be no liability for the wrongful or erroneous suing out a writ of injunction, except in cases where a court of equity might see fit to require a bond in advance. In the absence of the statute, it is therefore clear that the state, county, and municipal corporation would not be liable as on bond. It is equally certain that this statute does not require them to give a bond or declare that they shall be liable, the same as an individual, although they do not give a bond. The reasons for the enactment of this statute might be the subject of much speculation, but we are inclined to think that it was the legislative purpose to exempt the public from such liability, whether they be acting as a state, a county, or a municipal corporation, and that it was considered by the law-making power that, since an injunction procured by a municipal corporation must be sought and procured through executive or administrative officers who can have no personal interest in the matter except the discharge of their public duties, and the writ, if granted at all, must be granted by the judicial department of the state—that with these two means of investigation and two branches of the state government passing upon the matter, the chances of damages occurring to the individual would be minimized, and that no liability should be imposed on the public for any error or mis-

judgment on the part of the officers, both executive and judicial, so acting. Primarily and theoretically, it is supposed, as a principle of law, that the public, whether it be the state, a county, or municipal corporation, acting through its duly constituted officers, will not commit any wrong against the citizen. This will be true in practice as well as theory, so long as the officers who represent the public do not fall into any errors, either of omission or commission. Experience has shown, however, that the latter is largely a theory and not always a fact.

Now, if the plaintiff had commenced this action charging the city of Sandpoint with having procured the injunction maliciously and without probable cause, he would, it seems to us, fail, for the reason that the municipality could not be guilty of procuring a writ of injunction maliciously. If the officers of the city acted maliciously and without probable cause in suing out the writ, the act would be that of the individuals and not of the municipality. To act maliciously would be outside of the scope of official duty and authority and would become the personal act of the individual, for which he and not the city would be responsible. *Horton v. Newell*, 17 R. I. 571, 23 Atl. 910; *Kansas City v. Lemen*, 57 Fed. 905, 6 C. C. A. 627; 1 Smith, *Modern Law of Municipal Corp.* § 811.

The judgment of the trial court should be affirmed, and it is so ordered. Costs awarded in favor of respondent.

SULLIVAN, C. J., concurs.

(18 Idaho, 660)

KEATING v. KEATING MINING CO. et al.
(Supreme Court of Idaho. Nov. 23, 1910.)

(Syllabus by the Court.)

1. FINDINGS OF FACT SUSTAINED BY EVIDENCE.

The evidence held sufficient to sustain the finding of facts.

2. VENDOR AND PURCHASER (§ 95*)—RESCISSION OF CONTRACT—ESTOPPEL.

Where a seller receives the entire purchase price of the property sold, and acquiesces in the transaction after he has had full knowledge of all the facts concerning it, he is estopped from a rescission of the contract by reason of his laches and neglect.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 158-160; Dec. Dig. § 95.*]

3. VENDOR AND PURCHASER (§ 42*)—CAPACITY OF PURCHASER TO TAKE TITLE—ESTOPPEL OF VENDOR TO QUESTION.

Where an owner has sold and conveyed real estate and has received the purchase price therefor, he can neither legally nor equitably question the capacity of the vendee to take and hold the title.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Dec. Dig. § 42.*]

(Additional Syllabus by Editorial Staff.)

4. APPEAL AND ERROR (§ 1051*)—HARMLESS ERROR—ADMISSION OF UNIDENTIFIED EXHIBIT.

The admission in evidence of papers as exhibits in the case alleged to contain a witness' signature, without permitting such witness to examine the paper so as to identify it understandingly, was not prejudicial error, where, after such papers were introduced, it was apparently admitted that witness signed them, he not being placed upon the stand to testify to the contrary.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4161-4170; Dec. Dig. § 1051.*]

Appeal from District Court, Shoshone County; W. W. Woods, Judge.

Action by John Keating against the Keating Mining Company and others. Judgment for defendants, and plaintiff appeals. Affirmed.

A. G. Kerns, for appellant. John P. Gray and Featherstone & Fox, for respondents.

SULLIVAN, C. J. This action was brought to restrain the sheriff of Shoshone county and his successors in office from executing or delivering to the defendant Goodsell or his assigns a sheriff's deed conveying the Golden Curry, the Savage, the Savage No. 2, the Grouse, and the Minnie Moore lode mining claims situated in the Yreka mining district, Shoshone county; and to vacate and set aside a deed dated November 20, 1905, made by John Keating to J. Frank Watson, conveying to said Watson the aforesaid mining claims; also to set aside a deed dated August 15, 1906, executed by the said Watson and wife to the Keating Mining Company, conveying said described mining claims to said company; and to set aside and hold for naught a certain mortgage upon said mining claims executed by the said Keating Mining Company to the defendant David Goodsell; and to set aside a certain judgment rendered February 17, 1908, in the district court of Shoshone county in an action wherein the said Goodsell was plaintiff and the said Keating Mining Company defendant, which judgment directed the foreclosure of the aforesaid mortgage; and to quiet the title to said mining claims in the plaintiff, John Keating, or in case said relief could not be granted, then that the plaintiff be awarded a vendor's lien against said mining claims to secure to him the payment of the sum of \$22,500, together with interest, and that such vendor's lien be given priority over all other liens against said mining claims, and for other relief. The pleadings put in issue certain transactions between defendants J. Frank Watson, P. J. and R. J. Jennings, and it is alleged in the complaint that a conspiracy was entered into by said three defendants with the intent to cheat and defraud the plaintiff out of said mining claims without paying the agreed purchase price

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

therefor; and it is also alleged that the defendant Goodsell procured a mortgage for \$16,000 on said property for the purpose of cheating and defrauding the plaintiff out of said mining claims and the purchase price therefor. By amendment to the complaint, it is alleged that said Keating Mining Company is a foreign corporation, and at the time J. Frank Watson and wife conveyed said mining claims to said corporation it had not complied with the Constitution and laws of this state in regard to filing its articles of incorporation and designating an agent upon whom service of process might be made, and that for that reason it took no title to said property through said conveyance. Upon the issues made by the pleadings, the cause was tried by the court, and finding of facts was made, and judgment entered in favor of the respondents. The appeal is from the judgment.

Statement.

It appears from the record that some time in 1905 appellant gave an option to purchase certain mining claims owned by him near Wardner, Idaho, to a man name Devin. About November 1st of that year Devin interested respondent P. J. Jennings in the property, and introduced him to the appellant, Keating. After some negotiations with Keating and Devin, Jennings went to Portland, Or., and presented the matter to respondent J. Frank Watson, a banker. It appears that Jennings represented to Watson that Keating wanted \$25,000 for said mining claims, to be paid as follows: \$2,500 in cash, \$2,500 in June, 1906, and \$20,000 in a year, and that if Watson would put up \$2,500 in cash, and take care of the pay roll in the development of said mining claims for 90 days, that he (Jennings) thought they could turn the property and make some money. After considering the matter, Watson agreed to put up the \$2,500 in cash, and take care of the pay roll for 90 days. Jennings then went to Wardner and met Keating and Devin, and, after certain negotiations with them, they returned to Portland with him, at which place they called on Watson and the following agreement was entered into by Keating and Watson:

"Memorandum of agreement made between John Keating of Wardner, Shoshone county, Idaho, hereinafter called the first party, and J. Frank Watson, trustee, of Portland, Oregon, hereinafter called the second party, witnesseth, The first party agrees to sell to the second party the following lode mining claims situated in Yreka Mining District in Shoshone County, Idaho, as follows, to wit: The Golden Curry and the Savage, as described by United States patent, also the Eastern extension of said Savage, known as 'Savage No. 2,' the Eastern extension of Golden Curry, known as 'the Grouse,' and the Western extension of the Savage, known as 'Minnie Moore,' for the sum of twenty-five thou-

sand dollars (\$25,000.00) payments to be made as follows: On or before December 8, 1905, \$2,500.00; on or before June 8, 1906, \$2,500.00; on or before December 8, 1906, \$20,000.00.

"Said first party agrees to furnish an abstract of title showing a good, clear and unincumbered title to each of said claims, the title to be satisfactory to, and subject to the approval of said second party; and also, upon the payment of the first twenty-five hundred dollars, to deposit, in escrow, at the Merchants' National Bank of Portland, Oregon, a deed to said five claims, free and clear of all liens and incumbrance, and showing a clear title thereto, executed to said second party. It is further agreed between the parties hereto that if any of the payments above mentioned are not made at the time when due, then the payments which shall have been made shall be forfeited, and that this agreement shall thereupon become void and of no effect. The second party agrees to work at least sixty (60) shifts per month, beginning on or before December 9, 1905, and to deposit the actual net proceeds of ore mined, after paying all the expenses incident to the production thereof, to the credit of the first party to apply on the purchase price of said mining claims; and to render said first party monthly statements of any and all ore shipped; said second party to have the right to work the property in mine fashion as to him seems best. The first party is to have access to the property at any time during the life of this agreement for the purpose of inspection of the work.

"In witness whereof, the parties hereto have hereunto set their hands and seals in duplicate, this 9th day of November, 1905.

"[Seal.]

John Keating.

"[Seal.]

J. Frank Watson."

Thereupon Watson made the first payment of \$2,500 to Keating, and a deed for the mining claims in favor of Watson was deposited in the Merchants' National Bank of Portland in escrow. Watson acted as trustee. Work was commenced on the mining claims, and Watson advanced the money to carry on such work until about the month of March, 1906. Prior to that date Watson had advised Jennings that he had already put up more money than he had anticipated would be necessary, and that he would not continue to put up money as he could not see the outcome, as no ore had yet been discovered. Jennings thereupon went to Wardner, inspected the property, and advised the appellant that Watson was not willing to advance any more money on said agreement. Jennings thereupon agreed with the appellant that if he would convey said mining claims, he would have organized a mining company for the purpose of owning and developing the same, and would pay Keating 60,000 shares of the capital stock of the Standard Development Company, and, in addition thereto, 100,000 shares of the capital stock of the

mining company to be organized to take over said Keating mining claims; or, in lieu of the 100,000 shares, \$7,500 in cash. It seems that Keating agreed to this, and returned with Jennings to Portland, Or., and an interview was had with said Watson, and thereupon the following agreement was entered into by P. J. Jennings and John Keating, to wit:

"This agreement made and entered into this twenty-first day of March, 1906, by and between John Keating of Wallace, Idaho, and P. J. Jennings of Portland, Multnomah county, Oregon, witnesseth, that whereas under the conditions of a certain escrow agreement now on deposit with the Merchants' National Bank, Portland, Oregon, between said John Keating and J. Frank Watson, it is provided that the following amounts shall be paid by said J. Frank Watson to said John Keating, viz.: Two thousand, five hundred dollars (\$2,500.00) on or before June 8th, 1906, and twenty thousand dollars (\$20,000) on or before December 8th, 1906. And whereas, said first party has sold to said second party hereto all his right, title and interest in and to said amounts to become due on said escrow agreement for fifteen thousand dollars (\$15,000), of stock in the Standard Development Company, and hereby agrees that on or before December 1st, 1906, he will pay to said first party the balance or seven thousand five hundred (\$7,500) dollars in cash or one hundred thousand shares (100,000) of the capital stock of a corporation to be formed covering the said mining claims, which capital stock shall be one million (1,000,000) shares of \$1.00 par value each.

"In witness whereof, the parties hereto have signed these presents this day and year first above written.

"John Keating,
"P. J. Jennings."

It is alleged in the complaint that, at the time said last-mentioned agreement was made, R. J. and P. J. Jennings and Watson, respondents, made a verbal agreement with Keating to pay him \$2,500 in addition to the consideration mentioned in said agreement. On March 21, 1906, the date when said last-mentioned agreement was executed, the appellant Keating directed by letter the Merchants' National Bank of Portland to deliver the deed theretofore placed in escrow to Watson without further payment. Thereupon P. J. Jennings delivered to the appellant certificates for 60,000 shares of the capital stock of the Standard Development Co. This stock was borrowed by P. J. Jennings from his brother, R. J. Jennings. P. J. Jennings induced Watson to keep the pay roll at the mine going with the expectation of interesting Eastern people in the property. This Watson did until he had advanced in the neighborhood of \$15,000 or \$16,000. Watson thereupon, with two mining engineers, visited and inspected said mining claims, and, after said inspection, declined to ad-

vance any further sums for their development, and so notified Jennings.

In the month of May, 1906, Watson, together with others, caused to be incorporated under the laws of the state of Oregon the Watson Mining Company with a capital stock of \$1,000,000, divided into 1,000,000 shares of the par value of \$1 each, with the intention of turning over the Keating mining claims to such corporation. But the property was not turned over to the corporation, and nothing but the mere organization of the company was effected at that time. Upon Watson's notifying P. J. Jennings that he would not advance any further sums of money in the promotion of said enterprise, said Jennings interested his brother, R. J. Jennings, in the property, and the latter thereupon on August 1, 1906, entered into an agreement with Watson by which he purchased all of Watson's interest in the property and in the corporation to be formed for the purpose of owning, holding and developing said mining claims. R. J. Jennings thereupon caused the name of the mining company organized as the Watson Mining Company to be changed to the Keating Mining Company, and, by direction of R. J. and P. J. Jennings, Watson on or about August 15, 1906, conveyed by deed to the Keating Mining Company the mining claims which had been conveyed to him by Keating and the deed was filed for record in Shoshone county on September 27, 1906. The defendant Goodsell was requested by R. J. Jennings to become a director in said corporation, and one share of the stock of said corporation was put in his name for the purpose of qualifying him to act as a director. It appears that Goodsell had no interest in the corporation or property other than the one share of stock. Thereafter the work of developing the property was continued, and the funds for the payment of such development was secured in part by sales of the treasury stock of the Keating Mining Company and by advances and loans of money made to the corporation by R. J. Jennings. The development work on said claims continued until some time in the summer of 1907, when the company became unable to pay its bills, and various liens for labor and supplies were filed against the property and suits were commenced to foreclose them. The mining company employed counsel to delay the foreclosure of the liens in order to give the company an opportunity to raise the money with which to pay off such indebtedness. In June, 1907, P. J. Jennings called upon the defendant Goodsell, and informed him that liens had been filed against the company and that there were other debts that would have to be met, and sought to borrow from Goodsell sufficient money to pay off the indebtedness of the respondent company and offered to secure Goodsell by a mortgage upon the property. Jennings represented to Goodsell that he was negotiating a deal with a man by the

name of Henschel, whereby he expected to obtain sufficient funds to pay off the indebtedness and liens of the company and for the further development of said property. Goodsell did not at that time give Jennings an answer. Henschel thereafter called on Goodsell and represented that he had an option on the treasury stock of said company, and that within a short time after his return from the East, he could arrange for the money to take up the treasury stock, and asked Goodsell if he could not tide the mining company over until his return. About September 1, 1907, P. J. Jennings again called on Goodsell, and stated that something would have to be done immediately as the liens were to be foreclosed. He further advised Goodsell at that time that the Keating Mining Company was indebted to R. J. Jennings in a sum exceeding \$7,500, and that R. J. Jennings was indebted to Goodsell in the sum of \$7,500 and interest, and that Jennings would assign to Goodsell his indebtedness against the company in payment of said indebtedness from R. J. Jennings, and that the company would execute a note for \$16,000 and a mortgage to secure the assigned indebtedness of R. J. Jennings and the balance to be represented by the note and mortgage of the company should be advanced by Goodsell for the purpose of paying off the indebtedness of the Keating Mining Company. After some further negotiations, and on or about September 4, 1907, Goodsell agreed to take an assignment of R. J. Jennings' claim against the company and advance certain money and take a note and mortgage from the company for the assigned claim and for money to be advanced by him, and the corporation on that day by resolution of the board of directors empowered the president and secretary to borrow the sum of \$16,000 and to execute a note therefor and mortgage to secure the same, which was done. Goodsell thereupon proceeded to Wallace, Idaho, and examined the records of Shoshone county for the purpose of ascertaining whether or not the property was in such condition as to justify him in satisfying the liens and paying out the money secured by the note and mortgage, and, after satisfying himself, he filed his mortgage for record, and thereupon paid off the liens and other indebtedness of the company in an amount in excess of \$8,500, personally attending to the matter of paying the bills and settling the liens, at the request of the Keating Mining Company. Thereafter the mining company made default in the payment of said note, and Goodsell on November 9, 1907, commenced an action to foreclose the mortgage, and a judgment was entered for the sum of \$17,332.48, and a foreclosure sale of the mortgaged property decreed, and on February 20, 1908, the sheriff of said county sold the property to Goodsell for the amount of the judgment, and issued to Goodsell a sheriff's certificate of sale.

The Finding of Facts.

Upon these facts and all of the evidence, the trial court found that Keating accepted and received 60,000 shares of the capital stock of the Standard Development Company at the agreed price of 25 cents per share, or \$15,000; that thereafter he accepted and received 100,000 shares of the capital stock of the Keating Mining Company; that said 100,000 shares of stock were accepted by him after consulting with his attorney and deliberation on the matter, and with the full knowledge of the liens against said mining claims, and that Keating has at all times held and retained said certificates of stock since said date until during the trial of this cause. The court also found that there was no conspiracy or fraud in regard to said transaction, and that because of Keating's accepting and retaining the entire purchase price for said mining claims and his long acquiescence in said matter subsequent to the execution and recording of the mortgage to Goodsell, he is not entitled to the relief prayed for in his complaint because of his laches and neglect. Upon all of the evidence the court found that no other agreement or contract was made or entered into between the parties on the 21st day of March, 1906, except the written contract above set forth made on that day, and that "no consideration was agreed to be paid except that mentioned in said agreement in writing." The court there finds against the allegations of the complaint to the effect that the defendants had agreed orally at the time said written contract was made that they would pay Keating \$2,500 in June, 1906. The court also found that the terms and conditions of said contract had been complied with, and, as to the allegations of conspiracy to defraud, the court found as follows: "The court further finds that the allegations of the plaintiff's complaint, charging fraud and conspiracy against the defendants, is not sustained by the evidence, and finds that the defendants are not guilty of fraud or of any conspiracy to defraud the plaintiff. The court further finds that the defendant David Goodsell was guilty of no fraud in the premises, and that the said defendant David Goodsell was not a party to any conspiracy to defraud the plaintiff out of his property or to defraud the plaintiff at all."

The court found that the defendant Goodsell advanced the money and took said mortgage in good faith and for a valuable consideration, and without notice of any claim or equity of the plaintiff or any other person to the property of said Keating Mining Company, and that the same was in all respects a bona fide transaction. The court clearly finds that the entire transaction in regard to the negotiations for the purchase of said mining claims, the contract entered into, the deeds conveying said mining claims

the execution of said mortgage to Goodsell, were all done and performed in good faith, and the evidence is sufficient to support those findings. The finding of facts is sufficient to defeat the recovery by the plaintiff.

Foreign Corporation.

The contention of counsel for appellant to the effect that the Keating Mining Company, being a foreign corporation, could not take title to said mining claims as shown by the facts established on the trial, for the reason that it had not at the time Watson conveyed said mining claims to said corporation complied with the Constitution (section 10, art. 11) and laws of the state (section 2792, Rev. Codes) in regard to filing its articles of incorporation and designating an agent upon whom service of process might be made, is not well taken, for the following reasons: First, it is found that the contract for the sale of said mining claims was a legal, valid contract, procured without conspiracy or fraud on the part of the defendants, and that Keating had accepted and received the entire purchase price therefor; and, second, that Keating had received the entire purchase price and acquiesced in the transaction after he had knowledge of all of the facts concerning said transaction, and is estopped from recovering by reason of his laches and neglect in not rescinding the contract and returning the purchase price within a reasonable time after he concluded that he had been defrauded. That being true, applying the rule laid down by this court in *Katz v. Herrick*, 12 Idaho, 1, 86 Pac. 873, Keating having received the full purchase price for said mining claims, the right of the Keating Mining Company to take and hold title to said mining claims is one that can neither legally nor equitably concern Keating, at least no further than as a stockholder thereof. This court in the *Katz-Herrick Case* said: "The right to take and hold title to real property is one that can neither legally nor equitably concern the vendor thereof after he has parted with his title and received the purchase price therefor." If this court should hold under said contention of appellant that the Keating Mining Company had no title to said property because of its failure to comply with the laws of this state, under the facts of the case as shown by the evidence the title would be in the defendant Watson, and that would not avail Keating in any manner. But the appellant having received full compensation for said claims, cannot now legally or equitably be concerned therein as he has parted with his title thereto and received the purchase price therefor.

Method of Identifying Exhibits.

During the cross-examination of the appellant, counsel exhibited to him certain let-

ters for identification, and the witness testified that he did not know whether the letters presented contained his signature or not, and stated to the counsel that he might tell whether they contained his signature if he were allowed to read them. Counsel for appellant thereupon stated to the court that the witness had a right to examine the letters which he was asked to identify, and requested that the witness be permitted to read the letters. The court denied the request, and that action of the court is assigned as error. When counsel presents a paper to a witness for identification and the witness states that he cannot identify it unless he is permitted to look at the paper and read it, it is error for the court not to permit the witness to examine it. The court ought not to permit a paper to be marked for identification where it has not been properly identified by the witness and he is permitted to examine it before he identifies it if he desires to do so. It is unfair to the witness to require him to testify whether a certain paper contains his signature without permitting him to examine it. Such an examination would no doubt refresh his memory in regard to the matter. Merely showing a witness a signature and requiring him to state whether or not he signed the paper to which that signature is attached, without permitting him to examine the paper so as to identify it understandingly, in this age when forgers have become so expert, is not consistent with reason and fairness. However, in this case, after said letters were introduced in evidence, it was apparently admitted that he signed them as he was not placed upon the stand to testify to the contrary. Therefore the action of the court in that matter was error without prejudice, and not cause for reversal.

Other errors are assigned, and after a careful examination of them we are satisfied that there is not sufficient error appearing in the record to justify a reversal of the judgment. The judgment is therefore affirmed, with costs in favor of the respondent.

AILSHIE, J., concurs.

(18 Idaho, 687)

CHICAGO, M. & ST. P. RY. CO. OF IDAHO
v. TRUEMAN et al.

(Supreme Court of Idaho. Nov. 28, 1910.)

(Syllabus by the Court.)

1. EMINENT DOMAIN (§ 197*)—PROCEEDINGS—DISMISSAL—STATUTORY PROVISION.

Section 5228 of the Revised Codes, which is a part of the title on eminent domain, makes the general provisions of the Code relative to "civil actions" applicable to proceedings under the eminent domain title, except as otherwise specially provided; and section 4354 of the Rev. Codes dealing with actions generally, provides that, "an action may be dismissed or a

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

judgment of nonsuit entered * * * by the plaintiff himself, at any time before trial, upon the payment of costs: Provided, a counterclaim has not been made or affirmative relief sought by the cross-complaint or answer of defendant." *Held*, that the latter section is applicable to actions and proceedings in eminent domain, and authorizes the plaintiff to dismiss an action in condemnation after the filing of a report by commissioners appointed to award the damages, or at any time before trial.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. § 527; Dec. Dig. § 197.*]

2. DISMISSAL AND NONSUIT (§ 32*)—PROCEEDINGS—HOW MADE.

A dismissal of an action, as authorized by subdivision 1 of section 4354, Rev. Codes, "is made by an entry in the clerk's register."

[Ed. Note.—For other cases, see *Dismissal and Nonsuit*, Dec. Dig. § 32.*]

3. EMINENT DOMAIN (§ 265*)—PROCEEDINGS—COSTS ON DISMISSAL.

By the provisions of section 5227, Rev. Codes, costs in eminent domain cases "may be allowed or not, and if allowed may be apportioned between the parties on the same or adverse sides in the discretion of the court." *Held* that, where a plaintiff commences an action in condemnation and procures the appointment of commissioners and has a hearing, and the commissioners make an award and file their findings and report and the plaintiff refuses to pay the award and thereafter dismisses the action, all costs usually taxed in civil actions should be taxed against the plaintiff, and that it would be an abuse of discretion not to do so under such circumstances, and that the provisions of the general statute relative to costs in "civil actions" would apply in such case.

[Ed. Note.—For other cases, see *Eminent Domain*, Dec. Dig. § 265.*]

4. EMINENT DOMAIN (§ 265*)—PROCEEDINGS—COSTS ON DISMISSAL.

Where a plaintiff in condemnation has, subsequent to the filing of the report of the commissioners appointed to assess the damages, dismissed the action under the provisions of subdivision 1, § 4354, the defendants must file their memorandum of costs within five days after notice of the dismissal, as provided by section 4912 of the Rev. Codes.

[Ed. Note.—For other cases, see *Eminent Domain*, Dec. Dig. § 265.*]

Appeal from District Court, Kootenai County; Robert N. Dunn, Judge.

Condemnation proceedings by the Chicago, Milwaukee & St. Paul Railway Company of Idaho against William Trueman and others. From the decree and order refusing to vacate it, plaintiff appeals. Reversed and remanded, with directions to dismiss.

J. L. McClear, Edwin McBee, and F. M. Dudley, for appellant. Ezra R. Whitla and Charles L. Heltman, for respondents.

AILSHIE, J. A motion has been made to strike out certain portions of the transcript and motion has also been made to dismiss the appeal. We have examined these motions and have reached the conclusion that they are not well taken. The motions are denied.

This is an appeal from a final decree of

condemnation and an order denying a motion to vacate and annul the decree. On the 24th day of January, 1908, the appellant company filed its complaint in the district court in and for Kootenai county, praying the condemnation of the south 30 feet of lot 10, block 1, in the townsite of St. Maries, for railroad purposes. Summons was issued and served, and at the same time notice was served on the defendants who are respondents here that the plaintiffs would apply to the court for the appointment of commissioners to assess and determine the damages that defendants would sustain by reason of the condemnation of the land described in the complaint. Commissioners were thereafter duly appointed, and after a hearing at which plaintiffs and defendants were represented and introduced proofs, the commissioners made and filed their findings and report. They found the value of the land sought to be condemned to be \$1,200, and that the damages that would accrue to the balance of the lot, buildings, and improvements thereon, by reason of the condemnation would amount to \$5,000. On May 11th following the plaintiff company filed with the clerk of the court its praecipe for the dismissal of the proceedings. Notice of this praecipe was served on the attorney for the defendants. No further action was taken in the matter until about September 21, 1909, when a notice of motion for judgment against the plaintiff was served on J. L. McClear, the local attorney at Coeur d'Alene City for the railroad company. This notice was forwarded by Mr. McClear to the general counsel at Spokane, and in the course of business was delayed and overlooked, and so no appearance was made on the day set for hearing, which was September 29th. On the latter date the motion was called up by the defendants, and on their application a final decree of condemnation was ordered upon the report of the commissioners, and thereafter and on October 9th a judgment was entered against the company for the amount of the award and a final decree of condemnation was entered. On October 15th the plaintiff moved for a vacation and annulment of the judgment and decree on several grounds, among which were: First, that the court was without jurisdiction to enter the judgment and decree; second, that the action had been dismissed long prior to the entry of judgment and decree.

The first question presented by the appellant deserving our consideration here is, that it had an absolute right, under section 4354 of the Rev. Codes, to dismiss the action.

That section provides as follows:

"An action may be dismissed, or a judgment of nonsuit entered, in the following cases: 1. By the plaintiff himself, at any time before trial, upon the payment of costs: Provided, A counterclaim has not been made

or affirmative relief sought by the cross-complaint or answer of defendant. If a provisional remedy has been allowed the undertaking must thereupon be delivered by the clerk to the defendant, who may have his action thereon."

Section 5228, Rev. Codes, which is a part of the title on eminent domain provides as follows:

"Except as otherwise provided in this title, the provisions of this Code relative to civil actions and new trials and appeals, are applicable to, and constitute, the rules of practice in the proceedings in this title."

It will be observed that this latter section makes the provisions of the Code relative to civil actions applicable "except as otherwise provided in this title," to proceedings in condemnation. Now in civil actions, under section 4354, supra, the plaintiff may dismiss, upon payment of costs, at any time before trial, provided a counterclaim has not been made or affirmative relief sought. No counterclaim had been filed and no affirmative relief had been sought in this case, and we are clearly of the opinion that the plaintiff had a right to dismiss. *Hancock Ditch Co. v. Bradford*, 13 Cal. 637; *Hopkins v. Superior Court*, 136 Cal. 552, 69 Pac. 299. So far as the record shows in this case no dismissal was ever entered. The statute, however, section 4354, provides that "the dismissal mentioned in the first two subdivisions" of this statute "is made by an entry in the clerk's register." It does not appear from the transcript that any entry of the dismissal has either been made in the clerk's register or any formal judgment has been entered. The failure to make such entry would not affect the plaintiff's right to have the action or proceeding dismissed.

It has been argued by the respondent, however, that the appellant was not entitled to the dismissal because he did not pay the costs, while it is urged by the appellant that there were no costs to pay. In the absence of a positive showing to the contrary, we assume that the plaintiff when applying to the clerk for a dismissal of the action paid the costs of the dismissal. Under the construction placed on the California statute, from which our section 4354 was taken, it has been held unnecessary for a plaintiff making a dismissal under subd. 1 of this statute to, at the time, actually pay more than the costs of the dismissal, and that the other costs follow the dismissal as a matter of law and must be taxed in the ordinary way, and that it was the intention of the statute that when ascertained they should be entered as a judgment against the

plaintiff. *Hancock Ditch Co. v. Bradford*, 13 Cal. 637; *Hopkins v. Superior Court*, 136 Cal. 552, 69 Pac. 299. But appellant contends that in a proceeding for condemnation no costs are taxable at all. To this contention we cannot give our assent. Appellant's contention seems to us contrary to both the letter and the spirit of the statute. By the provisions of section 5227, costs in eminent domain cases "may be allowed or not, and if allowed may be apportioned between the parties, on the same or adverse sides, in the discretion of the court." This provision of the statute was evidently written with a view that the case would go to final judgment after a regular trial had. It would clearly be an abuse of the discretion of the trial court, under this statute, to refuse to allow a defendant costs where the plaintiff had procured the appointment of commissioners and had a hearing, entailed all the costs incident to the production of witnesses and attendance on the meeting of the commissioners, and then had dismissed the action, as was attempted to be done in this case. Where the action is dismissed under these conditions, it would clearly be the duty of the trial court to tax the costs against the plaintiff, and the provisions of section 5229 making applicable the general statutes relative to civil actions would apply in the taxing of costs. The usual costs in civil actions would be taxable. It would be necessary for the defendants to file a cost bill within five days after notice of the dismissal as provided by section 4912, Rev. Codes.

From what has already been said it follows that the court erred in entering a decree of condemnation and a judgment on the findings and report of the commissioners. The plaintiff had already complied with the statute in order to entitle it to a dismissal of the proceeding. It would also follow from the holding of this court in *Pyle v. Woods*, District Judge (decided at this present term) 111 Pac. 746, that the court would have had no authority to enter a judgment over the objection of plaintiff on the findings of the commissioners. The condemning company was not obliged to pay the award made by the commissioners, and even though it did not desire to dismiss the proceeding it would still have had a right to apply to the court for a jury trial to assess the damages.

The judgment and order appealed from are reversed, and the cause is remanded, with direction to the trial court to dismiss the action. Costs of this appeal are awarded in favor of appellant.

SULLIVAN, C. J., concur.

(13 Idaho, 734)

GAMBLIN v. DICKSON.

(Supreme Court of Idaho. Dec. 3, 1910.)

*(Syllabus by the Court.)***1. SUFFICIENCY OF EVIDENCE.**

Evidence held sufficient to support the finding of facts.

2. CANCELLATION OF INSTRUMENTS (§ 24*)—OFFER TO DO EQUITY—SUFFICIENCY.

In an action for rescission of a contract, it is sufficient if the plaintiff makes offer to restore or to do equity in his complaint, as it is always within the power of the court to require that the person invoking equity shall do equity as a condition of relief, and the court may impose terms which may be just and equitable and may enforce compliance therewith.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 33-38; Dec. Dig. § 24.*]

3. CONTRACTS (§ 266*)—RESCISSON OF CONTRACT—ACTION AT LAW.

The rule is different in an action at law based upon a rescission of the contract by one of the parties, and such distinction arises out of the difference between the powers of the two courts—equity and law.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1186; Dec. Dig. § 266.*]

4. RESCISSON OF CONTRACT.

In the case at bar, the plaintiff has not attempted to abrogate or rescind the contract of sale by his own act, but has by this action sought to have it rescinded by judicial proceedings.

Appeal from District Court, Bonner County; Robert N. Dunn, Judge.

Action by Israel Gamblin against M. M. Dickson. Judgment for plaintiff. Defendant appeals. Affirmed.

Chas. L. Heitman, H. H. Taylor, and J. W. Merritt, for appellant. B. S. Bennett, for respondent.

SULLIVAN, C. J. The respondent brought this suit for the purpose of having canceled and annulled a certain warranty deed conveying real estate in Bonner county to the appellant. It is alleged, among other things, in the complaint that the defendant through fraud and conspiracy procured the respondent to convey said land to him. The defendant answered, and denied the material allegations of the complaint. The cause was tried by the court without a jury, finding of facts was made, and judgment entered in favor of the respondent. A motion for a new trial was denied. This appeal is from the judgment and order denying a new trial.

It appears from the record that the respondent was the owner of 78 acres of land bordering on Hayden Lake, Bonner county, and that the appellant desiring to purchase the same, offered to trade the respondent for said land 40 shares of stock in the Spokane & Big Bend Railway Company, a corporation that had done certain things toward procuring a right of way for said road, but none of said road had been constructed. It appears that the stock was represented by

the appellant to be of the value of \$100 per share, when in fact it had no market value. Upon all of the evidence introduced on the trial, in which there is a conflict, the court found upon all of the issues in favor of the respondent, and found that said railroad company at the time said exchange was made had little tangible property, and its franchises, contracts, and property were not sufficient to give more than a nominal value to its stock, and at the time of making said transfer in June, 1907, it was of little or no value, and that it was of little or no value at the time of making said finding of facts, to wit, on the 25th of September, 1909. On a careful examination of the evidence, we find that it fully supports and sustains the findings made by the court.

Errors are assigned in regard to the admission of certain testimony, in denying a motion to strike out certain testimony, denying a motion for a nonsuit, and also in refusing to admit certain testimony offered by the defendant. We are fully satisfied from an examination of the entire record that it contains no reversible error, and that the assignments of error are not well taken. In limine, counsel for appellant contends that, before a party is entitled to rescind a contract, he must put, or offer to put, the other party in statu quo by a full restoration of all he has received. The rule there stated is applicable in cases where a rescission is made before an action is brought, but it is not necessary where a suit for rescission is brought. The correct rule is stated in 24 Am. & Eng. Ency. of Law, p. 621. The author there says: "Whether the complainant in a suit for rescission must as a condition precedent to relief have offered or tendered restitution to the defendant prior to the beginning of the suit is a matter upon which the authorities are conflicting. The rule of the better considered cases is that it is sufficient that the plaintiff makes his offer to restore or to do equity in his bill or complaint, and shows therein that he has substantially preserved the status quo on his part so as to be able to fulfil his offer. This rule proceeds upon the principle that it is always within the power of a court of equity to require that the person invoking its aid shall submit to equitable terms as a condition of relief, and that, the parties being properly before the court, the court may impose upon them any terms which may be just and equitable in the premises, and may enforce compliance therewith. It is conceded that the rule is different in actions at law based upon a rescission by the act of the party, but the distinction taken is based upon the difference in the powers of the two courts."

In *Nelson v. Carlson*, 54 Minn. 90, 55 N. W. 821, the court held that, where a party seeks the aid of a court to rescind a contract, it

is not necessary that he previously attempt a rescission or make any tender to the other party, except where such tender is necessary to put the other party in default. In *Carlton v. Hulett*, 49 Minn. 308, 51 N. W. 1053, it was contended that a restoration or tender should have been made before the action could be brought, but the court held against that contention in the following language: "Authorities in support of respondent's position on this point are abundant, but are foreign to the case, because she has not attempted to abrogate and rescind the mortgage contract by her own act, but by judicial proceedings instead. In such cases, where one seeks the aid of a court to set aside and rescind a contract, it is not essential that he should have previously attempted a rescission, or should have made any tender to the other party, except when such tender is necessary to put the other party in default. By submitting her cause to the court, the plaintiff expressed a willingness to perform such conditions as it may regard necessary to impose as proper terms on which relief shall be granted. What such a plaintiff ought to do, and what he must do, to reinstate the other party in statu quo, as a condition for repudiation and rescission, is for the court, which always possesses the necessary power to determine the question." The same rule is adhered to in *Hansen v. Allen*, 117 Wis. 61, 93 N. W. 805, and in *Ludington v. Patton*, 111 Wis. 208, 86 N. W. 571. In the latter case the court clearly draws the distinction between a suit for a rescission of a contract on the ground of fraud and an action at law to recover back that which has been paid upon a contract void for fraud. The latter contemplates a precedent rescission of the contract by act of the plaintiff, and an action in equity to rescind a contract invites and requires equity to effect that end, and looks to the decision in that action to accomplish it and to impose such terms of rescission as may be deemed equitable under all of the facts in the case. The earlier decisions in California, Colorado, and Washington and some other states would indicate that they were made without reference to the distinction above mentioned. See, also, *Clark v. O'Toole*, 20 Okl. 319, 94 Pac. 547, where the rule here laid down is discussed at length and authorities cited.

The record shows that the respondent in the case at bar did offer to place the defendant in statu quo, not before the suit was brought, but afterward, and the decree entered required the plaintiff to pay to the defendant the sum of \$500 with interest thereon at the rate of 7 per cent. from the time said money was paid by the appellant, and to deliver to the appellant 40 shares of the capital stock of said railway company, and, upon the payment of that amount and the

delivery of said shares within 30 days after the entry of said judgment, defendant was required to reconvey said land to the respondent.

We find no reversible error in the record, and the judgment is affirmed, with costs in favor of respondent.

AILSHIE, J., concurs.

(18 Idaho, 711)

KEANE v. PITTSBURG LEAD MINING CO.
(Supreme Court of Idaho. Dec. 1, 1910.)

(Syllabus by the Court.)

1. COURTS (§ 57*)—STENOGRAPHIC RECORD—FEE.

Under the provisions of section 3984, Rev. Codes, either party to a suit in which a stenographic record has been made may demand a typewritten copy of a part or the whole thereof, and the reporter must furnish the same upon the payment of a fee of 7½¢ per hundred words.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 198-200; Dec. Dig. § 57.*]

2. COSTS (§ 254*)—BILL OF EXCEPTIONS—PREPARATION—COPY OF STENOGRAPHIC RECORD.

When a party procures a typewritten copy of the stenographic record to be used in the preparation of his bill of exceptions, or statement of the case, and intends to have the cost thereof taxed as costs in the case on appeal, he must serve the copy of the stenographic record upon the adverse party when he serves his proposed bill or statement, so that the adverse party may have the benefit of it in preparing amendments, or in ascertaining whether the proposed bill or statement is correct.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 974; Dec. Dig. § 254.*]

3. COSTS (§ 254*)—COST ON APPEAL—STENOGRAPHIC RECORD.

A transcript of such record in narrative form, made by the reporter, is not a compliance with said statute, requiring the reporter to furnish a typewritten copy of the stenographic record, and the cost of procuring said record in narrative form will not be allowed as costs on appeal.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 966; Dec. Dig. § 254.*]

4. COURTS (§ 57*)—STENOGRAPHERS—FEES.

All fees earned by the reporter or his deputy under the provisions of the reporter statutes, which include sections 3980 and the following seven sections, must be turned into the state treasury, and the reporter cannot evade that requirement by reducing the stenographic record to narrative form.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 200; Dec. Dig. § 57.*]

Appeal from District Court, Shoshone County; W. W. Woods, Judge.

In the action brought by Joseph P. Keane against the Pittsburg Lead Mining Company, an order taxing certain costs was made, from which defendant appeals. Reversed.

See also, 17 Idaho, 179, 105 Pac. 60.

A. G. Kerns, for appellant. Gray & Knight and Wm. K. Shissler, for respondent.

SULLIVAN, C. J. This is an appeal from an order of the district court taxing against the appellant the following item of costs, to wit: "Official stenographer, transcript of testimony, \$120." It appears from the record that plaintiff's counsel requested the court reporter to make a transcript of the testimony taken on the trial, in narrative form, which he did, and charged \$120 therefor. In taxing the costs, the court allowed said item as a part of the costs on appeal. That action of the court is assigned as error.

Under the provisions of section 3984, Rev. Codes, in any action in which a stenographic record has been taken, it is made the duty of the court reporter to furnish a copy of such record or a copy of any part thereof, to either party to the suit desiring the same, and he is authorized to charge a fee of 7½¢ per hundred words therefor, which must be paid in the first instance by the party requesting the copy, and the sum so paid may thereafter be taxed as costs in the case against the party finally defeated in the action. The copy contemplated by said statute is a literal copy of such record, containing the questions and answers, the objections made, the exceptions taken, etc., and such record reduced to narrative form by the stenographic reporter is not such a copy as the law contemplates.

Whenever an appellant is required to procure a transcript of the testimony taken on a trial by the reporter, in order to prepare his transcript on appeal, he may procure the same to be made and use it in the preparation of his proposed bill of exceptions or statement, and when he serves his proposed bill or statement upon opposing counsel, he ought to furnish him such copy of the record, and when that is done, the one who paid for such copy, if he prevails on the appeal, may tax the cost of the same as a part of the costs on appeal. The law does not contemplate that each party must procure a transcript of the evidence in order to prepare his bill or statement, or amendments thereto, but does contemplate that the appellant in the first instance shall procure such copy, and the respondent may have the benefit thereof.

The record shows that counsel for appellant requested the reporter to make a transcript of the evidence in narrative form, and not a true copy thereof. Counsel might differ as to the correctness of the narrative form of the evidence, as made by the reporter, and the respondent has a right to an exact copy of the record in order that he may decide whether the narrative form prepared is correct or not. And in cases where there is considerable evidence, opposing counsel might not be able to remember what the evidence was, and in order to reduce it to narrative form correctly, he ought to have a copy of the evidence as given by the witnesses. For the reasons suggested, said stenographic record in narrative form does not come within the provisions of section 3984, and for that

reason the court erred in taxing the cost thereof as a proper item of cost in said case.

Section 3988 provides that the fees earned by any court reporter or his deputy, under the provisions of the court reporter act, which includes sections 3980 to 3988, must be paid to the State Treasurer, to be placed to the credit of the general fund of the state, and requires such reporter to make a quarterly report to the State Auditor of all fees earned by himself and deputies, and that such report shall be accompanied by a remittance of such fees; and whatever fees the court reporter or his deputy receives under the provisions of said statute, whether in making an exact copy of his notes or in reducing the same to narrative form on the demand of litigants, must be turned into the state treasury.

The order of the court taxing said item of \$120 as a part of the costs is reversed, and the cause remanded, with instructions to the trial court to strike said item of \$120 from said cost bill. Costs of this appeal are awarded to the appellant.

AILSHIE, J., concurs.

(18 Idaho, 695)

**MIX v. BOARD OF COM'RS OF NEZ
PERCE COUNTY.**

(Supreme Court of Idaho. Nov. 30, 1910.)

(Syllabus by the Court.)

**1. STATUTES (§ 90*)—SPECIAL LEGISLATION—
SPECIAL CHARTERS—AMENDMENT.**

Under the provisions of the Constitution, the special charter of the city of Lewiston may be amended by a special law enacted for that specific purpose, or by a general law which declares a state policy concerning police regulations or in regard to matters affecting the state at large.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 98-100; Dec. Dig. § 90.*]

**2. STATUTES (§ 90*)—SPECIAL LEGISLATION—
SPECIAL CHARTERS—AMENDMENT.**

Ordinances providing for the pavement of streets, construction of sewers, and levying assessments to pay therefor are matters of local concern, and the special charters of the cities of this state in regard to such local matters can be amended only by special law.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 98-100; Dec. Dig. § 90.*]

3. CITY CHARTERS—FORMER DECISION DISTINGUISHED.

Boise City National Bank v. Boise City, 15 Idaho, 792, 100 Pac. 93, cited and distinguished.

4. MUNICIPAL CORPORATIONS (§ 46*)—INTOXICATING LIQUORS (§ 10*)—SPECIAL CHARTERS—CONTROL BY GENERAL LAW.

Whenever the Legislature enacts a general law declaring a state policy in regard to the prohibition of gambling or the regulation of the sale of intoxicating liquors, such law supersedes any special charter rights that cities within the state have been given in regard thereto.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 123-125; Dec. Dig. § 46.* Intoxicating Liquors, Cent. Dig. §§ 7-12; Dec. Dig. § 10.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

5. CITY CHARTERS—EFFECT OF GENERAL LAW—FORMER DECISION APPROVED.

In *re Ridenbaugh*, 5 Idaho, 377, 49 Pac. 12, cited and approved.

6. MUNICIPAL CORPORATIONS (§ 592*)—SPECIAL CHARTERS—CONTROLLING EFFECT OF GENERAL LAWS.

Special charter cities cannot by ordinance make acts lawful that are made criminal by the general law of the state.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1311-1314; Dec. Dig. § 592.*]

7. STATUTES (§ 77*)—LOCAL AND SPECIAL LAWS—LOCAL OPTION LAW.

The law known as the "Local Option Law" (Sess. Laws 1909, p. 9) held to be a general law declarative of the policy of the state in regard to traffic in intoxicating liquors.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 79-82, 95; Dec. Dig. § 77.*]

8. STATUTES (§ 77*)—LOCAL AND "SPECIAL LAW."

A special law is one that applies only to a special locality or to an individual or to a number of individuals selected out of a class to which they belong.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 79-82, 95; Dec. Dig. § 77.*]

For other definitions, see *Words and Phrases*, vol. 7, pp. 6577-6584; vol. 8, p. 7802.]

9. STATUTES (§ 68*)—"GENERAL LAW."

A general law is one framed in general terms, restricted to no locality, and operating upon all alike.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 70; Dec. Dig. § 68.*]

For other definitions, see *Words and Phrases*, vol. 4, pp. 3065-3071; vol. 8, pp. 7669, 7670.]

10. STATUTORY PROVISIONS.

Section 7 of the local option law (Laws 1909, p. 12) prohibits the board of county commissioners of any county where said law has been adopted from granting any person, firm, association, corporation, or club a license to sell or dispose of intoxicating liquors within such county.

11. INTOXICATING LIQUORS (§ 10*)—CHARTERS—CONSTRUCTION.

Under the provisions of section 63 of the special charter of the city of Lewiston (Laws 1907, p. 375), said city is prohibited from issuing a license authorizing any one to do any act or engage in any business which is made unlawful by the general laws of the state.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 7-12; Dec. Dig. § 10.*]

12. INTOXICATING LIQUORS (§ 10*)—CHARTERS—CONSTRUCTION—"LAW OF THE LAND."

The phrase "law of the land" as used in said section includes the general laws of the state—[citing 3 *Words and Phrases*, 2232 et seq.].

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 7-12; Dec. Dig. § 10.*]

13. INTOXICATING LIQUORS (§ 10*)—CHARTERS—CONSTRUCTION.

The Legislature by enacting the special charter of the city of Lewiston did not delegate to said city the authority to license persons to sell intoxicating liquors within such city, contrary to the general law of the state.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 7-12; Dec. Dig. § 10.*]

14. MUNICIPAL CORPORATIONS (§ 592*)—LICENSES—SCOPE OF AUTHORITY.

When the general law prohibits or makes a certain business criminal, the city cannot make such business lawful by licensing it.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1311-1314; Dec. Dig. § 592.*]

(Additional Syllabus by Editorial Staff.)

15. STATUTES (§ 77*)—CONSTRUCTION—"SPECIAL LAW"—"GENERAL LAW."

In determining whether a law is general or special, the court will look to its substance and necessary operation, as well as to its form and phraseology—[quoting 7 *Words and Phrases*, pp. 6578, 6579].

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 79-82; Dec. Dig. § 77.*]

16. INTOXICATING LIQUORS (§ 1*)—SALE—NATURE OF RIGHT.

There is no inherent right in a citizen of a state or of the United States to sell intoxicants by retail.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 1; Dec. Dig. § 1.*]

17. WORDS AND PHRASES—"SUBSTANTIVE LAW"—"REMEDIAL LAW"—"ADJECTIVE LAW."

Substantive law is that part of the law which creates, defines, and regulates rights as opposed to adjective or remedial law, which prescribes the method of enforcing rights or obtaining redress for their invasion.

[Ed. Note.—For other definitions, see *Words and Phrases*, vol. 7, pp. 6073-6076; vol. 8, p. 7784.]

Appeal from District Court, Nez Perce County; Edgar C. Steele, Judge.

Proceedings by Charles Mix for a writ of mandate to compel the Board of County Commissioners of Nez Perce County to issue a liquor license. Judgment of dismissal, and petitioner appeals. Affirmed.

Chas. L. McDonald and Eugene A. Cox, for appellant. D. C. McDougall, Atty. Gen., J. H. Peterson and O. M. Van Duyn, Asst. Attys. Gen., and Dwight E. Hodge, County Atty., for respondent.

SULLIVAN, C. J. This appeal involves the judgment and order of the trial court in refusing to grant a writ of mandate to the board of county commissioners of Nez Perce county, commanding them to issue a license to the appellant authorizing him to engage in the business of retailing intoxicating liquors in the city of Lewiston. The action was brought to determine the applicability of the local option law to the territory included in the city limits of Lewiston. It is alleged in the petition that the city is operating under a special act or charter; that the petitioner has been engaged for several years last past in the liquor business in said city, and that he now holds a license from that city; that he applied to the county commissioners for a renewal of his county and state licenses, and that such renewal was refused on the sole ground that a local option election was held in the county of Nez Perce on March 9,

1910, at which election the canvassers found that the majority of the votes cast were in favor of the proposition submitted, and that the board was thereby deprived of discretion to issue the license applied for. A general demurrer was interposed to the complaint or petition, which was sustained by the court and a judgment of dismissal was entered. This appeal is from that judgment.

In limine we desire to say that the oral argument of Eugene A. Cox, of counsel for appellant, which was submitted to the court in typewriting, shows a great deal of thought, study, and painstaking research, and is a very valuable historical treatise, and deserves special mention in this opinion. It is instructive and valuable for its clear and well-reasoned argument, and it traces the history of special charter cities from their early existence down to the present time. It is a splendid production, and ought to be preserved in proper form for the benefit of any who may be interested in that subject.

The main question presented is: Does the act known as the "Local Option Law" (Sess. Laws 1909, p. 9) apply to the city of Lewiston? It is contended by counsel that section 63 of the special charter of the city of Lewiston (Sess. Laws 1907, p. 375) gives that city the absolute power to regulate or prohibit the sale of intoxicating liquors within said city, and that the local option law, though adopted by the electors of the county, can in no manner affect the right of the city to control the traffic in intoxicating liquors. Said section 63 is as follows: "The mayor and council shall have full power and authority: * * * To license, regulate, restrain and prohibit for cause places where intoxicating beverages are sold, and all offensive and dangerous trades, occupations, employments or businesses, and for the purpose of this act to define what are offensive and dangerous trades, employments, occupations, or businesses; to limit and define the districts within the city within which intoxicating liquors may be sold, and any dangerous or offensive occupation carried on; but this section does not empower the city of Lewiston to declare a trade, employment, occupation or business offensive or dangerous contrary to the common understanding of the subject, nor to authorize any one to do any act or engage in any business contrary to the law of the land." In determining the questions involved, the method or manner of amending said special charter under the provisions of the state Constitution must be considered. It appears from the record that the city of Lewiston was created by an act of the Legislature of Washington Territory in 1863, prior to the creation of Idaho Territory; it then being a part of Washington Territory. That city's existence was recognized by the territory of Idaho and its charter was continued in force by section 2 of article 21 of the state Constitution, which is as follows:

"All laws now in force in the territory of Idaho which are not repugnant to this Constitution shall remain in force until they expire by their own limitation or be altered or repealed by the Legislature." Section 1 of article 12 of the Constitution provides for the organization of cities not operating under special charters, as follows: "The Legislature shall provide by general laws for the incorporation, organization and classification of the cities and towns, in proportion to the population, which laws may be altered, amended, or repealed by the general laws. Cities and towns heretofore incorporated, may become organized under such general laws, whenever a majority of the electors at a general election shall so determine, under such provisions therefor as may be made by the Legislature." Section 2 of article 11 of the Constitution provides as follows: "No charter of incorporation shall be granted, extended, changed or amended by special law, except for such municipal, charitable, educational, penal or reformatory corporations as are or may be, under the control of the state; but the Legislature shall provide by general law for the organization of corporations hereafter to be created: Provided, that any such general law shall be subject to future repeal or alteration by the Legislature."

It is contended by counsel for appellant under the provisions of section 2, art. 11, of our Constitution and the decisions of this court, that the charter of the city of Lewiston can be amended in two ways only: First, by special act for that specific purpose; and, second, by a general criminal law or a law treating a subject-matter of proper state control and declarative of a state policy, that the latter method is not express, but arises by necessary implication from the nature of state and city government, that cities are organized to deal with local questions, the state with problems and policies of a more general nature, that, before this implied method of amending the charter is applicable, it must appear that the Legislature has adjudged some subject to be proper for state regulation, and has declared a state policy with respect thereto. We are in accord with that contention of counsel. In *Boise City National Bank v. Boise City*, 15 Idaho, 792, 100 Pac. 93, this court had under consideration the authority of that city to construct sewers and to levy assessments for the payment thereof, and to regulate those matters in which the local community alone was interested, and the court there held that the provisions of the city charter must control, and not the general law of the state. The court said: "In the case at bar it is clear that the construction of sewers and the levying of assessments for the payment therefor are matters of local concern, in which the local community is alone interested, and in which the state at large has no special interest." The question presented for decision in that case was whether the provisions

of the Boise City charter of 1907 in regard to constructing sewers and assessing the property benefited and collecting from the property owners the cost thereof was the exclusive law by which those things must be done, or whether that charter was supplemented by the act of 1905 (Sess. Laws 1905, p. 113). It will be observed that the Boise City charter of 1907 was re-enacted and amended about two years subsequent to the general law of 1905, which law provided a complete method for building sewers and assessing the property benefited and collecting from the property owners the cost thereof, and applies to cities incorporated under the general law of the state. We held in that case that the special charter of Boise City could not be amended by general law, but that holding was applicable to the facts of that case, and the facts involved were relative to the construction of sewers and the levying of assessments for the payment therefor, and the court there held that that matter was of local concern, in which the state at large had no special interest, and, as to those matters, the charter could be amended only by special law. Section 2 of article 12 of the Constitution is as follows: "Any county or incorporated city or town may make and enforce, within its limits, all such local, police, sanitary and other regulations as are not in conflict with its charter or with the general laws." Said section was construed by this court in *Re Ridenbaugh*, 5 Idaho, 377, 49 Pac. 14, under the following facts: The city of Boise, operating under a special charter which gave it the right to regulate gambling, licensed Ridenbaugh to operate a gambling game in said city. While he was operating under said license, he was arrested under a general law of the state prohibiting gambling, and as a defense to said action he pleaded the license granted to him by the city of Boise. The court in passing upon that case said: "It was not the intention of the Legislature or the framers of the Constitution to empower the council of incorporated cities and towns to pass ordinances in conflict with the general laws of the state. The cardinal rule in construing constitutional, as well as statutory, provisions, is to discover and enforce the intention of those who made them. * * * It was not the intention to permit or authorize the councils of incorporated cities to legalize, by ordinance, acts prohibited as criminal by the general criminal laws of the state, or to enforce ordinances in conflict with the general law. In case of a conflict, the ordinance must give way. The ordinances authorized by the charter of Boise City must be in harmony with the general laws of the state." The real distinction between the case of *Boise City National Bank v. Boise City*, supra, and the *Ridenbaugh* Case, is that the former involved a mere matter of local self-government and the latter a state policy prohibiting gambling in the state. Special char-

ter cities cannot by ordinance make acts lawful that are made criminal by the general law of the state. Section 2, art. 12, of the state Constitution, prohibits special charter cities from making or enforcing any local, police, sanitary, or other regulation that is in conflict with its charter or the general law of the state.

But it is contended that the local option law is not a declaration of a state policy; that it is not a general law; that it is local and special, and applicable only to the counties that adopt it, hence in no manner amends the special charter of the city of Lewiston. The local option law is made applicable to every county in the state alike, and its provisions become operative in any county upon the electors of such county complying with its provisions and holding an election to determine whether the sale of intoxicating liquors as a beverage shall be prohibited, and, if at such election the majority of the electors vote in favor of prohibiting such sale, the law becomes operative in the county as provided by said act. A special law is one which applies only to an individual or to a number of individuals selected out of the class to which they belong, or to a special locality. *State v. Cal. Min. Co.*, 15 Nev. 234. A law may be general, however, and have but a local application, and it is none the less general and uniform because it may apply to a designated class if it operates equally upon all subjects for which the rule is adopted. In determining whether a law is general or special, the court will look to its substance and necessary operation as well as to its form and phraseology. *Ladd v. Holmes*, 40 Or. 167, 66 Pac. 714, 91 Am. St. Rep. 457; 7 Words & Phrases, pp. 6578, 6579; *Black's Law Dictionary*, p. 535, under title "General Law."

In *People v. Hoffman*, 116 Ill. 587, 5 N. E. 596, 56 Am. Rep. 793, the court had under consideration the question whether a certain law was general or special, and said: "Whether laws are general or not does not depend upon the number of those within the scope of their operation. They are general, 'not because they operate upon every person in the state, for they do not, but because every person who is brought within the relations and circumstances provided for is affected by the laws.' Nor is it necessary, in order to make a statute general, that 'it should be equally applicable to all parts of the state. It is sufficient if it extends to all persons doing or omitting to do an act within the territorial limits described in the statute.'" See, also, *Cox v. State*, 8 Tex. App. 254, 34 Am. Rep. 746; *People v. Wright*, 70 Ill. 388.

In the case of *Paul v. Gloucester Co.*, 50 N. J. Law, 585, 15 Atl. 272, 1 L. R. A. 86, the court had under consideration a local option law. The law was attacked on the ground that it was local or special in its application, and the court held: "The law is not in contravention of our constitutional provision

that 'the Legislature shall not pass private, local or special laws regulating the internal affairs of towns and counties.' This inhibition in the Constitution is not intended to secure uniformity in the exercise of delegated police powers, but to forbid the passing of a law vesting in one town or county a power of local government not granted to another." The local option law is of general application to every county in the state. While it is left with the people of each county to say whether it shall be enforced in the county, that fact does not make it any the less a general law. It is applicable to every county in the state, and under its terms and provisions the electors of each county have a right to vote upon the question whether the sale or disposal of intoxicating liquors as a beverage shall be prohibited in such county. Every county in the state may accept or reject it upon the same terms and conditions. It is clearly a "general law" within the meaning of that phrase as defined by the leading law writers and the courts of last resort of the nation. The Legislature has undertaken by this act to make a general law applicable to all of the counties in the state alike, as to whether the sale of intoxicating liquors shall be prohibited or not.

It is almost universally recognized that indulgence in intoxicating liquors leads to immorality, crime, and pauperism, and that such liquors are in their nature dangerous to the morals, good order, health, and safety of the people, and intoxicating liquors are not placed on the same footing with ordinary commodities. The business of selling such liquors has for many years, both in this country and in England, been regarded by Legislatures and courts with disfavor, and it does not stand upon the same plane of utility and morality with the useful arts, trades, and professions. *Joyce on Intoxicating Liquors*, § 76. It has been held by a long line of decisions from the United States Supreme Court down that there is no inherent right in a citizen of a state or of the United States to sell intoxicating liquor by retail. *Id.* § 77, and authorities there cited. The right to engage in the retail liquor traffic is a mere privilege, and, in defining the extent to which the privilege goes, the law should be strictly construed against the traffic. *Id.* § 77. See, also, *Woolen & Thornton on the Law of Intoxicating Liquors*, § 88 et seq. Considering the view that is generally held in regard to the retail liquor business, by the adoption of the local option law, the Legislature intended to authorize the electors of each county to determine whether the sale of intoxicating liquors should be prohibited in the county. Section 7 of the local option law shows the intent of the Legislature to make that law apply to all territory within a county, in special charter cities as well as cities incorporated under the general law. It provides, among other things, that: "If a majority of the votes cast at such election shall

be in favor of the proposition submitted (that is, to prohibit the sale of intoxicating liquors in such county), it shall thereafter be unlawful for the board of county commissioners of the county to grant any person, firm, association, corporation or club a license to sell or dispose of intoxicating, spirituous, malt or fermented liquors or wines within said county." It is there declared that it shall be unlawful for a board of county commissioners to grant a license to sell or dispose of such liquors "within said county"—not within said county exclusive of special charter cities. Had the Legislature intended to exclude special charter cities from the operation of said act, it would have been an easy matter to use clear and explicit language to that effect, but the phrase "within said county" has been used, which clearly means within every part and parcel of said county, and does not exclude special charter cities from the operation of said local option law.

In section 63 of the special charter of Lewiston, which section authorizes the council of that city to license, regulate, and prohibit the sale of intoxicating beverages, it is also specified that its provisions do not empower the city of Lewiston to authorize any one to do any act or engage in any business contrary to "the law of the land." What does the phrase "law of the land" mean as used in said section?

In the noted case of *Dartmouth College v. Woodward*, 17 U. S. (4 Wheat.) 518, 4 L. Ed. 629, which has received the sanction of the courts, Webster said: "By the law of the land is clearly intended the general law which hears before it condemns, which proceeds upon inquiry and renders judgment only after trial. It means every citizen shall hold his life, liberty and property under the protection of the general rules which govern society." In many decisions it has been held that the "law of the land" and "due process of law" are synonymous phrases, and, though verbally different, express the same thought and have the same meaning. In many of those decisions the phrase "due process of law" refers to procedure according to the law of the land, which process in each state is regulated by its own laws. "Due process of law" affords a hearing before it condemns, and renders judgment only after trial. And it is often stated that "due process of law" is that constitutional right which provides that no citizen shall be deprived of life, liberty, or property except as provided by law. It was held in *Huber v. Rely*, 53 Pa. 112, and in *Kalloch v. Superior Court*, 56 Cal. 229, that due process of law ordinarily implies and includes a complaint, a defendant, a judge, regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceeding. The term "due process of law" relates primarily to the remedy or means of redress where rights are invaded,

rather than to matters of substantive law. *Board v. Collins*, 46 Neb. 411, 64 N. W. 1090. The phrase "law of the land" in state Constitutions imports a general public law equally binding upon every member of the community. See authorities cited in 3 Words and Phrases, p. 2232 et seq.

In *Sheppard v. Johnson*, 21 Tenn. 285, the court held that whether a statute is the "law of the land" within the meaning of that term as used in the Bill of Rights depends upon two propositions: (1) That the Legislature had the power to pass it; (2) that it is a general and public law equally binding upon every member of the community. The phrase "due process of law" in many decisions refers more particularly to the procedure prescribed by statute for the protection of life, liberty, and property, and the method of enforcing rights or obtaining redress for their invasion, while the phrase "law of the land" includes the remedial law as well as substantive law. It includes that part of the law which the courts are established to administer, as opposed to the rules according to which the substantive law itself is administered. The substantive law is that part which creates, defines, and regulates rights as opposed to adjective or remedial law, which prescribes the method of enforcing rights or obtaining redress for their invasion. *Black's Law Dictionary*, under title "Substantive Law," p. 1132.

The phrase "law of the land," as used in said section 63 of the charter of Lewiston, means the law of the state, so far as the provisions of said section are concerned, and it prohibits the city of Lewiston from authorizing "any one to do any act or engage in any business contrary to the law of the land"—the general law of the state. By the provisions of said section, the Legislature has not abdicated the right to enact police regulations, to license, regulate, restrain, and prohibit the sale of intoxicating liquors in said city. The city of Lewiston was not granted thereby the absolute power to regulate its own saloons without reference to the laws of the state. By the provisions of said section 63, the state has reserved to itself the ultimate right to control and govern the liquor traffic within the state. The city of Lewiston was given the right to regulate, restrain, and prohibit it, but it was not given the right to violate the general police laws of the state by authorizing the sale of intoxicating liquors when such sales were prohibited by the general laws of the state. The Legislature did not abdicate or delegate to the city of Lewiston its power of police regulation over intoxicating liquors. Section 63 authorized the city of Lewiston to license and regulate the sale of intoxicating liquors within the corporate limits of such city so long as licensing and regulating were not

contrary to the general law of the state. So long as the state recognized the retail liquor business and licensed it, the provision of said charter would be operative, and the city might place additional restrictions and limitations upon the business within its corporate limits or might totally prohibit it; but, when the general law prohibits it, there is nothing left in that business for the city to regulate.

We therefore conclude that said local option law is a general law of the state, and the Legislature in adopting it established thereby a state policy in regard to the regulation of the traffic in intoxicating liquors, and, since the majority of the electors in Nez Perce county have voted in favor of prohibiting the sale of such liquors as a beverage in said county, the county commissioners are prohibited from issuing a license to retail intoxicating liquors to any person within the corporate limits of the city of Lewiston or within said county. The judgment must therefore be affirmed, and it is so ordered. Costs awarded to respondent.

AILSHIE, J., concurs.

(49 Colo. 210)

PRIBBLE v. PEOPLE.

(Supreme Court of Colorado. Dec. 5, 1910.)

1. HOMICIDE (§ 27*)—DEFENSES—INSANITY.

In a prosecution for murder, it may be shown that the killing was done while accused was insane from a drug administered to him without his knowledge for the purpose of robbing him.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 43½, 44; Dec. Dig. § 27.*]

2. HOMICIDE (§ 294*)—INSTRUCTIONS—APPLICABILITY TO ISSUES.

A charge in a prosecution for murder, that if the jury found that accused was not guilty of murder in the first or second degree, and believed beyond a reasonable doubt that he killed decedent, but without malice, they should find him guilty of manslaughter, either voluntary or involuntary, "unless you should acquit him on the ground of self-defense," was erroneous, in that the quoted part excluded from the jury's consideration the defense of insanity also relied on.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 605; Dec. Dig. § 294.*]

3. CRIMINAL LAW (§ 561*)—EVIDENCE—SUFFICIENCY.

While a finding of a material fact in a civil case may be made from a preponderance of the evidence, the finding of a material fact in favor of the state in a criminal case can only be made if shown by the evidence beyond a reasonable doubt.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1267; Dec. Dig. § 561.*]

4. CRIMINAL LAW (§ 331*)—DEFENSES—INSANITY.

It is presumed that an accused was sane when the crime was committed, and to overcome or cast a reasonable doubt upon the correctness of such presumption he must introduce evidence showing insanity.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 742-744; Dec. Dig. § 331.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

5. CRIMINAL LAW (§ 561*)—DEFENSES—INSANITY—SUFFICIENCY OF EVIDENCE.

If, upon considering the presumption of sanity with all the evidence in the case, a reasonable doubt exists as to accused's sanity, he must be acquitted.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1267; Dec. Dig. § 561.*]

6. CRIMINAL LAW (§ 789*)—INSTRUCTIONS—REASONABLE DOUBT.

A charge in a homicide case that if the jury found that accused was not guilty of murder in the first or second degree, but believed that he killed decedent, but without deliberation or malice, they should find him guilty of manslaughter, either voluntary or involuntary, "unless you should find that the defendant was of unsound mind," was erroneous, in that the quoted clause deprived accused of the benefit of any evidence introduced by him which merely created a reasonable doubt as to his sanity, when accused was entitled to an acquittal, if, under all the evidence, a reasonable doubt existed as to his sanity.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1851, 1906, 1907; Dec. Dig. § 789.*]

Error to District Court, El Paso County; James Owen, Judge.

Rube Pribble was convicted of murder in the second degree, and he brings error. Reversed and remanded.

Orr & Cunningham (Clarence M. Hawkins and H. M. Mason, of counsel), for plaintiff in error. John T. Barnett, Atty. Gen., and James M. Brinson, Deputy Atty. Gen. (Elmer L. Brock, of counsel), for the People.

MUSSER, J. The plaintiff in error, who was defendant below, was convicted of murder in the second degree and sentenced to confinement in the penitentiary for a period of not less than 20 or more than 25 years. The case has been brought here for review and numerous errors are assigned.

Instruction No. 20 was in part as follows: "Evidence has been introduced in this case for the purpose of showing intoxication on the part of defendant at the time of the commission of the alleged offense; likewise for the purpose of showing temporary insanity on the part of defendant." The instruction then proceeds with a description of the effect of drunkenness in the case, apparently to conform with the opinion of this court in *Brennan v. People*, 37 Colo. 256, 86 Pac. 79. From this instruction, it is seen that one of the defenses was temporary insanity, and that evidence was introduced to support this defense. The insanity referred to by the court was not a condition arising out of drunkenness. The defendant apparently attempted to make it appear that the insanity was caused by a drug administered without the knowledge of the defendant, through the artful contrivance of another, for the purpose of facilitating the robbery of defendant. The court saw and recognized the competency and purpose of this evidence, and the jury, of course, were

the sole judges of its weight and sufficiency, and of the credibility of the witnesses from whom it came. No other reference is made to this insanity as a defense, excepting as in instruction No. 15, hereinafter referred to.

Instruction No. 9 was as follows: "If you should find the defendant not guilty of murder of the first degree or murder of the second degree, and should believe from the evidence beyond a reasonable doubt that the defendant as charged in the information killed the said deceased, William A. Neff, but that there was not any malice or any mixture of deliberation therein, then you should find the defendant guilty of manslaughter, either voluntary or involuntary, in accordance with the definition of voluntary and involuntary manslaughter as hereinbefore given you, unless you should acquit him on the ground of self-defense."

Later on in the instructions, elaborate reference is made to the law relating to self-defense. Complaint is made of the last clause of the instruction, to wit: "Unless you should acquit him on the ground of self-defense." In the oral argument, counsel for the defendant vigorously insisted that this clause of instruction No. 9 tended to exclude from the consideration of the jury any other defense than that of self-defense, and that it had a tendency to impress the jury with the idea that in the mind of the court there was no other defense under the evidence. This seems to be the logical effect of the instruction. It told the jury that if they could not acquit the defendant on the ground of self-defense, they must find him guilty of manslaughter at least. They could only conclude that self-defense alone would excuse the homicide, and that for some reason the insanity mentioned in instruction No. 20 was not available to save the defendant. If that insanity would not excuse the homicide when committed under the circumstances that would otherwise reduce it to manslaughter, it was a very easy, and not unnatural, thing for the jury to conclude that it would not serve as a sufficient excuse were the circumstances such as to otherwise make the homicide murder. They could only conclude that, for some reason, acquittal, on the ground of insanity, was out of the case.

Instruction No. 15 was as follows: "If you should find the defendant not guilty of murder of the first degree, or murder of the second degree, and should believe from the evidence that the defendant, as charged in the information, killed the deceased, William A. Neff, but that there was not any malice or any mixture of deliberation therein, then you should find the defendant guilty of manslaughter, either voluntary or involuntary, in accordance with the definition of voluntary and involuntary manslaughter as hereinbefore given you, unless

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

you should find that the defendant was of unsound mind, or that the killing was done in self-defense."

The objection to this instruction relates to the last clause thereof, reading, "unless you should find that the defendant was of unsound mind, or that the killing was done in self-defense." Leaving out of view the part of the clause concerning self-defense, the jury were told by this instruction that they must find as a fact that the defendant was of unsound mind before such a condition could avail him, and that if they did not so find, they must find the defendant guilty of manslaughter at least. A finding of a material fact in a civil case is to be made from a preponderance of the evidence, and one in favor of the people in a criminal case, from the evidence beyond a reasonable doubt. In any event, a finding that the defendant was of unsound mind cannot be made when the preponderance of the evidence shows that he is of sound mind, even though the evidence of unsoundness may create in the mind a reasonable doubt of soundness. The people entered into this case with the presumption in their favor that the defendant was sane, and their evidence nowhere pointed otherwise, and if the defendant desired to overcome this presumption, or to cast a reasonable doubt upon its correctness in his case, it was necessary for him to introduce evidence for the purpose of showing his insanity, which he did, as shown by instruction No. 20. The people then gave evidence in addition to the presumption. Upon this question the presumption of sanity and the evidence were to be considered by the jury, and they were told in instruction No. 15 that before they could give the defendant any benefit, they must find as a fact that he was of unsound mind. In order to do that, the evidence must have at least preponderated in favor of unsoundness. As the evidence of unsoundness was introduced by the defendant, it is clear that under this instruction the burden was cast upon him of proving the unsoundness of his mind. If the evidence introduced by him created in the minds of the jury a reasonable doubt as to the soundness of his mind, but was insufficient to enable them to find that his mind was unsound, the defendant was, by this instruction, deprived of the benefit of his evidence. The jury could but conclude that this view of the law should be taken by them, not only in the consideration of manslaughter, but of murder as well. There are cases which appear to hold that in a prosecution for murder, wherein the defense is insanity, the burden is upon the defendant to prove his insanity. We think that the better doctrine, supported by the weight of authority, is, that if upon consideration of the presumption of sanity and all the evidence in the case, a reasonable doubt exists as to whether the defendant is sane or not, he is entitled

to the benefit of that doubt and to an acquittal.

After reviewing the cases supporting the opposite doctrine, the Supreme Court of the United States, in *Davis v. United States*, 160 U. S. 409, at page 484, 16 Sup. Ct. 353, at page 357 (40 L. Ed. 499), says: "We are unable to assent to the doctrine that in a prosecution for murder, the defense being insanity, and the fact of the killing with a deadly weapon being clearly established, it is the duty of the jury to convict where the evidence is equally balanced on the issue as to the sanity of the accused at the time of the killing. On the contrary, he is entitled to an acquittal of the specific crime charged, if upon all the evidence there is reasonable doubt whether he was capable in law of committing crime." And on page 487 of 160 U. S., page 358 of 16 Sup. Ct. (40 L. Ed. 499): "Strictly speaking, the burden of proof, as those words are understood in criminal law, is never upon the accused to establish his innocence or to disprove the facts necessary to establish the crime for which he is indicted. It is on the prosecution from the beginning to the end of the trial and applies to every element necessary to constitute the crime. Giving to the prosecution, where the defense is insanity, the benefit in the way of proof of the presumption in favor of sanity, the vital question from the time a plea of not guilty is entered until the return of the verdict, is whether, upon all the evidence, by whatever side adduced, guilt is established beyond reasonable doubt. If the whole evidence, including that supplied by the presumption of sanity, does not exclude beyond reasonable doubt the hypothesis of insanity, of which some proof is adduced, the accused is entitled to an acquittal of the specific offense charged."

The court cites and quotes liberally from numerous decisions supporting the same doctrine, and among others from *Brotherton v. People*, 75 N. Y. 159, as follows: "If evidence is given tending to establish insanity, then the general question is presented to the court and jury whether the crime, if committed, was committed by a person responsible for his acts, and upon this question the presumption of sanity, and the evidence, are all to be considered, and the prosecutor holds the affirmative, and if a reasonable doubt exists as to whether the prisoner is sane or not, he is entitled to the benefit of the doubt, and to an acquittal."

The jury were not obliged to find as a fact that the defendant was of unsound mind. If, after consideration of all the evidence in the case, a reasonable doubt existed in their minds as to the sanity of the defendant, he was entitled to the benefit of that doubt and to acquittal. There are other errors assigned to the giving and refusal of instructions which it is unnecessary to pass upon, but our silence thereon must not be

taken to indicate that such assignments are not good.

For the errors committed by the court in giving instructions Nos. 9 and 15, the judgment is reversed, and the cause remanded for new trial.

Reversed and remanded.

CAMPBELL, C. J., and GABBERT, J., concur.

(47 Colo. 320)

SMUGGLER-UNION MINING CO. v. KENT et al.

(Supreme Court of Colorado. Feb. 7, 1910. Rehearing Denied Jan. 3, 1911.)

1. MINES AND MINERALS (§ 38*)—RIGHT TO INSPECT MINE—STATUTES.

Code, § 364, authorizing inspection of mines on specified conditions, applies only where there is a suit pending involving some title or interest in the mine itself.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 92; Dec. Dig. § 38.*]

2. MINES AND MINERALS (§ 67*)—LEASE—EVICTION—RIGHT TO INSPECT MINE—ORDER OF COURT.

Where a lessee of a part of a vein of a mine sued the lessor for damages for a wrongful eviction, the court, though possessing power to make an order for an inspection of the mine by the lessee, could not make an order for an inspection of the entire mine; but the right of inspection could not be extended further than to the portion of the vein covered by the lease.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 187; Dec. Dig. § 67.*]

3. MINES AND MINERALS (§ 67*)—LEASE—EVICTION—RIGHT TO INSPECT—ORDER OF COURT.

Where, in a suit by a lessee of a part of a mine for a wrongful eviction, the issues were whether the lessor had, after ouster, extracted large bodies of ore, whether valuable ore bodies were still left in the mine, and whether the lessee was rightfully ousted because he was guilty of a breach, because his methods were injurious to the mine, the court, though possessing power to make an order for an inspection of the mine by the lessee, erred in imposing the condition that, on the lessor refusing to permit an inspection, he could not produce evidence of the condition of the mine subsequent to the ouster, unless the lessee first produced evidence on the subject, but the order for an inspection, if the court had power to make it, should have been absolute.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 187; Dec. Dig. § 67.*]

4. MINES AND MINERALS (§ 67*)—LANDLORD AND TENANT—WRONGFUL EVICTION—EVIDENCE.

Where, in an action by a lessee of a part of a mine for a wrongful eviction, the lessor alleged that the lessee was rightfully ousted because he was guilty of a breach of the lease, in that his methods of mining were injurious and unworkmanlike, the exclusion of evidence that the lessee did his work improperly, and that the lessor had to do work to restore the mine to a proper condition, was erroneous, and could not be sustained on the ground that the lessor withheld his consent to an inspection of the mine by the lessee, pursuant to an order providing for an inspection on the condition that, if the lessor refused to permit it, he should not

be permitted to produce evidence of the condition of the mine subsequent to the ouster.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 187; Dec. Dig. § 67.*]

5. MINES AND MINERALS (§ 67*)—EVICTION—ISSUES, PROOF, AND VARIANCE.

The variance between the complaint, in an action by a lessee of a mine for a wrongful eviction, which alleged that the lease was of an entire lode, calling for 12½ per cent. royalty on the returns of all ores mined and disposed of, and the proof of a written lease of only a part of a lode, calling for a royalty of 25 per cent. on the proceeds of specimen and shipping, and of 12½ per cent. on milling, ores, was material, and there was a failure of proof, requiring the granting of a nonsuit.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 187; Dec. Dig. § 67.*]

6. PLEADING (§ 237*)—COMPLAINT—AMENDMENTS.

Where a lessee of a mine, suing for an eviction, knew before the trial of the variance between the complaint and the lease, and during the trial his attention was called thereto, but he induced the court to hold during the trial that the variance was immaterial, the court properly refused leave after the trial to amend the complaint to conform to the proof.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 603-619; Dec. Dig. § 237.*]

7. MINES AND MINERALS (§ 67*)—EVICTION—RECOVERY OF PROFITS.

Where the object of a mining lease was the making of profits by the lessee, he could, in case of wrongful eviction, recover anticipated profits, on adequately proving the same.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 187; Dec. Dig. § 67.*]

8. MINES AND MINERALS (§ 67*)—EVICTION—RECOVERY OF PROFITS.

A lessee of a part of a mine sued for a wrongful eviction and sought to recover anticipated profits. No profits could have been made in working the mine, provided the lessee was confined to the outlet described in the lease; but he claimed that he could have made profits by repairing the outlet at a small cost, and by building a mill, and by securing from the lessor a right of way through a tunnel, which the lessor was not obliged to give. He did not show that he was able, willing, and ready to erect the mill. The lessor promised that, if the lessee built a mill for treating the ores, a three-year extension of the lease would be given; but the lessee did not bind himself to build a mill. *Held*, that the evidence was insufficient to show loss of profits resulting from the eviction.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 187; Dec. Dig. § 67.*]

9. MINES AND MINERALS (§ 67*)—EVICTION—RECOVERY OF PROFITS.

Where, in an action by a lessee of a part of a mine for loss of profits by wrongful eviction, it was admitted that the lessee could not make profits if confined to the outlet described in the lease, evidence of profits made out of special shipments taken out through another outlet by special permission of the lessor was improper, as a foundation on which to compute profits if the mine had been worked and the ore removed as provided by the lease.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 187; Dec. Dig. § 67.*]

10. MINES AND MINERALS (§ 67*)—EVICTION—RECOVERY OF PROFITS.

Where, in an action by a lessee of a part of a mine for loss of profits by wrongful eviction, the evidence conclusively showed that the vein of the mine was pockety and irregular, and not

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

uniform in value, the quantity of the ore left in the vein at the time of the eviction could not be determined by a mathematical computation, based on conditions in the vein as the lessee saw them at the time of the eviction, and on the assumption that the vein would continue unbroken, regular, and of uniform richness from 800 to 1,000 feet to the surface, to its supposed outcrop within the side lines of the claim, and such a computation did not furnish a basis for damages.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. § 187; Dec. Dig. § 67.*]

Appeal from District Court, San Miguel County; Theron Stevens, Judge.

Action by Joseph Kent and another against the Smuggler-Union Mining Company. From a judgment for plaintiffs, defendant appeals. Reversed and remanded.

Howe & Adams, for appellant. L. C. Kinikin and Bell, Catlin & Blake, for appellees.

CAMPBELL, J. The plaintiffs, who allege that they are lessees of the Carruthers lode mining claim, in San Miguel county, brought this action against the Smuggler-Union Mining Company, the alleged lessor, for damages occasioned by their wrongful eviction by the lessor, and obtained a judgment, from which defendant appeals. The assignment of errors contains many specifications. As the judgment must be reversed because it is not based upon sufficient legal evidence, only the objection on this ground and such other specifications as might be material in the event of a new trial will be considered.

1. After the issues were made up, and seven days before the date set for the trial, plaintiffs demanded of defendant a copy of the lease under which they claim they entered, and for an inspection of the mine. A copy of the lease was given to them by defendant on the following day, but the demand for inspection was refused. Three days later plaintiffs filed their verified petition in the action, in which they asked for an order granting them leave to inspect the mine, upon the ground that an examination was necessary to enable them to prove the allegations of their complaint, particularly that the defendant company, immediately after the wrongful eviction, entered into the mine and removed therefrom large bodies of valuable mineral-bearing rock, which were left exposed by plaintiffs before they were ousted. Defendant resisted the petition, and filed an affidavit stating, among other reasons for their refusal to let plaintiffs into the mine, that the premises were not then in its possession or under its control, but were leased to other parties. The affidavit also denied that there was any necessity for an inspection. On the same day the court issued an order for the inspection. It was not absolute, but provided that, if defendant refused to permit the examination, then, in the

production of its evidence upon the trial, it should be confined to the condition of the mine and its ore bodies at and before the time of the ouster, "unless the plaintiffs elect to and are permitted to go into developments since the ouster." Defendant again refused to permit the examination, and objected to the order, and preserved its exception, and renews the same here.

This application was not made under section 364 of the Code, as that applies only where there is a suit pending involving some title or interest in the mine itself (*People ex rel., etc., v. De France*, 29 Colo. 309, 68 Pac. 267), but is based upon the inherent power of a court of equity to permit an examination of the subject-matter of an action. Defendant strenuously contends that such an order, in a case like this, and under such issues, is without precedent, and wholly beyond the power of the court, in the absence of a permissive statute. In *Montana Co. v. St. Louis Mining & Milling Co.*, 152 U. S. 160, 14 Sup. Ct. 506, 38 L. Ed. 398, it was said that courts of equity have frequently granted such orders, and, while the custom is not decisive of the question, the right to make them has never been denied by the courts. The observation may not have been necessary to that decision, because the inspection there was granted under authority of a statute; but, in passing upon the constitutionality of the statute, the court said that if courts of equity, by virtue of their general powers, have such authority in a case pending before them, the state, by statute, may authorize the courts to order an inspection in advance of the suit. This case may be decided without determining whether the authority which plaintiffs invoke is an inherent power of an equity tribunal. If it is assumed that it is, it is quite clear that the order in this case was wrong. Three days before it was made plaintiffs received from defendant a copy of the lease under which they claim, and therefore must have known, for it is therein expressly recited, that the lease was only of that portion of the Carruthers vein lying and being above the level of the Sheridan cross-cut tunnel, which crosses the Carruthers lode, and extending from such level to the surface of the Carruthers claim. Notwithstanding plaintiffs had a lease only for this portion of the vein, they asked, and received of the court, an order for an inspection of the entire Carruthers mine, and every part thereof, for the purpose of examining it. Certainly plaintiffs' right of inspection, if it existed at all, extended no farther than to that portion of the vein which was covered by their lease. At least it was not claimed that an inspection of other premises would furnish evidence tending to establish the allegations of the complaint concerning the leased premises. Defendant, therefore, had the right to refuse the demand for inspection

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

as it was made, and the court was wrong in making the broad and comprehensive order that it issued.

But there are other, and equally conclusive, reasons why the order was wrong, harmful to defendant, and resulted in obstructing the due administration of justice. Let us consider for a moment its meaning and effect. The court apparently was in doubt about its power to compel defendant to admit plaintiffs into the mine; otherwise, the order would probably have been made absolute. Its alternative character contemplated the possibility that defendant might disregard it, and, as a penalty for the anticipated disobedience, provision was made, in that event, that no evidence of the mine's condition subsequent to the ouster should be produced by defendant, unless plaintiffs themselves opened the door by first producing similar evidence. As plaintiffs for six months worked the vein, they knew as much about the condition of the mine at the time of the ouster as defendant did, and no further examination by them was needed to get evidence on that issue. But there were other important and controverted issues involved: That defendant extracted and removed large bodies of valuable ore after the ouster, and that other large and valuable ore bodies were still left in the mine, all of which plaintiffs claim they would have worked at a large profit had they not been evicted; and the defense in the answer that plaintiffs were rightfully ousted because they were guilty of a breach, in that their methods were injurious and unworkmanlike. It needs no argument to show that these issues could not be satisfactorily determined without reference to subsequent work and development, if any, and without careful examination and measurements and tests made after the eviction occurred. In other words, subsequent conditions would throw the only satisfactory light upon these important issues of fact, and furnish more certain and reliable proof than would the character of evidence to which defendant was restricted. Palpably erroneous, therefore, was the order, which not only tied defendant's hands unless plaintiffs themselves chose to loosen them, but put it in the power of plaintiffs to close the door to the best, the only reliable and certain, data with respect to the question of profits, the vital issue in the case. The trial court, even had it possessed the power, abused its discretion in imposing such a condition or penalty as this order contains. If plaintiffs were entitled to go into the mine to secure evidence to prove their case, the order should have been made absolute; but the court committed error when it invested them with power to keep out of the case the only reliable evidence upon which the issue of profits could be determined. So, also, when defendant attempted to prove its defense that plaintiffs were lawfully evicted because they did their work improperly, and when it offered to

prove the work (and its cost), which had to be done to restore the mine to a proper condition, the court again committed error by rejecting the offer on the ground that defendant withheld its consent to an inspection which, as we have seen, it could not be coerced to give.

2. There is grave doubt if plaintiffs proved a lease from defendant. The complaint alleges that the mine was first leased to the plaintiff Dunlap and B. L. Gearing, but they refused to accept the tendered written instrument of leasing and renounced all their prospective rights thereunder, and afterwards, by consent of defendant, plaintiff Kent was substituted in place of Gearing, whereby Kent and Dunlap were to have the same rights which formerly were intended to be granted to Dunlap and Gearing. The evidence is uncontradicted, even plaintiffs themselves admit it, that Dunlap and Gearing never accepted the lease which defendant proposed to give them. It is a little difficult to understand how Kent and Dunlap, as substituted lessees, ever acquired any rights under a lease which was never accepted by their predecessors, if the only thing the former acquired was that which the latter might have secured, but which they would not assent to. But if it be assumed, for the purposes of this case, that Kent and Dunlap, the plaintiffs here, accepted the lease in evidence, and entered upon the premises thereunder, and for a time mined ore therefrom, it is entirely clear that the lease which they produced in evidence, as the measure of their rights, is not the lease which they allege in their complaint, but is a materially different one. Defendant objected upon the ground of the variance; but the court, in accordance with the contention of the plaintiffs, held that the variance was not material. The lease, as alleged in the complaint, was of the entire Carruthers lode. The lease produced in evidence was only of a fractional part thereof, as hereinbefore set forth. The royalty alleged in the complaint was a straight 12½ per cent. royalty on the returns of all ores mined and disposed of. The royalty provided for in the lease, which was produced in evidence, was a royalty of 25 per cent. upon the proceeds of specimen and shipping, and of 12½ per cent. on milling, ores. Such a variance is material, and the court should not have received the written lease as evidence without permitting an amendment of the complaint. It is no answer to say that no specimen or shipping ores were produced. That circumstance does not affect the character of the lease, or the question of variance between the lease as pleaded and the lease which was offered in evidence. Plaintiffs, doubtless later concluding that the variance was, or might be held, material, asked permission, after the trial, to amend the complaint by making its allegations concerning the character of the lease conform to the proof; but the court very properly with-

held its permission, not only because plaintiffs were dilatory in making the application, having known of the variance before the trial began, and their attention having been specially called thereto repeatedly during the trial, but also because it had been induced to hold, during the trial, upon plaintiffs' contention, that the variance was immaterial, though the contrary was maintained by defendant. Manifestly plaintiffs could not be allowed during the trial to say that the variance was immaterial, and afterwards that it was material, and have an amendment made to the complaint. The variance was harmful to defendant. There was a failure of proof on this issue, and defendant's motion for non-suit should have been granted. *People's M. & M. Co. v. Central C. M. Co.*, 20 Colo. App. 561, 80 Pac. 479.

3. The most serious and prejudicial error concerns the award of damages. Plaintiffs in their complaint and in their evidence sought to recover as damages only the profits which they claim they would have realized had they not been ousted. There was evidence by plaintiffs tending to establish a wrongful ouster, and the thwarted attempt by defendant, as hereinabove stated, to produce evidence tending to show that the eviction was proper. Assuming for our present purpose that the eviction was wrongful, and that in all other respects plaintiffs proved their case, we pass to the assignment of error that the verdict on which the judgment for plaintiffs was rendered is not based upon any reliable or sufficient evidence. Defendant contends that anticipated profits of a mining venture are not a proper element of damages, where a tenant is wrongfully evicted before the termination of his lease. The general rule is that prospective profits are not a proper element of damage; but the rule is not universal, and there are certain well-known qualifications. Where the very object of a mining lease, as in this case, is the making of profits by the lessee, such must have been within the contemplation of the parties to the lease at the time of its execution, and it was likewise within their contemplation that, in case of a wrongful eviction, the lessee will be entitled to recover profits, provided his proof is adequate. This rule is recognized in *Anvil Mining Co. v. Humble*, 153 U. S. 540, 14 Sup. Ct. 876, 38 L. Ed. 814. In that case, however, the proof was quite different from the evidence in the pending case, as we shall hereafter see. In *Ramsay v. Meade*, 37 Colo. 465, 86 Pac. 1018, in the case of an established commercial business, profits as a proper element of damage were recognized. So, also, in *Rio Grande Western Ry. Co. v. Rubenstein*, 5 Colo. App. 121, 38 Pac. 76. In *Isabella G. M. Co. v. Glenn*, 37 Colo. 165, 170, 86 Pac. 349, profits were held an element in the measure of damage in a case of wrongful eviction of a lessee of a mine, while in *Milheim v. Baxter*, 46 Colo. 155, 103 Pac. 376, 133 Am. St. Rep. 50, a case where a tenant

was evicted, profits were not allowed on account of an inadequate basis for their ascertainment. This is a case where the only recovery asked is prospective profits, and, as they are the true measure of damages herein, the inquiry is whether proof of that issue was made.

We proceed to search the record to see what it exhibits on such issue. The lease under which plaintiffs claim provides that all ores shall be taken out of the mine through the seventh level and down the Union shaft. The ores extracted by plaintiffs during their six months' occupancy consisted of two separate lots, which, by special permission of defendant, they took out through the Sheridan shaft. But all parties understood and say that this was not of right, but a special privilege, limited to the two shipments. It was because of this designated method of removing ores contained in the lease tendered to Dunlap and Gearing that they refused to accept it, and Kent knew this before he began negotiations with defendant. Both of the plaintiffs say that because of the condition of the seventh level and the Union shaft, of its distance from the leased premises, and for other reasons not necessary to mention, no profits could be made in working the mine, if the lessees were confined to that outlet for their ores. At the very time plaintiffs were evicted, they say that they were negotiating with defendant for taking out ore through the Sheridan shaft; but permission would not be given, because other lessees and the defendant were constantly using it. Before plaintiffs' rights attached, they knew of the impracticable and unprofitable method of removing ores to which the lease restricts them, and so obtained from defendant the promise that if they built a mill for treating the ores a three-year extension of the lease would be given. Plaintiffs, however, did not, as they expressly say, bind themselves to build, but merely might do so if they saw fit, in which event the extension would be granted. Nothing is said in the complaint about plaintiffs' ability, willingness, or readiness to build a mill, or that they ever intended to do so. While on the stand both of them testified, at one time, that they could make no profit if confined to the Union shaft in taking out ore; elsewhere, and later, they qualified this evidence with the statement that at an expense of about \$300 they could have repaired the Union shaft and passageway thereto, and that they could have then made some profit, provided they built a mill and secured from defendant further concessions, which defendant was not obliged to give, such as a right of way through a certain tunnel. Upon this evidence of plaintiffs themselves, defendant insisted that they had disproved their own case and asked a direction to the jury to that effect. In passing upon this motion, the trial judge said that plaintiffs' testimony was contradictory and inconsistent, yet he thought the matter should be submitted to the jury to

determine which claim of plaintiffs was true. The judge evidently overlooked, or for the moment forgot, a previous and correct ruling which he had made, that because plaintiffs had not averred in their complaint that they were able, willing, and ready to build a mill, no consideration could be given by the jury in estimating profits as to what might have been realized if a mill was built. In other words, all reference to a mill was foreign to the case. It is entirely clear, therefore, that plaintiffs themselves, in correcting or explaining their former testimony that profits could not be made if they were restricted to the seventh level and Union shaft, in no respect helped their case, because they said that profits might have been realized provided they built a mill and got certain rights of way. They also said that if they were unable to use the Sheridan shaft, or could not get permission to make a new mill hole near it, then they intended to build the mill, not that they would repair the main shaft and passageways thereto. Such explanatory evidence is entitled to no weight whatever, and forms no basis for a verdict in plaintiffs' favor on the issue of profits. It is uncertain, and depends on too many contingencies to make it of any value.

In other respects the evidence of profits was insufficient. In view of plaintiffs' admission that no profits could be made if they were confined to the Union shaft, evidence as to profits which they made out of two special shipments taken out through the Sheridan shaft by permission of defendant was manifestly improper as a foundation on which to compute profits if the lease was worked and the ores removed as its terms provided. Yet such incompetent evidence was the basis on which plaintiffs estimated their profits for milling ores which they claim they could have extracted, had they not been ousted. During the six months they were in possession, they did only about 15 feet of development work in running a drift; the ores they took out being from workings on the vein opened by previous lessees or the defendant. The court permitted them to testify, though the figures are not given in the record, as to the quantity of ore left in the mine which they say they could have taken out during their lease, and this quantity they arrived at by a mathematical computation, based on the conditions in the vein as they saw them, and on the further assumption that the vein continued unbroken, regular, and of uniform richness 800 to 1,000 feet to the surface, to its supposed outcrop within the side lines of the claim. And yet the evidence by mining engineers and experts was uncontradicted that the ore bodies in the mine at the time of the eviction were not so exposed or developed as that any definite or reliable or reasonably accurate estimate or calculation could be made as to the amount thereof, even if the vein extended to the surface. The evidence was all one way that the vein, as worked by plaintiffs and lessees in this mine, and in mines generally

in that section of the country, was pockety and irregular, and not uniform in value. We know of no law or principle that warrants the presumption that the vein in a mine exposed hundreds of feet below the surface will on the upward dip come to the surface within the side lines of the claim and continue all the way of the same richness as where actually exposed. Nevertheless the court, in ruling on defendant's objection to this kind of evidence and to plaintiffs' basing their estimate of quantity and value on such presumptions, said that they might do so, observing that, under the conditions shown, it is not more unreasonable to presume that the vein would continue to the surface than it is to presume that people will continue to eat. We are aware that in *Armstrong v. Lower*, 6 Colo. 393, this court said that, when one has discovered a lode upon the unappropriated public domain, and has, within the proper time, in good faith performed all of the subsequent acts essential to a valid location, as provided by law, he is entitled to the presumption that his lode extends on its strike throughout the full length of the claim. In the same case, at page 581 of same volume, the court more accurately stated the proposition by saying that, if such accompanying facts are proved, the jury may infer therefrom, in the absence of contradictory proofs, that the vein extends on its strike throughout the entire claim. These observations were made in a controversy between conflicting mining claims, and this presumption was indulged in favor of the first locator. This, however, is not authority for the proposition which the trial court laid down in this case, where the question is as to the volume and value of ore in a mine, that a vein exposed at a certain place therein will continue on its dip either upward to the surface or indefinitely downward and of the same size and value throughout.

Plaintiffs may have produced enough evidence as to the profits they made out of the two lots of ore which they mined and milled by special permission of defendant; but they failed to prove that they would have made any profits, even out of these shipments, had they mined and removed the ores as they were required to do by the lease, as the trial court said. And it is altogether clear that they produced no reliable or reasonably certain evidence either as to the quantity or value of the ores that remained in the mine after the ouster, and which they might have milled during the remainder of their term, or that there would have been any profits. On the contrary, the evidence is wholly conjectural, and consists of mere guesses, as the trial court itself suggested. The witnesses did not even purport to consider their estimates otherwise. Indeed, when the order for inspection in effect delegated to plaintiffs the right to keep out the only kind of evidence which might throw light on this issue, and when plaintiffs elected to exercise such right by confining its evidence to con-

ditions before and at the time of ouster, it necessarily resulted that the only kind of evidence left was of this unsatisfactory character. And so it is not surprising that plaintiffs in their testimony say they could have taken out ores of the value of at least \$900,000, and would have surely made \$200,000 profit during the remaining 18 months of their term, had not their possession been interfered with, notwithstanding they swear that during their six months' occupancy they removed and milled ores extracted by stopping on the vein, which, so far as it had been exposed at all, was the result of the work of others, of the gross value of only \$5,000, and at a profit of \$3,500 to \$3,800. The jury returned a verdict for \$5,000 in favor of plaintiffs. It might just as well have been for \$250,000. There is no evidence at all upon which the verdict can rest. It is purely speculative. The estimate of plaintiffs' witnesses as to quantity and value, as well as the verdict of the jury, is conjectural—the result of guesswork. A judgment based on such a foundation cannot stand.

Out of many authorities that might be cited in support of our conclusion, we refer to *Central Coal & Coke Co. v. Hartman*, 111 Fed. 98, 49 C. C. A. 244, where Sanborn, Circuit Judge, in an exhaustive and discriminating opinion, discusses profits as an element of damage in such cases; 1 *Sutherland on Damages* (3d Ed.) § 59 et seq.; 3 *Sutherland on Damages* (3d Ed.) § 867 et seq.; 13 *Cyc.* pp. 38, 49–53, 157, 161, 212, 213, 219; 8 *Am. & Eng. Enc. Law* (2d Ed.) pp. 616–626; *Boston & Albany R. R. Co. v. O'Reilly*, 158 U. S. 334, 15 Sup. Ct. 830, 39 L. Ed. 1006; *Howard et al. v. Stillwell, etc., Co.*, 139 U. S. 199, 11 Sup. Ct. 500, 35 L. Ed. 147.

The judgment is reversed, and the cause remanded.

Reversed and remanded.

STEELE, C. J., and MUSSER, J., concur.

(61 Wash. 246)

In re **SOUTH SHILSHOLE PLACE.**
ROBINSON et ux. v. CITY OF SEATTLE.
(Supreme Court of Washington. Dec. 16, 1910.)

1. MUNICIPAL CORPORATIONS (§§ 488, 489*)—**SPECIAL ASSESSMENTS—OBJECTIONS—WAIVER OR ESTOPPEL.**

Since a valid ordinance is prerequisite to a city's right to condemn land for street purposes, parties to a condemnation proceeding, who did not there raise the objection that the ordinance under which the proceedings were conducted was duplicious, could not raise such objection as a defense to assessments subsequently levied for benefits.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1147–1152; Dec. Dig. §§ 488, 489.*]

2. MUNICIPAL CORPORATIONS (§ 112*)—**EXTENSION OF STREET—SEPARATE PIECES OF PROPERTY—CONDEMNATION—ORDINANCE—PLURALITY OF OBJECTS.**

A city, in order to create a connected street between two points, passed an ordinance to con-

demn several strips of property lying from one-fourth to one-half mile apart. *Held* that, since all were involved in one general plan to create a continuous course between the termini, the ordinance was not objectionable as embracing more than one object.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 112.*]

3. MUNICIPAL CORPORATIONS (§ 502*)—**STREET IMPROVEMENTS—BENEFITS.**

Where property is taken for the opening of a street, and adjoining unplatted property is assessed therefor, it will be presumed that the property so assessed shared in the common benefit flowing from the improvement as a whole, and has been specially benefited.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1174; Dec. Dig. § 502.*]

4. MUNICIPAL CORPORATIONS (§ 460*)—**STREET IMPROVEMENTS—ASSESSMENT OF BENEFITS—COSTS AND EXPENSES.**

Laws 1907, c. 153, § 20, provides that commissioners shall include in an assessment for the opening of a street compensation and damages which may be or shall have been awarded for the property taken or damaged, with all costs and expenses of the proceedings to the time of their appointment, or to the time when the proceedings were referred to them, together with the probable further costs and expenses of the proceedings, including therein the estimated costs of making and collecting such assessment. *Held*, that the provision contemplated an assessment to pay the aggregate amount awarded to the owners of the property, and interest, and also the costs and expenses of the proceedings incurred, and the probable further costs and expenses thereof, and hence justified the inclusion of the costs of the corporation counsel in preparing and serving the petition in the condemnation suit, the fees paid expert witnesses and other costs of the trial, the amount paid the city engineer for making surveys and platting the same, fees of the eminent domain commissioners, the estimated costs of the city treasurer in collecting the assessments, and the estimated interest on the awards.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1102–1104; Dec. Dig. § 460.*]

5. MUNICIPAL CORPORATIONS (§ 503*)—**STREET IMPROVEMENTS—ASSESSMENTS—DAMAGES.**

Where an ordinance for the opening of a street did not establish its grade, objectors to an assessment for benefits could inquire whether the commissioners in levying the assessments had considered the physical features of their land, and whether a reasonable grade had been considered in assessing benefits.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 503.*]

Parker, J., dissenting in part.

Department 1. Appeal from Superior Court, King County; R. B. Albertson, Judge.

In the matter of the laying off, etc., of South Shilshole Place in the City of Seattle. W. W. Robinson, Jr., and wife filed objections to an assessment of benefits, and from a judgment confirming the assessment, they appeal. Reversed, with directions.

Todd, Wilson & Thorgrimson, for appellants. Scott Calhoun and King Dykeman, for respondent.

GOSE, J. The city of Seattle, by ordinance, provided for the laying off, extending

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

and establishing of South Shilshole Place, Emerson street, and an unnamed street, as public streets, and for condemning five detached tracts of land for that purpose. The ordinance provided that an assessment should be made upon the property benefited, for the purpose of compensating the owners of the property taken, and for the costs of the proceeding, in the manner provided by law. Thereafter, in obedience to the provisions of the ordinance and the statute, a jury trial was had for the purpose of ascertaining the just compensation to be made for the private property taken or damaged. After the return of the verdict, a judgment was entered whereby it was decreed that, upon payment to the respective owners or into the registry of the court of the amount found by the jury and taxable costs of the proceeding, the city should be entitled to the possession of the land taken. Damages in the sum of \$2,850 were awarded to the appellants. The appellants are the owners of a tract of unplatted land through which Shilshole Place is sought to be extended. The board of eminent domain commissioners, to whom the matter was referred, prepared and filed an assessment roll for the purpose of creating a fund with which to pay the damages awarded, and the costs and expenses of the proceedings. The appellants in due time filed written objections to the assessment. This appeal was taken from a judgment confirming the assessment.

Three questions are presented. It is asserted (1) that the ordinance contains more than one subject, and that it therefore conflicts with section 10, art. 4, of the city charter; (2) that the assessment contains items of costs that cannot be assessed to the property; and (3) that the court erred in refusing to admit testimony in regard to the probable cut to be made upon the appellants' property. These questions will be treated in the order stated.

The appellants were parties to the condemnation proceeding, and did not raise the question that the ordinance was duplicitous. A valid ordinance was a prerequisite to the right to condemn. It would seem that the point was, at that hearing, decided adversely to the present contention, and that the decree of necessity foreclosed a further hearing upon that ground. However, assuming that the question is open, under the authority of *In re Third, Fourth, and Fifth Avenues*, 49 Wash. 109, 94 Pac. 1075, 95 Pac. 862, we do not think that the objection is tenable. An examination of the maps in the record discloses that the purpose of the city in condemning the several strips of property was to create a connected way from the Lake Washington canal to Ft. Lawton. To accomplish this purpose, it was necessary to condemn five separate pieces of property lying from one-fourth to one-half a mile apart. It is, however, all involved in the one general plan, and creates a continuous but sin-

uous course between the termini. We think the ordinance embraces but a single object. *Weed v. Goodwin*, 36 Wash. 31, 78 Pac. 36; *Seattle v. Sylvester-Cowen Inv. Co.*, 55 Wash. 659, 104 Pac. 1121.

In the *Weed Case* the title of the act was: "An act providing for condemnation proceedings for right of way for irrigating ditches, canals, and flumes for agricultural and mining purposes and relating to right of appropriation of water." Laws 1899, c. 131. It was contended that there was a union of two distinct objects, viz., one pertaining to the condemnation of the right of way, and the other pertaining to rights of persons engaged in irrigation to appropriate water. It was held that neither the title to the act nor the act itself is duplicitous, and that the act would have been valid under the less detailed title of: "An act relating to the appropriation of water." In the *Sylvester Case* a like objection was made to an ordinance entitled: "An ordinance providing for the laying out, widening, extending and establishing of Meadow Place, University boulevard and East Seventieth street, as public streets, highways, boulevards and parkways in the city of Seattle, between East Green Lake boulevard and Fifteenth avenue northeast, over and across certain lots, blocks, tracts, and parcels of land in said city, and providing for the condemnation and appropriation to the public use as a park of certain other lands and premises adjoining and proximate thereto, and providing for the taking and damaging of land and other property necessary therefor. * * *" It was claimed that the ordinance provided for two separate and distinct objects: (1) The condemnation of certain property for streets, and (2) the condemnation of certain other property for a park. In that case we said: "The charter provision does not forbid the lawmaking body from passing an ordinance having a general object, and it may bring within its scope any number of sub-subjects germane to the general subject. Whatever is legitimately connected with a unified subject may be embraced in a single title or act"—and that the ordinance was valid.

The appellants cite *Weckler v. City of Chicago*, 61 Ill. 142, *People v. Latham*, 203 Ill. 9, 67 N. E. 403, and *Arnold v. City of Cambridge*, 106 Mass. 352. In the *Weckler Case* an ordinance was held invalid, in that it combined two distinct improvements which provided for widening an alley running north and south through a block, and for opening an alley running east and west through the same block to intersect with the alley running north and south. In the *Latham Case*, a later case from Illinois, an ordinance was held invalid which provided for the laying of more than 40 separate and disconnected sidewalks located on 25 different streets in the village of Willamette, and in diverse and widely separated parts of the

village, aggregating about seven miles of cement sidewalk. It was held that the ordinance was in violation of the general law of the state which gave authority to villages to construct sidewalks. The court was considering the language of a special sidewalk statute. The case, however, in principle upholds the validity of the ordinance under consideration. Speaking of the question of the power of the city to unite one general scheme of improvement in a single ordinance, the court said: "It is true that a single ordinance, providing for paving one or more streets, or providing for a system or common scheme for laying sewers, service pipes, or drains has been held by this court to be a valid and legal ordinance. Where, in such case, many streets and parts of streets have been embraced in the scheme of improvement adopted by the city, they have been all regarded as parts of the same improvement. But the cases where this rule has been announced, and where such double improvements made by a single ordinance have been indorsed and approved, have arisen under other provisions of the law than the sidewalk act of 1875. Thus, in *City of Springfield v. Green*, 120 Ill. 269, 11 N. E. 261, it was held that an ordinance for the paving of several streets and alleys and parts of streets with the same materials, and in the same way, was not obnoxious to the objection that it embraced more than one improvement. The principle announced in *City of Springfield v. Green*, supra, was applied to a system of sewerage in *Drexel v. Town of Lake*, 127 Ill. 54, 20 N. E. 38, and *Village of Hinsdale v. Shannon*, 182 Ill. 312, 55 N. E. 327, and *Haley v. City of Alton*, 152 Ill. 113, 38 N. E. 750, and to a system of drains and sewers, as in *Walker v. People*, 170 Ill. 410, 48 N. E. 1010, and to sewer and water service pipes, as in *Palmer v. City of Danville*, 154 Ill. 156, 38 N. E. 1067, and to a main sewer with lateral branches, as in *Payne v. Village of South Springfield*, 161 Ill. 285, 44 N. E. 105. In all such cases a special benefit is supposed to be conferred upon the property taxed, and in theory, at least, there is supposed to be a common benefit flowing from the improvement as a whole." In the *Arnold Case*, it was held that a sidewalk statute did not confer the power upon the city to include sidewalks in two different streets in a single assessment.

The appellants argue, further, that an inspection of the map makes it apparent "that the inclusion of several of these streets was of no benefit whatever to appellants' property." As we have seen, their property is unplatted, and South Shilshole Place, as projected, extends through it from east to west. The same objection could be made to the opening of a new street of a considerable length. Something must be left to the good judgment of the commissioners. The absence of benefit in the case at bar cannot be

declared as a matter of law. As was said in the *Latham Case*, in all such cases a special benefit is supposed to be conferred upon the property taxed, and in theory there is supposed to be a common benefit flowing from the improvement as a whole.

The record discloses that, in addition to the amount of the awards given for the several parcels of land, there was included in the assessment the costs of the corporation counsel in preparing and serving the petition in the condemnation suit, the costs paid expert witnesses, and other costs of the trial, the amount paid the city engineer for making the surveys and platting the same, the fees of the eminent domain commissioners, the estimated costs of the city treasurer in collecting the assessments, and the estimated interest on the awards. It is claimed that these items of expense cannot be assessed against the property benefited by the improvement. Section 20, Laws 1907, p. 323, provides: "Such city may file in the same proceeding a supplementary petition, praying the court that an assessment be made for the purpose of raising an amount necessary to pay the compensation and damages which may or shall have been awarded for the property taken or damaged, with costs of the proceedings, or for such part thereof as the ordinance shall provide. The said court shall thereupon appoint three competent persons as commissioners to make such assessment, or if there be a board of eminent domain commissioners of such city, appointed under the provisions of this act, said proceeding for assessment shall be referred to said board. Said commissioners shall include in such assessment the compensation and damages which may or shall have been awarded for the property taken or damaged, with all costs and expenses of the proceedings incurred to the time of their appointment, or to the time when said proceeding was referred to them, together with the probable further costs and expenses of the proceedings, including therein the estimated costs of making and collecting such assessment." The section quoted discloses a two-fold purpose: First, to assess the property for the purpose of paying the aggregate amount awarded to the owners of the property—the interest follows as an incident to the award; and, second, to include in the assessment "all costs and expenses of the proceedings incurred, to the time when said proceeding was referred to them, together with the probable further costs and expenses of the proceedings." The change from the singular to the plural number, and the use of the words "all costs and expenses of the proceedings," clearly indicate an intention to make the property benefited carry the entire burden of the improvement. The appellants have cited, in support of their view, *Chicago v. Cook*, 105 Ill. App. 353. The Illinois statute empowers the commissioners to include the "costs" of the assessment, as contradistinguished

from our statute which includes "costs and expenses." The case is therefore not in point.

The appellants were awarded \$2,850 in the condemnation proceedings, and their property was assessed for \$1,296 by the commissioners. One of the commissioners testified on cross-examination that he was not an engineer, but that he would "judge from the looks of the land" that a reasonable grade of the street would require a cut. The corporation counsel thereupon stated that, in the hearing of the condemnation proceeding, "it was understood that a reasonable grade should be put through," and that the court allowed that question to go to the jury. Counsel for the appellants then stated: "If that is the case, I think I have a right to show what the effect of the grade would be upon the property." The court then ruled that he was not going into the question of grades, and that the "question is, Will the property be benefited by this highway—the mere extension of the street across the tract?" This ruling is assigned as error. We think the assignment has merit. The ordinance did not establish the grade of the street. The appellants had a right to inquire whether the commissioners had considered the physical features of their land, and whether a reasonable grade, which it may be assumed will be made, had been considered by them in assessing benefits. It is obvious that the benefits to them may be materially affected by the presence or absence of a cut through their property. The appellants had a right to inquire as to this matter, and the order confirming the assessment without permitting it was error. *Ettor v. Tacoma*, 57 Wash. 50, 106 Pac. 478, 107 Pac. 1061, has reference to platted streets. There is no merit in the other points raised.

The judgment is reversed, with directions to permit the appellants to inquire whether the matter of a reasonable grade through their property was considered by the commissioners, and what effect, if any, it will have upon the benefits to the property.

RUDKIN, C. J., and FULLERTON and MOUNT, JJ., concur.

PARKER, J. I reluctantly yield my assent to the views of the majority, to the effect that these five separate pieces of property, lying separated at such a distance from each other as they are, will, when acquired by the city, all become a part of a single homogeneous local improvement, such as the spirit of the law contemplates it shall be, to support a local assessment. It clearly never was intended, and the authorities cited by the majority so indicate, that widely separated improvements could be united and called one improvement, for the purpose of local assessment, unless they clearly formed one improvement. Each part of a local improve-

ment must have some relation to every other part, and the proximity of the parts is a very important matter to be considered in determining such relation. This does not necessarily mean that all parts shall be physically contiguous; but they must all clearly be a part of one scheme or plan, which when completed can be said to be a single improvement. I conceive the correct rule to be that the improvement must be such that the benefits forming the basis for the assessment flow from the whole improvement, not merely from some part of it, to each of the properties sought to be charged with the expense of its creation; and when any substantial part of the improvement does not have this effect the spirit of the law is violated. This is in harmony with *New Whatcom v. Improvement Co.*, 9 Wash. 639, 38 Pac. 163, and *In re Third, Fourth & Fifth Avenues*, 49 Wash. 109, 94 Pac. 1075, 95 Pac. 862, though the principle is not there very elaborately discussed. I think the city, in this case, has gone to the very limit permitted by law, in its uniting of such widely separated parts to constitute a local improvement. With these observations I yield concurrence with the majority upon this question.

I dissent from the view of the majority, which seems to assume that appellants are precluded from raising the question above discussed since they did not raise it upon the hearing of necessity in the condemnation proceeding. The question of assessment was in no way involved at that hearing. The principles I have discussed above would have no bearing upon the city's right to condemn. If appellants were parties to that proceeding, it was not for the purpose of hearing any question touching the assessment of their property. Indeed, the statute expressly provides for the process and procedure by which jurisdiction over the property owner is to be acquired to adjudicate the assessment. While the two proceedings are under the one title, they are as separate and distinct as can be, so far as acquiring jurisdiction over the parties and hearing of the questions involved is concerned. One is a pure eminent domain proceeding, while the other is a local assessment proceeding, each based upon separate pleadings and separate process.

I concur in the result.

(61 Wash. 343)

COX et al. v. WILKESON COAL & COKE CO.

(Supreme Court of Washington. Dec. 22, 1910.)

1. MASTER AND SERVANT (§ 235*)—DEATH OF SERVANT—OBEDIENCE TO FOREMAN—DUTY TO MAKE EXAMINATION.

Where, after a blast in a coal mine, decedent's foreman undertook to ascertain the safety of the place, and, calling to decedent, told him that the place was safe, and directed him to work, where, in a few moments, he was killed by a cave-in, decedent was entitled to rely on

the foreman's statement that the place was safe, and was not required to make an examination of his own.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 710-722; Dec. Dig. § 235.*]

2. TRIAL (§ 296*)—INSTRUCTIONS—MISUSE OF WORDS.

Where, in an action for the death of a servant, the court charged that the way to determine whether a person has been negligent is to compare what he had done or left undone with what would have been done or left undone by a man acting with ordinary prudence, and that if a man fails to act as an ordinarily prudent man would under the same circumstances and conditions there is negligence, there was no reversible error in the court's misuse of the word "could" for "would" in certain other of the instructions relating to the acts of a reasonably prudent man, etc.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-713, 715, 716, 718; Dec. Dig. § 296.*]

3. APPEAL AND ERROR (§ 1050*)—HARMLESS ERROR.

In an action for the death of a coal miner by a cave-in, after the attempted drawing of a pillar, defendant was not prejudiced by the admission of evidence that pillar drawing was the most dangerous work in a mine.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1050.*]

4. DEATH (§ 99*)—DAMAGES—EXCESSIVENESS.

Deceased, a coal miner 35 years old, and earning fair wages, was killed by defendant's negligence in a cave-in of the mine. He had accumulated two lots and a house with a two-acre piece of land, and was industrious and thrifty. *Held*, that a verdict allowing \$16,500, which the court reduced to \$14,000, was not excessive.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 125-130; Dec. Dig. § 99.*]

Department 2. Appeal from Superior Court, Pierce County; John A. Shackelford, Judge.

Action by Alice Cox and others against the Wilkeson Coal & Coke Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

Hudson & Holt, for appellant. Fitch & Jacobs, for respondents.

MORRIS, J. The facts, in so far as they are pertinent to the appeal herein, are as follows: On March 12, 1903, J. H. Cox, husband and father of respondents, was at work in appellant's mine, in what is known as "Pillar No. 119." He had with him a working partner named Hudson. The method used in working the mine was to run vertical breasts which would be intersected by crosscuts, dividing the coal into large blocks. The line of blocks between any two breasts was called a pillar. The coal is taken out as quickly as it can be done, and its place is supplied by props and cogs which support the roof. After the coal is taken out, it is expected that the roof will shut down and close up the space from which the coal was removed. This closing in of the roof is called a "squeeze," and is usually a gradual

one, depending somewhat upon the character of the deposit lying between the coal and the rock. A squeeze is generally foretold by falling rock or coal, in time to seek protection against it; although they are known to occur without any previous indication or warning. The miners in working the pillars start in at the upper corner of a block and take the coal off at an angle so it will fall into the breast. They leave the rear end of the block for the time, and this is known as the "tail." The tail in block 119 extended from crosscut No. 6 to crosscut No. 7, and was about four feet wide. The day before the accident, the foreman of the mine observed that no squeeze had taken place for some distance in pillar No. 119, and that it was open up to crosscut No. 9. Knowing there was danger of a cave-in, he considered it prudent to draw the tail of the block between crosscuts 6 and 7, in order to bring about a squeeze. He discussed the matter with Cox and Hudson, and it was understood that it should be done, and a squeeze produced. Next morning Cox was told by the assistant foreman to wait before going to work, and he would come up and draw the tail, which it was expected would bring about the squeeze. The holes were bored, filled with dynamite, and the fuse lighted by the assistant foreman, and, accompanied by Cox and Hudson, he went into crosscut No. 6, pillar 120, where they would be safe until the shot had exploded and the expected squeeze followed, which it was anticipated would occur, if at all, in about 20 minutes. They remained in crosscut No. 6 about 20 minutes after the shot had been fired, when the assistant foreman went up among the props and cogs to note the effect of the blast. The tail had not run out, but was apparently blocked on top of the cog underneath crosscut No. 6. He says he saw no indication of a squeeze. He then came back and waited in the crosscut for a short time, when hearing no indications of a cave-in, he went down below into the pillar between crosscuts 5 and 6, and commenced putting in a battery, an arrangement of planks under the open space of the tail to protect the men from falling rock, as he expected a squeeze. He then called Cox and Hudson to come, telling them "it was all right; them cogs were all right." They came in response to his call, and had been there but a few minutes, when a large cave-in took place, and in falling swept away the props, and hurled a large mass of rock down into the pillar where the men were, killing Cox. The action was brought, alleging negligence in failing to make the place reasonably safe, and a reliance upon the assurance of the assistant foreman that the place was safe. There are other allegations of negligence, but they are not material to our view of the case. Verdict was returned for \$16,500,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

which was reduced by the court, and judgment entered for \$14,000 and the company appeals.

The errors assigned are in denying appellant's motion for judgment, and new trial, in the admission of testimony, and in the instructions. There was ample proof of negligence to sustain the judgment. When the assistant foreman undertook to ascertain the condition of the place as to its safety after the shot had been fired, he was undertaking the master's duty. In calling to Cox and telling him that the place was safe, it was an assurance of safety upon which Cox had a right to rely. It was made upon and after an inspection of the conditions, and Cox could rely upon the sufficiency of the examination and the truthfulness of the result. If Cox had suspicions of danger, he was not free to act upon them. He had been called by one in authority over him, and told the place was safe. It was his duty to obey the call, and in so doing he could rely upon the safety of the place to which he was called. He was not required to then make a critical examination. The assurance of the foreman was sufficient for his protection in law. *Christianson v. Pacific Bridge Co.*, 27 Wash. 582, 68 Pac. 191; *Hilgar v. Walla Walla*, 50 Wash. 470, 97 Pac. 498, 9 L. R. A. (N. S.) 367; *McKenzie v. North Coast Colliery Co.*, 55 Wash. 495, 104 Pac. 801; *Labatt, Master and Servant*, § 440. There was, therefore, no merit in appellant's motion for judgment.

The alleged vice in the instructions consists in the use of the word "could," in saying to the jury:

"You should not render a verdict against the defendant in this case because the place of work was unsafe, unless you find from the evidence that the employer could have taken some action which would have rendered the place more safe, and unless you find that such action would have been taken by a reasonably prudent employer."

"In regard to the method of work, you are to consider the method of work with reference to the conditions at the place where the work was being done. If at the place where the work was being done the method used by the employer was as safe as any other that could have been used, it would be your duty to find that the employer was not negligent with reference to the method of working."

It is true that the test of appellant's liability in this connection is what the reasonably prudent man, not "could," but "would" have done under similar conditions; and the use of the word "could" in this connection was unfortunate, although the proper qualification is given in the first two instructions. Appellate courts, however, are not justified in reversing judgments because of the use of an improper word in an instruction, unless it is apparent that its use would mislead or confuse the jury, and we have often held, as have other jurisdictions, that

where the rules and tests of liability are correctly given to the jury by the court, the instructions will be read as a whole; and no error will be found because of the use of an improper word in one or more instances unless prejudice is apparent.

We have examined each of the instructions given, and find the court in correct language defining the liability of the appellant and giving the true tests for determining negligence as defined in the following instruction: "In determining the question as to whether the defendant or its foreman was negligent, I instruct you that the way to determine whether a man has been negligent or not is to compare what was done by such person—or left undone by him—with what would have been done or left undone by a man acting with ordinary prudence. If a man acts as an ordinarily prudent man would act under the same circumstances and conditions, there is no negligence. If a man fails to act as an ordinarily prudent man would under the same circumstances and conditions, there is negligence." This was a clear, apt expression of the true rule, and one which the jury could readily understand and easily comprehend. In another instruction the court told the jury "it was the duty of the master to see that the mine was properly timbered, and if you should find from the evidence that there were safe and unsafe ways of timbering the mine known to the defendant, then it became the duty of the defendant to adopt the safe way"; and if the safe way was not adopted and would have been with reasonable prudence, the defendant was negligent. Counsel for appellant critically analyze this instruction, and think they find a possibility of an erroneous meaning. We see no error in it, and think its meaning clear and capable of comprehension by the jury.

Coming to the testimony, respondents were permitted to show that pillar drawing was the most dangerous work in the mine. We think appellant's objection to this testimony is more refined than real. We see no error in it. There was also testimony to the effect that it would have been safer to have left the tail of the pillar in place and gone elsewhere and mined, when it was discovered that the top was loose. We do not see the relevancy of this testimony, but can see no prejudice to appellant in its admission.

The next complaint is of the size of the judgment. The deceased was 35 years of age, earning fair wages, and had accumulated two lots, a house, and a two-acre piece of land in Puyallup. He was evidently industrious and thrifty, and we can find no reason to disturb the verdict.

Judgment affirmed.

RUDKIN, C. J., and DUNBAR and CROW, JJ., concur. CHADWICK, J., concurs in the result.

(61 Wash. 150)

In re LITTLEFIELD.

(Supreme Court of Washington. Dec. 10, 1910.)

1. PHYSICIANS AND SURGEONS (§ 5*)—LICENSE—DENIAL OF APPLICATION—APPEAL—REVIEW.

Laws 1909, c. 192, § 13, provides that on denial by the State Board of Medical Examiners of an application for a license to practice medicine and surgery, the applicant may appeal from the decision to the superior court of the county in which the last general meeting of the board was held, prior to the refusal of the license. *Held*, that on such appeal, the court had jurisdiction to hear the merits of the case on trial de novo and itself administer the provisions of the act.

[Ed. Note.—For other cases, see Physicians and Surgeons, Dec. Dig. § 5.*]

2. PHYSICIANS AND SURGEONS (§ 5*)—APPLICATION TO PRACTICE—DENIAL—APPEAL—RECORD.

Under Laws 1909, c. 192, § 13, providing for an appeal to the superior court from an order of the board of medical examiners, denying an applicant a license to practice medicine and surgery in Washington, the secretary of the board, within 10 days after service of the notice of appeal, shall transmit to the clerk of the superior court to which the appeal is taken a certified copy, under the seal of the board, of the decision, and the grounds thereof, in case of the refusal of the license, and that the clerk of the court shall docket the appeal, which shall stand for trial in all respects as ordinary civil actions, and like proceedings shall be had thereon, and that the case shall be tried de novo, it was the intention of the Legislature that the evidence generally should be transmitted to the superior court.

[Ed. Note.—For other cases, see Physicians and Surgeons, Dec. Dig. § 5.*]

3. APPEAL AND ERROR (§ 895*)—"TRIAL DE NOVO"—ISSUES.

While trial de novo on appeal means a trial anew, it only requires a new trial as to the questions in issue, and not a re-examination of matters concerning which there was no dispute.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3645-3648; Dec. Dig. § 895.*]

For other definitions, see Words and Phrases, vol. 8, p. 7108.]

Department 2. Appeal from Superior Court, King County; O. R. Holcomb, Judge.

Application by Charles W. Littlefield for a license to practice medicine and surgery in Washington. The application having been denied by the board, petitioner appealed to the superior court where a judgment was entered directing the issuance of the license, from which the board appeals. Affirmed.

Howard G. Cosgrove and Higgins, Hall & Halverstadt, for appellant. E. P. Dole, for respondent.

DUNBAR, J. Charles W. Littlefield, the respondent, filed a written application with the board of medical examiners of the state of Washington, for a license to practice medicine and surgery in this state, under the provisions of chapter 192 of the session laws of the state of Washington for 1909. An examination was given the applicant pursuant

to said act, and upon said examination the board refused to grant the license applied for. Thereafter the applicant appealed to the superior court for King county. After hearing the case, the court entered its judgment, directing the board to issue the license applied for. The court made findings of fact and conclusions of law.

The record shows that the license was refused by the board principally for the reason that the applicant did not obtain a rating equal to 60 per cent. on the subjects of histology, pathology, and general diagnosis, which he was required to obtain under the statute before a license could issue to him. The other subjects upon which the law provides for an examination are anatomy, physiology, chemistry, toxicology, bacteriology, gynecology and obstetrics, and hygiene.

It is the contention of the appellant, first, that the court had no jurisdiction to hear this case; that it could not administer the provisions of the medical act as applied to appeals from orders of the board denying a license after examination, because it is asserted that it is familiar law that, if the court cannot administer the law on a subject brought before it by virtue of the appellate statute, the court has no jurisdiction, and many cases are cited to sustain this announcement of the law. But this is assuming the very question at issue. It seems to us that under the statute the court has the right to administer the provisions of the medical act, for the statute specially provides for an appeal from the decisions of the board.

Section 13 of the act provides: "In any case of the refusal or revocation of a license by the said board under the provisions of this act, the applicant whose application shall be so refused, and the licentiate whose license shall be so revoked by said board, shall have the right to appeal from the decision so refusing or revoking such license within thirty days after the filing of such decision in the office of the secretary of said board, as hereinbefore in this act provided. Such appeal shall be to the superior court in and for the county in which was held the last general meeting of said board, prior to the refusal of such license," etc.

And provision is made in the statute for an appeal from the decision of the superior court to the Supreme Court. It is contended by the appellant that, if this statute is to be given force at all, it must be construed to the effect that the appeal is not from the facts in the case or the merits of the case, so far as the examination is concerned, but only for the purpose of having determined any questions of law arising on the examination or in connection with the same. But the statute is a general one, and confers the general right without any limitations of this kind. So far as the statute itself is concern-

ed, it does not remove from the operation of the appeal questions of fact, any more than it does questions of law.

But it is insisted that it must be construed with reference to the asserted fact that it would be a travesty for the superior court to undertake to pass upon the qualifications of applicants to practice medicine; that it would resolve itself simply into the hearing of expert testimony on questions brought before the court. Difficulties of this kind are presented in the trial of many cases. A common instance is where a defense is based upon the alleged insanity of a defendant in a criminal action. The testimony of alienists and other scientists is the controlling testimony in the case. The Legislature evidently was not willing to leave the exclusive and final determination of this question to the discretion of the examining board, but evidently thought that justice and public policy demanded that there should be a review of the action of this tribunal.

It is true, there are some inconsistencies in the act; one of which is the fact mentioned by the appellant, that there may be an oral examination which it would not be possible to transmit in the record. But that it was intended by the Legislature that the evidence generally should be transmitted to the superior court is evident from the provisions of the statute, for the law requires that the secretary shall within 10 days after the service of such notice of appeal, transmit to the clerk of the superior court to which such appeal is taken, a certified copy, under the seal of said board, of the decision of said board, and the grounds thereof in the case of the refusal of the license; that the clerk of the court shall docket such appeal cases, and that they shall stand for trial in all respects as ordinary civil actions, and like proceedings be had thereon. It also provides that upon said appeals said causes shall be tried de novo, which excludes the idea advanced that only questions of law shall be passed upon by the superior court. It provides that the examination papers shall form a part of the records of the board, and shall be kept on file by the secretary for a period of one year after each examination. All these and other provisions of the statute tend to show that the preservation of such records is in the interest of appeal.

But it is contended by the learned counsel for the appellant that, if the statute is to be literally construed, the proper procedure was not followed in this case, for the court only passed upon the question in the main as to whether the applicant had been properly rated in his examination on the subjects of histology, pathology, and general diagnosis, while the other subjects on which the applicant was examined were not examined by the superior court; that a trial de novo is a trial anew, and that a trial anew means the

trial of all the questions that were involved in the case below. But it seems to us that this is not a broad view of this statute. Undoubtedly a trial de novo does mean, and is generally understood to mean, a trial anew; but it means anew, of course, only as to the questions in issue. This court tries equity causes de novo, but if the court in an equity case makes findings of fact, and those findings of fact are not excepted to and no issue is tendered concerning them, it would be idle for this court to spend its time in determining whether the findings were properly made. In this case, so far as the respondent is concerned, he is satisfied with the rating he received on the other subjects of examination, and there is no objection made to them by the appellant. So that they are really not in issue in the case, and the case was tried de novo so far as the issues were concerned.

In some minor particulars, such as the standing of the college from which the applicant received his diploma, and one or two other technical requirements in the presentation of his application, some little objection is made to the findings of the court. But we are satisfied that the findings were substantially justified by the testimony.

Finding no reversible error, the judgment will be affirmed.

RUDKIN, C. J., and CROW, CHADWICK, and MORRIS, JJ., concur.

(61 Wash. 213)

STARCK v. WASHINGTON UNION COAL CO.

(Supreme Court of Washington. Dec. 14, 1910.)

1. MASTER AND SERVANT (§ 221*)—ASSUMPTION OF RISK.

Where an employé in a mine complained that the roof was dangerous, and requested that props be furnished, and the foreman inspected it in his presence, presumably thoroughly, as was his duty, and assured him that it was safe, but promised to furnish props, the master assumed the risk of his continuing at work till props were furnished.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 638-647; Dec. Dig. § 221.*]

2. MASTER AND SERVANT (§ 234*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.

Where an employé did not assume the risk of continuing at work in a mine, because, when he complained of the roof being dangerous and asked for props, the foreman on an inspection told him it was not dangerous, but promised to furnish props, he was not guilty of contributory negligence in merely continuing at work; but only some negligence in the manner of doing the work, which was the proximate cause of his injury, would make him guilty of contributory negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 684-686; Dec. Dig. § 234.*]

3. MASTER AND SERVANT (§ 270*)—INJURY TO SERVANT—NEGLIGENCE—EVIDENCE.

The controlling question in an action for injury to a miner from the fall of the roof of

the mine being whether the master had furnished props as required, evidence of any trouble the master had with other miners in the matter of putting up props is immaterial.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 913-927; Dec. Dig. § 270.*]

4. TRIAL (§ 46*)—RECEPTION OF EVIDENCE—SHOWING PURPOSE—QUESTIONS IRRELEVANT ON FACE.

Defendant's counsel, in an action against a master for injury to an employé in a mine from props for the roof not being furnished, having asked, without any explanation to show its relevancy, the question whether prior to bringing the action plaintiff presented to defendant any claim for the injury, which question on its face is not relevant, it was not error to sustain an objection thereto, evidently made, and understood by the court as made, on the theory that it was not necessary as a matter of statutory requirement that the claim be presented, though the question might have been permissible had defendant explained that it desired that the fact that no claim had been presented should in connection with the facts, as claimed by defendant, that plaintiff at a coroner's inquest had exonerated defendant, and had stated that props had been furnished, be considered as circumstances bearing on the question of plaintiff having sworn falsely at the trial.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 115-117; Dec. Dig. § 46.*]

5. MASTER AND SERVANT (§ 293*)—MISLEADING INSTRUCTIONS.

Where the only claim of negligence was failure of a master to furnish props for the roof of a mine, an instruction that if the jury found defendant had performed its statutory duty, as explained to them, and was not guilty of "any" negligence, plaintiff could not recover, could not have misled the jury to understand that any negligence other than in respect to said statutory duty was meant.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 293.*]

6. DAMAGES (§ 132*)—PERSONAL INJURY.

A verdict of \$20,000 for injury to a miner, 37 years old, having a wife and five children dependent on him, will not be disturbed as excessive, there being credible evidence that he is left a broken and disjointed wreck, with no hope of improvement, and with nothing to look forward to but suffering and embarrassments.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 372-385; Dec. Dig. § 132.*]

Department 2. Appeal from Superior Court, Clarke County; Donald McMaster, Judge.

Action by Bernard Starck against the Washington Union Coal Company. Judgment for plaintiff. Defendant appeals. Affirmed.

W. W. Cotton, Arthur C. Spencer, Jas. P. Stapleton, and Ralph E. Moody, for appellant. Owens & Finck, A. L. Miller, and Reynolds, Ballinger & Hutson, for respondent.

DUNBAR, J. The appellant owns and operates a coal mine in Thurston county, in this state, and the respondent was employed to work in such mine. While working he was injured, and brought this action against the appellant to recover damages for such injury in the sum of \$25,475. The complaint alleges, among other things, that on the 5th day of May, 1909, respondent was working

in a room or tunnel in said mine by excavating coal, earth, and stone in the progress of the mining operations of appellant; that in said room there were three layers or ledges of coal, the top of the uppermost of which three ledges ran to the roof of said room; that in the mining of the coal it was the custom to drill between said veins or ledges of coal for a distance of approximately six feet and place explosives therein, which explosives were fired at night, at the conclusion of the work in said room, for the purpose of throwing down and dislodging the coal and materials between the same, and, upon resuming work the following day, the miners loaded the coal and material into cars in said room to be taken to the surface of the mine; that occasionally the explosives would not break loose all of the upper ledge of the coal, and a portion thereof, not exceeding six feet in length, would be left adhering to the roof of said room; that respondent was accustomed to prop up, not merely the roof of the room, but also such coal in the upper seam or ledge which might adhere to the roof; that, unless the roof and the coal adhering thereto were properly timbered or shored up or otherwise supported, the coal and the roof were apt to fall, and were very dangerous to miners working in the room mining the coal; that on and prior to May 5, 1909, the roof of said room, for a distance of approximately 30 feet from the working of said mine, was not propped up, or in any way timbered or shored so as to prevent the same from falling; that, by reason of said fact, there was danger that said roof and coal would fall; that on said date respondent complained to appellant's foreman that such roof was dangerous, and requested the foreman to furnish timber or props to be used in securing said roof and making it safe; whereupon appellant's foreman examined said roof, and pronounced the same safe, and assured respondent that the same was safe and would not fall upon him; that again, on or about the 4th of May, 1909, respondent called the foreman's attention to the condition of said roof, and that it was not propped up, and again requested the foreman to furnish him with timbers for props to secure said roof; that the foreman again assured respondent that the roof was safe, but promised to send props to said working place to be used in securing said roof; that respondent believed and relied upon said assurances of said foreman and upon his promise to furnish timbers and props to secure said roof; that thereafter, and on the 5th day of May, 1909, there being coal from said upper seam or ledge adhering to the roof of said room, and the same requiring to be timbered or propped up, respondent again requested the foreman to furnish said props or timbers; that the foreman again examined said roof and examined

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

said coal, and informed respondent, and respondent believed, that the roof and coal were not immediately dangerous; that the foreman thereupon promised to furnish props and timber to secure said roof and said coal, and respondent relied thereon, and, in relying upon said assurances of the foreman, continued to work in the mine; that the foreman was the person in charge of that portion of the mine in which respondent was working, and was the proper agent of appellant to furnish props and timber for the use of said working place, and the proper person for respondent to apply to; that neither the foreman nor any other agent of appellant, nor appellant, furnished any timber for use as props whatever to hold up or secure said roof or prevent it from falling, nor did appellant keep a sufficient supply, or any supply, at the mines so that the workmen therein might be able to properly secure the roof of said mine; that all these facts were on the 5th day of May, 1909, and during all the time of their continuance, well known to appellant and his foreman, but that respondent relied upon said assurance of the foreman that the said place of work was safe, and upon his promise to supply props to hold up said roof, and, believing said assurance and promise, continued to work at said place until the happening of the accident. The complaint further sets out the nature of the accident and the damages arising therefrom; the accident being caused by the caving in and falling upon respondent of the coal from the roof. The answer denied the failure of the appellant to furnish respondent with props as required by law, alleged that the respondent and his fellow servant, who was killed at the time of the injury to the respondent, were on the day of the falling of said top coal and the injury complained of warned by the foreman of the mine and by other workmen in the mine that it was unsafe for them to continue work under such overhanging coal, and that they should prop up the same, and alleged negligence on the part of the respondent, that the dangers and risks of working under this coal at the place described in the complaint were open, obvious, and apparent and understood by respondent, and were voluntarily assumed as the risk and danger incident to his employment, and that it was the duty of the respondent to use the timbers furnished him by appellant in propping up and timbering the overhanging coal as the work progressed. The affirmative matter in the defense was denied by the reply, and upon these issues the cause went to trial by a jury, and verdict in favor of the respondent for \$20,000 resulted. The ordinary motions were made before verdict. After the return of the verdict, a motion for new trial was made and refused, judgment entered, and appeal followed.

The first assignment of error is that the amended complaint fails to state facts suffi-

cient to constitute a cause of action against the appellant, because it shows upon its face that whatever injury respondent suffered was caused through his own want of care and prudence, and through his own negligence, and that he directly contributed thereto and was guilty of contributory negligence; that when the respondent stated that he was accustomed to prop up, not merely the roof of said room, but also such coal of the upper seam or ledge which might adhere to said roof, and that unless such roof and said coal adhering thereto were properly timbered or shored up, or otherwise supported, it created a dangerous condition; that condition and other statements of the complaint which we have set forth conclusively show that it was no surprise to the respondent that the coal adhering to the roof fell upon him, for he knew that it was likely to do just what it did, and expected that it would do so; that the matters and things stated in the complaint conclusively show contributory negligence on the part of the respondent as a matter of law. Appellant cites *Green v. Western American Company*, 30 Wash. 87, 70 Pac. 310, and *Narramore v. Cleveland, etc., Ry. Co.*, 96 Fed. 298, 37 C. C. A. 499, 48 L. R. A. 68, to sustain this contention. It is contended by the appellant that the matters and things set forth in the complaint could be brought to the knowledge of the respondent only by observation of the roof, and, that being true, the respondent was in a better position to observe them, working continuously in the room with the coal, than was the foreman; that, if they were in such a dangerous situation, it must be brought to the attention of the foreman by such casual observation as one in his position would make in passing in and through said room, and that the danger would therefore be much more apparent to an experienced miner who was all the time in the room working at the coal. There are two sufficient answers to this contention. The first is that it ignores the rule, which is well established in this court and in practically all the courts in the Union, that the servant has a right to rely upon representations of the master that the dangerous condition of which the servant notifies the master will be corrected. This doctrine proceeds upon the theory that the promise of the master to amend constitutes an implied contract on his part that he will be responsible for the safety of the servant so far as the safety of the place is concerned; or, in other words, that he will assume the risk incident to working in the particular place. It is true the complaint says that the roof had become dangerous, and no doubt it was the belief of the respondent that the roof was dangerous. But, upon reporting the danger to the foreman, this promise was made with the assurance on the part of the foreman that the roof was safe. That assurance was made after an examination by the foreman in the pres-

ence of the respondent, and upon that assurance and promise respondent unquestionably had a right to rely. Nor should the examination made by the foreman under such circumstances have been a casual examination or observation. His duty was to inspect, not casually, but thoroughly, and it was upon the presumed thorough inspection that the respondent had a right to rely.

Nor do we think that the allegations of this complaint bring it within the cases cited to sustain it. It is true that in *Green v. Western American Company*, 30 Wash. 87, 70 Pac. 310, which was the first case in this jurisdiction to lay down the rule that the master assumed the risk where the statutory requirements in regard to safe place and appliances had not been complied with, there were some expressions used by the court which might readily lead to the conclusion that the doctrine claimed for it by the appellant was true, viz., that while the plaintiff in an action for damages in a case brought under the statute for violation of failure to guard, or make safe, would not be held to have assumed the risk, he would be held to have been guilty of contributory negligence for working in an unsafe place. But this doctrine certainly never was intended by the court to be carried so far as to hold that a plaintiff would be held guilty of contributory negligence for working in a place where he would not be held to have assumed the risk in working. No court would trifle with the rights of a litigant to such an extent as to hold that he could recover in a given case because he did not assume the risk of working in a certain place, and then hold that he could not recover because he was guilty of contributory negligence in working in that certain place. This would be allowing words and terms to control a principle. If the contention of the appellant were to be sustained, it would destroy the logic of the decision in *Green v. Western American Company*, supra, for in that case the complaint was in principle identical with that in the case at bar. That was a coal mine case where the plaintiff had been injured by the falling of the coal, for the reason that the walls had not been propped, exactly as in the case at bar. In that case the complaint also showed, as in this, that it became necessary to timber and prop the cross-cut where the plaintiff was working, so as to protect him from falling coal and rock, and that he requested the pit boss to furnish him with timbers to be used as props for the purpose of protecting himself, but that the pit boss, as in this case, requested the plaintiff to proceed to his working place, assuring him that the place was safe and did not need and require timbers, but that he would shortly furnish the plaintiff with timbers to prop; that, by reason of such representation on the part of the pit boss, he went back to work; that by reason of the failure of the pit boss to furnish the props the coal fell

and he was injured. It would be difficult to distinguish the complaint in that case in principle from the complaint in the case at bar.

Narramore v. Cleveland, etc., Ry. Co., supra, which is the case upon which the *Green Case* to a large extent was founded, does not sustain appellant's contention. It is true that it was there said that many authorities hold that contributory negligence was a defense to an action arising from the violation of a statutory duty, and that was undoubtedly the proper view, citing cases to sustain that rule. There can be no question but that cases might arise where contributory negligence would be an element in the case available to the defendant, but the two propositions have no real relation to each other. One relates to the risks assumed by an employé in entering into a given service, and the other to the vigilance to be exercised by the employé under certain circumstances; that is to say, that the servant may be guilty of contributory negligence in a case where the master has neglected or refused to perform a statutory duty, but the negligence has no relation to the place, but must be negligence in the doing of some independent act on the part of the servant, which is the proximate cause of his injury. It must be borne in mind, however, that it is this independent act of the servant, instead of the danger of the place or of the machinery, which causes the accident. This view has been sustained by this court in *Hall v. West & Slade Mill Co.*, 30 Wash. 447, 81 Pac. 915, which was the first case affirming the doctrine announced in the *Green Case*. There it was said: "But it will hardly do to say that an employé is guilty of contributory negligence for merely working in a dangerous place when he does not assume the risk of injury for working therein. It is true that in such cases contributory negligence and assumption of risk approximate, and it is difficult to draw a line between them, but we think that, to convict an employé of contributory negligence for working in a place where he does not assume the risk of injury it must be shown that he did not use care reasonably commensurate with the risk to avoid injurious consequences; in other words, that it was some negligent act of his own that caused his injury, and not alone the dangers of his situation." In *Doyle v. Great Northern R. Co.*, 43 Wash. 558, 86 Pac. 861, the court said: "Having determined that respondent did not assume the risk as a matter of law, the question of contributory negligence based thereon is necessarily decided." In *Johnson v. Far West Lumber Co.*, 47 Wash. 492, 92 Pac. 274, it was held that an employé who works about machinery after having notice that it is not guarded as required by the factory act, and the risk of which condition he does not assume, is not thereby guilty unless the injury is caused by a negligent act of his own, and not alone by

the danger of his situation. This must be the true and only distinction. We therefore conclude that the complaint was sufficient in this case to place the defendant upon trial.

There was no error upon the part of the court in sustaining objection to the question to witness Needham: "What do you know of your own knowledge as to the trouble, if any there was, had there with compelling the miners to put up props?" The controlling question in this case was whether the appellant had furnished the props as required. The fact that the appellant may have had trouble with other miners in this regard would in no way bind the respondent.

It is also earnestly contended that the court erred in sustaining objection to the following question to the witness Needham: "Did he, or any one in his behalf, ever present a claim to you or to the company for his injuries in this case prior to the filing of the complaint in this case?" The following objection was made by Mr. Ballinger, counsel for respondent: "We object on the ground of not material, not relevant, not responsive to any issue in this case whether Mr. Starck has presented any claim to the company prior to the bringing of the suit." The objection was sustained and exception noted. The contention of the appellant is that inasmuch as the testimony was exceedingly conflicting, as it is claimed that at the coroner's inquest the respondent exonerated the appellant from any blame for the accident and stated that props had been furnished, and that if he had not presented a claim between the time of the accident and the bringing of the action which we believe was some four months, these would be circumstances which the jury would have a right to consider tending to show that the respondent had sworn falsely upon the hearing of this cause. It might be possible that under some circumstances a question of this kind would throw light upon the case and the point in issue. But this question, if such was its purpose, was not brought to the attention of the court or the counsel for respondent. It evidently was the understanding of the court and of counsel for respondent that the objection was made simply upon the theory that it was not necessary as a matter of statutory requirement for this claim to have been presented, as it is required to be in damage cases against municipal corporations. Counsel for appellant was content to simply ask the question without enlightening the court as to its relevancy. On its face it was not relevant, and we think it would be doing a great injustice to reverse this case, because the question was properly objected to so far as its object was indicated.

Objection is made to many of the instructions given by the court, and the refusal of the court to give instructions offered. Appellant sets forth many general principles of law governing and controlling instructions, citing cases to sustain those principles; but

from an examination of the instructions given and refused we think such principles were respected by the court in this case. In considering the instructions given, and requested and refused, the appellant directs the court's attention to requested instruction No. 7, refused by the court, and to instruction No. 16, given by the court. Requested instruction No. 7 was as follows: "I further charge you that the law requires the defendant to furnish sufficient timbers for props with which to safeguard the roofs above where the plaintiff is working, and if the defendant has failed to do that, and the plaintiff has been put to an election whether he will go ahead and risk the danger or quit working, and he concludes to go ahead and work, it becomes a question as to whether in so doing he acted with due care or recklessly exposed himself to obvious and imminent danger. If while in the exercise of due care he is injured by reason of the fact that the company, after request, willfully failed to furnish sufficient or suitable timbers with which to prop the roof, his injury is then due to a violation of the statute on the part of the company and they are responsible. On the other hand, if the danger is obvious and imminent, and it is nothing but recklessness for the plaintiff to have exposed himself to it, then I charge you that the law will not permit the plaintiff to recover for the injury in that event is due directly to his own lack of ordinary prudence." It will be seen that the contention in this instruction was the same contention that was made by the appellant, which we have discussed, in relation to the sufficiency of the complaint. However, instruction No. 16 given by the court was as follows: "You are instructed that one of the defenses set forth in the answer is that the dangers of the working place where plaintiff claims to have been injured were open and apparent to him and were known to him, and that, by working in said place, he assumed the risk thereof. I instruct you that if you find from the evidence that defendant performed its statutory duty, as hereinbefore defined to you in these instructions, and was not guilty of any negligence, and that there still remained a peril and risk to the plaintiff at said working place, and that the same was open and apparent to plaintiff, or known to him, or that he had such notice thereof that a man of ordinary prudence under like circumstances would have discovered such danger, then plaintiff did assume the risk of such danger and if he was thereby injured he has no redress; but if you find from the evidence that the danger to plaintiff at said working place, if any, was caused by the neglect of defendant to perform its said statutory duty, if it did fail to perform the statutory duty and that it was by reason of such negligence that plaintiff was injured, if he was injured, then you are instructed that plaintiff did not assume the risk of injury through such neglect." It seems to us that

the appellant's rights were guarded in an exceedingly liberal manner in this instruction, and that the only objection that can be raised to it is the very technical objection as to the use of the word "any" in the early part of the instruction. It is contended by the appellant that there was no other negligence than the negligence of neglecting to perform its statutory duty in relation to the furnishing of props, and that under the instruction the court authorized the jury to consider the question as to whether appellant had been guilty of some other negligence, thereby authorizing the jury to take into consideration a fact that was not in the pleadings and particularly not in the evidence, and that the instruction was therefore erroneous. But we think this is too narrow a construction to place upon this instruction. There was probably an unfortunate use of the word "any," but we think the jury well understood, when the court said, "I instruct you if you find from the evidence that the defendant performed its statutory duty, as hereinbefore defined to you in these instructions, and was not guilty of any negligence," that the court had reference not to any other negligence, but any negligence in not performing its statutory duty as thereinbefore defined. If judgments were reversed for every little mistake made in the use of language by courts while instructing juries, the wheels of justice would be effectually blocked.

The court further instructed the jury as follows, in No. 14 of the instructions, which is also objected to by the respondent: "You are instructed that if you find that the defendant failed and neglected to keep a sufficient supply of timber at the mine where plaintiff was working required for use as props so as to enable plaintiff to properly secure the said workings from caving in, and failed and neglected to send down into the mine such props as were required and to deliver the same at the entrance of the working place, then you are instructed that plaintiff cannot be held to have assumed the risk of such danger, if any, as you may find there was, of injury to him from the caving in of his working place, for want of such props, nor can you under such circumstances ascribe to plaintiff contributory negligence solely by reason of the fact that he worked in said place, if he did so work, unless the peril of working there, if any was so obvious or imminent that any man of ordinary prudence would not have worked there under like circumstances, but, if you find that such danger was so obvious and imminent that no man of ordinary prudence would incur it, then I charge you that the law will not permit the plaintiff to recover." This instruction surely went as far as any court has ever gone in protecting the interests of the defendant, and the court made the distinction

which this court has made when it said: "Nor can you under such circumstances ascribe to plaintiff contributory negligence simply by reason of the fact that he worked in said place, if he did so work."

Many other assignments of error are made in relation to the instructions, but they are principally based upon the reason alleged to support the assignment that the complaint did not state a cause of action. There was but one issue in this case, viz., the negligence charged that the appellant did not perform its statutory duty. The instructions squarely placed that question before the jury. Both the theory of the appellant and the theory of the respondent in relation to that question were fairly presented. No errors can be discerned in the giving or refusing instructions, nor in the admission or rejection of testimony. The question at issue was properly submitted to the jury, and they decided it against the appellant.

There is one remaining question which has given us more trouble. The judgment is for \$20,000, and a judgment of this magnitude in a case of this kind will, and should always, challenge the attention of the court, and compel the closest scrutiny of the testimony on which the verdict in this respect is based. But, after such scrutiny, we are unable to say that the amount of the verdict was any indication of passion or prejudice on the part of the jury, or that it was more than would reasonably compensate the respondent for the injuries sustained and the suffering imposed. The respondent at the time of the injury was 37 years old, and had a wife and five children depending upon him for support. We will not attempt to describe his condition in detail, but if the testimony of unimpeached doctors, who are evidently physicians of ability and standing and strangers to the respondent, is to be credited, to say nothing of the testimony of the respondent, he is left a broken and disjointed wreck, with no hope of improvement, and with nothing to look forward to but suffering and embarrassments. Appellant offered no testimony on the subject of the injury. Under such circumstances we would not be justified in interfering with the verdict of the jury.

The judgment will be affirmed.

RUDKIN, C. J., and MORRIS, CHADWICK, and CROW, JJ., concur.

(61 Wash. 195)

NORTHERN PAC. RY. CO. v. S. E.
SLADE LUMBER CO.

(Supreme Court of Washington. Dec. 12, 1910.)

NAVIGABLE WATERS (§ 38*) — ACCESS TO WHARF—INTERFERENCE.

The owner of upland purchased from the state the tide lands in front of them out to deep water, no harbor line having been estab-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

liabed, and built a wharf at the edge of deep water. A railroad company subsequently built a drawbridge adjoining the wharf so close that the draw could not be opened while a vessel was lying at the wharf. *Held*, that the wharf owner's right to have vessels load at the wharf could not be enjoined by the railroad without compensation, though the bridge had the sanction both of the state and federal authorities.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. §§ 228-238; Dec. Dig. § 38.*]

Rudkin, C. J., and Gose, J., dissenting.

En Banc. Appeal from Superior Court, Chehalis County; Mason Irwin, Judge.

Action by the Northern Pacific Railway Company to enjoin the S. E. Slade Lumber Company from interfering with the opening and closing of a drawbridge. Judgment for defendant, and plaintiff appeals. Affirmed.

George T. Reid, J. W. Quick, and John C. Hogan, for appellant. Bridges & Bruener, for respondent.

CROW, J. This action was commenced by the Northern Pacific Railway Company against the S. E. Slade Lumber Company to enjoin the defendant from interfering with the opening and closing of a drawbridge. From an order of dismissal, the plaintiff has appealed.

The material facts are undisputed. The Wishkah river, tributary to Grays Harbor and subject to tidal flow, is navigable for seagoing vessels to and above the city of Aberdeen. The appellant corporation, a common carrier, engaged in interstate commerce, owns and operates a line of railroad extending from Grays Harbor to Centralia and Tacoma, where it makes connections extending through Washington and other states. Shortly after October, 1897, under a permit from the Secretary of War, appellant constructed a drawbridge across the river in the city of Aberdeen, and maintained and used the same until January, 1908. On April 20, 1907, the Secretary of War issued to appellant a permit for the erection of a permanent steel bridge, and permission to place a temporary wooden bridge on the stream for use during its construction, which was commenced in January, 1908. The swinging arms of the temporary bridge and the new steel bridge are each 31 feet and 10 inches longer than the arm of the old bridge. Respondent lumber company owns certain upland and tract 13 of Aberdeen tide land immediately in front thereof, on the bank of the river. Its tide land extends from its upland to the deep waterway, and both tracts lie immediately north of appellant's railroad. Respondent and its predecessors were owners of the upland for many years prior to July 10, 1907, when it procured from the state title to the tide land by exercising its preference right to purchase immediately after a plat of the Aberdeen tide lands had been filed in the

office of the State Land Commissioner. On the east side of the river, immediately north of and contiguous to appellant's railroad, respondent built a wharf partly upon its upland and partly upon its tide land. The outer or west line of this wharf is identical with the inner or east line of deep water, there being no established harbor area. For many years respondent has owned and operated a sawmill on its upland, and has used its wharf for loading and unloading seagoing vessels. By reason of the length of the arms of the temporary wooden bridge and the steel bridge, appellant could not open or close the same while a vessel was lying in the stream alongside of respondent's wharf, immediately north of and contiguous to the railroad, although the shorter arm of the old bridge could always be opened and closed at such times. Prior to the commencement of this action the respondent frequently placed and permitted vessels to remain, for loading and unloading at its wharf, immediately north of appellant's right of way, thereby preventing appellant's opening and closing its bridge and moving its trains. Appellant thereupon commenced this action to restrain the respondent from thus interfering with its bridge and trains. A temporary restraining order was granted, and the steel bridge was completed. On final trial a permanent injunction was denied, the action was dismissed, but the trial court permitted the appellant to file a supersedeas bond and continue the temporary restraining order during the pendency of this appeal.

The sole question before us is whether the appellant having constructed its bridge under the authority of section 8670, Rem. & Bal. Code, and the permit of the Secretary of War, is entitled to interfere with respondent's use of its wharf, without compensating it for resulting damages. Appellant, citing *Eisenbach v. Hatfield*, 2 Wash. St. 236, 28 Pac. 539, 12 L. R. A. 632, *Harbor Line Com'rs v. State*, 2 Wash. St. 530, 27 Pac. 550, *Muir v. Johnson*, 49 Wash. 66, 94 Pac. 899, *Brace-Hergert Mill Co. v. State*, 49 Wash. 326, 95 Pac. 278, *Grays Harbor Boom Co. v. Lownsedale*, 54 Wash. 83, 102 Pac. 1041, 104 Pac. 267, *Lownsedale v. Grays Harbor Boom Co.*, 54 Wash. 542, 103 Pac. 833, and other cases from this court, contends that, if the state be the absolute owner and proprietor of the beds and shores of all its navigable waters, subject only to the right of Congress to regulate interstate commerce, no owner of any bordering land can have a right of access to deep water; that the respondent having no such right is not entitled to recover damages for appellant's obstruction of the stream, under the authority of the state and the war department, and that any such impairment of respondent's access to its wharf over the stream is *damnum absque in-*

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

juria. Under the conceded facts, we think this contention cannot be sustained. Respondent owns and holds not only the absolute fee-simple title to the upland, but also a fee-simple title to the tide land, formerly owned by the state, upon which the wharf is now constructed. The outer line of the tide land and wharf, its private property, is coincident with the inner line of the waterway, and there is no harbor area. Its wharf therefore abuts upon deep water, and is accessible to seagoing vessels. Although the state established and platted the tide lands, it refused to establish any harbor area. Having thus established and platted tide lands which extend to and border upon the waterway, it has sold to respondent every right it held in and to such lands, and now holds no right to any intervening harbor area. By virtue of the improvement and location of the tide land and respondent's ownership thereof, it (the respondent) has acquired a right of access to its wharf over the navigable waters, which interferes with no intervening right of the state. The cases cited by appellant are not pertinent. In the *Eisenbach Case*, which the others follow, it was held that an upland owner had no right of access to navigable waters, for the reason that the tide land or shore land lying between such upland and the deep water belonged to the state, that the recognition of any such right of access in the upland owner would impair the state's title, and interfere with its absolute ownership over, and control of, its tide or shore lands. In this action respondent has acquired the tide land which extends to the deep waterway, and owns the same in fee simple. There is no intervening land or harbor area between it and deep water. In the absence of facts and conditions upon which the *Eisenbach Case* was predicated, its doctrine ceases to be applicable, and on the facts now before us, respondent should be held to have a right of access to its wharf located on its own land and contiguous to the deep water, and that the same is a valuable property right. In *Muir v. Johnson*, supra, we said: "As early as the case of *Eisenbach v. Hatfield*, 2 Wash. St. 236 [26 Pac. 539, 12 L. R. A. 632], this court held that the owner of uplands bordering on navigable waters as such had no riparian or littoral rights in such waters as would enable him to maintain an injunction from interference therewith. This holding was based on the ground that between the boundary of the upland and the navigable waters proper there were shore lands which belonged to the state, and to which all riparian and littoral rights attached, and the state, or its grantee after it conveyed the lands, had the sole right to complain of obstructions placed between the lands and the navigable waters of the river, lake, or other body of water upon which they bordered."

"If the grantee of the state has the right

to complain of such obstructions, it is apparent that the respondent, being such a grantee, has the right to complain in this action. If appellant can, under permission granted by the Secretary of War, so extend the arm of its bridge as to interfere, without compensation, with respondent's access to a portion of its wharf, there is no logical reason why it may not in like manner completely destroy all access to the wharf and insist that the injuries resulting to the respondent are *damnum absque injuria*. It is our view that no case heretofore decided by this court contemplates or warrants any such holding. As no tide land, harbor area, or other property of the state intervenes or lies between the respondent's wharf and the deep waterway, we hold the respondent has a special property right of access to the wharf which cannot be taken, damaged, or destroyed without compensation.

The judgment is affirmed.

DUNBAR, PARKER, MOUNT, MORRIS, CHADWICK, and FULLERTON, JJ., concur.

RUDKIN, C. J. (dissenting). The majority opinion holds that a drawbridge, constructed over a public navigable stream of the state and of the United States, by authority of both the state and the United States, cannot be operated or maintained without the consent of the owner of private property abutting on the stream. This is contrary to my conception of the law, and I find nothing in the majority opinion to change my views or convince me of my error. I have always supposed that a sovereign state had absolute control and dominion over the public navigable waters within its borders, and that the individual, as against the sovereign, had neither property nor property rights therein. Such was the conclusion of the Supreme Judicial Court of Maine in *Frost v. Washington County R. Co.*, 96 Me. 76, 51 Atl. 806, 59 L. R. A. 68, after a full review of the authorities, and in that conclusion I fully concur. The court there said:

"2. The plaintiff further contends that even if the trestle in its present condition is a lawful structure, and is lawfully maintained by the defendant company, he has nevertheless suffered much pecuniary loss from the action of the defendant company in building and maintaining it, and should be reimbursed therefor by the company. He concedes that the company has not taken, nor even touched, any of his tangible property, real or personal. The trestle is three-fourths of a mile distant from the property described in this suit. But the closing of the channel by the trestle has undoubtedly reduced the earning powers to selling value of his property on the cove, and has lessened the profits of the business he was carrying on there. He claims he has a cause of action against the railroad company for the injury thus done to his property and business.

"This claim cannot be sustained. The only right of the plaintiff interfered with by the defendant company was his right of navigation by water in and out of the cove through the channel. This right of the plaintiff, however, was not his private property, nor even his private right. It could not be bought, sold, leased, or inherited. He did not earn it, create it, or acquire it. He did not own it as against the sovereign. The right was the right of the public, the title and control being in the sovereign in trust for the public and for the benefit of the general public, and not for any particular individual. The plaintiff only shared in the public right. He had no right against the public. The sovereign had the absolute control of it, and could regulate, enlarge, limit, or even destroy it, as he might deem best for the whole public; and this without making or providing for any compensation to such individuals as might be inconvenienced or damaged thereby. The sovereign cannot take private property for public uses without providing for just compensation to its owner, but this constitutional provision does not limit the power of the sovereign over public rights. If, in the evolution of life and commerce, the sovereign comes to believe that the public good will be increased by the creation of some new or additional means of communication and commerce at the expense, or even sacrifice, of some older one enjoyed merely as a public right, the sovereign can so ordain even to the detriment of individuals. If, in the judgment of the sovereign, a railroad across a navigable channel of water, and completely obstructing its navigation, is of more benefit to the public than the navigation of the channel, he has the unrestricted power to thus close the channel to navigation, without making compensation to those who had been wont to use it. Every individual making use of a merely public privilege must bear in mind that he may be lawfully deprived of that privilege whenever the sovereign deems it necessary for the public good, and he must order his business accordingly. Unless the person authorized by statute to obstruct or close a navigable channel is required by the statute to make compensation to persons injured by such action, he is under no legal obligation to do so. In such case the inconvenience and loss, however great, are *damnum absque injuria*. The company has damaged the plaintiff, but it has not wronged him. The defendant company has not interfered with the private property nor private rights of the plaintiff. It has lawfully, by express authority from the sovereign, merely abridged the use of a public right which was within the exclusive control of the sovereign. For this lawful act it is not obliged to make any compensation to the plaintiff, any more than to all other persons who might have oc-

casion, however seldom, to navigate the channel.

"The authorities which support the foregoing statement of the law are numerous and uncontradicted. We cite a few only: *Spring v. Russell*, 7 Me. 273; *Rogers v. Railroad Co.*, 35 Me. 319; *Gowen v. Railroad Co.*, 44 Me. 140; *Brooks v. Improvement Co.*, 82 Me. 17, 19 Atl. 87, 7 L. R. A. 460, 17 Am. St. Rep. 459; *Miller v. City of New York*, 109 U. S. 385, 3 Sup. Ct. 228, 27 L. Ed. 971; *Gilman v. City of Philadelphia*, 3 Wall. 713, 18 L. Ed. 96; *Pound v. Turck*, 95 U. S. 459, 24 L. Ed. 525; *Hamilton v. Railroad Co.*, 119 U. S. 280, 7 Sup. Ct. 206, 30 L. Ed. 393; *Escañaba & L. M. Transp. Co. v. City of Chicago*, 107 U. S. 678, 2 Sup. Ct. 185, 27 L. Ed. 442; *Cardwell v. Bridge Co.*, 113 U. S. 205, 5 Sup. Ct. 423, 28 L. Ed. 959; *Scranton v. Wheeler*, 179 U. S. 141, 21 Sup. Ct. 48, 45 L. Ed. 126.

"It follows that the plaintiff has no legal claim to compensation, and cannot sustain the action. We regret that the plaintiff has been damaged by this new railroad being lawfully built across the channel he was wont to use, but he is only one of many thousands who are being individually damaged every day by the frequent lawful changes in the means and methods of manufacture and commerce, and yet cannot be said to be wronged by illegal acts."

The judgment of the court below should be reversed, with directions to grant a permanent injunction as prayed.

GOSE, J. I concur in the view expressed by the Chief Justice.

(61 Wash. 227.)

WEST v. SHAW et al.

(Supreme Court of Washington. Dec. 14, 1910.)

1. LICENSES (§ 61*)—REAL PROPERTY—REVOCA-TION.

A license to cross real property can be revoked by the owner either by a notice warning off trespassers, or, as to a particular person, by commanding him not to go on the property, or by tying the gate by which licensees were accustomed to go on it.

[Ed. Note.—For other cases, see *Licenses*, Cent. Dig. § 124; Dec. Dig. § 61.*]

2. NEGLIGENCE (§ 33*)—CONDITION OF LAND—DUTY TO TRESPASSERS.

As a rule, the only duty owing by a landowner to trespassers is to refrain from wantonly or willfully injuring them; he not being required to keep the premises in a safe and suitable condition for use by them.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 45-47; Dec. Dig. § 33.*]

3. NEGLIGENCE (§ 139*)—INJURIES FROM USE OF REALTY—ACTIONS—INSTRUCTIONS.

In an action for personal injuries sustained by plaintiff, while going over defendant's land to an adjoining house, by inadvertently stepping into a post hole dug by defendant for the purpose of erecting a fence on the boundary agreed upon by the adjoining owner and defendant,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

there was evidence that plaintiff and defendant had discussed the question of the boundary, and defendant had ordered plaintiff to keep off his premises, and had put up a warning against trespassers, which had been torn down, and that an hour or so before the accident a workman digging the post holes had tied the gate in the fence of the adjoining lot, which had been generally used by persons going over defendant's lot to the adjoining house. Defendant requested instructions that if plaintiff was warned by defendant to keep off his premises before the injury occurred, and afterwards came thereon without express or implied invitation, she was a trespasser, and defendant only owed her the duty of refraining from willfully injuring her, and that a landowner is under no duty to trespassers except to refrain from wantonly or recklessly injuring them after discovering their peril. *Held*, that it was error to refuse the requested instructions.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 371–377; Dec. Dig. § 139.*]

4. TRIAL (§ 203*)—INSTRUCTIONS.

A party has a right to have his theory of the case presented by proper instructions requested, if there is evidence tending to support his theory.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 477–479; Dec. Dig. § 203.*]

Department 2. Appeal from Superior Court, Clarke County; W. W. McCredie, Judge.

Action by Jennie L. West against William Shaw and others. From a judgment for plaintiff, defendants appeal. Reversed, and new trial ordered.

Miller & Crass, for appellants. R. H. Back, for respondent.

CHADWICK, J. Appellants and a family named Richter were adjoining lot owners. The lot belonging to the Richters had been fenced. The home of respondent was to the east of the Richters. The Richter tract was bounded on the north and west by roads or streets, but for a long time a gate had been maintained in their south fence, through which a path led out on to the unfenced lots of the appellants. There was testimony tending to show that this pathway and gate had been used generally by those going into or coming away from the Richter home for such a length of time and under such circumstances as would imply a license or consent to its use. The appellants and the Richters had some dispute as to the true line dividing their tracts, and finally agreed that it should be nine feet north of the line fence theretofore erected, thus placing it within the inclosure. Appellants accordingly caused post holes to be dug preparatory to moving the fence. The work was begun, but was not completed on the — day of December, 1905. On the evening of that day respondent went to the Richter home to borrow some article of neighborly interchange, and in doing so inadvertently stepped into a post hole which had been dug, but left unguarded by the workmen. She alleges that she sustained

injuries, and from a verdict in her favor this appeal is prosecuted.

Many errors are assigned, most of them going to the instructions given or refused. Assuming that the instructions will be recast upon another trial, we shall discuss only such as we deem materially prejudicial. One of the defenses was that respondent was a trespasser. There was testimony to the effect that respondent and appellant William Shaw had discussed the question of the boundary line, and that Mr. Shaw had ordered respondent to keep off of his premises; that he had put up a notice warning all trespassers off of the property, but that it had been torn down; and that one of those engaged in digging the post holes had securely tied the gate with a rope when he quit work between 4 and 5 o'clock in the afternoon. The accident occurred about 5 o'clock. Upon the duty owing to a trespasser by the owner of land, the court instructed the jury as follows:

"A party's liability to trespassers depends upon the owner's contemplation of the likelihood of their presence on the premises, and the probability of injuries from contact with conditions existing there.

"If the owner of land digs a dangerous pitfall or excavation in a passageway or pathway used by people in going to and from a residence and known by the excavators to be so used, or reasonably could be anticipated or contemplated that it was and would be so used, then the owner will be liable for a failure to take reasonable precautions to prevent injury to any person passing along said pathway with due care, whether he be a trespasser or a licensee. A failure to take such reasonable precautions will be gross or wanton negligence.

"Wanton negligence is the failure of one charged with a duty to exercise an honest effort in the employment of all available means to prevent injury."

These instructions were excepted to, and the following instructions were requested by appellants:

"If you find that plaintiff was warned by defendants to keep off of their premises, and particularly the premises where the injury is alleged to have occurred, then you are instructed that, if after being so warned, plaintiff came onto defendants' property without invitation, express or implied, she was a trespasser, and defendants owed her no duty except to refrain from willfully injuring her."

"You are instructed that the rule applicable to trespassers is that the proprietor upon whose land the trespasser enters is under no duty towards the trespasser, except that of refraining from wantonly or recklessly injuring him, after discovering his trespass or peril."

It is clear that the trial judge miscon-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ceived the law pertaining to the duty which appellants owed to respondent, in the event that the jury found she went upon the premises of the appellants in defiance of their orders. The pathway was not a public way, but was used by the express or implied permission of the owners of the property; and the most that could be claimed by any one was that the circumstances of its use had been such that it operated as an implied invitation to the public to use it. A revocation of this license or permission could be manifested in either of the ways set up by appellants—by notice, command, or by tying the gate. "The general rule is that no duty exists towards trespassers except that of refraining from wantonly or willfully injuring them. The principle that owners of property are bound to see that persons lawfully on such premises are not injured does not extend to those who are on the premises without right or without permission. So the owner of land is under no obligation or duty as to a mere trespasser to keep his premises in a suitable condition. The mere maintenance of a dangerous nuisance on one's inclosed premises gives no right of action to one who without necessity and without the owner's invitation express or implied enters on such premises and is injured thereby." 29 Cyc. 442. As we read the instructions, appellants were denied the right the law gives them of having the court instruct upon the theory of the defense tendered in the answer and sustained in some degree by competent testimony. Every litigant has a right to have his theory of the case presented to the jury. *State v. Messner*, 43 Wash. 206, 86 Pac. 636.

The judgment of the lower court is reversed, and a new trial ordered.

RUDKIN, C. J., and MORRIS, DUNBAR, and CROW, JJ., concur.

(61 Wash. 118)

COOK v. DANAHER LUMBER CO.

(Supreme Court of Washington. Dec. 7, 1910.)

1. MASTER AND SERVANT (§ 217*)—INJURY TO SERVANT — VIOLATION OF FACTORY ACT — QUESTION FOR COURT.

An employé in a sawmill, to clean up waste accumulating about machinery and push it to a conveyor chain carrying the same away, worked regularly on both sides of an unguarded revolving shaft. At times it became necessary to move waste pieces which lodged under the chain. The chain was, according to the employé's testimony, less than three feet from the shaft which was about waist high to a man of ordinary height, and according to the master's evidence the chain was 42 inches from the shaft. The employé leaned over the shaft to remove material caught in the conveyor chain and his coat was caught on the revolving shaft, causing personal injury. *Held*, as a matter of law, that the master failed to guard the shaft, as required by the factory act of 1905

(Laws 1905, c. 84), so that the defense of assumption of risk was unavailable.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 574-600; Dec. Dig. § 217.*]

2. MASTER AND SERVANT (§ 236*)—GUARDING MACHINERY—STATUTES.

Where reasonable minds cannot differ on the proposition that a master should have guarded machinery, as required by the factory act of 1905 (Laws 1905, c. 84), requiring employers to guard machinery dangerous to employes in the performance of their duty, the court must decide the question, as a matter of law and rule, that the servant injured by unguarded machinery may recover.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1010-1050; Dec. Dig. § 236.*]

3. MASTER AND SERVANT (§ 121*)—GUARDING MACHINERY—STATUTES.

The liability of a master for injury to a servant by coming in contact with unguarded machinery is not limited to employes working with the machinery, but it is enough that in the performance of such work as an employé has to do it is possible for him to be injured by machinery which should be guarded, as required by the factory act of 1905 (Laws 1905, c. 84).

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 228-231; Dec. Dig. § 121.*]

4. MASTER AND SERVANT (§ 289*)—INJURY TO SERVANT — CONTRIBUTORY NEGLIGENCE — QUESTION FOR JURY.

Whether an employé injured by coming in contact with an unguarded shaft which the master, as required by the factory act of 1905 (Laws 1905, c. 84), should have guarded, was guilty of contributory negligence *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1069-1132; Dec. Dig. § 289.*]

5. MASTER AND SERVANT (§ 289*)—INJURY TO SERVANT — CONTRIBUTORY NEGLIGENCE — QUESTION FOR JURY.

Whether an employé injured by coming in contact with an unguarded shaft knew of the key seat in the shaft or could have seen it *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1089-1132; Dec. Dig. § 289.*]

6. TRIAL (§ 248*)—INSTRUCTIONS—ABSTRACT PROPOSITIONS.

The court, as a general rule, should not instruct in the abstract, but whether an instruction is abstract must be determined by reference to the evidence and to the instructions as a whole.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 582, 583; Dec. Dig. § 248.*]

7. TRIAL (§ 248*)—INSTRUCTIONS—ABSTRACT PROPOSITIONS.

Where, in an action for injuries to an employé, the court defined the issues and submitted the defense of a choice between places to work, it was not error to follow the charge with an abstract proposition of law that if there were two ways and neither one was safe, and one was safer than the other, it was for the jury, if they were equally available and speedy.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 582, 583; Dec. Dig. § 248.*]

8. MASTER AND SERVANT (§ 296*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.

An instruction, in an action for injuries to an employé that the way to determine whether the employé was negligent is to compare what was done by him with what would have been

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

done by a man acting with ordinary prudence, and that the jury should consider all the facts, including the evidence of the age, experience, knowledge, intelligence, and opportunity for knowledge of the employé, properly submitted the test of ordinary care.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1180-1194; Dec. Dig. § 296.*]

9. DAMAGES (§ 100*) — PERSONAL INJURIES — ELEMENTS.

The measure of damages for impairment of earning capacity is the difference between the earning capacity before and after the accident, and this depends not only on the actual earning capacity, but on the use made of it.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 237-241; Dec. Dig. § 100.*]

10. APPEAL AND ERROR (§ 1067*) — HARMLESS ERROR — INSTRUCTIONS.

Where the character and extent of personal injuries were such that there was no probability that another jury would return a verdict for a sum less than was returned, the refusal to charge that in determining the extent of the impairment of plaintiff's earning capacity, the jury might consider what he had been earning in the past and the probabilities of what his earnings would have been in the future, if he had not been hurt, including the physical condition of plaintiff at the time of the injury, was not prejudicial; the court in the charge given embodying a correct statement of the law in general terms.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4229; Dec. Dig. § 1067.*]

11. EVIDENCE (§ 192*) — PERSONAL INJURIES — EXHIBITION OF PERSON OF PLAINTIFF.

The court has discretionary power to permit one suing for a personal injury to exhibit his person before the court and jury, and the decision of the trial court in permitting an exhibition within the *res gestæ* of the case will not be disturbed.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 677; Dec. Dig. § 192.*]

Department 2. Appeal from Superior Court, Pierce County; John A. Shackleford, Judge.

Action for injuries by E. G. Cook against Danaher Lumber Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Hudson & Holt, for appellant. Govnor Teats, Hugo Metzler, and Leo Teats, for respondent.

CHADWICK, J. Plaintiff was employed by defendant in the work of cleaning up on a part of the lower floor of a sawmill owned and operated by the defendant. He worked within certain defined limits, and his duty was to clean up all sawdust and waste as it accumulated about the machinery, and push or carry it to a conveyor chain which carried the trash away. Plaintiff had been employed about sawmills for some time, but had not directed the movement of any machinery. He had worked for defendant about four months when the accident occurred. In the zone of plaintiff's employment there was a shaft about four feet long, which operated a pulley. Behind or east of it, the space was limited; possibly so much so, that appellant could not use the longhandled scrapers which he was accustomed to use when working at

his usual place of employment, which was to the west of the shaft. The space to the west was comparatively open, and the duties of plaintiff involved no particular danger. About two weeks before the accident, the installation of a sprinkler system was inaugurated by defendant. Those engaged in this work created a different condition in the surroundings in this: they put pulleys on another shaft further to the west, set up two work benches with pipe-cutting machines and a threader, in close proximity to the place where plaintiff was accustomed to push the waste on the conveyor chain; the pipe when cut into proper lengths was put on the floor in the space usually occupied by plaintiff; a guard was also taken off the shaft upon which plaintiff was injured. The conveyor chain returned out of a box or guide, and it was not unusual for short lengths, generally about four feet, to come out of the conveyor box. If they were carried on top of the chain, they would fall to the floor of their own weight; but at times they would lodge under the chain when, if carried into the bull wheel or sprocket, they might break the chain, causing it to pile up. Plaintiff, being on the east side of the unguarded shaft which had an exposed key seat running its full length, observed a length of edging protruding from the conveyor but held under the chain. This shaft was about waist high to a man of ordinary height, and the chain, according to defendant's testimony, was about 42 inches from the shaft, while plaintiff's testimony shows that it was less than three feet. Plaintiff leaned over the shaft to reach the edging and pull it out, when his jumper coat caught on the shaft, his clothing was stripped from his body, his arm was broken so that amputation followed, one of his legs was so injured that he complains that it will be permanent, and his private members were so torn and lacerated as to materially interfere with, if not entirely destroy, some of their material functions. Defendant set up the usual defense of assumption of risk and contributory negligence. From a judgment in favor of the plaintiff, defendant has appealed.

The complaint is based upon the factory act. In pursuance of that theory, the court instructed the jury as follows: "In this case the defense of the assumption of risk, set up in defendant's third affirmative defense in its answer, has no application and you will disregard that defense. It will be your duty in this case to bring in a verdict for the plaintiff, unless it appears from a fair preponderance of the evidence that the plaintiff was guilty of negligence which contributed to and was one of the causes of his injury. The burden rests upon the defendant to prove contributory negligence by a fair preponderance of the evidence." It is contended that this is an instruction on the weight of the evidence. Our attention is called to the fact that the factory act of 1905 (Laws 1905, c.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

84) differs from the act of 1903 (Laws 1903, c. 37), in that a millowner is not required to guard his machinery, unless the employé is liable to come in contact with it in the performance of his duty; and hence, respondent being under no duty to be on the side of the shaft opposite the conveyor, there was no duty imposed upon appellant, and the recovery should have been denied on the ground of assumption of risk. To so rule would require us to hold as a matter of law that respondent was not engaged in the performance of his duty when injured; that is, that having put himself in an unusual and unnecessary position and having reached over the shaft in such manner as to make it evident that he had gone beyond his duty in utter disregard of his own safety, he cannot be heard to claim the benefit of the factory act. The factory act was passed in obedience to the commonest instincts of humanity, and should not be construed so as to defeat its intent, except in a plain case. For two weeks, or at least while the pipe fitters were at work on the lower floor of the mill, respondent had performed a certain part of his work when upon the east side of the shaft. He testified that he had reached over, as he did in this instance, a number of times without injury. It is true that, if the testimony showed that the conveyor chain was so far beyond respondent's reach that the legal conclusion followed that he had voluntarily abandoned the path of duty, it might be so held. But the evidence is conflicting on this point. It was respondent's duty to clean up, and he was expected, if he saw scraps of boards in the conveyor, to remove them. This duty, taken in connection with the fact that the jury must have found his usual place of work to be obstructed, in some degree at least, by the pipe men, and the further fact that a model or rather reconstruction of the place where respondent was injured was exhibited to the jury, allowing them to test with their own eyes and senses the conflict of testimony as to the distance from the shaft to the conveyor chain, was enough to sustain the verdict upon this point. Under this state of facts, we do not think the court erred in saying to the jury that respondent was bound under the factory act. The shaft was in the open, and an employé would not have to reach for it or climb over other machinery to come in contact with it; yet he was liable to come in contact with it in the performance of his admitted duty. In some cases the court might hold that the servant could not recover as a matter of law, or in doubtful cases he might submit the question of fact to the jury. But where the situation is such that reasonable minds could not differ, it is the duty of the court to withhold the question of compliance with the factory act from the jury and decide it as a matter of law. Liability to injury by coming in contact with unguarded machinery does not mean that an employé must be working with the machinery. It is enough that, in the performance of such work as

he has to do, it is possible for him to be injured. We think these principles are covered by the case of *Hall v. West & Slade Mill Co.*, 39 Wash. 447, 81 Pac. 915, and the cases collected under section 6587, 2 Rem. & Bal. Code.

Nor do we think that respondent is to be held guilty of negligence as a matter of law. He was in the performance of his duty. He, as men of ordinary understanding and common prudence will do at times, obeyed the impulse of his mind to reach over and clear the chain. He had done the same thing before, and, while custom will not excuse negligence, we cannot say that his act was so in disregard of the duty a person owes to himself as to bring him within the rule of contributory negligence when, as in this case, the factory act controls and the accident would not have happened but for its violation. It is insisted that the key seat on the shaft was in plain view, and was in itself a warning of danger. Whether respondent knew of the key seat or could see it, the machinery according to his testimony being always in motion when he was about it, was a question for the jury.

Error is also predicated on the refusal of the court to instruct upon the doctrine of a safe and unsafe way. It is complained that the court refused the instruction based upon the concrete facts of the case, and in lieu thereof submitted only the abstract proposition of law that, "if there were two ways and neither one was safe and one was safer than the other, it was a question for the jury, if they were equally available and speedy." It is true that, as a general proposition, a court should not instruct in the abstract; but whether an instruction is to be so considered, must be determined by reference to the evidence as well as the instructions as a whole. The court had defined the issues, and submitted the defense of a choice between places to work, and it was not error to follow it with the abstract law covering the issue as defined.

It is complained, also, that the court instructed the jury that the test of due care was the conduct of an "ordinarily prudent man." If this stood alone it might be prejudicial, for an ordinarily prudent man might act recklessly at times. But the whole instruction given by the court cannot be held to be prejudicial, for the premise of the instruction is, "the way to determine whether the plaintiff was negligent or not is to compare what was done by him with what would have been done by a man acting with ordinary prudence"; and its conclusion is: "In determining whether plaintiff was guilty of contributory negligence you should consider all of the facts shown by the evidence, including the evidence throwing light upon the age and experience and knowledge and intelligence, and opportunity for knowledge, of the plaintiff."

It is urged that the court erred in refusing to instruct the jury as follows: "You are instructed, gentlemen of the jury, that in de-

termining the extent to which the earning capacity of the plaintiff has been impaired by his injuries, you may take into consideration, if you see fit, what he has been earning in the immediate past and the probabilities of what his earnings would have been in the future if he had not received his injury; and in this connection, you may consider the physical condition of the plaintiff at the time of his injury and what it would have been but for his injury." This request, more specific than the general charge of the court, embodied a correct statement of the law, and might well have been given. The measure of damages for loss or impairment of earning capacity is the difference between the earning capacity before and after the accident, and this depends not only on the actual earning capacity, but on the use made of it. However, it would seem that a jury of average intelligence would understand this without explicit instructions from the court. In any event, we do not think the failure to give the instruction was prejudicial in this case. The verdict of \$7,500 doubtless finds its limitation in the statute fixing the maximum recovery in that sum, rather than in the testimony. If the respondent is entitled to recover at all—and the verdict establishes that fact in his favor—the character and extent of his injuries were such that there is no probability that another jury would return a verdict for a less sum.

Finally, it is claimed as error that the court permitted the plaintiff to expose his person before the court and jury; that the exhibition was indecent, and calculated to arouse the prejudices and passions of the jury. This point has been but recently decided by this court adversely to the contention of the appellant. *Dunkin v. Hoquiam*, 58 Wash. 47, 105 Pac. 149. While such exhibitions are not to be encouraged as a general thing, the only safe rule is to leave such requests to the discretion of the trial judge, and, if within the *res gestæ* of the case, his decision will not be held to be prejudicial error.

Finding no reversible error, the judgment is affirmed.

RUDKIN, C. J., and DUNBAR, and CROW, JJ., concur.

(61 Wash. 180)

STETSON & POST LUMBER CO. v. W. & J. SLOANE CO. et al.

(Supreme Court of Washington. Dec. 12, 1910.)

1. MECHANICS' LIENS (§ 158*)—LIEN CLAIM—AMENDMENT.

Under Rem. & Bal. Code, § 1134, providing that no lien shall exist, or action to enforce it be maintained, unless within a certain time a claim therefor be filed, which claim shall state certain facts, but that such claim may be amended, in case of action to foreclose the lien, as pleadings may be, in so far as the interests of third persons are not affected, and section 1147, providing that the provisions of the lien act

shall be liberally construed to effect their objects, the claim for lien, which states that a certain party claims an interest in the premises, the exact nature of which is unknown to claimant, but is inferior to his lien, may be amended, at the trial, though after the time for filing the claim, so as to be a lien on the leasehold interest of such party.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 275-278; Dec. Dig. § 158.*]

2. MECHANICS' LIENS (§ 277*)—FORECLOSURE—VARIANCE.

Rem. & Bal. Code, § 299, declaring immaterial a variance between the allegations in a pleading and the proof, unless it shall have actually misled the adverse party to his prejudice, is applicable to lien cases; and any variance between the statement, in the claim of a materialman for lien, that the material was furnished for "construction" of a building, and evidence that it was furnished for a balcony added by the lessee to a new building, so as to become a part of the storeroom and building, except, perhaps, as between the landlord and tenant under a special agreement, and of such a permanent and substantial nature as to be lienable, though this might more properly be described as an alteration and improvement, was immaterial, where, by reason of further reference to the contract, the lessee could not have been misled.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Dec. Dig. § 277.*]

Department 2. Appeal from Superior Court, King County; John F. Main, Judge.

Suit by the Stetson & Post Lumber Company against the W. & J. Sloane Company and others. Decree for plaintiff. Defendants appeal. Affirmed.

Kerr & McCord, for appellants. Jay C. Allen, for respondent.

MORRIS, J. Appeal from a decree establishing and directing the foreclosure of a materialman's lien. The errors assigned are insufficiency of the notice, variance between the pleading and proof, and that the work was not lienable.

The material was furnished by respondent to Wallace, who, under contract with appellant, built a balcony floor in the building owned by defendant Maud, and of which appellant was lessee for a term of years. The notice states that the material was furnished to Wallace, agent for Maud, the owner, and was used in the construction and erection of the building, and "that said W. & J. Sloane Company, a corporation, has or claims to have some interest in or lien upon the said premises, the exact nature of which this claimant is ignorant, but such interest or claim, if any, is subsequent, junior, subordinate, and inferior to the rights and lien of this claimant." The complaint, in so far as here material, is substantially the same as the notice. Wallace defaulted, and defendant Maud and appellant answered, denying the allegations of the complaint, and setting out the interest of appellant as that of lessee. Upon the trial, which was more than 90 days after the furnishing of the material, the court permitted the complaint and notice to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

be amended. The nature of the amendment is thus referred to in the findings of fact: "That, after the introduction of the testimony, the court permitted the plaintiff's lien to be amended, so as to be a lien upon the leasehold interest held by the said W. & J. Sloane Company, and also permitted the amendment of the complaint to be made accordingly." It then entered its decree, establishing the lien against the leasehold estate of W. & J. Sloane Company, and providing for its foreclosure, and the company appeals.

The defect in the notice claimed by appellant is the failure to refer to the lease of the Sloane Company, or to claim a lien upon the leasehold estate. This, appellant suggests, was not cured by the amendment, and that the amendment came too late, in that it was permitted after the expiration of the statutory time for filing lien. If it were not for the amendment, this claim of error would have much force. We think, however, the amendment cured the defect, if any, and that the fact that it was made after the expiration of 90 days is immaterial. Many cases hold in accordance with appellant's contention, both as to the defect in the lien and the lateness of the amendment; but such holdings are made under statutes not as liberal in their provisions for amendment as ours, and therefore we do not regard them as controlling, or, if made under statutes permitting amendments, are not in accordance with the rules heretofore announced by this court. We can only refer to the amendment in the language of the findings above quoted, as we fail to find the amendment in the record. If the effect of it was as indicated by the court in its finding, then there is no question in our minds as to its sufficiency. Neither did it come too late. The rule of amendment established by this court is that amendments of this character are in the nature of amendments to pleading, and the same liberal rule as to substance and time should be followed, where the interests of third parties are not injuriously affected. Such is the plain import of our statute. Rem. & Bal. Code, §§ 1134, 1147; *Sullivan v. Treen*, 13 Wash. 261, 43 Pac. 38; *Olson v. Snake River Valley R. Co.*, 22 Wash. 139, 60 Pac. 156; *Malfe v. Crisp*, 52 Wash. 509, 100 Pac. 1012. Other jurisdictions, with similar amendment statutes, adopt the same rule. *El Reno Elec. Light & Tel. Co. v. Jennison*, 5 Okl. 759, 50 Pac. 144, wherein the court says: "If this provision authorizing amendments does not allow an amendment to be made after the time for filing the lien has expired, then it would just as well never have been written."

* * * So long as a party's time for filing a mechanic's lien had not expired, he could file as many statements in his effort to make a good lien as he chose." See, also, *Blanshard v. Schwartz*, 7 Okl. 23, 54 Pac. 303; *Real Estate & Imp. Co. v. Phillips*, 90 Md. 515, 45 Atl. 174; *Thirsk v. Evans*, 211 Pa. 239, 60 Atl. 726.

The second error claimed is based upon the statement in the lien notice that the materials for which the lien was claimed were used in the construction and erection of the building; appellant contending the proof to show the materials were used for the alteration and improvement of the building, and that this is a fatal variance. The building was new, and appellant was the first tenant. Upon moving in, it desired more room for storage of its goods, and, with consent of the owner, it employed Wallace to construct what witnesses called a "mezzo" or "balcony" floor, commencing at the rear of the storeroom and extending about 40 feet toward the front, and from side wall to side wall. It was connected with the lower floor by a stairway, and was supported by 4x4's and 4x6's, set upright on the lower floor. It is not shown how these uprights are fastened to the lower floor. They stand against the inside wall, and down the center, and are about 7 feet high. Upon the top of these girders are strung, from which stringers extend across the room from girder to girder. A floor is laid upon these stringers. Witnesses say it could not be told how the fastening was made to the side walls or the lower floor without a prying apart, but that it has the appearance of a permanent and substantial structure. It is also shown that the court below, upon request of the parties and in order to better satisfy his mind as to the character of the structure, made a personal investigation of it. What he learned or discovered upon this visit to the building does not appear in the record. We assume, however, from the findings, that he was convinced that the structure was of such a character as to be lienable. It may be that, as between the owner and appellant, it was viewed as a mere trade fixture, and subject to removal at the end of the tenancy; but this, we think, is by virtue of their agreement and understanding to that effect. It appears to us, from the description in the record, it is a part of the storeroom and building, and of such a permanent and substantial nature as to be lienable.

Neither was there a fatal variance. Under our practice, no variance is material, unless it shall actually mislead the adverse party to his prejudice in maintaining his defense. Rem. & Bal. Code, 290. This statute is applicable to lien cases. *Olson v. Snake River Valley R. Co.*, supra. Appellant could not have been misled. It had but one contract with Wallace, and that was for the construction of this structure. It was plain, from the notice of lien and the complaint of foreclosure, that the materials for which the lien was claimed were furnished Wallace for use in this structure. Again, the building was new. It had never been occupied. Respondent could hardly be expected to know whether the building of this floor was included in the original plans and specifications of the building or not. He saw this

work being done in a new building, and he had a right to assume it was part of the original construction. Had it been in an old building, it might be he would not be justified in regarding it as "construction," but should have known it was "alteration, improvement, or repair." We do not think there was such variance, if at all, as can be of any beneficial use to appellant on this appeal.

The judgment is affirmed.

RUDKIN, C. J., and DUNBAR, CROW, and CHADWICK, JJ., concur.

(61 Wash. 178)

RUSSELL v. MITCHELL et al.

(Supreme Court of Washington. Dec. 12, 1910.)

APPEAL AND ERROR (§ 655*)—STATEMENT OF FACTS—FAILURE TO FILE AND SERVE IN TIME.

Under Rem. & Bal. Code, § 393, providing that a proposed bill of exceptions or statement of facts must be filed and served either before or within 30 days after the time begins to run within which an appeal may be taken from a final judgment, the statement of facts will be stricken, where not filed and served within the time limited, when no legal order for an extension of time is made by the court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2823-2825; Dec. Dig. § 655.*]

Department 2. Appeal from Superior Court, Skagit County; Geo. A. Joiner, Judge.

Action by C. E. Russell against J. A. Mitchell and another. From the judgment, defendants appeal. Motion to dismiss granted, statement of facts stricken, and judgment affirmed.

Quinby & Beagle, for appellants. Padgett & Bell, for respondent.

PER CURIAM. This is an action in replevin, tried by the court. The respondent moves the court to strike the statement of facts herein and affirm the judgment of the lower court, for the reason that the statement of facts was not filed and served within 30 days from the date of the entry of the judgment, and that no legal order for an extension of time for filing and service thereof had been made by the court. The record showing this state of facts, this motion must be sustained by reason of the uniform holdings of this court.

The appellants, in answering this motion, rely upon the case of *Dodds v. Gregson*, 35 Wash. 402, 77 Pac. 791; but we are unable to see that that case in any way sustains their theory. The court in the case cited denied the motion, upon the ground alone that a stipulation had been made extending the time for filing the statement of facts, and distinguished the other cases cited by the respondent in that case on that ground alone. There is no stipulation in this case, and no

showing that any order extending the time was made. Section 393, Rem. & Bal. Code, provides that a proposed bill of exceptions or statement of facts must be filed and served either before or within 30 days after the time begins to run within which an appeal may be taken from the final judgment of the case. The record in this case shows that the statement of facts was not filed or served within 30 days after the time began to run, or after the entry of the judgment, and that there was no order obtained to extend the time.

In *State v. Seaton*, 26 Wash. 305, 66 Pac. 397, in passing upon this question, it was said: "The due administration of justice requires that the rules relating to the time in which an appeal shall be taken and perfected be definite and fixed. Anything else is confusion. And it would seem that, had it been intended by the Legislature that the rules fixing these times should be enforced or ignored as the courts might, in the exercise of their discretion, direct, it would have said so in terms, and not left it to be inferred from language couched in loose generalities and of doubtful interpretation." To the same effect: *Wollin v. Smith*, 27 Wash. 349, 67 Pac. 561; *Zindorf Construction Company v. Western American Company*, 27 Wash. 31, 67 Pac. 374; *Jones v. Herrick*, 33 Wash. 197, 74 Pac. 332; *State v. Yandell*, 34 Wash. 409, 75 Pac. 988; *Driscoll v. Dufur*, 45 Wash. 494, 88 Pac. 929; *State v. Aschenbrenner*, 45 Wash. 125, 87 Pac. 1118.

Under the rule announced in these cases, the motion to dismiss must be sustained, and the statement of facts stricken.

As there is no question arising upon the pleadings, and as the judgment is warranted by the facts found by the court, it will be affirmed.

(61 Wash. 186)

GRAFF v. CITY OF TACOMA et al.

(Supreme Court of Washington. Dec. 12, 1910.)

1. APPEAL AND ERROR (§ 781*)—DISMISSAL—GROUNDS—MODE OF ACTUAL CONTROVERSY—POSSIBILITY OF PERFORMANCE.

It is no ground to dismiss an appeal from an order denying an injunction forbidding a city and its officials from making a contract for a public work with another, that the city has, pending the appeal, made the performance impossible by entering into the contract sought to be enjoined, under which the work has been substantially performed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3122; Dec. Dig. § 781.*]

2. MUNICIPAL CORPORATIONS (§ 335*)—CONTRACTS—POWER OF PARTICULAR OFFICERS—STATUTE.

Tacoma City Charter, § 129, provides that, subject to the control of the city council, etc., the commissioner shall have charge of and superintend the public works, etc., but shall make no purchases in excess of \$500, except upon written contract, and after advertising for bids. Section 130 provides that he shall have special charge and control, subject to the municipal

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

council and ordinances of the city, etc., of the streets, roads, and bridges and of improvements and repair thereof, etc. Section 160, which is part of article 12 of the charter, relating to the improvement of streets and kindred improvements, to be made at the expense of the property benefited, provides that the commissioner shall compare bids with the record made by the clerk and award the contract to the lowest legal bidder, etc. Plaintiff in this case made a bid to construct a bridge, which was accepted by the commissioner. Later by ordinance, another bid was accepted and the bridge constructed by that contractor. *Held*, that under the several provisions of the city charter set out above, the commissioner could not, by accepting a bid for the construction of the bridge, preclude an award of the contract therefor to another bidder by the city council, because section 160 refers particularly to street improvements, etc., and the others specifically place the matter under the control of the city council.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 860-863; Dec. Dig. § 335.*]

Department 2. Appeal from Superior Court, Pierce County; W. O. Chapman, Judge.

Action by C. F. Graff against the City of Tacoma and others. From a judgment for defendant, plaintiff appeals. Affirmed.

Roberts, Battle, Hulbert & Tennant and C. J. France, for appellant. T. L. Stiles, F. R. Baker, and Frank M. Carnahan, for respondent.

CROW, J. On January 20, 1908, the council of the city of Tacoma, by resolution, directed the commissioner of public works to have preliminary plans, specifications, and estimates prepared for the construction of certain bridges. Being prepared, they showed an estimated cost of \$300,000. On March 24, 1909, an ordinance was passed, in pursuance of which a special election was held, authorizing the issuance and sale of \$300,000 of bonds to construct the proposed bridges. On January 10, 1910, the commissioner of public works advertised for bids. On February 14, 1910, he received nine sealed bids for one of the bridges, one bid from the Western Bridge Company for \$44,100, and one from the plaintiff, C. F. Graff, for \$47,495; all others being for larger sums. After consultation with the city attorney, the commissioner concluded the Western Bridge Company bid was defective, that plaintiff had made the lowest regular bid, approved the latter, and indorsed an acceptance thereon. His clerk noted an award to plaintiff on his office record, and posted a five-days' notice thereof. No further action was taken by the commissioner, nor was any contract executed with the plaintiff. Thereafter and on March 2, 1910, the city council passed an ordinance whereby it declared the bid of the Western Bridge Company to be the lowest, accepted the same, awarded a contract thereon, and directed the commissioner of public works to execute the same. Thereupon the plaintiff commenced this action to enjoin the city, its mayor, councilmen, and

commissioner of public works from contracting with the Western Bridge Company, and to compel the execution of a contract with him. From a final judgment dismissing the action, the plaintiff has appealed.

The respondents have moved to dismiss the appeal because the controversy has ceased. In support of their motion they have shown that since the entry of final judgment, the city has contracted with the Western Bridge Company, and that the bridge has been substantially constructed. On the authority of *Green v. Okanogan County*, 111 Pac. 226, this motion must be denied. We there said: "It is true that when, pending an appeal from the judgment of the lower court, and without any fault on the part of the respondent, an event occurs which renders it impossible to enter a judgment in favor of the appellant which will give any effectual relief, the court will not proceed to a formal judgment, but will dismiss the appeal; and it is held, also, that the same result will follow if the intervening event is owing to some voluntary act of the appellant. But no such result follows merely because the respondent has changed the status of the subject-matter in litigation. So in this case, if it appears that the contract entered into was subject to be enjoined because in violation of the statutes, the court may now inquire into the subsequent acts of the respondents and compel them to undo what they have wrongfully done, in so far as it is capable of undoing, and to answer in damages for anything that cannot be undone."

Appellant contends that, after his bid had been approved and an award had been made thereon by the commissioner of public works, he was entitled to his contract.

Section 129 of the city charter provides that: "Subject to the direction and control of the city council and the law and ordinances of the city, the commissioner shall have charge of and superintend all public works of the city, and shall make such purchases of materials and supplies as may be authorized by ordinance or the city council; but he shall make no purchase of material or supplies of an amount or value in excess of five hundred dollars, except upon a written contract and after advertising for bids for furnishing such materials or supplies in the manner provided in sections 160, 161, and 162 of this charter. * * *"

Section 130 provides: "He shall have special charge and control subject to such ordinances as the city council may adopt * * * of streets * * * roads, bridges, etc., * * * and of the improvement and repair thereof, * * * and of all public works and improvements that may hereafter be made by the city. * * *"

Section 160 in part provides as follows: "The commissioner of public works shall compare the bids with the record made by the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

clerk, and shall thereupon at said time, or at such other time, not exceeding ten days thereafter * * * award the contract to the lowest bidder, except as otherwise herein provided. Notice of such award shall forthwith be posted for five days by the clerk of the commissioner of public works in some conspicuous place in the office of the commissioner. He may reject any and all bids, and must reject the bid of any party who has been delinquent or unfaithful in any former contracts with the city, and all bids other than the lowest regular bid, and on accepting said lowest bid shall thereupon return to the proper parties the checks, corresponding to the bids so rejected. If all the bids are rejected, * * * he shall return all the checks to the proper parties and again invite sealed proposals, as in the first instance."

Appellant contends that under these sections the commissioner of public works had authority to award the contract to him, that the commissioner did so, and that he is now entitled to the benefits of his bid, award, and contract. It will be observed from a reading of sections 129 and 130, supra, that the commissioner in the performance of his duties acts at all times subject to the direction and control of the council. These particular sections do not authorize him to contract for the construction of bridges, and thereby bind the city. They confer upon him the power to supervise their construction and repair. To contract for the construction of a bridge he should first be authorized by the council. No such specially delegated authority as to the bridge here involved has been shown. He had only been authorized to prepare plans, specifications, and estimates, and advertise for bids. Section 160 above quoted, upon which appellant especially relies, is a part of article 12 of the charter relating only to street and kindred improvements, which are to be made at the expense of benefited property specially assessed therefor. No such improvement is here involved. The cost of the bridge in question is to be paid from the proceeds of the sale of the bonds above mentioned, which bonds are an obligation of the entire city. We must in this action look to sections 129 and 130, supra, for the authority of the commissioner of public works. We find that in the exercise of powers conferred by these sections, he is at all times subject to the direction and control of the council. There is no evidence that the council has at any time authorized the commissioner to enter into a contract, or to take any steps further than to prepare plans, specifications, and estimates, and advertise for bids. The latter part of section 129 consists of the following additional words: "Whenever the city council shall so require, by ordinance or resolution, before any contract shall be entered into upon any award under this charter, the same shall be

submitted to the city council for its approval and shall not take effect until so approved." The argument of the appellant is made upon the theory that all conditions precedent for awarding the contract to him had been fully performed by the commissioner, who, he contends, was vested with full authority. He insists that when the award had been made to him by the commissioner, the city council, if they desired to thereafter pass upon such award, could only do so by passing an ordinance or resolution directing the commissioner to submit the award and contract to them for approval, but that no such resolution or ordinance was passed. Appellant concedes that, if such an ordinance or resolution had been passed, and the council had thereafter rejected the award made to him, he would not be entitled to any equitable relief. The latter portion of section 129, supra, discloses a manifest intention to vest the council with unlimited control over the actions of the commissioner in the matter of awarding contracts such as the one here involved. The only purpose of any resolution, directing him to submit proposed contracts to them, would be to obtain their final consideration. When that purpose had actually been accomplished, either by resolution or by the enactment of the ordinance of which appellant now complains, declaring the bridge company's bid to be the lowest, and awarding it the contract, it would certainly be an idle and unnecessary proceeding to enact another resolution or ordinance requiring the commissioner to submit the bids and any proposed contract to them for further consideration.

In view of the fact that the council, by the enactment of the ordinance, did take charge of the entire matter, and did determine the award to be made, and the contract to be executed, and in view of the further fact that the commissioner was at all times compelled to proceed under their supervision and control, we fail to see how the appellant is entitled to any relief in this action.

The judgment is affirmed.

RUDKIN, C. J., and DUNBAR, MORRIS, and CHADWICK, JJ., concur.

(61 Wash. 203)

CAMERON v. BURKE et ux.

(Supreme Court of Washington. Dec. 13, 1910.)

1. BOUNDARIES (§ 8*)—PLATS.

Where one owning lands on the shore of a navigable lake, but not the land under water, apparently assuming that he did own it, made a plat, before the outer harbor line was established or there was anything to indicate it would be, on which, in addition to the lots entirely on upland, were lots in some cases wholly under water, and in other cases partly under water, and the lengths of the side lines extending into the water unequal distances were not given on the plat, and the outer or water side line was not given, it will not be considered

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

that it was intended to plat only the upland or that the area of such lots was indefinite, but the length of the side lines will be determined by applying thereto the scale on which the plat was drawn, the plat saying that the "Dimensions of all lots, blocks, streets and drives are as shown on the plat," and the outer side of each lot will be the straight line between the unconnected termini of the side lines.

[Ed. Note.—For other cases, see *Boundaries*, Dec. Dig. § 8.*]

2. COVENANTS (§ 128*)—QUIET ENJOYMENT—DAMAGES FOR BREACH—EVICTION FROM PART OF LAND.

The damages for breach of a covenant of quiet enjoyment from eviction from parts of the lots conveyed is an amount the ratio of which to the entire consideration of the deed is the same as that of the area from which the grantee was evicted to the whole area of the lots.

[Ed. Note.—For other cases, see *Covenants*, Cent. Dig. §§ 243, 255, 256; Dec. Dig. § 128.*]

Department 2. Appeal from Superior Court, King County; Boyd J. Tallman, Judge.

Action by John B. Cameron against E. C. Burke and wife. Judgment for plaintiff. Defendants appeal. *Reversed and remanded, with directions.

Robert F. Booth, Farrell, Kane & Stratton, and Reynolds, Ballinger & Hutson, for appellants. John B. Denny, H. A. Martin, and A. A. Booth, for respondent.

MORRIS, J. Respondent brought this action to recover for breach of a covenant of quiet enjoyment contained in a deed from appellants to himself. The property described in the deed is "lots 1, 2, & 3 in block 18, B. F. Day's Eldorado addition to the city of Seattle." After the delivery of the deed, and the enjoyment of possession thereunder by respondent, the state, through its board of state land commissioners, platted Lake Union shore lands, lots 1, 2, and 3, block 96, of which plat overlaps a portion of the area claimed by respondent under his deed from appellants, which gave respondent the option of purchasing from the state or suffering an eviction. The portion of lots 1, 2, and 3, block 18, Eldorado addition, not affected by the plat of Lake Union shore lands, was an irregularly shaped tract whose north line would be 94 feet, the east line 158 feet (approximately), the south line 60 feet, and the original frontage on the west line of 186 feet. The portion covered by the plat of Lake Union shore lands depends upon the construction to be given the east or water line of lots 1, 2, and 3, in Eldorado addition. The chief value of the lots in this block of Eldorado addition is their water frontage on the lake, and respondent, for the purpose of preserving this frontage, purchased lots 1, 2, and 3 in block 96, Lake Union shore lands, from the state, paying therefor \$1,859.13. The court below, being of the opinion that the lots so purchased from the state were within the description

called for by appellants' deed to respondent, and that such assertion of paramount title by the state was an eviction, awarded judgment accordingly in said sum, and appellants, alleging error in such judgment, appeal.

Lots 1, 2, and 3, block 96, Lake Union shore lands, cover an area irregular in shape and approximately 194 feet on the north line, 95 feet on the east, 195 feet on the south, and 158 feet on the west or base line; while the west or base line of lots 1, 2, and 3, block 18, Eldorado, is approximately 94 feet farther west on the north line and 60 feet farther west on the south line, with a west or base line of 186 feet. As originally platted, these lots in block 18 are all in the water, except a triangular piece of upland about 40 feet in length on the north line of lot 1, and running thence southwesterly to the base line, including a small portion in the northwest corner of lot 2. The recorded plat of Eldorado addition shows these lots in block 18 as having north, south, and west lines only, the east line being somewhere out in the lake, the length of the north and south boundary lines not being given on the plat. The plat, however, says the "Dimensions of all lots, blocks, streets and drives are as shown on the plat," and the plat is drawn upon a given scale, so that by applying the scale it is possible to ascertain the length of any given line. The lots in block 18 having then no east end lines, the question naturally presents itself: What area is described in these lots and what passed by the deed? This must first be ascertained before it can be determined from what portion of his grant respondent has been evicted.

The first rule to be observed in ascertaining the true construction of the grant to respondent, inasmuch as the description of the lots follows the description of the plat of Eldorado addition, is to ascertain the intention of the dedicator as expressed in the plat, and, in doing so, to give effect to the entire plat. Following this rule and applying the scale to the northerly and southerly boundary lines of lots 1, 2, and 3, in block 18, as given on the plat, we find the length of the northerly line of lot 1 to be 127 feet, the length of the line common to lots 1 and 2 is 120 feet, the next line common to lots 2 and 3 is 112 feet, and the southerly boundary line of lot 3 is 114 feet. The fact that these lines are of irregular length is immaterial. It is the duty of the court to give effect to the plat, and, if by using the description of the plat we can give length to these lines, we should do so. The law will not disregard the lines so ascertained, because they may be of uneven length, as we cannot assume that in platting these lots it was the intention of the dedicator to give even lengths to all his side lines, although it

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

may be difficult to imagine a good reason why it should not have been done. Having ascertained the length of the side lines, it is possible to give the lots an easterly end line by connecting the side lines. This brings us within a well-known rule of law in the construction of deeds. Where three sides of a grant are given and the fourth omitted, the missing line should be ascertained by connecting the outer terminal of the adjoining lines with a straight line. *Laub v. Buckmiller*, 17 N. Y. 620; *Dygert v. Pletts*, 25 Wend. (N. Y.) 402; *Woodward v. Nims*, 130 Mass. 70; *Johnson v. Williams*, 22 N. Y. Supp. 247.¹ Applying this rule, it is possible to sustain the deed, thus bringing us within an equally known rule that a deed will be sustained when from the entire description it is possible to ascertain and identify the land intended to be conveyed. *Devlin on Deeds*, § 1012. Appellants, while admitting the above rule and suggesting the possibility of its application in this case, suggest that the deed is void for want of definiteness of description, and that it is impossible to ascertain the grantor's intention as to the eastern boundary of the lots, no length being given to the side lines, and the lots thus have no area. What we have said answers this contention.

It is next suggested that the area intended is such upland as might lie within the lines. The only upland without these lines is that small portion in lots 1 and 2, the whole of lot 3 and practically the whole of lot 2 lying in the water. Such description therefore would not be necessary if it was only intended to pass the upland, and it is evident additional area was intended. Next, that, in the absence of a given length to the side lines, it is impossible to ascertain whether it was intended to claim to the center of the lake or to the outer harbor line. The outer harbor line had not been established at the time of the making of this plat, nor was there anything to indicate (it being prior to the adoption of our Constitution) that a harbor line ever would be established in Lake Union at the time of the dedication of this plat, June 22, 1889. It is therefore evident, as we held in construing this same plat in *Gifford v. Horton*, 54 Wash. 595, 103 Pac. 968, and *Shorett v. Signor*, 107 Pac. 1033, that, while the Days, the dedicators of this plat of Eldorado addition, did not own all the land they platted, they filed the plat and laid out the lots under the assumption that they owned the shore lands, and by virtue of their ownership of the uplands bordering on the lake, had and could convey title to the water lots. They did claim an area, covered by the water lots, and as it is possible from the plat to ascertain what that claimed area was, and to thus give effect to the missing end lines, it is the duty of the court to do so.

Having established the area covered by respondent's deed, the next inquiry is: To what extent has he been evicted by the assertion of paramount title in the state? Taking the northerly line of lot 1 of block 18 as we have established it as indicated on the plat, to be 127 feet, and the southerly line of lot 3 to be 114 feet, and referring again to that portion of the area of these lots not covered by the plat of block 96, a tract 94 feet on the northerly side and 60 feet on its southerly side, we have remaining an area 33 feet on its northerly side, 54 feet on its southerly side, having the west or base line of block 96, a line approximately 158 feet in length, for its westerly boundary, and the established missing line approximately 146 feet in length as its eastern boundary, all of which area is included within block 96, and represents that portion of block 96 which overlaps or is overlapped by lots 1, 2, and 3, block 18, as we have established them. This is the area, according to our holding, from which respondent has been evicted by the state. The amount paid by respondent to the state for all of lots 1, 2, and 3, block 96, was \$1,859.13, and the measure of his damage for such eviction is that amount the ratio of which is to the amount paid by him as the area from which he was evicted is to the whole area of lots 1, 2, and 3, block 96, which is the sum of \$376.87, which amount we hold represents the true measure of respondent's damage. *West Coast M. & I. Co. v. West Coast Imp. Co.*, 31 Wash. 610, 72 Pac. 455.

The respondent sets forth in his complaint that "the city of Seattle, relying upon the plat of the shore lands and upon the dedication of said premises by the state of Washington as a shoreland street, is now proceeding to use the same premises as a public street." And the statement of facts shows the admission of a summons and complaint in what is referred to as the "Westlake Avenue Boulevard condemnation suit," marked "Plaintiff's Exhibit B." There is, however, no such exhibit in the record here. Nor did the court make any finding in this regard. We are therefore unable to determine what portion of the area in question here is sought by the city for a street, or what effect, if any, such a street would have on that portion of block 18 not included in block 96, or that portion included in the overlapping of the two blocks. We are therefore unable to determine what effect, if any, such condemnation proceedings have on the questions submitted by this record.

The judgment of the court below is reversed, and the cause remanded, with instructions to enter a judgment for the plaintiff in the sum of \$376.87, with interest from the time of respondent's payment to the state, which time we are from the record unable to ascertain.

RUDKIN, C. J., and CHADWICK, DUNBAR, and CROW, JJ., concur.

¹ Reported in full in the New York Supplement; reported as a memorandum decision without opinion in 67 Hun, 652.

(61 Wash. 230)

DENSMORE et al. v. EVERGREEN CAMP,
NO. 147, WOODMEN OF THE
WORLD et al.

(Supreme Court of Washington. Dec. 15, 1910.)

1. NUISANCE (§ 3*)—UNDERTAKING ESTABLISHMENTS—PER SE.

An undertaking establishment is not a nuisance per se.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 4, 5, 9-25; Dec. Dig. § 3.*]

2. NUISANCE (§ 1*)—COMMON-LAW NUISANCE.

The question of nuisance vel non cannot be determined by reference to the rules of the common law, but each case must be considered on its own facts.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. § 1; Dec. Dig. § 1.*]

3. NUISANCE (§ 1*)—WHAT CONSTITUTES.

A thing may or may not be a nuisance according to the manner in which it is used, the situation in which it is placed, or the time it has been carried on without complaint, when measured by the mind and taste of the average citizen.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. § 1; Dec. Dig. § 1.*]

4. NUISANCE (§ 3*)—UNDERTAKING ESTABLISHMENTS—RESIDENCE DISTRICTS.

The maintenance of an undertaking establishment in a building three or four feet from the residence of one of the plaintiffs and 35 feet from the residence of the other in a residence district of a city, though the mortician operating the same intended to occupy the upper stories of the building as a residence, constituted a nuisance where it was shown that noxious odors, gases, etc., were likely to permeate the houses of the plaintiffs therefrom, and that there was danger of infection and contagion from the proximity of the morgue, with the possibility of flies passing from one place to the other, etc.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 4, 5, 9-25; Dec. Dig. § 3.*]

Department 2. Appeal from Superior Court, Snohomish County; Geo. A. Joiner, Judge.

Suit by Al. Densmore and wife and others against Evergreen Camp, No. 147, Woodmen of the World, and others. Decree for complainants, and defendants appeal. Affirmed.

Noah Shakespeare and Bell & Anderson, for appellants. Cooley & Horan and R. Mulvihill, for respondents.

CHADWICK, J. Hewitt avenue is the principal business street in the city of Everett. Wall street runs parallel thereto. One of the cross-streets is Hoyt street. A business block runs back from Hewitt avenue 120 feet. The remainder of the block on Hoyt street is occupied by residences. The next block to the south is entirely given up to residences, so that, in the opinion of a witness who had been in the real estate business for ten years in the city of Everett, the property owned and occupied by the plaintiffs was situate in a residence district. A short time before this action was begun Evergreen Camp, No. 147, Woodmen

of the World, had moved a three-story building, formerly used as a residence, onto lots 26 and 27. Plaintiffs Densmore are the owners of lots 28 and 29, and plaintiffs Mathewson are the owners of lots 23 and 24. The building owned by the Woodmen Camp now stands within 3 or 4 feet of the Densmore residence and about 35 feet from the Mathewson residence, being between the two. At about the time the building was moved onto the lots, it was leased by the Woodmen Camp to defendants Maulsby, who purpose to start an undertaking establishment therein. Plaintiffs protested to one or more of the officers of the camp, and, this proving of no avail, the present action was begun, resulting in a temporary injunction after a full hearing upon the facts. Testimony offered to show that the property of respondents would be depreciated in value was excluded by the court.

That an undertaking establishment is not a nuisance per se may be assumed without citing authority. It is further shown that it is the purpose of the appellant Maulsby to maintain every sanitary precaution known to the profession of morticians. The question before us is whether such an establishment by reason of its location and being operated in a legitimate manner may be or become a nuisance within the definition of the statutes of this state. In the case of *Everett v. Paschall* (just decided) 111 Pac. 879, we called attention to the fact that the question of nuisance or no nuisance cannot be determined by reference to the rules of the common law, but that each case must be considered upon its own facts. For in this age, when population is becoming more and more congested in the cities, it would be manifestly unfair to grant injunctive relief only in those cases where the object attacked was a nuisance per se, when other circumstances or conditions intervene which might tend to destroy the repose and comfort of a part of a city or town given over to homes. In this case as in that, the element of comfort and repose in the enjoyment of the home becomes an essential element of our inquiry; for it is not only shown by the evidence, but it may be accepted as within the common knowledge of man, that the immediate presence of those mute reminders of mortality, the hearse, the chapel, the taking in and carrying out of bodies, the knowledge that within a few feet of the windows of one's dwelling house where the family sleep and eat and spend their leisure hours autopsies are going on, that the dead are there, cannot help but have a depressing effect upon the mind of the average person, weakening, as the testimony shows, his physical resistance, and rendering him more susceptible to contagion and disease. There is evidence tending to show that noxious odors, gases, especially those arising from

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the deodorants used in cleansing the premises, would permeate the homes of respondents; that there is danger of infection and contagion from the proximity of the morgue, and the possibility of flies passing from one place to the other. This testimony is supplied by physicians sworn as experts. Their testimony is denied or minimized by the appellant Maulsby and other undertakers who were called as witnesses, but the fact that reasonable men of fair minds differ upon these questions impelled the trial judge to find against appellants upon the facts, and warrants us in subscribing to his view that the danger is at least probable. "The law takes care that lawful and useful business shall not be put a stop to on account of every trifling or imaginary annoyance, such as may offend the taste or disturb the nerves of a fastidious or overrefined person. But, on the other hand, it does not allow any one, whatever his circumstances or condition may be, to be driven from his home, or to be compelled to live in it in positive discomfort, although caused by a lawful and useful business carried on in his vicinity. The maxim, 'Sic utere tuo ut alienum non lædas,' expresses the well-established doctrine of the law." *Ross v. Butler*, 19 N. J. Eq. 294, 97 Am. Dec. 654. We think the facts, as established by the evidence and found by the court below, bring this case within the rule of the cases cited in *Everett v. Paschall*, *supra*. *Deaconess Hospital v. Bontjes*, 207 Ill. 553, 69 N. E. 748, 64 L. R. A. 215; *Baltimore v. Fairfield Imp. Co.*, 87 Md. 352, 39 Atl. 1081, 40 L. R. A. 494, 67 Am. St. Rep. 344; *Cherry v. Williams*, 147 N. C. 452, 61 S. E. 267, 125 Am. St. Rep. 568.

In *Barnes v. Hathorn*, 54 Me. 124, a tomb had been erected within 44 feet of the plaintiff's dwelling, in which dead bodies had been kept. They were finally removed, but after a lapse of six years a body was placed in the tomb. In reversing a judgment of nonsuit, the court said: "It was only some 15 paces from the windows of his dining and sitting room. It was certainly not a very cheering or exhilarating prospect which met the plaintiff's vision, whenever he looked abroad. How far to a man of ordinarily nervous temperament, or to one of a sensitive nature, who shrunk from the constant view of this fixed memorial of death and decay, this erection might prove injurious to health, it is impossible to say. * * * In addition to this, we have the testimony of the physicians called on the trial that any emission from dead bodies in that tomb might be injurious to health, bodily and mentally. It had proved so before, and might again. A single body might not be so liable to create deadly or noxious effluvia as a larger number. But it would be of the same general character, and might of itself prove uncomfortable, if not positively unhealthy." The fact that some courts have not drawn a consistent line between nuisances per se

where the injury is real and hurtful to the physical senses and those cases where the nuisance is mental or destructive of comfort and repose has led to much confusion. But the rule that a thing may or may not be a nuisance according to the manner in which it is used, or the situation in which it is placed, or the time it has been carried on without complaint, when measured by the mind and taste of the average citizen, furnishes a guide as certain as it is possible to state a rule in a class of cases where, at best, there must be an element of compromise.

The case of *Westcott v. Middleton*, 43 N. J. Eq. 478, 11 Atl. 490, is relied upon by appellants. It is the only case cited, and, so far as we have been able to discover, it is the only case in the books where it was sought to restrain an undertaking establishment. It is seemingly in point, yet it may be distinguished from the case at bar. There, so far as the decision indicates, the undertaking establishment was in the most populous section of the city. We may assume that it was not in a residence section, for the lower floor of the building occupied by the complainant was given over to business purposes, the upper floors only being occupied for residence purposes, and, further, the establishment had been carried on without complaint for 11 years. Furthermore, the court found that the complainant was of a supersensitive nature rather than one possessed of the plain, sober, and simple notions prevailing among the English people, as is stated in the books; that he had a horror of such things in excess of the ordinary person, so much so that in the 72 years of his life he had not attended to exceed half a dozen funerals. We think, from reading that opinion, that it comes within the rule announced in *Gilbert v. Showerman*, 23 Mich. 448, where the complainant had taken up his residence over a store in a part of the city chiefly given up to business, and then sought to restrain the operation of a steam flouring mill located on adjoining property. Chief Justice Cooley, who rendered the opinion of the court, speaking of offensive trades, said: "Even the most offensive trade, as we have seen, is allowed to be carried on in a remote place, and this means, not a place remote from all other occupations and trades, but remote from such other occupation or trade as would be specially injured or incommoded by its proximity; in other words, in a place which, in view of its offensive nature, is a proper and suitable one for its establishment. The most offensive trades are lawful, as well as the most wholesome and agreeable; and all that can be required of the men who shall engage in them is that due regard shall be had to fitness of locality. They shall not carry them on in a part of the town occupied mainly for dwellings, nor, on the other hand, shall the occupant of a dwelling in a part of

the town already appropriated to such trades have a right to enjoin another coming in because of its offensive nature. Reason and a just regard to the rights and interests of the public require that in such case the enjoyments of pure air and agreeable surroundings for a home shall be sought in some other quarter; and a party cannot justly call upon the law to make that place suitable for his residence which was not so when he selected it. In the case before us we find that the defendants are carrying on a business not calculated to be specially annoying, except to the occupants of dwellings. They chose for its establishment a locality where all the buildings had been constructed for purposes other than for residence. Families, to some extent, occupied these buildings, but their occupation was secondary to the main object of their construction, and we must suppose that it was generally for reasons which precluded the choice of a more desirable neighborhood." The testimony in this case further shows that it is the intention of the defendant Maulsby to occupy the upper stories of the building as a residence, but we believe that this fact will not take this case out of the general rules of the law.

In *Cleveland v. Citizens' Gaslight Co.*, 20 N. J. Eq. 201, 205, Chancellor Zabriskie, who is perhaps more frequently quoted as an authority upon the subject of nuisance than any other American jurist, said: "The discomforts must be physical, not such as depend upon taste or imagination. But whatever is offensive physically to the senses, and by such offensiveness makes life uncomfortable, is a nuisance, and it is not the less so, because there may be persons whose habits and occupations have brought them to endure the same annoyances without discomfort. Other persons or classes of persons whose senses have not been so hardened, and who, by their education and habits of life, harden the sensitiveness of their natural organizations, are entitled to enjoy life in comfort as they are constituted." Mr. Bishop, in his *Noncontract Law*, § 418, has stated the underlying principle in this class of cases as follows: "Two things essential to the general prosperity and happiness are useful trades, whereby people are supplied with things necessary in life, and healthful and peaceful dwellings. * * * The courts, in administering justice between them, necessarily require each to lay aside something of what pertains to mere convenience and comfort, yet they permit each to stand so far on its own rights as not to be destroyed."

The decree of the lower court, being thus sustained by the authorities upon the subject, is affirmed.

RUDKIN, C. J., and MORRIS, DUNBAR, and CROW, JJ., concur.

(61 Wash. 314)

HYDE et ux. v. PHILLIPS.

(Supreme Court of Washington. Dec. 21, 1910.)

VENDOR AND PURCHASER (§ 176*)—CONTRACT OF SALE—SALE BY ACRE OR IN GROSS.

A contract for the sale of land described it by metes and bounds, followed by the words, "containing 399 $\frac{1}{4}$ acres," and then provided that the vendee agreed to pay for the same at the rate of \$27.50 per acre, a sum in total equal to \$11,000, in specified payments. The vendor also sold to the vendee for the consideration mentioned all the straw and one stack of hay on a part of the land, and agreed to assign a lease on certain other land, and to convey to the vendee the vendor's interest in the plowing on the land. *Held*, that such contract provided for a sale in gross, and not by the acre; and hence, in the absence of fraud or deceit, the vendee was not entitled to a reduction from the price for a shortage of 31 $\frac{1}{2}$ acres, under the rule that the mention of the quantity of acres after a specified description by metes and bounds or other specifications is but matter of description, and does not amount to a covenant.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 333-340; Dec. Dig. § 176.*]

Department 2. Appeal from Superior Court, Spokane County; Henry L. Kennan, Judge.

Suit by Fred H. Hyde and wife against Henry Phillips to enforce specific performance of a contract for the sale of land. Judgment for defendant, and plaintiff appeals. Affirmed.

H. J. Hibschan and N. W. Washington, for appellant. John L. Dirks, for respondent.

CHADWICK, J. On the 16th day of September, 1908, the parties to this action entered into a contract for the sale of land, the parts of the contract material to our present inquiry being as follows: "Witnesseth: That the party of the first part hereby sells and conveys to the party of the second part, the following described real estate and personal property, to wit: The north half (N. $\frac{1}{2}$) of section nineteen (19), and the southwest quarter (S. W. $\frac{1}{4}$) of section eighteen (18), township twenty-six (26), all north of range thirty-one (31) E. M. W., containing three hundred and ninety-nine and one-third acres, all in Lincoln county, state of Washington. In consideration therefor the party of the second part hereby agrees to pay for the same at the rate of twenty-seven dollars and fifty cents per acre, a sum in total of eleven thousand dollars. In payment as follows: Two hundred dollars payable in cash, twenty-eight hundred dollars, on or before the first day of November, 1908, and the balance in three equal payments, payable annually or before at the option of the party of the second part. The deferred payments to bear interest at the rate of six per cent. per annum. The party of the first part further sells to the party of the second part, for the consideration above mentioned, all

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the straw and one stack of hay now on the S. W. $\frac{1}{4}$ of Sec. 18, and one superior drill. * * * The party of the first part further agrees to assign to the party of the second part all his right in and to a certain lease upon the N. W. $\frac{1}{4}$ of section 18, township 26, R. 31, to pay the rental for 1908, and to convey to the party of the second part his interest in the plowing done on said land." The sum of \$200 was paid when the contract was executed. Appellants took possession under the contract, and thereafter had the land surveyed. It was found to contain 358 acres, or $31\frac{1}{2}$ acres less than the area mentioned in the contract. In November, 1909, appellants tendered the sum of \$7,286.95 in full payment for the land, being the whole amount due at the rate of \$27.50 per acre, upon the acreage as ascertained by the survey. This tender was refused; respondent demanding the full sum named in the contract, that is, \$11,000, less the \$200 paid down and an existing mortgage of \$2,000. This action was then brought to enforce specific performance of the contract and to compel the execution of a deed. From an order sustaining a demurrer to the complaint, plaintiffs have appealed.

There is but one question in this case, whether the sale was by the acre or in gross. It seems to be admitted that the actual number of acres was unknown to either party at the time the contract was entered into.

The complaint recites: "That at the time of the execution of the agreement neither of the parties thereto knew the exact number of acres in said premises, and that the plaintiffs did not ascertain the same for a number of months after the execution of said agreement." If the sale was made by the acre, and the difference held to be a material one, appellants would be entitled to an abatement of the purchase price in a sum equaling the difference between the number of acres mentioned in the contract and the amount ascertained by the survey. On the other hand, if it was a sale in gross, appellants would be held to the payment of the purchase price, notwithstanding a deficiency in the area. Whether it was a sale in gross or by the acre, depends upon the intention of the parties. In the case at bar we are held to an examination of the complaint, and to a construction of the contract.

Where land is sold by reference to maps, plats, or government subdivisions, followed by the number of acres contained therein, the rule, as stated by Chancellor Kent, is as follows: "The mention of the quantity of acres after a certain description of the subject by metes and bounds or by other specifications is but a matter of description, and does not amount to any covenant, or afford any ground of breach of any of the usual covenants, though the quantity of acres should fall short of the given amount." 4 Kent's Commentaries, 467.

The rule deduced by Mr. Warvelle is as

follows: "Where the quantity of a tract of land is stated in the deed, as well as the metes and bounds, the latter, if they can be ascertained with certainty, will control the location, although they contain less than the given quantity—the designation of quantity never being permitted to control the boundaries where they are clearly indicated. But where there is doubt as to the true description, such designation of quantity may be properly considered. As a rule, however, a recital in a conveyance of land that the tract contains a certain number of acres will always, unless there is an express covenant as to quantity, be regarded as part of the description merely, and will be rejected if inconsistent with the actual area as ascertained by known monuments and boundaries. Such recital aids but does not control the description of the granted premises. The word, 'about,' so frequently employed in connection with statements of quantity, is generally regarded as a word of approximation only; it will not cover any material deficiencies." Warvelle on Vendors, § 381.

Brewster, in his work on Conveyancing, § 92, says: "Courses and distances mentioned generally control the statement of quantity; the latter being considered, generally speaking, as less likely to be definite. A statement of quantity has little effect where the rest of the description is definite and accurate. * * *"

Devlin finds the rule to be: "In the description of land it is usual, after the description by metes and bounds or subdivisions, to add a clause stating that the land described contained so many acres. But unless there is an express covenant that there is the quantity of land mentioned, the clause as to quantity is considered simply as a part of the description, and will be rejected if it is inconsistent with the actual area, when the same is capable of being ascertained by monuments and boundaries. The mention of the quantity of land conveyed may aid in defining the premises, but it cannot control the rest of the description. Neither party has a remedy against the other for the excess of deficiency, unless the difference is so great as to afford a presumption of fraud. Where an owner of a league of land, having sold off several tracts, executed a deed for the unsold balance, which described it as 'all and singular a certain piece or parcel of land containing one thousand acres, situated and described as follows: In Harris county, and on Buffalo bayou, adjoining the city of Houston, being the undivided part of the league granted to Allen C. Reynolds'—it was held that the deed conveyed title to the whole of the unsold balance, although in excess of the number of acres mentioned." Devlin on Deeds, § 1044. See, also, 13 Cyc. 635; 2 Washburn, Real Property, p. 672; 29 Am. & Eng. Ency. Law, 625, 628.

Practically all of the cases where the

term, "more or less," is employed, are in point, for where the description is by metes and bounds or by reference to fixed boundaries or subdivisions, the general rule is applied, but little if any importance being attached to the words "more or less." Reference to a few cases where the description was by government subdivision will not be out of place. A case is reported in 33 Iowa, 110, where Ufford sued Wilkins, and the case turned on the construction of a deed to the southwest quarter of the northwest quarter, etc., followed by the words, "being 40 acres." It was held: "The rule is that when the quantity of land is mentioned in a deed as part of the description, it will be rejected if it be inconsistent with the actual area of the premises as ascertained by known monuments or other certain description, where the tract is definitely described and limited, as in the present instance, according to the original survey, so that any surveyor can ascertain its contents, and if within the boundaries, according to the description, there be less or more than the supposed quantity of land, the grantee takes all included within the description. No more and no less, if the grantor had right to convey all. The grantee, in his purchase, must be considered as relying on the boundaries described, and not on the contents mentioned." So, too, in *Kerr v. Kuykendall*, 44 Miss. 137, the description was "section 22," etc., and the price, \$1,920, was calculated on a basis of \$3 per acre. A subsequent survey showed the section to be of less area. Applying the rule announced in *Fulton v. McAfee*, 5 How. 762, "that 650 acres is the strictly legal complement of a section, yet it is well known that not one section in ten contains that quantity. Some contain more, some less; but they are sections nevertheless," the court held there having been no artifice, fraud, or misrepresentation, that the sale was in gross, and not by the acre.

In *Perkins' Exr's v. Winter's Adm'rx*, 7 Ala. 855, it was held: "We are now brought to inquire whether the complainants are entitled to relief for the supposed deficiency in the quantity of the land purchased by the testator. It has been held that, although the purchaser of a tract of land promise to pay a certain sum by the acre, yet if he also agree to take it by the patent, or survey previously made (in the absence of fraud on the part of the vendor), he must be understood to risk the quantity, and, therefore, is not entitled to any compensation for deficiency. * * * In the case at bar, the land of which the testator was the purchaser was sold by the quarter section, according to the survey made under the authority of the federal government, and each quarter was supposed to contain 160 acres—that being the proper size of such a subdivision. By bidding it off at a certain sum per acre, the purchaser expected to pay for so much land, as the patent from the United States

to the patentee recited to be the number of acres embraced by each quarter section. Neither party contemplated a survey in future; and if the tracts were larger than supposed, the purchaser would be entitled to the excess, or if less, he must stand by his bargain. This view of the case, as it respects the assumption of fact, is sustained by the record, and the legal conclusion seems to us to result so clearly, from the authorities cited, as to make it unnecessary to amplify the point."

In *Austrian v. Dean*, 23 Minn. 62, the land was described as a legal subdivision containing 20 acres more or less. The land sold actually contained but 17.15 acres. The purchaser brought suit for relief, claiming that the words, "containing twenty acres more or less according to the government survey," amounted to a covenant that by the government survey there should have been 20 acres in the piece described. It was held: "Words expressing the quantity, in a deed of a tract otherwise definitely described, are held to be merely additional description, and are controlled by the definite calls in the deed, and, therefore, immaterial. Being inserted merely as matter of description, and not for the purpose of covenant, it is not material, where there is no fraud or express covenant as to quantity, whether the quantity is more or less than that stated."

To take the case out of the general rule there must be an express covenant or some allegation of fraud or misrepresentation. There must be artifice and deceit, or, as some courts have held, the deficiency must be so great as to warrant a court in saying that the deficiency amounts to a failure of consideration. There is no such allegation in the complaint before us.

It is alleged that neither party knew the exact acreage, which in itself is some confirmation of the assertion of the respondent that it was a sale in gross, and that quantity was not of the essence of the contract. In arriving at the intention of the parties, and that is the test to be applied in this class of cases, we must look to the whole contract, rather than to a single recital. The fact that the parties contracted in good faith has been alluded to. Another incident is that the land was not the only subject of the contract. There was personal property, a lease of other lands was assigned, and the interests of the vendor in certain plowing on the leased land also furnished a part of the consideration which, as expressed in figures, amounts to more than would the estimated acreage, if sold at \$27.50 per acre. It would seem to be manifest, also, that the intent of the vendee was to pay and the vendor to receive the gross sum of \$11,000. These items are all suggestive circumstances, tending to show that the sale was in gross. While the words, "twenty-seven dollars and fifty cents per acre," as employed in the contract, are significant, they are not con-

trolling, as against the facts and circumstances outlined above. 29 Am. & Eng. Ency. Law, 6:9; Kerr v. Kuykendall, supra; Terrell v. Kirksey, 14 Ala. 209.

The complaint did not state a cause of action, and the judgment is affirmed.

RUDKIN, C. J., and CROW, MORRIS, and DUNBAR, JJ., concur.

(61 Wash. 209)

STATE v. DONOVAN.

(Supreme Court of Washington. Dec. 13, 1910.)

1. INTOXICATING LIQUORS (§ 14*)—LOCAL OPTION LAW—CONSTITUTIONALITY.

The local option law is not unconstitutional. [Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 16; Dec. Dig. § 14.*]

2. INTOXICATING LIQUORS (§ 40*)—LOCAL OPTION — INCORPORATION OF TOWN AFTER ELECTION.

Under the local option law, where, after an election has been had putting in effect prohibition in all the territory outside incorporated cities and towns, a town is incorporated from out of the prohibition district, it may license the sale of liquor therein, as it could had it been incorporated before the election; it not being necessary to first have a local option election therein.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 40.*]

Morris, J., dissenting.

Department 2. Appeal from Superior Court, Skagit County; Geo. A. Joiner, Judge.

Harry Donovan was convicted of violating the liquor laws, and appeals. Reversed.

M. P. Hurd, for appellant. Augustus Brawley, for the State.

DUNBAR, J. An information was filed against the appellant by the prosecuting attorney of Skagit county, charging him with unlawfully keeping and maintaining a certain building in the town of McMurray, in which he kept, received, and harbored intoxicating liquors for the purpose of selling, giving away, and distributing the same, contrary to the statute, etc. Based on this information, a search warrant was issued, and the sheriff took possession of appellant's building and saloon property. Upon the trial of the cause the appellant was convicted as charged. From a judgment of conviction, this appeal is taken.

The agreed statement of facts shows that Skagit county, in which the town of McMurray is situated, is a duly organized county and political subdivision of the state of Washington; that a petition was duly and regularly filed with the proper officer of said county, for the purpose of ascertaining whether or not intoxicating liquors should be licensed to be sold in that unit, consisting of all that part and portion of said county outside of the incorporated cities and towns therein. The election resulted in a large ma-

jority in favor of the prohibition of the sale of liquor in such district. Afterwards the town of McMurray, having the requisite population, was incorporated within the boundaries of the territory which had voted to prohibit the sale of intoxicating liquors. The city officers were duly elected, and the council duly passed an ordinance regulating the manner and place of the sale of spirituous, vinous, fermented, and malt liquors in the town of McMurray, imposing and fixing licenses, etc. Defendant, the appellant here, was granted a license to sell. This is a sufficient statement to indicate the nature of the case.

There are certain queries which are pertinent in this case: Was the result of that vote to fix the status of the territory voting for one year; was that the aim and object of the Legislature, or was the policy of the Legislature to fix the status for the whole territory until a part of the territory was removed from its operation by a change in its form of local government; or did the Legislature fail to contemplate such a situation as developed here, and therefore made no provision to govern it? We are inclined to adopt the last view, and that deprives us of the benefit of one of the commonest tests of statutory construction, so that we will be compelled to examine, not only the local option law, but the general statutes, to determine the rights contested in this case.

The first contention of appellant is that the local option law is unconstitutional. But this character of laws has been sustained in so many jurisdictions that we do not feel called upon to enter upon a discussion of that question. The principle has also been sustained by this court in State v. Storey, 51 Wash. 630, 99 Pac. 878; Gunther v. Hu-neke, 108 Pac. 1078; State ex rel. O. R. & N. Co. v. Railroad Commission, 52 Wash. 17, 100 Pac. 179.

The further contention is made that, after the town of McMurray was incorporated, it was relieved from the operation of the local option law, and was clothed with the rights that other towns of its class, viz., cities of the fourth class, were clothed with in relation to the licensing of the sale of intoxicating liquors. It is conceded that in towns of this class outside of the operation of the local option law the city authorities have power to license and regulate the sale of liquors. This contention, we think, must be sustained. The learned prosecuting attorney contends that the town of McMurray can only be relieved from the operation of the law which theretofore controlled its territory by holding an election; that otherwise the law as voted upon in the territory in which it then existed must control; and he cites many cases to sustain this contention. The first authority cited is 23 Cyc. p. 65, which is to the effect that: "Where a

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

local option law is in force in an entire district, and a portion of the district is cut off and joined to other territory under a new name, the law still remains operative through the part not thus severed. And also, where a new district is carved out of one where prohibition is in force, the same law will continue in force in the new district." To sustain this announcement, the author cites many cases, most of which are cited by the respondent in this case, and undoubtedly sustain the text. In *Higgins v. State*, 64 Md. 419, 1 Atl. 876, it was decided that where by act of assembly submitting the question to the voters of the several election districts of Carolina county, whether or not spirituous or fermented liquors should be sold therein, a majority of the votes in the third election district of the county was cast against the sale of spirituous or fermented liquor therein, and by a subsequent act of assembly a new election district was established out of the third election district, the prohibition will continue to apply to the inhabitants of the new district; there being nothing in the latter act at all inconsistent with the provisions of the former act. The other cases cited are of this kind. But the principle involved there is not the principle that is involved in this case at all. There it was the question of changing boundaries alone which was considered, and those cases are undoubtedly rightly decided. As the court in *Higgins v. State*, supra, well said: "All the qualified voters, therefore, of that part of election district No. 3, now forming election district No. 6, had a right and were called upon to vote at the election in May, 1876, for or against the adoption of the prohibitory law, and the result of that election subjected the entire population of district No. 3, as then constituted, to the provisions of the act, and the subsequent division of the district has not had the effect of restricting the operation of the act to only a part of the original territory in which it applied and for which it was adopted. The mere change of name or number, as applied to part of the district, certainly should have no such effect, and that is really all that has been done in this case." While a cursory, superficial view of this language might lead to the conclusion that it bore upon the case under discussion here, it will be seen that another principle altogether is involved here, which has no reference to the change of boundaries; but it does have reference to the establishment of another form of government within the territory which had previously been brought under the operation of the law. There was a limited sovereignty formed within this territory by the incorporation of this city. It is one of the aids of the state, clothed to a certain extent with the powers of the state. The law prescribes these powers for cities of the fourth class,

and it will not be presumed that it intended to make any distinction in powers between cities of the same class.

It is conceded by the respondent that the town would have a right to relieve itself of the prohibition within the time which the prohibition lasts, but that it must be done by an election. It would have a right to hold an election only by reason of the fact that it had become an incorporated town. By reason of that same fact, it would have a right to exercise any right which was accorded to an incorporated town of its class. In other words, it is not by reason of any change of territory that it is given this right, but by reason of the authority which the general law gives to an incorporated town. We think, therefore, that the town of McMurray is clothed with the same powers that other towns of its class are clothed with, and that it did not violate any provision of the law when it assumed to regulate the sale and traffic of intoxicating liquors.

The judgment will therefore be reversed.

RUDKIN, C. J., and CHADWICK and CROW, JJ., concur, MORRIS, J., dissents.

(61 Wash. 137)

TALKINGTON v. WASHINGTON VENEER CO.

(Supreme Court of Washington. Dec. 10, 1910.)

1. MASTER AND SERVANT (§ 121*)—INJURIES TO SERVANT—STATUTES—SAFEGUARDING SHAFTING—APPLICATION.

Where plaintiff, a boy 14 years of age, was injured by the sudden starting of a revolving shaft in a mill in which he was employed, while using it as a horizontal bar for gymnastic exercises, he not having come in contact therewith while in the performance of his duties, defendant was not liable for his injuries because the shaft was unguarded, under Rem. & Bal. Code, § 6587, providing for reasonable safeguards for all shaftings with which the employees are liable to come in contact while in the performance of their duties.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 228-231; Dec. Dig. § 121.*]

2. MASTER AND SERVANT (§ 289*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

In an action for injuries to a boy 14 years of age by the sudden starting of a revolving shaft which he had been using as a horizontal bar for gymnastic exercises, whether he was guilty of contributory negligence held for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1069-1132; Dec. Dig. § 289.*]

3. MASTER AND SERVANT (§ 296*)—INJURIES TO SERVANT—INSTRUCTION.

Plaintiff, a boy 14 years old, employed in a mill, was injured by the starting of a shaft which he had been using as a horizontal bar for gymnastic exercises. Before starting the shaft, the foreman ordered plaintiff to get down, and the evidence was conflicting as to whether he had time to do so before the shaft was started. *Held*, that the court erred in refusing to charge that if plaintiff while on the shaft was

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

instructed to get down by the foreman, and by the exercise of reasonable diligence he could have done so before the machinery was started, but failed to obey the order, could not recover.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 296.*]

Morris, J., dissenting in part.

Department 2. Appeal from Superior Court, Pierce County; John A. Shackelford, Judge.

Action by Willie Talkington, by his guardian ad litem, J. B. Talkington, against the Washington Veneer Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Bates, Peer & Peterson, for appellant. Govnor Teats, Hugo Metzler, and Leo Teats, for respondent.

CROW, J. Action for personal injuries by Willie Talkington, by his guardian ad litem, against Washington Veneer Company, a corporation. From a judgment in his favor, defendant appeals.

The appellant corporation owns and operates a box factory, in which it has installed a machine for cutting veneer. The respondent, Willie Talkington, a minor, 14 years of age, was employed by appellant to work near this machine. Slightly back of and parallel with it, but about 7½ feet above the floor, was an unguarded shaft, 2 inches in diameter. The mill frequently stopped, at which times the shaft revolved slowly, or became stationary. Respondent and other boys employed in the mill were then in the habit of playing on the shaft by hanging to it with their hands, and seeing how long they could remain after the shaft commenced to revolve. The boys were all subject to the orders of one Levi Fillet, appellant's foreman, who worked with them. On the day of the accident Willie Talkington threw one of his legs over the shaft, which was then stationary, and, with his head hanging downward, told another boy he could not do the same act. The foreman ordered him down, telling him the mill was about to start, and that he might be injured. Respondent removed his leg from the shaft, had his feet on a bench underneath, but, while his hand was still in contact with the shaft, the mill started, it revolved, caught his arm, wrapped it around the shaft, and injured him. There was evidence, some of it disputed, tending to show that, to the foreman's knowledge, the boys frequently played on this shaft; that they reached it by stepping on a bench or box some 18 inches in height, located immediately beneath it on the mill floor; that they could not ordinarily come in contact with it while engaged in the performance of their duties, but that occasionally, when material accumulated on the bench, their heads might reach it while they were thus employed; that it was unguarded; that it could have

been guarded without impairing its usefulness or functions, and that the foreman had cautioned the boys, including respondent, not to play on the shaft. Respondent alleges the appellant was negligent in failing to safeguard the shaft, and in knowingly permitting the boys to play on the shaft; they by reason of their youth being ignorant of the attendant dangers.

Appellant first contends that its alleged negligence in failing to guard the shaft is not sustained by the evidence; that under the factory act (section 6587, Rem. & Bal. Code) it was only required to provide and maintain safeguards on shafts with which its employes were liable to come in contact while engaged in the performance of their duties; that this particular shaft was far above the heads of the boys; that they could only reach it by climbing on the box or bench; that appellant was not required to guard it; and that it was not negligent in failing to do so. The trial court held the evidence of one witness, although disputed, was sufficient to show that at certain times the boys might come in contact with the shaft while in the performance of their duties, and submitted to the jury the question as to whether it should have been safeguarded. Section 6587, supra, provides that the operators of factories, mills, and workshops shall provide reasonable safeguards for all shafting "with which the employes of any such factory, mill or workshop are liable to come in contact while in the performance of their duties." The undisputed evidence shows that at the time of receiving the injuries complained of the respondent was voluntarily using the offending shafting as a horizontal bar for gymnastic exercises, and that he did not come in contact therewith while in the performance of his duties. The majority of this court, with whom the writer does not agree, hold that, such being the admitted fact, the factory act has no possible application, and that any question as to its violation should have been withdrawn from the consideration of the jury. The writer, speaking for himself only, is, however, of the opinion that the action of the trial judge in submitting this issue to the jury should be sustained; that if at times, as the evidence of one witness indicates, appellant's employes while in the performance of their duties might come in contact with the shaft, it was appellant's duty to safeguard it. Had appellant not been negligent in failing to discharge this duty, the accident could not have occurred, and the respondent, a minor employe of tender years, who should have been instructed, warned, and protected against such dangers, would not have been injured.

Appellant further contends that the evidence did not show respondent was ignorant of the danger of playing on the shaft, or that the appellant had failed to warn him;

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

that, on the other hand, the evidence did show respondent fully appreciated and understood the danger; that as a matter of law he was guilty of such contributory negligence as to preclude a recovery herein; and that appellant's motions for a nonsuit and a directed verdict should have been sustained. We have carefully read the evidence, find that it was in direct conflict, and conclude that, in view of respondent's youth, it was for the jury to determine whether he was guilty of contributory negligence.

Appellant requested the following instruction: "You are instructed that if you believe from the evidence that while the plaintiff, Willie Talkington, was on the shaft or using the shaft, he was instructed by the foreman to get down off from the shaft, and if you further find that the said Willie Talkington, by the exercise of reasonable diligence, could have got down from the shaft before the machinery started, but that he failed and refused to obey said order, then the plaintiff cannot recover, and your verdict should be for the defendant." This instruction was not given, nor was any other one to the same effect given by the trial judge. While there was evidence tending to show that the respondent did not have time to get down and away from the shaft before the machinery started, there was also positive evidence to the effect that he did have an abundance of time; that after he was ordered down by the foreman he stood on the box with his hand on the shaft for quite a perceptible period of time, before and until the mill started. There is no dispute as to the order given by the foreman. That it was given is conceded by all of the witnesses, the only dispute being as to the time that elapsed after it was given and before the mill started. The order being given, it was respondent's duty to promptly obey. He knew this duty, and that he was subject to the commands of the foreman. If by exercising reasonable diligence he could have withdrawn himself from the shaft after the order was given, and before the machinery started, but, by refusing to obey, failed to do so, he cannot recover in this action. There was evidence introduced on behalf of appellant sufficient to sustain a finding of such refusal. The failure of the trial judge to give this requested instruction was prejudicial error.

The judgment is reversed, and the cause remanded for a new trial.

RUDKIN, C. J., and CHADWICK and DUNBAR, JJ., concur.

MORRIS, J. I concur with the majority that the factory act has no application to this case, for the reason that the injury occurred while the respondent was at play. It is further apparent from the record that such an injury could not occur while re-

spondent was at work taking the height of the shaft above the table at which, and sometimes upon which, he worked. His act was therefore an independent, reckless act. He was 14 years old and understood its danger. The rule of assumption of risk should therefore apply, and the court should have directed a verdict for appellant. The cause should be remanded, with instructions to dismiss.

(61 Wash. 264)

STATE v. PILEGGE.

(Supreme Court of Washington. Dec. 19, 1910.)

1. CRIMINAL LAW (§ 687*)—TRIAL—RECEPTION OF EVIDENCE—REOPENING CASE—DISCRETION OF COURT.

Where counsel for accused, with all his witnesses present, knowing what the testimony would be, refused to offer any evidence after the state had closed, at about the time for adjournment in the evening, and the witnesses for the state were excused from further attendance and a recess taken until the next morning, the court acted within its discretion in refusing to reopen the case on the next morning to permit accused to take the witness stand and testify to a certain fact.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1621, 1622, 1625; Dec. Dig. § 687.*]

2. RAPE (§ 53*)—ASSAULT WITH INTENT TO COMMIT—SUFFICIENCY OF EVIDENCE.

Evidence held to support a conviction of assault with intent to commit rape.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 78-82; Dec. Dig. § 53.*]

3. RAPE (§ 16*)—ASSAULT WITH INTENT TO COMMIT—RESISTANCE NECESSARY.

To constitute an assault with intent to commit rape, the assault must have been committed with the intent at the time of making it to feloniously commit an act of sexual intercourse with the person assaulted against her will and without her consent by forcibly overcoming her resistance, but it is not necessary that she shall make all the resistance within her power.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 15-19; Dec. Dig. § 16.*]

Department 1. Appeal from Superior Court, Spokane County; J. Stanley Webster, Judge.

Frank Pilegge was convicted of an assault with intent to rape, and he appeals. Affirmed.

Gallagher, Smith & Mack, for appellant. Fred C. Pugh and Lucius G. Nash, for the State.

MOUNT, J. The appellant was convicted of an assault with intent to commit the crime of rape. He appeals from the judgment pronounced thereon.

It appears that, after the state had introduced all its evidence and counsel for the appellant had called the appellant to the witness stand in his own behalf, the trial court requested counsel for the appellant to first make a statement of his defense to the jury.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Counsel for the defense thereupon declined to do so, and, after a short consultation with the defendant, announced to the court that the defendant would rest his case and offer no testimony. This occurred in the afternoon, at about time for the usual adjournment. The trial court thereupon took a recess until the next morning. The witnesses for the state were excused from further attendance upon the court. The next morning counsel for the defendant requested permission to place the defendant upon the witness stand to testify that he passed by the place where the crime was alleged to have been committed on the morning thereof, but did not stop. Counsel for the state objected to this, upon the ground that the case was finished the evening before, that he had excused his witnesses, and that one of his important witnesses whom he would need upon rebuttal had gone away and could not be had. Defendant's request was thereupon denied, and he argues now that the trial court abused its discretion in so ruling.

There are cases in which the courts have held that the fact that all the witnesses for one side have been excused after the case has been closed is not sufficient ground for refusing a reopening. *Maddox v. State*, 68 Ga. 294. In *State v. Craemer*, 12 Wash. 217, 40 Pac. 944, this court said: "If the record disclosed that there was in fact a person whose testimony could have been secured upon reasonable adjournment had, and that such testimony was material to appellant's case, we should not hesitate to say, considering the great importance of the issue, that the refusal of the court to grant a reasonable continuance would be error. * * *". Those were cases, of course, where diligence had been used, and where defendant did not know of and could not call the witnesses in the regular and orderly conduct of the trial. In this case, however, no such condition arises. Here counsel for the defense had all of his witnesses, and he knew what the testimony would be on the evening before when he refused to offer any evidence. He did so advisedly. But, after the state had excused its witnesses, he changed his mind, and concluded that he would offer the evidence stated. It was clearly within the discretion of the court at that time under the circumstances stated to refuse the request, and we think the denial was not such an abuse of discretion as would justify a reversal of the case.

Appellant next argues that the evidence is insufficient to sustain the verdict of the jury, because it was necessary for the state to show (1) an assault; (2) an intention to have carnal knowledge of the prosecuting witness against her will; (3) without her consent; (4) with force; and (5) to overcome by such force as was necessary all resistance the prosecuting witness could make, and that none of these elements were shown except the assault. Conceding that all these ele-

ments are necessary to be shown, there is abundant evidence of each fact stated. The assault is conceded. The intention of the appellant in making the assault is shown by his acts, and it was for the jury to say what his intentions were. The evidence shows that the prosecuting witness lived in the country, about a mile distant from an interurban railway station; that this was a small waiting station for passengers, open on one side, with no one in charge; that on October 26, 1909, she walked from her home to the station, where she intended to take the train for Spokane; that she arrived at the station about 9:30 in the morning; that the train was due at about 9:39; that she was the only occupant of the station; that while she was there the appellant came up, and made some remark to her about the time the train would be along; that, while she was standing looking at the time card, he grabbed her and threw her to the floor and fell upon her; that she struggled and resisted the assault, but nevertheless he succeeded in holding her down and pulling her clothes up to her hips, and then discovered that she had on closed drawers, when he desisted, got up, and went away; that his trousers were unbuttoned. She testified that her hands were free a part of the time, and that she did not strike him or scratch him, and that she did not kick him. The witness Jamieson heard the scuffling and shouting, and came up to the scene immediately thereafter, and saw the appellant as he went away. The train came along three or four minutes later. Passengers on the train arrested the appellant. The arms and back of the prosecuting witness were badly bruised. She was bitten on the face, her hair was disheveled, and her clothes were covered with dust from the floor. After reading the evidence no reasonable man can doubt what the appellant's intention was when the assault was made. All the elements above stated were either directly proved, or follow as a matter of course from the acts of the appellant. Even if the prosecuting witness did not strike, scratch, and kick her assailant, if she could have done so, there was ample evidence to show that the assault was made by force, against her will, and with intent to overcome all resistance. The reason why he did not finally accomplish his purpose is evident.

It is also argued by the appellant that the court erred in giving instructions to the jury. These instructions clearly and concisely and fully covered the case. The appellant's counsel is apparently sincere in arguing that the court should have instructed the jury to the effect that, before a conviction could be had, they must find that the accused intended to overcome all resistance that the prosecuting witness could make, and that she must make all the resistance within her power. We shall therefore notice this contention briefly. The court instructed the jury as, follows: "Such assault must have been committed by

said Pilegge upon said Laura Newlon with the intent at the time of making same to feloniously commit an act of sexual intercourse with said Laura Newlon, against her will and without her consent, by forcibly overcoming her resistance." This was the correct rule. It is stated in substance and the reasons therefor given in *State v. Shields*, 45 Conn. 256, as follows: "The defendant requested the court to charge the jury that, to constitute the crime of rape, it was necessary that the prosecutrix should have manifested the utmost reluctance, and should have made the utmost resistance. The court did not comply with this request, and the refusal to do so is made a ground for asking a new trial. While it may be expected in such cases, from the nature of the crime, that the utmost reluctance would be manifested, and the utmost resistance made which the circumstances of a particular case would allow, still, to hold, as matter of law, that such manifestation and resistance are essential to the existence of the crime, so that the crime could not be committed if they were wanting, would be going farther than any well-considered case in criminal law has hitherto gone. Such manifestation and resistance may have been prevented by terror caused by threats of instant death, or by the exhibition of brutal force which made resistance utterly useless; and other causes may have prevented such extreme opposition and resistance as the request makes essential. The importance of resistance is simply to show two elements in the crime—carnal knowledge by force by one of the parties, and nonconsent thereto by the other. These are essential elements, and the jury must be fully satisfied of their existence in every case by the resistance of the complainant, if she had the use of her faculties and physical powers at the time, and was not prevented by terror or the exhibition of brutal force. So far resistance by the complainant is important and necessary; but to make the crime hinge on the uttermost exertion the woman was physically capable of making would be a reproach to the law as well as to common sense. Such a test it would be exceedingly difficult, if not impossible, to apply in a given case. A complainant may have exerted herself to the uttermost limit of her strength, and may have continued to do so till the crime was consummated. Still a jury, sitting coolly in deliberation upon the transaction, could not possibly determine whether or not the limit of her strength had been reached. They could never ascertain to any degree of certainty what effect the excitement and terror may have had upon her physical system." This reasoning is sound, and disposes of the contention that the complaining witness must make all the resistance within her power.

There is no merit in any of the other assignments of error. The judgment must therefore be affirmed.

RUDKIN, C. J., and PARKER, FULLERTON, and GOSE, JJ., concur.

(61 Wash. 192)

NATIONAL BANK OF COMMERCE OF
SEATTLE v. PUGET SOUND
BISCUIT CO. et al.

(Supreme Court of Washington. Dec. 12, 1910.)

1. CORPORATIONS (§ 397*)—INFORMAL ACTS OF OFFICERS—LIABILITY.

Where the corporation trustees have habitually followed the practice of giving their separate approval to the acts of their agents, without formal action of the board, the corporation will be held liable for an act so authorized.

[Ed. Note.—For other cases, see *Corporations*, Dec. Dig. § 397.*]

2. CORPORATIONS (§ 414*)—AUTHORITY OF SECRETARY—EXECUTION OF PROMISSORY NOTES—LIABILITY.

Although the secretary of a corporation was not authorized to make promissory notes in a meeting of the trustees, yet where he and the president were the only trustees, and the notes were issued with the president's consent, the corporation will be bound by them.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 1640-1646; Dec. Dig. § 414.*]

Department 2. Appeal from Superior Court, Pierce County; W. O. Chapman, Judge.

Action by the National Bank of Commerce of Seattle against the Puget Sound Biscuit Company and others. Judgment for plaintiff, and defendants appeal. Affirmed.

J. W. A. Nichols, for appellants. Williamson & Williamson, Geo. G. Williamson, H. F. Norris, Kerr & McCord, and E. F. Freeman, for respondent.

CROW, J. Action by the National Bank of Commerce against the Puget Sound Biscuit Company, a corporation, and its receiver, on six promissory notes alleged to have been executed and delivered by the defendant corporation, to Gawley Foundry & Machine Works, a corporation, and assigned to plaintiff. From a judgment in plaintiff's favor, the defendants have appealed.

The notes for \$1,000 each are signed "Puget Sound Biscuit Company, by J. E. Davis, Sec'y." Appellants contend that no authority for their execution by Davis has been shown, and that the corporation business was conducted by two trustees who did not direct the execution and delivery of the notes. The trial court found that on July 24, 1909, the defendant corporation executed the notes, which maturing at different dates from September 24, 1909, to July 24, 1910, were payable to the order of Gawley Foundry & Machine Works; that on July 29, 1909, the payee, for a valuable consideration, in-

dorsed and delivered them to the respondent; that F. Charles Maurmann was president, J. E. Davis was secretary, and F. Charles Maurmann, and J. E. Davis were trustees of the Puget Sound Biscuit Company; that J. E. Davis signed the notes with authority of F. Charles Maurmann and himself, the sole trustees; that within a day thereafter the trustees ratified the action of Davis; that respondent had no notice or knowledge of any want of authority in the secretary, or any alleged invalidity of the notes; that Joseph Gawley was an authorized manager of the Puget Sound Biscuit Company, and that the notes were delivered to him to be negotiated. Appellants contend these findings are not supported by the evidence, but we hold they are, and that they must be approved. Although the business of the appellant corporation was generally conducted in an irregular and informal manner, without keeping complete records, and only one or two meetings of the board were held, it appears from the evidence that Davis as secretary executed these notes with the knowledge and consent of F. Charles Maurmann, the president, and only other trustee, for the express purpose of raising funds with which to finance the corporation, purchase machinery, complete its equipment, and enable it to transact its contemplated business. The respondent does not contend that Davis was necessarily authorized to execute the notes by reason of the simple fact that he was secretary, but does contend that, being secretary, he could be, and in fact was, vested with the ministerial duty of signing the name of the corporation to the notes, which thereupon became valid evidence of its indebtedness. Although it must be conceded that no meeting of the trustees was held, that no formal resolution was adopted requiring Davis as secretary to execute the notes, and that a corporation usually acts by resolution of its trustees adopted as a board in regular or special session, and not through the trustees acting individually and separately, it has nevertheless been held that, when trustees habitually adopt the practice of giving their separate approval to the acts of agents of their corporation, as appellant's trustees did, such conduct will have the same effect as though evidenced by their formal action at a regular or special meeting.

In *Winer v. Bank of Blytheville*, 89 Ark. 448, 117 S. W. 237, the court said: "It is contended by appellants that there were no minutes or written evidence of the proceedings of the board of directors of the corporation authorizing the transfer of these notes, and that any other testimony as to that was incompetent. But a corporation, its board of

directors, and shareholders may waive any necessity of a meeting of its board of directors for the transaction of the business of the company. "They can do so by permitting the directors to establish a habit or usage of assenting separately to the making and performance of contracts by their agents. By permitting such usages or habits to be formed by a long course of business, they adopt and become bound by them, so long as they acquiesce. If this were not so, great injustice might be done to parties contracting with them in their usual way." This court, applying the same rule in *Anderson v. Wallace Lumber & Mfg. Co.*, 30 Wash. 147, 70 Pac. 247, said: "The authority of defendant's officers to make the agreement is challenged by defendant chiefly upon the ground that the trustees did not act as an official board, but as individuals only. It appears there were four trustees. Each had knowledge of, and three of them actively participated in, the transaction—the president, vice president and superintendent, and the secretary. The principle stated in *Carrigan v. Port Crescent Improvement Co.*, 6 Wash. 590 [34 Pac. 148], is applicable here, and is approved; that is, when a corporation allows certain officers to manage its business, particularly, as here, such as president, vice president, and superintendent, it must be responsible for their acts unless it affirmatively shows they were unauthorized."

This rule is applicable when corporation officers and trustees have indulged in an habitual method of transacting business, individually, separately, by common consent, and without formal action of the board as such. The appellant corporation was regularly organized. Its stock was fully subscribed. It installed a large manufacturing plant with machinery of great value. It manufactured and sold its product, transacting business for several months. It had at different times two separate managers, who acted for it, directed its affairs, and had knowledge of the execution and negotiation of these notes. It finally became insolvent and passed into the hands of a receiver. After its first organization, no meeting of its board of trustees was held for the transaction of business or to take formal action in regard to any of its affairs. The evidence, although conflicting, is sufficient to sustain the findings of the trial judge. Under the facts shown, the appellants are in no position to now question the authority of the secretary to execute these notes.

The judgment is affirmed.

RUDKIN, C. J., and DUNBAR, MORRIS, and CHADWICK, JJ., concur.

(61 Wash. 239)

McPHERSON BROS. CO. v. OKANOGAN COUNTY et al.

(Supreme Court of Washington. Dec. 16, 1910.)

1. JUDGMENT (§ 713*)—RES JUDICATA—SCOPE.

In an action between the same parties, a judgment therein is res judicata in general as to all points in issue and also all points which might have been raised and adjudicated.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1234-1241; Dec. Dig. § 713.*]

2. JUDGMENT (§ 590*)—RES JUDICATA—ISSUES—WITHDRAWAL OF ISSUES.

At a public sale of certain land by defendant county, plaintiff's bid not having been accepted, it filed a complaint for specific performance, alleging that the county officers acted in bad faith. Complainant subsequently abandoned such allegation, and the case was finally submitted on a complaint which alleged a completed contract. An appeal was taken on which the Supreme Court held that there was no enforceable contract, intimating that there was nothing alleged in the complaint to overcome the presumption that the officer acted in good faith and within his best judgment. Plaintiff then brought another action against the same parties on the same cause of action, alleging bad faith. *Held*, that the judgment in the former action was res judicata.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1106; Dec. Dig. § 590.*]

Department 1. Appeal from Superior Court, Chelan County; Wm. A. Grimshaw, Judge.

Suit by the McPherson Brothers Company against Okanogan County and others. Judgment for defendants, and plaintiff appeals. *Affirmed*.

Peter McPherson, for appellant. Alvin W. Barry, for respondents.

MOUNT, J. The appellant brought this action, seeking to specifically enforce an alleged contract for the purchase of certain real estate. The respondents, for answer to the complaint, denied the material allegations necessary to recovery, and pleaded affirmatively that the action was barred by time, and also that there has been a former adjudication of the subject-matter of the action between the same parties. The plaintiff filed a demurrer to the affirmative matter alleged in the answer. The court overruled this demurrer, and the plaintiff electing to stand thereon, the action was dismissed. Plaintiff has appealed.

It is conceded in the case that the parties and the subject-matter of the action are the same as in a prior action which was decided adversely to the appellant below, and which was appealed to this court, and upon such appeal we held that there was no contract between the parties which could be specifically enforced. *McPherson Bros. Company v. Okanogan County*, 45 Wash. 285, 88 Pac. 199, 9 L. R. A. (N. S.) 748. We said in that opinion: "The record here is silent as to the reason the officer refused to accept the appellant's bid, but nothing is alleged in

the complaint to overcome the presumption that the officer acted in good faith, and within his best judgment." After the decision in that case, the appellant brought this action, and alleged bad faith of the officers, in addition to the facts set out in the original complaint, upon which the case was finally submitted to this court in the case above cited.

Appellant now argues that, by reason of these allegations of bad faith on the part of the county officers, the case was not finally adjudicated upon the other appeal. The answer in this case shows, that there was an original complaint and two amended complaints in the former action; that in the original and in the first amended complaint allegations were made of bad faith on the part of the officers, substantially the same as in the complaint in this action, but when the second amended complaint was filed in the other action these allegations of bad faith were omitted. It clearly appears, therefore, that the appellant knew all the facts now alleged at the time the first action was brought. The general rule is, and has often been stated by this court, that "in an action between the same parties a judgment therein is res adjudicata as to all points in issue, and also all points which might have been raised and adjudicated." *Olson v. Title Trust Company*, 109 Pac. 49, and cases there cited.

In *Sweeney v. Waterhouse & Company*, 43 Wash. 613, 86 Pac. 946, we said: "It is hardly worth while to go into a discussion of the doctrine of res adjudicata and the cases cited thereon. This court has, in more recent cases, somewhat modified the doctrine as announced in the earlier cases, where the old rule was laid down that the plea of res adjudicata applies not only to points which were raised, but to those which might have been raised in the trial of the former action. But no court, we think, has gone so far as to allow a litigant to experiment with a court by trying his case piecemeal. The cause of action which the appellants now urge was available to them at the former trial. * * * They should not be allowed to split their causes of action, try their case out on a part of their causes, and, if they fail, commence another action setting forth the other causes."

This is precisely what the appellant in this case has attempted to do. It brought its first action upon an alleged contract which it claimed arose out of a bid it had made for land offered at public sale by the county. It alleged in its original complaint that the officers conducting the sale had acted in bad faith in not striking the land off to it. It subsequently abandoned this allegation, and the case was submitted upon a complaint which alleged a completed contract. The case was appealed, and we held

there was no enforceable contract, and stated that there was no claim of bad faith. Then plaintiff brought another action against the same parties, based upon the same causes, alleging bad faith. It selected the ground upon which it based its original cause of action and was defeated. Under the rule stated above, it is bound by the decision in that case.

The judgment must therefore be affirmed.

RUDKIN, C. J., and PARKER, FULLERTON, and GOSE, JJ., concur.

(61 Wash. 242)

GLADDEN v. JACOBOWSKI et ux.

(Supreme Court of Washington. Dec. 16, 1910.)

1. CONTRACTS (§ 191*)—CONSTRUCTION.

Defendants, in consideration of a transfer of certain property by plaintiff, agreed to support him in a manner suited to his condition in life for the remainder of his life; provided, that plaintiff should not refuse to reside at defendants' home, unless such refusal was occasioned by neglect or inability of plaintiff to obtain there sufficient clothing, lodging, and maintenance, the total liability of defendants in the event plaintiff determined not to live at their home not to exceed \$15 a month during his refusal so to reside with them. *Held*, that defendants were not liable to pay plaintiff \$15 per month, where plaintiff capriciously refused to live at defendants' home; they not having refused or neglected to provide for him as required.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 852-855; Dec. Dig. § 191.*]

2. JUDGMENT (§ 602*)—RES JUDICATA—SCOPE.

Where plaintiff brought a prior suit to rescind certain conveyances executed in consideration of defendants' contract to support him for life, alleging that defendants had failed to support and maintain plaintiff, and on the trial the court found for defendants and declined to give plaintiff any relief, such judgment was res judicata of the issues between the parties up to the time of the decree, and plaintiff could not maintain a new action for the same relief because of alleged defaults occurring prior to such judgment.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 1117; Dec. Dig. § 602.*]

Department 1. Appeal from Superior Court, King County; M. L. Clifford, Judge.

Action by Isadore M. Gladden against Adam Jacobowski and wife. Judgment for defendants, and plaintiff appeals. Affirmed.

John E. Humphries and George B. Cole, for appellant. S. H. Steele, for respondents.

MOUNT, J. The appellant brought this action to rescind two written contracts by which he had conveyed to the respondents certain personal property and real estate, in consideration for support and maintenance during his lifetime. As a ground for the rescission, he alleges that there became due from the respondents, under the terms of the contract, \$15 per month from August 20, 1908, to August 20, 1909, amounting to \$180, which respondents refused to pay. Respond-

ents, for answer to the complaint, denied these allegations, and alleged affirmatively a former adjudication, and set forth the record of the former case. For reply to the allegations of the former adjudication, the appellant filed a general denial upon information and belief. The cause came on for trial to the court without a jury, and counsel for the appellant made a statement of the case, in which he recited the history of the former litigation, in substance admitting the allegations of the reply in reference thereto, and then stated: "The plaintiff did not appeal, and this suit is brought on this theory to a great degree, as we allege in the complaint that the defendants have failed to pay the plaintiff the \$15 per month as provided in the deed, he not living there at the home of the defendants, he claims on account of the treatment he received, and this suit is founded mainly upon that ground and also upon the ground that the defendants have transferred the greater portion of the personal property over to Mrs. Jacobowski. * * * The turning point perhaps in this case to a great degree will rest upon that clause regarding residence and the payment of \$15 per month."

The clause in the contract referred to, and which was admitted in the pleadings, is as follows: "And in consideration of the premises, the parties of the second part doth hereby for themselves, their executors and administrators, agree to and with the party of the first part that they will support and maintain and comfortably and sufficiently clothe the party of the first part and in all respects care and provide for him in the manner suited to his condition in life for and during the remainder of his natural life; provided, however, that the said party of the first part shall not refuse to reside at the home and residence of said second parties in the said King county, or elsewhere to which said parties may remove, except such refusal may be occasioned by neglect or inability of the party of the first part to obtain comfortable and sufficient clothing, lodging and maintenance sufficient to one in his station and condition in life at the home of said second parties, the total liability to which said second parties shall be held in the event that said first party shall determine not to live at the home and residence of said second parties shall not exceed the sum of \$15 per month during the time of his refusal to live at the home and residence of said second parties."

Thereupon the respondents moved the court to dismiss the action upon the pleadings and the opening statement of counsel for the plaintiffs. This motion was granted, and the plaintiff has appealed from the order of dismissal.

Counsel for appellant relies upon the rule to the effect that, where land has been con-

veyed in consideration of the grantee's agreement to support the grantor during the latter's life and the grantee refused to perform the same, the court of equity will set aside the deed, as held by this court in *Gustin v. Crockett*, 51 Wash. 67, 97 Pac. 1091, and cases there cited. That rule, however, has no application to the facts admitted in this case, for here the appellant had brought a former action, wherein it was alleged that the defendants had failed and refused to support and maintain the plaintiff, and the court found upon the trial of that case, "that the said defendants at all times had been ready, able, and willing to support and maintain the plaintiff at their home and to fully comply with the obligations imposed upon the said defendants by the terms of said deed." The court in that action also construed the provisions of the contract above set out, and found upon the trial "that said plaintiff without cause or excuse on or about the 20th day of August, 1908, refused to reside at the home and residence of said defendants and refused to accept and receive support and maintenance from the said defendant at the home of said defendants." It is therefore clear that the judgment in that action was res adjudicata upon the issues between the parties, up to the time of that decree. *McPherson Bros. Co. v. Okanogan County* (just decided) 112 Pac. 267.

It is not alleged in this action, and it is apparently not claimed, that there has been any breach of the contract since the date of that decree. It appears that this action was brought within 50 days after that decree was entered. The complaint in this case does not even allege the breach of the conditions of the contract. It simply alleges, "that pursuant to the terms of said agreement, there became due and payable to said plaintiff from said defendants the sum of \$15 per month from August 20, 1908," and that a demand was made therefor, which defendants refused to pay. It is plain from the terms of the contract that the respondents did not agree to pay the appellant \$15 per month. The contract provides that the respondents will support, maintain, and comfortably and sufficiently clothe the appellant, provided that he shall not refuse to reside at the home and residence of the defendants, "except such refusal may be occasioned by neglect," or inability of the appellant to obtain such maintenance at the home of the respondents. Then the contract provides that the total liability of the respondents shall not exceed the sum of \$15 per month. It is plain, we think, that the appellant is not entitled under the contract to recover \$15 per month, or any other sum, unless it is shown that the respondents refused or neglected to provide for appellant at their home. No such allegation is made in the complaint. It is true, counsel for the ap-

pellant stated in opening the case that the appellant is "not living at the home of the defendants; he claims on account of the treatment he received." This question was admittedly litigated in the other action, and was decided adversely to the claim of the appellant, and that finding was conclusive of the fact up to the time of the judgment therein. There is no allegation or claim that there has been any neglect since that time, or any breach of the contract by the respondents, and it is clear that the appellant could not, under the terms of the contract, capriciously refuse to live at the home of the respondents, and require them to pay \$15 a month or suffer a rescission of the contract; yet this is apparently the sole purpose of the action.

We think the judgment was right, and it is therefore affirmed.

RUDKIN, C. J., and PARKER, FULLERTON, and GOSE, JJ., concur.

(61 Wash. 142)

STATE v. NICOLLS.

(Supreme Court of Washington. Dec. 10, 1910.)

1. CITIZENS (§ 9*)—CHILDREN OF CITIZENS—INDIANS.

The civil status of one born of an Indian mother and a white father, who is a citizen of the United States, follows that of the father.

[Ed. Note.—For other cases, see *Citizens*, Cent. Dig. § 11; Dec. Dig. § 9.*]

2. INDIANS (§ 34*)—SALE OF LIQUORS—PROHIBITION.

The Legislature in the exercise of its police power may prohibit the sale of liquor to Indians or those of Indian descent.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. § 60; Dec. Dig. § 34.*]

3. INDIANS (§ 34*) — "INDIANS OF MIXED BLOOD."

A person born of an Indian mother and a white father who is a citizen of the United States, taking his civil status from his father, is nevertheless an Indian of mixed blood, within the statute prohibiting the sale of liquor to any Indian whatsoever, or to a mixed blood Indian, being more than a one-eighth Indian.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. § 60; Dec. Dig. § 34.*]

4. CONSTITUTIONAL LAW (§ 206*)—PRIVILEGES AND IMMUNITIES—RIGHT TO SELL LIQUOR.

The right to sell or drink intoxicating liquor is a privilege only, which the state may grant to one class of citizens and deny to another class.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 625-631; Dec. Dig. § 206.*]

5. INDIANS (§ 34*)—SALE OF LIQUOR—OFFENSES—INTENT.

Criminal intent was not an essential element of the offense of selling intoxicating liquors to an Indian of mixed blood, within the state statute prohibiting, without qualifying words, the sale of intoxicating liquors to an Indian of mixed blood, etc.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. § 60; Dec. Dig. § 34.*]

Department 2. Appeal from Superior Court, Whatcom County; Ed. E. Hardin, Judge.

A. Nicolls was convicted of selling liquor to an Indian of mixed blood, and he appeals. Affirmed.

Abrams & Shamel, for appellant. George Livesey and J. W. Kindall, for the State.

CHADWICK, J. Appellant was convicted of the crime of selling liquor to an Indian of mixed blood. The apt words of the statute under which the information was drawn are as follows: "That any person who shall sell, give away, dispose of, exchange, or barter any malt, spirituous, or vinous liquor of any kind whatever * * * to any Indian whatsoever, or a mixed-blood Indian, being more than one-eighth Indian, shall be guilty," etc. Section 6288, Rem. & Bal. Code. The fact of the selling is not denied. But the case is brought here upon numerous assignments of error, all of which are directed to two propositions of law: First, whether a person born of an Indian mother and a white father, being a citizen of the United States, is an Indian, within the meaning of the law; and, second, whether the want of intent is a defense to the crime charged.

That the civil status of one born of an Indian mother and a white father, who is a citizen of the United States, follows that of the father, is well established by the authorities. *Ex parte Reynolds*, 20 Fed. Cas. 582; *United States v. Ward* (C. C.) 42 Fed. 321; *United States v. Hurshman* (D. C.) 53 Fed. 544; *Keith v. United States*, 8 Okl. 446, 58 Pac. 507. But it does not follow that there is any merit in the contention of the appellant that, because Plaster was a citizen of the United States, he is not therefore an Indian of the mixed blood, within the meaning of the law; or that being a citizen, the enforcement of the law would result in an unlawful discrimination between citizens, in violation of the rights, privileges, and immunities guaranteed by section 1 of the fourteenth amendment to the Constitution of the United States. The cases bearing upon the question of citizenship have no relevancy here. The power of the Legislature to pass all needful police regulations cannot be questioned, and so long as regulations bear with equal weight upon all of like situation or of the same class, they are universally upheld by the courts. The power of the Legislature to pass laws prohibiting the sale of liquor to Indians or those of Indian descent, rests upon the same principle of protection to the public as laws prohibiting the sale of liquor to minors, habitual drunkards, and the like. *State v. Mamlock*, 109 Pac. 47; 17 Am. & Eng. Ency. Law, 345; *Black, Intoxicating Liquors*, 42.

It is contended, however, that Plaster does not come within the term "mixed-blood Indian, being more than one-eighth Indian";

that following the status of the father as to citizenship, he would technically and strictly speaking be a white man of mixed blood, and thus immune from the law. While the statute may be subject to this technical construction, we think its intent to prescribe all persons of Indian descent, who have more than one-eighth Indian blood in their veins, is apparent. The words, "mixed blood," are equivalent, in our judgment, to the words of the Michigan statute construed in the case of *People v. Gebhard*, 151 Mich. 192, 115 N. W. 54; the words being that liquor should not be sold "to any Indian, nor any person of Indian descent." The court concluded: "We think that the language used by the Legislature clearly manifests their intention to prohibit, not only sales to full-blooded Indians, but to all persons with Indian blood in their veins." For, as was said by the court: "The same reason which applies to prohibiting sales to full-blooded Indians applied also to half breeds. The Indian blood, like the blood of all savage races, is liable to much greater inflammation and excitation than that of civilized races, rendering people otherwise friendly and sober, ferocious and ungovernable when under the influence of intoxicating drink." "The term 'mixed bloods,' used in treaties and in statutes, includes persons of half, or more or less than half, Indian blood, derived either from the father or from the mother." 22 Cyc. 113.

The right to sell or drink liquor is not a constitutional right, but a privilege which the state may grant to one class of its citizens and deny to another class. This proposition is so well established that it will require no citation of authorities to prove that it is in no way obnoxious to the federal Constitution.

Nor does the lack of intent excuse the offense. While it is an axiom of the law that there can be no crime without criminal intent, there are many cases where the execution and enforcement of the law demand that the intent be implied; a presumption flowing from the acts of the parties. This rule has been generally, although not quite universally, applied in the enforcement of statutes passed in aid of the police power of the state, where the word "knowingly," or other apt words, are not employed to indicate that knowledge is an essential element of the crime charged. In the statute before us no qualifying words are employed. One who sells, gives, or barter intoxicating liquor to an Indian or one of mixed blood, is guilty. The fact of selling being established, the law supplies the element of intent. "In these cases there is a voluntary act which the party does at his peril, and he is not to be excused, either by ignorance of the law or ignorance of the fact. Either kind of ignorance implies a fault, and it must be assumed that, with due diligence, the true character of the act could have been ascertained." *Freund, Police Power*, 635, 636, and 8 Am. & Eng. Ency. Law, 291, and 12 Cyc. 158, where

additional authorities are collected. In the case at bar there is no showing of positive intent, and the Legislature, evidently mindful of the peril of the liquor seller in such cases, has provided that the trial judge shall have a wide discretion in fixing the punishment. This is as far as the law goes to relieve the appellant of his inadvertence.

Finding no error in the record, the judgment is affirmed.

RUDKIN, C. J., and MORRIS, DUNBAR, and CROW, JJ., concur.

(61 Wash. 236)

ANDERSON et ux. v. WOOLLEY et ux.
(Supreme Court of Washington. Dec. 15, 1910.)

1. DEEDS (§ 194*) — DELIVERY — EVIDENCE — PRESUMPTIONS.

Where a properly executed and acknowledged deed passes into the custody and under the control of the grantees therein named, and is filed for record, a strong presumption arises that the deed was delivered and became operative, and such presumption can only be overturned by clear and convincing proof.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 574-583; Dec. Dig. § 194.*]

2. NEW TRIAL (§ 102*) — NEWLY DISCOVERED EVIDENCE — DISCRETION OF COURT.

Where affidavits in support of a motion for a new trial on the ground of newly discovered evidence were made by parties who had already testified on the trial, the court acted within its discretion in denying the motion.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 210-214; Dec. Dig. § 102.*]

Department 1. Appeal from Superior Court, Spokane County; J. Stanley Webster, Judge.

Action by August Anderson and wife against J. W. Woolley and wife. Judgment for defendants, and plaintiffs appeal. Affirmed.

Belt & Powell, for appellants. Nuzum & Nuzum, for respondents.

RUDKIN, C. J. The plaintiffs in this action were the owners of a town lot in the city of Spokane, and the defendants of a 40-acre tract in Spokane county, adjacent to the city, together with certain personal property situate thereon. Some time prior to the 30th day of April, 1908, the parties agreed upon an exchange of these properties, and entered into a contract to that effect, which does not appear in the record. On the last-mentioned date the plaintiffs executed a deed of the Spokane property in favor of the defendants, and the defendants in turn executed a deed in favor of the plaintiffs for the 40-acre tract, and also a bill of sale for the personal property. The present action was instituted to set aside the deed executed by the plaintiffs, or to procure a reconveyance of the property therein described, on the ground that the deed was fraudulently ob-

tained from the possession of the plaintiff August Anderson while intoxicated, and its delivery was never authorized or assented to by the plaintiff Emelia Anderson. The case was tried before the court without a jury, and from a judgment in favor of the defendants, the plaintiffs have appealed.

It is an admitted fact that a deed properly executed and acknowledged by the appellants passed into the custody and under the control of the grantees therein named, and was filed for record. This fact alone gives rise to a strong presumption that the deed was delivered and became operative, a presumption that can only be overthrown by clear and convincing proof. *Jackson v. Lamar*, 108 Pac. 946, and cases cited. When this presumption is aided by the further admitted facts that the appellants voluntarily surrendered possession of the granted premises to their grantees, immediately after the delivery of their deed, entered upon the possession of the premises taken in exchange, consumed and necessarily treated as their own a considerable part of the personal property received in exchange, and paid a commission to the agents who perpetrated the alleged fraud, long after the delivery of the deed, the presumption becomes well-nigh absolute and conclusive.

The theory advanced by the appellants is this: They contend that Mrs. Anderson was unwilling to sign or execute the deed, until she had made a further examination of the property to be taken in exchange; that she finally executed the deed with the express understanding that the deed should remain in her possession, undelivered, until such further examination was made; that the husband obtained possession of the deed from the wife, with strict injunctions not to deliver it; and that the respondents or their agents fraudulently obtained possession of the deed from the husband while intoxicated. The contention of the respondents, on the other hand, is that the deed was executed by both husband and wife for the purpose of making a delivery thereof; that an examination of the abstract disclosed some defect in the respondents' title, which rendered it necessary to obtain a deed of correction from parties residing in the state of Wisconsin; that the appellants left their deed with their attorney until the deed of correction was returned; and that after the receipt of the latter deed, the deed from the appellants was delivered and placed of record.

The court below made no findings of fact, but it evidently adopted the respondents' theory of the case, and with that conclusion we are in entire accord. The conduct of the appellants was in many respects utterly inconsistent with their present claims, and in many other respects their testimony was utterly discredited. The court below saw the parties and their witnesses, observed their

demeanor, and its conclusion finds ample support in the record.

A motion for a new trial was interposed on the ground of newly discovered evidence. The affidavits in support of the motion were made by parties who had already testified on the trial. The denial of this motion is assigned as error, but the court acted within its discretion. The reasons for the denial of the motion do not appear, but the court might well have proceeded on the theory that it was so little impressed with the testimony already given by these witnesses, that any further testimony they might offer would not change the result.

Finding no error in the record, the judgment is affirmed.

PARKER, GOSE, FULLERTON, and MOUNT, JJ., concur.

(61 Wash. 184)

GERBER v. AETNA INDEMNITY CO. et al.
(Supreme Court of Washington. Dec. 12, 1910.)

1. TRIAL (§ 273*)—EXCEPTIONS—FORM.

Where no exceptions were taken to instructions, or to the refusal to give instructions requested, the filing of exceptions with the clerk after the trial is insufficient.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 680-682; Dec. Dig. § 273.*]

2. TRIAL (§ 277*)—EXCEPTIONS—FORM.

The fact that counsel during the argument of a legal contention indicated to the court that he believed the court was about to make an erroneous ruling on instructions did not constitute a sufficient exception to the ruling when made.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 687, 688; Dec. Dig. § 277.*]

Department 2. Appeal from Superior Court, King County; Boyd J. Tallman, Judge.

Action by Maurice Gerber against the Aetna Indemnity Company and another. Judgment for plaintiff, and defendant Indemnity Company appeals. Affirmed.

Peters & Powell, for appellant. Jay C. Allen, for respondent.

MORRIS, J. The only errors suggested on this appeal are in the giving and refusing to give instructions; and we are met at the outset by a motion to affirm the judgment up-

on the ground that the record shows no proper or sufficient exceptions taken to the errors assigned. The trial was had on October 19, 1909. No exceptions appear to have been taken to the instruction now complained of, nor to the refusal to give the one offered. On October 28th, however, appellant filed its exceptions with the clerk. So far as the record goes, this appears to be all that was done in this connection. Under the rule announced in Coffey v. Seattle Electric Company, 109 Pac. 202, this was not a proper or sufficient exception, and the motion to affirm is well taken.

Appellant contends that it brings itself within the rule announced in the Coffey Case by taking a proper exception to the court during the trial. It appears that during the giving of the instructions counsel for respondent interrupted the court, and called its attention to what he deemed was an improper statement of the law, and asked the court to then and there correct it. The court thereupon dismissed the jury and heard from counsel as to their respective contentions in this regard. After some argument, the court seemed inclined in respondent's favor. Counsel for appellant thereupon, among other things, said to the court: "I submit the matter to your honor's consideration, and I think that, should you make the other qualification of the instruction, it will be error. All three of these cases refer to another condition, to the first branch of the contract." Further argument was then heard by the court, and counsel again stated: "I do not want to take advantage of the record, but I am satisfied that that would be error, because it refers to an entirely different condition. * * *"

We cannot hold, when during the argument upon a legal contention counsel indicates to the court his contention that the court is about to make an erroneous ruling, that such expression of counsel's view will operate as, and take the place of, an exception to the ruling. Exceptions and the manner of taking the same are controlled by statute, and to be beneficial the statutory requirement must be followed.

The judgment is affirmed.

RUDKIN, C. J., and DUNBAR, CROW, and CHADWICK, JJ., concur.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

(33 Nev. 531)

STATE v. GRIMMETT. (No. 1,922.)
(Supreme Court of Nevada. Dec. 29, 1910.)

1. HOMICIDE (§ 118*)—SELF-DEFENSE.

Where one, without voluntarily seeking, provoking, inviting, or willingly engaging in a difficulty, is attacked by an assailant, and it is necessary for him to kill the assailant to protect his own life, he need not flee for safety, but may stand his ground and kill the assailant.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 168; Dec. Dig. § 118.*]

2. HOMICIDE (§ 244*)—SELF-DEFENSE—EVIDENCE—SUFFICIENCY.

Evidence held to show that a killing was committed in self-defense.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 507; Dec. Dig. § 244.*]

Appeal from District Court, Esmeralda County.

S. P. Grimmatt was convicted of voluntary manslaughter, and he appeals. Reversed.

P. A. McCarran and Wm. Woodburn, for appellant. R. C. Stoddard, Atty. Gen., L. B. Fowler, Deputy Atty. Gen., and Augustus Tilden, Dist. Atty., for the State.

SWEENEY, J. The appellant, S. P. Grimmatt, was indicted by the grand jury of Esmeralda county, state of Nevada, for the crime of murder, for shooting and killing one Charles Edward Baker on the 24th day of October, 1909. The appellant was regularly tried before a jury in the district court of Esmeralda county, found guilty of voluntary manslaughter, and sentenced by the court to serve a term of six years in the Nevada state penitentiary. From the judgment of conviction, and from the order of the lower court denying a motion for a new trial interposed by defendant, relief is sought by appeal in this court.

Many assignments of error are urged by the appellant, but it will be only necessary to consider one, to wit: "That the verdict of the jury is contrary to the evidence." Before proceeding to a consideration of this assignment of error, which we believe will be sufficient for the purpose of disposing of this case on appeal, we will advert to the confession of error made by the Attorney General in behalf of the state in submitting this case, at which time the representative of the Attorney General's office said: "May it please the Court: In the case of State v. Grimmatt, the state concedes that fatal error exists, in that the verdict of the jury was clearly contrary to the evidence. A careful examination of the record shows that the defendant acted in self-defense; that he would have probably been killed himself if he had not shot at the time he did. The

aggressive acts of Baker, the decedent, brought about his own death, and the defendant acted as any other reasonable man would have done when so situated." After the submission of the case the district attorney of Esmeralda county, in opposition to the position of the Attorney General in confessing error, asked leave and was permitted by the court to file a supplemental brief in behalf of the state, which we have given due consideration.

An examination of the evidence, however, reveals to our mind a clear case of self-defense. The evidence introduced in behalf of the state and also of the defendant conclusively proves that Baker was the aggressor in the difficulty, which resulted in the loss of his life, and that it was necessary for the defendant to kill him in order to preserve his own. It appears on the night of the tragedy, from the testimony of witnesses for the state, corroborated by that of the defendant, that the decedent, after being asked for \$7.50, which the defendant claimed the decedent owed him, became violently angry, called the defendant a "hophead" and a "son of a bitch," hurriedly removed his coat, threw it on a roulette wheel in the saloon, ran for a billiard cue, and rushed towards the defendant, but was intercepted and the cue taken away from him by bystanders. Whereupon the decedent immediately ran back of the bar, took a revolver from the drawer, and as he rushed to the end of the bar, revolver in hand, fired one shot at the defendant, whereupon the defendant fired two shots, killing the decedent. For some time prior to the killing, the participants in this fatal affray were on unfriendly terms, and the decedent had threatened to kill the defendant.

The law is well established that where a person, without voluntarily seeking, provoking, inviting, or willingly engaging in a difficulty of his own free will, is attacked by an assailant, and it is necessary for him to take the life of his assailant to protect his own, then he need not flee for safety, but has the right to stand his ground and slay his adversary. Reviewing the whole evidence, we believe the position of the Attorney General, in confessing fatal error, is supported by an overwhelming preponderance of the evidence, and that the verdict of the jury is contrary to the evidence and must be reversed.

It is so ordered.

NORCROSS, C. J., and TALBOT, J., concur.

(33 Nev. 288)

SMALL et al. v. ROBINS. (No. 1,867.)

(Supreme Court of Nevada. Dec. 20, 1910.)

On petition for rehearing. Rehearing granted.

For former opinion, see 110 Pac. 1128.

SWEENEY, J. A petition for rehearing and a reply thereto have been filed in the above-entitled cause. The reply to the petition admits as true the following statement contained in the petition: "It is undisputably established that at all times after the boundary line was fixed the respondent had and held all ground covered by her conveyances and the ground in dispute belonging to these complainants."

The foregoing is a statement of a fact not impressed upon the court upon oral argument or in the briefs heretofore made or filed. Upon the contrary, this court accepted as a correct statement of facts the letter of C. S. Martin, of date August 30, 1908, quoted in the opinion heretofore rendered (110 Pac. 1128), which letter was admitted in evidence upon the request of one of the parties and the consent of the other party to the action. This letter concludes with the following statement: "This shows that Mr. Haskell, being the owner of Chinatown, made a mistake of 20 feet of ground, more or less, not in his favor, but against himself. He used 20 or more feet belonging to Chinatown, Miss Robbins used 20 or more feet belonging to me, her westerly neighbor 20 or more feet belonging to her, and such has been the case for 23 or 24 years."

Having accepted this statement contained in the said letter of C. S. Martin as a fact, it appeared that the respondent, Ida Robbins, in case plaintiffs and appellants prevailed in the action, would be the loser of 20 feet or more of the aggregate amount of land embraced within her deeds to lots 45, 46, and 47. It now appears from the petition and reply thereto that the statement above quoted in the letter of C. S. Martin is not the fact as established by the record, but that, upon the contrary, the respondent has all of the land embraced in lots 45, 46, and 47, and in addition thereto the extra 20 or more feet included in lot 48.

We are still of the opinion that the conclusion reached in our former decision was entirely correct, based upon the facts stated in the decision and then assumed to be true, for under such state of facts the equities were with the respondent. It now being admitted that the said statement contained in the letter of C. S. Martin was in error, and that the record establishes a contrary state of facts, in order that the question may be presented upon the facts as stated in the above quotation from the petition for a rehearing, which are conceded by the respondent

to be true, a rehearing is hereby granted. It is so ordered.

NORCROSS, C. J., and TALBOT, J., concur.

(153 Cal. 690)

CALIFORNIA SAFE DEPOSIT & TRUST CO. et al. v. SIERRA VALLEYS RY.

CO. et al. (Sac. 1,759.)

(Supreme Court of California. Dec. 1, 1910.)

1. LIMITATION OF ACTIONS (§ 48*)—COUPONS—DETACHMENT FROM BONDS—LIMITATIONS APPLICABLE.

In the absence of any provision to the contrary in bonds or the instruments securing them, interest coupons, consisting of a simple promise to pay to bearer at a given date and place a specified amount of interest, when detached from the bonds and transferred by the bondholder to others, are independent obligations, subject to the four-year statute of limitations, which commences to run from the date of their maturity.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 259-265; Dec. Dig. § 48.*]

2. LIMITATION OF ACTIONS (§ 15*)—WAIVER—PROVISIONS OF MORTGAGE.

A provision of a railroad mortgage securing bonds that the railroad company, for itself, its successors, etc., waived the benefit of all valuation, stay, appraisal, or redemption laws respecting liens and mortgages to be foreclosed by action or suit, and all laws which, but for such provision, would prevent the absolute and unconditional sale of the premises conveyed, by a court or the trustee without suit, was not a waiver of the defense of limitations to interest coupons detached from the bonds.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 62-65; Dec. Dig. § 15.*]

3. RAILROADS (§ 180*)—MORTGAGES—DEFAULT—FORECLOSURE—RIGHTS OF BONDHOLDERS.

In the absence of any provision to the contrary in a railroad mortgage securing bonds, default may be taken advantage of by the holder of a single bond or coupon.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 605-609; Dec. Dig. § 180.*]

4. RAILROADS (§ 180*)—MORTGAGES—FORECLOSURE—RIGHTS OF BONDHOLDERS.

A provision of a railroad mortgage on default in the payment of any bond or interest coupon, continuing for six months after demand and presentation for payment, the whole principal sum mentioned for payment in all and each of the bonds should at the option of the holders of a majority in interest of the bonds then outstanding, or at the option of the trustee, forthwith become due and the lien foreclosed, was effective merely to authorize the acceleration of maturity of the bonds, and did not prevent the holder of detached interest coupons from collecting the same by suit or by foreclosing the mortgage.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 605-609; Dec. Dig. § 180.*]

5. RAILROADS (§ 180*)—MORTGAGES—INTEREST COUPONS—DEFAULT—RIGHT TO SUE.

A provision in a railroad mortgage securing bonds that no action should be prosecuted against the railroad company on any of the coupons annexed to the bonds, at law or otherwise, except by the trustee, unless the trustee after having been duly requested in writing, and having been fully indemnified, should fail and neglect for three months so to do, did not

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

prevent the holder of matured and unpaid interest coupons from suing to enforce the same by foreclosure of the mortgage, or otherwise, since after the expiration of three months after demand such holder was entitled to sue in his own name, making the trustee a defendant in case of the latter's refusal to sue.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 605-609; Dec. Dig. § 180.*]

6. RAILROADS (§ 166*)—SECURITIES—MORTGAGE OR TRUST DEED.

Where an instrument, executed by a railroad company to secure bonds, was described as a mortgage in the bonds; contained no provision for reconveyance; required neither notice of sale by the trustee nor prescribed the manner thereof, and referred to "the lien or incumbrance thereby created," and in various references to its own terms and effects used the expression "this mortgage," it would be held to be a mortgage and not a trust deed.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 516-518; Dec. Dig. § 166.*]

7. LIMITATION OF ACTIONS (§ 180*)—PLEADING—DEMURRER.

Though the defense of the statute of limitations may be raised by demurrer, where it appears on the face of the complaint that the claim is barred, the demurrer must specially state that the claim is barred; an allegation that the complaint is defective for want of facts being insufficient.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 670-675; Dec. Dig. § 180.*]

8. LIMITATION OF ACTIONS (§ 180*)—WAIVER OF DEFENSE—FAILURE TO DEMUR.

Since the only ground of demurrer under which the defense of the statute of limitations may be raised by demurrer is "failure to state facts sufficient to constitute a cause of action," and such ground, by the express provisions of Code Civ. Proc. § 434, is not waived by a failure to demur, where defendants did not demur, but answered the complaint at once, pleading limitations, they did not waive it by failing to demur.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 670-675; Dec. Dig. § 180.*]

Department 1. Appeal from Superior Court, Lassen County; F. A. Kelley, Judge.

Action by the California Safe Deposit & Trust Company, continued in the name of T. F. Dunaway, substituted trustee, against the Sierra Valleys Railway Company and others, in which C. R. Bowen filed a cross-complaint. From a decree dismissing the cross-complaint Bowen appeals. Affirmed.

Snook & Church and John W. Stetson, for appellant. E. D. Knight, E. R. Dodge, Warren Olney, Jr., L. N. Peter, and J. V. De La-veaga, for respondents.

SLOSS, J. In April, 1895, the Sierra Valleys Railway Company, a California corporation, having taken the statutory steps for the authorization by its stockholders of a bonded indebtedness, caused 1000 bonds of \$1000 each, falling due in 20 years, with interest coupons attached, to be signed by its president and secretary. It also executed and delivered to the California Safe Deposit & Trust Company, as trustee, a mortgage or

deed of trust of all its property to secure said bonds and coupons. Three hundred of the bonds were duly issued to Henry A. Bowen.

This action was commenced by the trustee to foreclose the security, it being claimed that the said trustee had exercised the option granted to it by the mortgage or deed of trust to declare the principal sum due in advance of maturity upon default, continuing for six months, in the payment of interest. Other breaches of the conditions of the instrument securing the bonds were alleged. The Boca & Loyaltan Railroad Company and Cora Chambers Pool were made defendants, and were alleged to claim an interest in the property. It is alleged that Bowen, also named as a defendant, was the owner and holder of a number of overdue interest coupons, which had been detached from the bonds originally owned by him, said bonds having passed into the ownership of the Nevada-California-Oregon Railway, a corporation. Bowen answered and cross-complained, seeking a foreclosure and the payment to him of the amount due on his coupons.

The court found that certain coupons including those held by Bowen had matured more than four years prior to the commencement of the action, and that any claim thereon was barred by sections 335 and 337 of the Code of Civil Procedure. The material allegations of the complaint were found to be true, and a decree of foreclosure providing for payment out of the proceeds of the sale of the amount due on all bonds and coupons, except those found to be barred by limitation, was entered. From this judgment Bowen appeals. The only question presented is whether the court below was correct in holding that he had lost his right to relief by lapse of time.

The coupons in question were in the usual form, each consisting of a simple promise to pay to bearer, at a given date and place, the sum of \$30, being six months' interest on one of the bonds. In the absence of any provision to the contrary in the bonds, or in the instrument securing them, it is undoubtedly the general rule that such coupons are independent obligations, and that, at least when they have been detached from the bonds and transferred to others than the holders of the bonds, the statute of limitations begins to run from the time of their maturity. Short on Law of Railway Bonds, § 75; Jones on Corp. Bonds and Mort. § 267; Amy v. Dubuque, 98 U. S. 470, 25 L. Ed. 228; Clark v. Iowa City, 20 Wall. 585, 22 L. Ed. 427; Koshkonong v. Burton, 104 U. S. 668, 26 L. Ed. 886; Nash v. El Dorado County (C. C.) 24 Fed. 252; Huey v. Macon Co. (C. C.) 35 Fed. 481; Galveston v. Loonie, 54 Tex. 517; Threadgill v. Com'rs, 116 N. C. 616, 21 S. E. 425. The appellant claims,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

however, that a different rule has been established in this state by the decision in *Meyer v. Porter*, 65 Cal. 67, 2 Pac. 884, and the two companion cases of *Roeding v. Porter*, 2 Pac. 888, and *Haysmeister v. Porter*, 3 Pac. 123, decided in the same month as the *Meyer Case*, and based upon its authority alone. *Meyer v. Porter* was an appeal from a judgment denying a writ of mandate to compel the treasurer of the city of Sacramento to pay certain coupons out of funds in his possession. The trial court had sustained a demurrer to the petition for the writ. In the Supreme Court various objections to the granting of the relief sought were considered and overruled. The opinion concludes with these words: "And as the coupons partake of the nature of the bonds to which they belong, and against which the statute of limitations had not run, they were not barred by the statute." There is no further discussion of the point, nor is there, in the report of the case, any showing of the facts upon which the bar of the statute was claimed to have arisen. We are not informed whether the coupons were independent obligations, negotiable and enforceable by others than holders of the bonds, nor whether, if so enforceable, a right of action had in fact accrued at such time as to make the bar of the statute applicable. Under these circumstances, we do not regard the isolated expression above quoted as binding this court to the doctrine that an action upon interest coupons is never barred by lapse of time until a right of action on the bond itself would be barred. On the contrary, we are inclined to take the view expressed by the United States Circuit Court of Appeals for the Ninth circuit in *Mather v. City and County of San Francisco*, 115 Fed. 37, 43, 52 C. C. A. 631, 639, where the following language was used in reference to the foregoing statement of this court in *Meyer v. Porter*: "It is claimed for this utterance of the court that it announces the rule that an action upon coupons is not barred until the statute of limitations has run against the bonds to which they were attached. We do not so understand the decision, although it is impossible, from the meager statement of the case, to determine the precise bearing of the remarks of the court. We are inclined to think that by the use of the language so quoted it was intended only to affirm the well-settled rule that in the application of the statute of limitations the coupon, although it may not be in form the same kind of instrument as the bond to which it belongs, will partake of the contractual nature of the latter, and both will be governed by the same statute of limitations; that is to say, if the bond be a specialty, the coupon, which may be a simple promise to pay, will be considered a specialty, and be governed by the statute of limitations applicable to specialties. *City of Lexington v. Butler*, 14 Wall. 282 [20 L.

Ed. 809]." Although the distinction between specialties and writings not under seal had been abolished in this state, it is probable that the writer of the opinion in *Meyer v. Porter* had in mind the rule just referred to. To this extent, it is quite true that "the coupons partake of the nature of the bonds to which they belong," and the question whether an action on the coupons is barred must accordingly be answered by reference to the statute prescribing the period of limitation for an action on the bonds. This is all that was decided in *Lexington v. Butler*, supra, and *City of Kenosha v. Lamson*, 9 Wall. 483, 19 L. Ed. 725, although the opinions of the Supreme Court of the United States in these cases contained expressions which, taken alone, might have been, and, indeed, were by some, interpreted to mean that an action on the coupons was not barred until an action on the bonds would be. Such was not, however, the true meaning of the decisions, as is clearly pointed out in *Clark v. Iowa City*, supra, and other cases. In view of all this, we think there is nothing in *Meyer v. Porter* to prevent this court from applying the rule supported by reason, as well as by overwhelming authority, viz., that, in the absence of some special circumstance to the contrary, the period of limitation of an action on coupons begins to run from the date of the maturity of the coupons.

But, says the appellant, if this be the true doctrine, there are provisions in the mortgage or deed of trust taking the present case out of the general rule. He points in the first place to article 10, reading as follows: "It is further provided and agreed that the party of the first part (Sierra Valleys Railway Company), for itself, its successors and assigns, doth hereby absolutely and irrevocably waive the benefit or advantage of any and all valuation, stay, appraisal or redemption law or laws, respecting liens or mortgages to be foreclosed by action or suit, and of all laws now existing or hereafter passed, which but for this provision would prevent the absolute and unconditional sale of the premises hereby conveyed, by a court or by the trustee, without suit. * * *"

This is claimed to constitute a waiver on the part of the debtor of the right to plead the statute of limitations. Assuming the effectiveness of such waiver, if the railway company had undertaken to make one, we do not find in the language quoted anything which purports to waive the defense in question. The provision is quite plain and has reference to matters not connected in any way with the statute of limitations.

The further point is made that under the terms of the instrument securing the bonds and coupons, the holder of coupons had no independent right to proceed by action to collect the amount of his coupons or to foreclose the security therefor. If this be so, the defense of the statute of limitations

would, of course, not be applicable, since a claim cannot be barred by limitation until the lapse of the statutory time after the claimant had a right to proceed by action to enforce his demand. *Swamp Land Dist. v. Glide*, 112 Cal. 85, 44 Pac. 451. But we cannot agree with the contention of appellant that the instrument does prevent the holder of an overdue coupon from proceeding to enforce his right to payment by an action of foreclosure.

In the absence of any provision to the contrary, default may be taken advantage of by the holder of a single bond or coupon. *Short on Law of Ry. Bonds, etc.*, §§ 376, 398; *C. & V. R. R. Co. v. Fosdick*, 106 U. S. 47, 27 L. Ed. 47. The provision principally relied on by the appellant to show that such right did not exist here is found in article 2, and is to the effect that in case of default in the payment of any bonds or interest coupons, and if such default shall continue for six months after demand and presentation for payment, "the whole principal sum mentioned for payment in all and each of said bonds shall at the option of the holders of a majority in interest of said bonds then outstanding, or at the option of the party of the second part (the trustee), forthwith become and be immediately due and payable, and the lien or incumbrance hereby created may be at once enforced. * * *" It is argued that this provision prevents a foreclosure except upon the motion of the trustee or of a majority of the bondholders. But this is not the true meaning of the clause. The purpose of this provision is to enable a majority in interest of the holders of bonds then outstanding, or the trustee itself, in case of default in the payment of interest for six months, to accelerate the maturity of the bonds, and to enforce the payment of the principal sum due, although the time provided in the bonds for their payment shall not have arrived. It is true that a holder of coupons alone or of less than one-half of the bonds could not so advance the time of maturity of the principal, but there is nothing in this clause to prevent the holder of an overdue coupon from proceeding by appropriate action (in the name of the trustee, or, in case the trustee should decline to act, by bill in equity making the trustee a party defendant) to realize upon the security. "The right of a coupon holder to foreclose for default in the payment of interest is not affected by a provision in the mortgage that, if the interest shall remain unpaid for a given period, the principal shall become due, and that the trustees may, and upon the written request of a majority in amount of the bonds shall * * * within a reasonable time proceed to foreclose the mortgage. Such a clause is operative as a restriction upon the coupon holder's right to bring suit, only when it is sought to take advantage of the waiver as advancing the date when the principal becomes due." *Short on Law of*

Ry. Bonds, etc., § 398; *Beekman v. Hudson R. & W. S. R. Co. (C. C.)* 35 Fed. 3. *Van Loo v. Van Aken*, 104 Cal. 269, 37 Pac. 925, is not in conflict with these views. In that case, the court held that the mortgage involved showed affirmatively that the parties intended that there should be no foreclosure until the maturity of the principal.

The appellant relies also upon the provision of article 8 as follows: "It is hereby further provided and agreed that no action shall be commenced or prosecuted against said Sierra Valleys Railway Company, party of the first part, upon any of the coupons annexed to said bonds or otherwise, at law or otherwise, except by the said trustee, unless the said trustee, after having been duly requested in writing, and having been fully indemnified as hereinafter provided, shall fail or neglect for three months so to do. * * *" It is apparent that this clause does not prevent the coupon holder from bringing an action. It expressly protects his right to do so in the event that the trustee shall, after proper demand made, fail for three months to bring an action. It is always in the power of the coupon holder to make such demand and he cannot by failure to make it extend indefinitely the period of limitation. It is true that his right of action is by this clause deferred for three months, after demand, and the statute should therefore not be held to run against him for this period after the maturity of the coupon. But allowing to the appellant the period of four years and three months after the maturity of each of the coupons sued upon, he would still, at the date of the commencement of this suit, have been too late to institute his action.

The appellant claims that the instrument providing security for the bonds and coupons is a deed of trust, rather than a mortgage, and from this promise draws the conclusion that the only sale that could be had was one by the trustee, rather than, as directed by the decree, one by a commissioner appointed by the court. We need not inquire whether this conclusion would follow, since we have no doubt that the instrument is to be construed as a mortgage. It is described in the bonds as a mort., ge. The instrument itself has no provision for reconveyance; it prescribes neither manner of nor notice for a sale by the trustee; it refers to "the lien or incumbrance hereby created"; and, in various references to its own terms and effects, used the expression "this mortgage." There appears to be no good reason for holding that the instrument was not a mortgage, as it purported to be. See *Earle v. Sunnyside Land Co.*, 150 Cal. 214, 227, 88 Pac. 920.

Finally, the appellant raises the point that the defense of limitation was waived by reason of the fact that the various cross-defendants did not raise this defense by demurrer, but set up the bar of the statute by answer.

The contention is that, under sections 433 and 434 of the Code of Civil Procedure, an objection specified in section 430 as ground of demurrer (except want of jurisdiction or failure to state facts), must, if it appears on the face of the complaint, be taken by demurrer, or be deemed to be waived. *Tingley v. Times-Mirror Co.*, 151 Cal. 1, 13, 89 Pac. 1007. If this be the rule, it is clear that the defense of limitation does not come within it. This defense is not specified in section 430 as a ground of demurrer. While defendants have been permitted to demur on the ground that the action was barred, the only subdivision of section 430 under which this ground of demurrer could be brought was that "the complaint does not state facts sufficient to constitute a cause of action." But, inasmuch as the statute of limitations is a special defense, personal in its nature, which may be waived or asserted, the party relying upon it must affirmatively set it up in his pleading. A demurrer merely stating that there is a want of facts will not suffice. *Brown v. Martin*, 25 Cal. 82; *Bliss v. Sneath*, 119 Cal. 526, 51 Pac. 848. Accordingly, there has grown up a practice, difficult, perhaps, to defend on logical grounds, of permitting a defendant to demur to a complaint on the ground that "it fails to state facts sufficient to constitute a cause of action, in this, that the alleged cause of action appears to be barred by the provisions of * * *." This is an exception to the general rule that no particular specification is required in a demurrer for want of facts. *Kent v. Snyder*, 30 Cal. 666, 672. But, notwithstanding the necessity for such particularity, the only ground of demurrer applicable is the failure to state facts sufficient, and this ground is, by the express provision of section 434, not waived by failure to demur. The true rule, under our practice, is, we think, that the defendant may, if the defect appears on the face of the complaint, set up the bar of the statute either by demurrer or by answer. If the complaint does not show that the statute has run, the defendant must plead his right by answer. In the present case, it appears that the cross-defendants did not demur at all, but came in at once and filed answers setting up the bar of the statute. It would be a harsh ruling to hold that, merely because they had claimed their privilege by answer rather than by demurrer, they had waived a defense which they had asserted at the earliest opportunity. We shall not so hold, inasmuch as the Code sections relied on by appellant do not require it.

The record presents no other points requiring notice.

The judgment is affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.

(158 Cal. 646)

In re CLAIBORNE'S ESTATE. (Sac. 1,864.) (Supreme Court of California. Nov. 28, 1910.)

1. WILLS (§ 577*)—PROVISIONS—EFFECT.

If a will is ineffectual to dispose of property, a provision thereof that testator desired his property should be considered and treated as community property could not be carried out; but the property would be regarded as community or separate property, according to the facts.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1257; Dec. Dig. § 577.*]

2. WILLS (§ 577*)—VALIDITY—EFFECT.

Testator, after revoking prior wills, provided that in the administration of his estate he wished all of his property to be treated and considered as community property, adding the clause, "So much of my will I make and declare this day to protect my wife, not yet having been fully advised of my further purposes," and then nominated executors. Held, that such will should be construed as a valid disposition of testator's property, giving to the wife such portion thereof as she would take under the law of succession, if the property was community property.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1257; Dec. Dig. § 577.*]

Department 1. Appeal from Superior Court, San Joaquin County; W. B. Nutter, Judge.

Judicial settlement of the estate of Gilbert B. Claiborne, deceased. From a decree of final distribution, certain heirs appeal. Affirmed.

Geo. F. Buck and J. M. Kile, for appellants. D. M. Young and J. P. Langhorne, for respondents.

ANGELLOTTI, J. This is an appeal from the decree of final distribution in the matter of the estate of Gilbert B. Claiborne, deceased. The deceased died testate, his will being as follows:

"I, Gilbert B. Claiborne, of the city of Stockton, California, do hereby make and declare this my last will and testament, hereby revoking and declaring void all wills and codicils to the same by me heretofore made. In the administration of my estate it is my wish that all property shall be considered and treated as community property.

"So much of my will I make and declare this day to protect my wife, not yet having been fully advised of my further purposes.

"I nominate and appoint Richard C. Minor, together with my wife, as executors and request that no bonds or undertakings be required of them or either of them.

"In witness whereof, I have written this wholly with my own hand and signed the same this 24th day of February, A. D. 1905, at Stockton, California.

"Gilbert B. Claiborne."

He left no descendants, and his only heirs at law were Marian F. Claiborne, his surviving wife, and the children of several deceased brothers. All the property left by deceased was his separate property. The

lower court determined that under the terms of the will the surviving wife was entitled to have distributed to her an undivided three-fourths of all the property, and that the children of the deceased brothers were entitled to the remaining one-fourth. From the decree made in conformity with this determination, some of said children have appealed, claiming that the surviving wife is entitled to only one-half of the property and that the children of the deceased brothers of deceased are entitled to one-half of the property.

The theory of appellants is that deceased died intestate so far as any distribution of his property by will was concerned; the claim being that the only effectual part of his will was the provision appointing executors, and that the property passed under the law of succession as separate property, one-half to the widow and one-half to the children of his deceased brothers. It is clear that, if the will was not effectual to dispose of the property, the claim of appellants must be held to be well founded; for, despite the declaration in the will of the wish of the testator that his property should be considered and treated as community property, such property would have to be regarded and treated by the courts as separate property if found to be such (*Estate of Learned*, 156 Cal. 309, 104 Pac. 315; *Estate of Granniss*, 142 Cal. 4, 75 Pac. 324), and under the law of succession the separate property of deceased would pass as claimed by appellants (Civ. Code, § 1386, subd. 2).

It appears very clear to us, however, that the will should be construed as giving to the wife such portion of the property as she would take under the law of succession if the property was community property, which would be, under the circumstances of this case, the death of the husband without descendants, three-fourths of all the property. *Estate of Boody*, 113 Cal. 682, 688, 45 Pac. 838; section 1402, Civ. Code. It is an elementary rule in the construction of wills that no particular words are essential to create a legacy or devise, and that the essential thing is that the intention of the testator to thereby make a testamentary disposition clearly appears. Where the will clearly shows such an intention, the courts will carry it into effect, if this can be done consistently with the rules of law applicable. For instance, in *Estate of Barclay*, 152 Cal. 753, 93 Pac. 1012, a provision devising the residue of real estate to certain named parties "after my son * * * has been paid what he has paid for me at various times" was held to clearly show a legacy to the son to the extent of the amount of money he had paid out for the testator. In the will before us the testator, after declaring that he is making his will, declares: "In the administration of my estate it is

my wish that all property shall be considered and treated as community property. So much of my will I make and declare this day to protect my wife, not yet having been fully advised of my further purposes." These are the only provisions of the will referring in any way to his property, and unless they are to be considered a testamentary disposition we have a case of total intestacy, a construction not to be favored if any other construction is reasonably possible. Civ. Code, § 1326; *Le Breton v. Cook*, 107 Cal. 410, 416, 45 Pac. 552. The theory of an intended testamentary disposition in favor of the wife is, in our judgment, the only reasonable theory that can be based on the language used. It cannot reasonably be denied, and learned counsel for appellants do not deny, that the will clearly shows the intention of the testator that his wife should be given on distribution such portion of his property as she would have taken if it were community property and he had died intestate.

This intention being made clearly to appear in the document which testator declares to be his will, we do not see that there is anything left to be said on behalf of appellants. The provision is as effectual as a testamentary disposition as it would have been had it read: "I give, bequeath, and devise to my wife so much of my property as she would have received if all my property was community property and I had died intestate." Learned counsel rely on the language, "So much of my will I make and declare this day to protect my wife, not yet having been fully advised of my further purposes," as showing lack of intent on the part of the testator to then fully dispose of his property; but, if we concede this to be so, the language certainly shows no lack of intent so far as disposition to the wife is concerned. It may be that, as to the one-fourth that was not to go to the wife, it could reasonably be held that there was no testamentary disposition. But as to the wife and the share she shall take there is no room for doubt as to the intention of the testator. Whatever might ultimately be done with the remainder, she was to have the portion already specified. Any other construction would make the act of the testator in executing the will an absolutely idle one so far as any protection to the wife was concerned. She would take under the will exactly what she would take without the will. But the will clearly shows the intention that she shall have something more than the portion she would take of the separate estate under the law of succession, and the amount that she shall take is clearly defined.

The decree appealed from is affirmed.

We concur: SHAW, J.; SLOSS, J.

(158 Cal. 699)

BRODE et al. v. GOSLIN et al. (L. A. 2,677.)
(Supreme Court of California. Dec. 1, 1910.)

1. APPEAL AND ERROR (§ 494*) — RECORD — BILL OF EXCEPTIONS.

On appeal from orders denying a new trial and refusing to vacate a judgment, the orders need not be contained in any bill of exceptions or statement, as, under Code Civ. Proc. §§ 951, 952, copies of the orders certified by the clerk, together with a copy of the notice of appeal, are sufficient to sustain the appeal, though appellant may not succeed without a bill of exceptions or statement.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 494.*]

2. APPEAL AND ERROR (§ 339*)—TIME TO APPEAL.

An appeal from an order denying a motion to vacate a judgment, taken within 60 days after the making of the order, as allowed by Code Civ. Proc. § 939, subd. 3, is in time.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1883-1887; Dec. Dig. § 339.*]

3. APPEAL AND ERROR (§ 351*)—TIME TO APPEAL.

Under Code Civ. Proc. §§ 941a, 941b, authorizing, as an alternative mode of appeal, a notice of appeal, to be filed within 60 days after notice of entry of the judgment or order, and providing that if no notice of entry is given, the notice of appeal must, under any circumstances, be filed within six months after entry of the judgment or order, an appeal taken April 6th, from an order denying a new trial made January 10th preceding, where a notice of entry of the order was not served, was taken in time.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 351.*]

4. APPEAL AND ERROR (§ 117*)—ORDERS APPEALABLE.

An appeal does not lie from the refusal of the trial judge to settle a bill of exceptions, on the ground that the same has not been presented within the time allowed by law.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 117.*]

5. APPEAL AND ERROR (§ 117*)—ORDERS APPEALABLE.

An order denying an application by a party who has failed to comply with the law in the presentation of his bill of exceptions, for relief under Code Civ. Proc. § 473, authorizing the court to relieve one from proceedings taken against him through his mistake, etc., is appealable.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 117.*]

6. EXCEPTIONS, BILL OF (§ 53*)—COMPELLING SETTLEMENT—PROCEEDINGS.

A party who has not complied with the law regulating the presentation of proposed bills of exceptions is not entitled to have his proposed bill settled, unless he is relieved by the court from his default, as authorized by Code Civ. Proc. § 473.

[Ed. Note.—For other cases, see Exceptions, Bill of, Dec. Dig. § 53.*]

7. EXCEPTIONS, BILL OF (§ 53*)—COMPELLING SETTLEMENT—MANDAMUS.

Where a party has complied with the law regulating the presentation of bills of exceptions, and the court erroneously concludes that he has not, and refuses to settle the bill proposed, on that ground, the exclusive remedy is mandamus to compel the settlement.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. §§ 80-88; Dec. Dig. § 53.*]

S. APPEAL AND ERROR (§ 655*) — RECORD — STRIKING MATTER FROM TRANSCRIPT—HEARING ON MERITS.

The court will not strike out matters from the transcript on the ground that the same are not contained in any bill of exceptions or statement, or authenticated in any manner allowed by statute or rules of the court, in advance of a hearing of the appeal on the merits; but if, on a consideration of the appeal, the matters are found to have no proper place in the record, they will be disregarded.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 655.*]

In Bank. Appeal from Superior Court, Los Angeles County; W. P. James, Judge.

Action by A. W. Brode and others against William G. Goslin, and others. From orders denying a motion for a new trial, and a motion to vacate the judgment, and refusing to settle the bill of exceptions, defendant, John G. Ritter, appealed. Respondents move to strike out certain matters contained in the transcript on appeal, and to dismiss the appeals. Motion to dismiss appeal from order refusing to settle bill of exceptions granted, and the other motions denied.

Randall & Gaines, for appellant. George H. Moore, for respondents.

ANGELLOTTI, J. Motion by respondents for an order striking out certain matters contained in the transcript on appeal, and also to dismiss appeals taken by defendant Ritter from an order denying his motion for a new trial, from an order denying his motion to vacate the judgment in said action, and from an order refusing to settle a bill of exceptions to be used on appeal.

The only grounds urged for the dismissal of the appeals from the order denying a new trial and the order denying the motion to vacate the judgment are that the appeals were not taken in time, and that the orders appealed from are not contained in any bill of exceptions or statement.

As to the latter ground. It is not necessary that the orders appealed from should be contained in any bill of exceptions or statement. Copies of the orders appealed from, certified by the clerk, together with a copy of the notice of appeal, are all that are requisite to sustain the appeal from such orders. Code Civ. Proc. §§ 951, 952. It may be that without a bill of exceptions or statement showing facts upon which error in making the orders is apparent, the appellant is not likely to succeed upon his appeal, but this goes to the question of the merits of the appeal and does not warrant a dismissal.

The order denying the motion to vacate the judgment was made February 21, 1910, and the appeal therefrom was taken April 6, 1910. This was within the 60 days allowed by subdivision 3, § 939, Code of Civil Procedure. The order denying a new trial was made January 10, 1910, and the appeal therefrom was not taken until April 6, 1910.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

which was more than 60 days from the making of the order. The record does not show, however, that notice of entry of said order was ever served on appellant's attorneys of record (see *Foss v. Johnstone*, 110 Pac. 294, 296), and it was expressly admitted at the argument of this motion that no such notice had ever been given. In view of the provisions relating to an alternative method of taking appeals, appellant had 60 days from the giving of such a notice within which to take an appeal, provided that the appeal must in any event be taken within 6 months. Code Civ. Proc. §§ 941a and 941b. The appeal therefore was in time.

The settlement of a proposed bill of exceptions was refused by the judge of the trial court on the ground that the same had not been presented within the time allowed by law. It is claimed that appeal is not the remedy for such a refusal, and, in view of the now well-established rule in this state, this claim must be held good. We are not dealing with the case of a denial of a party's motion for relief under section 473, Code of Civil Procedure, where he has failed to comply with the law in the matter of presenting his proposed bill of exceptions. It appears to be well settled that an order denying such an application is appealable. There was no such application for relief in this case, but only a mere refusal of the trial judge to settle the proposed bill. If appellant had not complied with the requirements of the law in the matter of the presentation of his proposed bill of exceptions, he was not entitled to have the same settled, unless relieved by the court from his default, under the provisions of section 473, Code of Civil Procedure. If he had complied with the law, and the trial judge erroneously concluded that he had not so complied, and therefore refused to settle the bill, such wrongful refusal is not the subject of an appeal, and the proper and exclusive remedy for such wrongful refusal is mandamus to compel the settlement. *Murphy v. Stelling*, 138 Cal. 641, 72 Pac. 176; *Whipple v. Hopkins*, 119 Cal. 349, 51 Pac. 535; *Machado v. Kinney*, 135 Cal. 354, 67 Pac. 331; *Hudson v. Hudson*, 129 Cal. 141, 61 Pac. 773; *Miller v. American, etc., Co.*, 2 Cal. App. 271, 274, 83 Pac. 289. See, also, *Landers v. Landers*, 82 Cal. 480, 23 Pac. 126; *Pendergrass v. Cross*, 73 Cal. 475, 15 Pac. 63; *Gay v. Torrance*, 145 Cal. 144, 78 Pac. 540.

Respondents also move for an order striking out and expunging from the transcript on appeal certain matters contained therein, which it is claimed cannot be considered on the appeal, because not contained in any bill of exceptions or statement, or authenticated in any manner allowed by statute or the rules of this court. This court cannot well entertain and consider motions of this character in advance of a hearing of the appeal

on its merits. If upon a consideration of the appeal it be found that the matters referred to have no proper place in the record, they will be disregarded.

The appeal from the refusal of the trial judge to settle appellant's proposed bill of exceptions is dismissed. In all other respects, respondents' motion is denied.

We concur: SHAW, J.; SLOSS, J.; LORIGAN, J.; MELVIN, J.; HENSHAW, J.

(158 Cal. 650)

PEOPLE v. GLASS. (Cr. 1,535.)

(Supreme Court of California. Nov. 30, 1910.)

1. INDICTMENT AND INFORMATION (§ 154*) — DEFECTS—WAIVER—FAILURE TO DEMUR.

Under Pen. Code, § 1012, all defects appearing on the face of the indictment, save want of jurisdiction over the subject-matter, and that the facts stated do not constitute a public offense, are waived, unless the indictment be attacked for such defects by demurrer.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 501; Dec. Dig. § 154.*]

2. CRIMINAL LAW (§ 970*)—MODE OF OBJECTION—MOTIONS—ARREST OF JUDGMENT.

While, under Pen. Code, § 1185, defects in the indictment waived by failure to demur cannot be made a ground for arrest of judgment, the same objections that may be raised by demurrer may also be raised on motion in arrest of judgment if not waived by failure to demur.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2445-2462; Dec. Dig. § 970.*]

3. CRIMINAL LAW (§ 1088*)—APPEAL—RECORD—DEMURRER—STATUTES—CONSTRUCTION.

Pen. Code, § 1207, provides that when judgment on a conviction is rendered the clerk must enter the same in the minutes, and must, within five days, annex together and file the following papers, which constitute a record of the action: "The indictment or information, and a copy of the minutes of the plea or demurrer. Held that, there being no such thing as a minute of the demurrer, the word "and" must be substituted for "or," the statute meaning that the record must contain the indictment or information, the demurrer and a copy of the minutes of the plea, etc., therefore, on such judgment the demurrer need not be contained in a bill of exceptions.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1088.*]

4. BRIBERY (§ 6*)—INDICTMENT—SUFFICIENCY.

Under Pen. Code, § 165, punishing one offering a bribe to any member of any board of supervisors, etc., with intent to corruptly influence such member, etc., an indictment charging defendant with giving one L. a bribe, with intent to corruptly influence said L. as such member of said board of supervisors in his action, etc., as such member of said board, etc., necessarily carried with it the fact of knowledge in defendant that L. was a member of the board, and an express allegation that defendant knew that L. was a member of the board was unnecessary.

[Ed. Note.—For other cases, see Bribery, Cent. Dig. §§ 5-8; Dec. Dig. § 6.*]

5. INDICTMENT AND INFORMATION (§ 110*) — SUFFICIENCY — FOLLOWING STATUTE — "BRIBE"—"UNLAWFULLY"—"CORRUPTLY."

Pen. Code, § 7, subd. 6, defines the word "bribe" as anything of value or advantage, etc.,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

given with a corrupt intent to influence "unlawfully" the person to whom it is given in his action, vote, etc., in any public or official capacity. Section 165 punishes one giving a bribe to any member of any board of supervisors with intent to "corruptly" influence such member in his action on any matters, etc. *Held*, that the use of the word "unlawfully" as qualifying "to influence" in section 7, adds nothing to the meaning of section 165, and hence an indictment for bribery charging an intent to "corruptly" influence, etc., by giving money, etc., was sufficient, though the word "unlawfully" was not used.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 5; Dec. Dig. § 110.*]

For other definitions, see Words and Phrases, vol. 1, p. 867; vol. 2, p. 1630; vol. 8, pp. 7191-7193.]

6. BRIBERY (§ 6*)—INDICTMENT—SUFFICIENCY.

Under Pen. Code, § 950, subd. 2, requiring an indictment to contain a statement of the acts constituting the offense in ordinary language so that a person of common understanding could know what was intended, and section 959, subd. 6, substantially to the same effect, an indictment for bribery charging that on a certain day one L. was a member of the board of supervisors of the city and county of San Francisco; that there was then pending before said board a matter relating to a franchise for constructing, etc., a telephone system in said city and county, and an application made by the H. Telephone Company, and a bill and ordinance relating to the same, etc.; that on said day defendant did unlawfully, etc., give said L. as a bribe \$5,000 with the corrupt intent to corruptly influence said L. as such member, etc., in his action and in his official vote in the aforesaid matter, etc.—was sufficient.

[Ed. Note.—For other cases, see Bribery, Cent. Dig. §§ 5-8; Dec. Dig. § 6.*]

7. BRIBERY (§ 6*)—INDICTMENT—SUFFICIENCY.

Under Pen. Code, § 165, punishing one who bribes, etc., a member of certain boards with intent to corruptly influence such member in his action on any matter before such board, an indictment showing that defendant gave a bribe with intent to influence L. in his vote and action as a member of the board of supervisors of, etc., on an application for a telephone franchise, sufficiently showed that the act intended to be influenced was an official one, the court knowing as a matter of law that such board may grant such franchises, and a vote by a member of the board on such an application being therefore necessarily an official act, though it did not specifically state what acts L. was to do or not to do.

[Ed. Note.—For other cases, see Bribery, Cent. Dig. §§ 5-8; Dec. Dig. § 6.*]

8. CRIMINAL LAW (§ 369*)—EVIDENCE—OTHER OFFENSES—COLLATERAL FACTS.

The rule that evidence of the commission of a different offense cannot be admitted in proof of the offense for which defendant is on trial excludes all evidence of collateral facts or matters which are incapable of offering a reasonable presumption or logical inference as to the principal fact or matter in dispute.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 822-824; Dec. Dig. § 369.*]

9. BRIBERY (§ 10*)—EVIDENCE—MOTIVE—INTENT.

In a trial of defendant for bribing one L., a member of the board of supervisors, with intent to influence his official action in the matter of granting a franchise to the H. Telephone Company, evidence that defendant or the company of which he was general manager attempted to prevent a rival company from obtaining a franchise in another city, and at-

tempted to forestall competition in such city, tended only to degrade defendant and was inadmissible for the purpose of showing motive or intent.

[Ed. Note.—For other cases, see Bribery, Cent. Dig. § 9; Dec. Dig. § 10.*]

10. CRIMINAL LAW (§ 371*)—EVIDENCE—OTHER OFFENSES—MOTIVE.

While evidence as to offenses other than the one for which defendant is on trial may be given to show motive, the motive must grow out of the collateral crime, it not sufficing that both crimes spring from the same motive.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 830-832; Dec. Dig. § 371.*]

11. CRIMINAL LAW (§ 1169*)—APPEAL—HARMLESS ERROR.

Error, if any, in the admission of evidence was harmless, where accused was not prejudiced thereby.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3137-3143; Dec. Dig. § 1169.*]

12. CRIMINAL LAW (§ 338*)—EVIDENCE—CIRCUMSTANTIAL EVIDENCE.

Where circumstantial evidence is relied on to connect a defendant with a crime, much must be left to the discretion of the trial court in admitting it, and it is not necessary that each circumstance of itself would to every person appear to connect defendant with the offense, it sufficing if such circumstances, considered in relation to other facts and circumstances in evidence, may fairly tend to such result.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 753; Dec. Dig. § 338.*]

13. BRIBERY (§ 7*)—ISSUES, PROOF, AND VARIANCE.

Under an indictment charging the payment of \$5,000 as a bribe, proof of the payment of such sum in two payments under an agreement to pay and to receive \$5,000 presents no question of variance as to the thing paid as a bribe.

[Ed. Note.—For other cases, see Bribery, Dec. Dig. § 7.*]

14. CRIMINAL LAW (§ 369*)—EVIDENCE—COLLATERAL MATTERS—OTHER OFFENSES—EVIDENCE TENDING TO DEGRADE.

The rule excluding evidence as to other offenses in criminal trials also exclude all evidence tending to degrade defendant, to arouse the prejudice of the jury, to divert their minds from the real issues in the case, or to persuade them by matters not judicially cognizable that defendant for reasons other than those contained in legitimate evidence was more likely to have committed the offense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 822-824; Dec. Dig. § 369.*]

15. BRIBERY (§ 10*)—EVIDENCE.

In a trial for bribing one L., a member of the board of supervisors, with intent to influence his official action in an application for a franchise for the H. Telephone Company, a witness testified that one R. was the boss of the board of supervisors, with a representative thereon who had distributed money to members of the board with reference to another ordinance, but it appeared that R. was not employed by defendant in furtherance of the conspiracy to bribe the supervisors regarding the H. Company, that he took no part in the matter of their bribery, and that his services were actually enlisted in behalf of an opposition company, testimony tending to show that defendant was responsible for the employment of R. by such company was inadmissible, its purpose being to degrade defendant and prejudice him in the eyes of the jury.

[Ed. Note.—For other cases, see Bribery, Dec. Dig. § 10.*]

16. CRIMINAL LAW (§ 372*)—EVIDENCE—OTHER OFFENSES.

In a trial for bribing one L., a member of the board of supervisors, with intent to influence his official vote on an application for a franchise, evidence that 10 of L.'s fellow members of the board were bribed in the same manner and by the same person as L. was admissible, to show that the specific act of bribery charged was but a part execution of a scheme contemplating the bribery of a sufficient number of supervisors to prevent the granting of the franchise.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 833; Dec. Dig. § 372.*]

17. CRIMINAL LAW (§ 673*)—TRIAL—INSTRUCTIONS—LIMITATION OF EVIDENCE.

In a bribery case, where certain evidence was admissible only to show that the specific act of bribery charged was but a part execution of one conspiracy, it was error to refuse to instruct that the evidence was received for such purpose only, and that it could not be considered to show that defendant probably committed the crime charged by showing that at other times he had committed like crimes.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1597, 1872-1876; Dec. Dig. § 673.*]

18. CRIMINAL LAW (§ 673*)—EVIDENCE—OTHER OFFENSES — INSTRUCTIONS — LIMITING PURPOSE FOR WHICH RECEIVED.

When evidence of other crimes is admitted it should be carefully guarded by instructions so that its operation may be confined to the legitimate purposes for which it is competent.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1597, 1872-1876; Dec. Dig. § 673.*]

19. CRIMINAL LAW (§ 788*)—TRIAL—WITNESSES — REFUSAL TO TESTIFY — INSTRUCTIONS.

In a bribery trial, where the closing argument of the prosecuting attorney was calculated to impress on the jury that the evidence a witness refused to give would have tended to convict defendant, and that the witness' refusal to tell what he knew was to protect crime, it was error to refuse instructions that the jury could not indulge in any presumption unfavorable to defendant because of the refusal of any witness to testify, and that the refusal of an alleged co-conspirator or agent of the conspiracy to testify should not be considered in determining the guilt or innocence of defendant, and the jury should not presume from such refusal that the testimony of the witness, if given, would be against the defendant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1855; Dec. Dig. § 788.*]

20. CRIMINAL LAW (§ 735*)—TRIAL—INSTRUCTIONS—"FEARS OR HOPES."

In a criminal case, where the court read to the jury Code Civ. Proc. § 1847, providing that the presumption that a witness speaks the truth may be repelled by the manner in which he testifies, etc., or by evidence affecting his character for truth, honesty, or integrity, or his motives, etc., it was not error to refuse an instruction that in passing on the credibility of witnesses the jury may consider their motives, fears or hopes, if any have been proved, "fears or hopes," but expressing a modification of "motives," and adding nothing to the meaning of the section.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1774-1781, 1889-1894; Dec. Dig. § 785.*]

Shaw and Angellotti, JJ., dissenting. Sloss, J., dissenting in part.

In Bank. Appeal from Superior Court, City and County of San Francisco; William P. Lawlor, Judge.

Louis Glass was convicted of bribery, and from the judgment and an order denying a new trial, he appealed to the District Court of Appeal. Judgment and order reversed, and cause remanded for new trial, and on rehearing in the Supreme Court in bank, the same disposition of the case was made.

See, also, 99 Pac. 553.¹

The opinion of Hall, J. (concurred in by Cooper, P. J., and Kerrigan, J.), in the District Court of Appeal, was as follows:

Defendant was charged by indictment with the crime of bribery, under section 165 of the Penal Code, and having been convicted of the charge he has appealed to this court from the judgment and the order denying his motion for a new trial. After his conviction, and before judgment was pronounced, the defendant made a motion in arrest of judgment, which was by the court denied. As this motion attacked the sufficiency of the indictment, it is proper that the ruling of the court thereon be first considered on this appeal.

The motion was based upon certain defects or alleged defects in the indictment. In this connection it is insisted by respondent that in the condition of the record in this case, this court can only consider whether or not the court had jurisdiction over the subject-matter of the indictment, and whether or not the indictment states facts sufficient to constitute a public offense. Sections 1012, 1185, Pen. Code. No demurrer is contained in the bill of exceptions, and the transcript as originally filed in this court did not, in the judgment roll, or "record of the action," as it is denominated in the statute (section 1207, Pen. Code) contain the demurrer. Upon suggestion of diminution of the record, this court permitted appellant to file a certified copy of the demurrer, reserving, however, for determination at the final hearing the question as to whether or not such demurrer may be properly considered as a part of the record on this appeal. All defects appearing upon the face of the indictment, save want of jurisdiction of the court over the subject-matter of the indictment, and that the facts stated do not constitute a public offense, are waived unless the indictment be attacked, for such defects, by demurrer. Section 1012, Pen. Code. Defects, waived by failure to demur, cannot be made a ground for arrest of judgment, but the same objections that may be raised by demurrer may also be raised on motion in arrest of judgment if not waived by a failure to demur. Section 1185. It is thus apparent that it is important for this court to be informed as to the contents of the

¹ Reported in full in the Pacific Reporter; reported as a memorandum decision without opinion in 9 Cal. App. xiii.

demurrer, in order to determine whether or not the court erred in overruling the motion in arrest of judgment. The proper scope of the motion depends upon what objections were raised by the demurrer.

Respondent contends that the demurrer is no part of the record on appeal, and cannot be considered by this court unless contained in a bill of exceptions; citing *People v. Long*, 121 Cal. 494, 53 Pac. 1097, *People v. Druffel*, 3 Cal. App. 731, 86 Pac. 907, and sections 1172 and 1174, Pen. Code. On the other hand, appellant insists that the cases cited have no application to a case where a judgment on conviction is rendered, and that under section 1207, Pen. Code, the demurrer in such case is a part of the record of the case, and as such must be transmitted to the appellate court after the taking of the appeal. Section 1246, Pen. Code.

In *People v. Long*, supra, the appeal was by the people from an order sustaining defendant's demurrer, and ordering that the case be resubmitted to the grand jury. There had been no judgment of conviction rendered, and the court pointed out that the minute entry of the order sustaining a demurrer could get into and become a part of the record on appeal only by virtue of section 1207. The court simply held that where there has been no judgment of conviction "the statute does not provide for a judgment roll or a record of any kind, except through a bill of exceptions." (Italics are ours.) The court did not attempt to determine in the *Long* Case what shall constitute the "record of the case," or the "judgment roll," as it is usually called by the profession, when a judgment of conviction has been rendered.

The case of *People v. Druffel*, supra, decided by this court, was, like the *Long* Case, an appeal by the people upon demurrer sustained, and perforce this court simply followed the doctrine of the *Long* Case.

On the other hand, *People v. McPherson*, 6 Cal. App. 266, 91 Pac. 1098, was an appeal by defendant after judgment rendered on a conviction, and the court there pointed out that the doctrine of *People v. Long*, supra, has no application to such a case, and proceeded to examine and pass upon the ruling upon the demurrer, although the same was not contained in any bill of exceptions, but appeared in the judgment roll only.

Section 1207 of the Penal Code provides that: "When judgment upon a conviction is rendered, the clerk must enter the same in the minutes, * * * and must within five days annex together and file the following papers, which constitute a record of the action:

"1. The indictment or information, and a copy of the minutes of the plea or demurrer;

"2. A copy of the minutes of the trial;

"3. The written instructions given, modified or refused, with the indorsements thereon, and the certified transcript of the charge of the court; and

"4. A copy of the judgment."

It is the meaning of the language of subdivision 1 that is involved in this matter. It is contended by respondent that the word "demurrer" should be read as qualified by "a copy of the minutes of the." In other words, that the subdivision may be properly paraphrased thus: "The indictment or information, and a copy of the minutes of the plea or (and) a copy of the minutes of the demurrer." It may be that this meaning does conform most nearly to the strict grammatical construction of the clause, and yet we do not think it correctly gives the meaning of the clause as intended by the Legislature. It is perfectly obvious, we think, that the word "and" must be substituted for the word "or." It is hardly conceivable that the Legislature intended to invest a clerk, a ministerial officer of the court, with a discretion to select either a copy of the minutes of the plea, or "a copy of the minutes of the demurrer," as making a part of the record of the action. And yet this conforms strictly to the grammatical construction of the clause. "And" must be substituted for "or." What is meant by the word "demurrer," and by what, if any, words it is qualified, must be determined by the entire section, read in the light of its manifest purpose, and other provisions of the law bearing upon the subject.

The primary purpose of this section is evidently to cause to be annexed together, and thus preserved in the form of a judgment roll, such papers as shall show what issues were presented for determination, and the result of such determination. The first pleading in a criminal action, brought in the superior court, is the indictment or information, which must be in writing. The original indictment under section 1207, Pen. Code, clearly becomes part of the judgment roll. The next pleading is the demurrer, and this also must be in writing. The demurrer must be in writing and filed. Section 1005, Pen. Code. Strictly speaking, there is no such thing as a minute of the demurrer. It speaks for itself. Doubtless the clerk must enter in his minutes the fact of its presentation and filing and the action of the court thereon. Section 1007, Pen. Code. But none of these minute entries can in strictness be properly called a minute of the demurrer. There is no such thing as a minute of the demurrer. The demurrer speaks for itself.

The next pleading is the "plea," and may be of four kinds (section 1016, Pen. Code), and is not in writing, but must be oral, and entered upon the minutes of the court in certain prescribed forms. Section 1017, Pen. Code. The form of each plea that may be made to an indictment being given by the statute, the clerk can have no difficulty in making the proper minute entries. The pleas being oral, the only way they can become a part of the judgment roll is by putting into the judgment roll a copy of such minutes. These in connection with the indictment or

information, show what issues of fact were presented for determination. On the other hand, as the demurrer, like the indictment, must be in writing and filed with the clerk, there is no reason why it may not be, like the original indictment, put into the judgment roll as an original document, and thus, in connection with the indictment, show what issues of law were presented for determination. We think that such is the meaning and purpose of the section under discussion. To so hold does not entail any great departure from the strict grammatical meaning of the language employed, and produces a result reasonable and consistent with the manifest purpose of the section read as a whole. Certain it is that when the Legislature provided that the clerk should annex together and file "The indictment or information, and a copy of the minutes of the plea or (and) demurrer," it intended that some document relating to the demurrer should be annexed and filed as a part of the judgment roll. It could not have meant "a copy of the minutes of" the demurrer, for, as we have seen, the law makes no provision for any minutes of the demurrer. There are minutes of the plea expressly required to be entered, but there are, properly speaking, no minutes of the demurrer provided for. The demurrer must, like the indictment, be in writing and filed. The minute entry of the action of the court allowing or disallowing the demurrer (section 1007, Pen. Code), is in no proper sense a minute of the demurrer.

While the legislative purpose is clumsily expressed, we are satisfied that it is sufficiently clear that the record of the action, or judgment roll, as it is commonly called, should contain the indictment or information, the demurrer, and a copy of the minutes of the plea, together with the other papers provided for in subdivisions 2, 3 and 4 of section 1207, Pen. Code. To read the word "demurrer" in section 1207 as qualified by "a copy of the minutes of the" would be to convict the Legislature of requiring the clerk to put something into the judgment roll that has no existence under the law, for, as we have before said, there can be no "minutes of the demurrer." There may, however, be a demurrer, and it is this that the law intends shall be annexed to the indictment, and form a part of the record of the action.

We do not think there is anything in sections 1172, 1173, and 1174, Pen. Code, that militates against the conclusion we have reached as to the scope of section 1207, Pen. Code. Sections 1172 and 1173 enumerate seven classes of decisions of the court to which exceptions may be reserved, among which are the decision of the court in allowing or disallowing a demurrer, or in granting or refusing a motion in arrest of judgment. Section 1174 fixes the time and the procedure for the settlement of a bill of exceptions upon any of these decisions, but throw no light upon what matters become a

part of the "record of the case" without being included in the bill of exceptions. This is provided for by section 1207, under which, as we have shown, the indictment, the demurrer, and the plea, as set forth in the copy of the minutes of the plea, are a part of the record of the case.

This brings us to the consideration of the action of the court in denying defendant's motion in arrest of judgment. This motion is set forth in the bill of exceptions, and was based upon the same objections to the indictment as were made by the demurrer appearing in the judgment roll. It thus appears that none of the objections raised on the motion had been waived by a failure to raise such objections by demurrer. Section 1185, Pen. Code.

The indictment is framed under section 165 of the Penal Code, and, omitting the formal parts, is as follows: "That on the 15th day of March, A. D. 1906, one Thomas F. Lonergan was, and at all times herein mentioned has been, a duly elected, qualified and acting member of the board of supervisors of the said city and county of San Francisco, state of California; that there was then and there pending before the said board of supervisors a matter and subject relating to a franchise for constructing, maintaining and operating a telephone system in the said city and county of San Francisco, and an application made June 12, 1905, by the Home Telephone Company of San Francisco, a corporation, for such franchise, and a bill and ordinance relating to the same, which said ordinance was on the 1st day of October, 1906, passed and adopted by the said board of supervisors, and was entitled an Ordinance 'Granting to the Home Telephone Company of San Francisco a franchise to construct, maintain and operate a telephone system in the city and county of San Francisco, and to construct, maintain and operate through, along, under and in the public streets, alleys and highways of said city and county poles, wires, cables, underground conduits and other appliances for the purpose of transmitting sound, signals and conversation by means of electricity or otherwise;' that on the said 15th day of March, A. D. 1906, at the said city and county of San Francisco, state of California, and while the said matter and subject were pending before the said board of supervisors, the said Louis Glass did willfully, unlawfully, feloniously and corruptly give to said Thomas F. Lonergan, while the said Lonergan was such member of the said board of supervisors, a bribe, to wit, the sum of five thousand (\$5,000) dollars, in lawful money of the United States of America, as a bribe, with the willful, unlawful, felonious and corrupt intent in him, the said Louis Glass, to corruptly influence said Thomas F. Lonergan as such member of said board of supervisors, in his action, and in his official vote, opinion, judgment and action, as such member of said board of

supervisors, in and upon the aforesaid matter and subject then pending before said board of supervisors as aforesaid, and which was afterward to be considered, and was considered, by said board of supervisors," etc.

It is first objected that it is not alleged that defendant knew that Lonergan was a member of the board of supervisors. The statute under which the indictment was drawn (section 165, Pen. Code) does not expressly require that the defendant know the person bribed to be a member of any board of supervisors. The language of the statute in this regard is "with intent to corruptly influence such member in his action on any matter or subject pending before, or which is afterward to be considered by, the body of which he is a member." The language of the indictment carefully follows this language of the statute, and we think is all that is required in this respect.

The allegation of the indictment that the bribe was given to Lonergan by defendant "with intent in him, the said Louis Glass, to corruptly influence said Thomas F. Lonergan, as such member of said board of supervisors, in his action, and in his official vote, opinion, judgment and action, as such member of said board of supervisors," necessarily carries with it the fact of knowledge in Glass that Lonergan was a member of such board. To a person of common understanding, when it is charged that a defendant gave money to a member of a board of supervisors with intent to influence him as such member of said board of supervisors in his official vote, judgment, and action as such member of said board of supervisors, it clearly appears that said defendant knew such person to be a member of said board. This is the view taken of a similar allegation, drawn under a similar statute, in *State v. Dankwardt*, 107 Iowa, 704, 77 N. W. 495. The case of *State v. Howard*, 66 Minn. 309, 68 N. W. 1096, 34 L. R. A. 178, 61 Am. St. Rep. 403, does support the contention of defendant, but though it was cited in *State v. Dankwardt*, supra, it was not there followed. Neither do we think it should be followed. The other cases cited by defendant on this point are cases for uttering forged instruments, assaults on public officers, and the like, where there was nothing in the indictment that necessarily or at all imported knowledge on the part of the defendant of the forged character of the instrument, or the official character of the person assaulted. In the case at bar the language of the indictment not only follows the language of the statute, but, to a person of common understanding, necessarily imports knowledge on the part of the defendant of the official character of the person bribed.

It is next urged that the indictment fails to state an offense because it is not alleged that the money was given to influence "unlawfully" said Lonergan as such member of said board. The language of the indictment is "with the willful, unlawful, felonious and corrupt intent in him, the said Louis Glass, to

corruptly influence said Thomas F. Lonergan," etc. This fully covers the language of section 165, Pen. Code, which is: "Every person who gives or offers a bribe to any member of any * * * board of supervisors * * * with intent to corruptly influence such member in his action on any matter," etc. The word "unlawfully" is not used in this section to qualify the verb "to influence," but the word "corruptly" is used instead. But this section does not specify of what the bribe may consist, and appellant points to subdivision 6 of section 7, Pen. Code, as defining "bribe." It is there said: "The word 'bribe' signifies anything of value or advantage, present or prospective, or any promise or undertaking to give any, asked, given or accepted with a corrupt intent to influence, unlawfully, the person to whom it is given, in his action, vote or opinion, in any public or official capacity." It is manifest that the principal and particular purpose of this provision of the statute was to define the word "bribe" used as a noun, and to indicate what things may be given or accepted as a bribe. Section 165 relates particularly to the bribery of members of boards of supervisors and similar boards. The use of the word "unlawfully" as qualifying "to influence" in subdivision 6 of section 7, adds nothing to the meaning of section 165. It is inconceivable that any officer may be corruptly influenced in his official action by the giving to him of money without unlawfully influencing him. If defendant had the intent to corruptly influence Lonergan, as a member of the board of supervisors, by giving him money, he had the intent to unlawfully influence him in so doing. There can be no corrupt influencing of a member of a board of supervisors in his official action, by the giving to him of money, which is not an unlawful influencing of such member. There can be no intent to corruptly influence an officer in his official capacity, by giving to him money, that is not an intent to unlawfully influence such officer in such action. The contention of appellant upon this point cannot be sustained.

The indictment is also attacked for uncertainty in several particulars. Under this head it is claimed that it does not state with certainty what matter and subject was then pending before the board of supervisors, or with what intent the bribe is alleged to have been given. While the indictment in this regard is not a model to be commended, we think that from the language of the indictment any person of common understanding would know that an application, made June 12, 1905, by the Home Telephone Company of San Francisco, a corporation, for a franchise for constructing, maintaining, and operating a telephone system in the said city and county of San Francisco, was pending before said board, and that the bribe was given with intent to influence said Lonergan in his action as a member of said board on said application, and in this respect the indictment is suf-

ficient. Section 950, subd. 2, Pen. Code; section 959, subd. 6, Pen. Code; *People v. King*, 125 Cal. 370, 58 Pac. 19. It is equally clear that the indictment charges that the matter in regard to which the offense was committed was not only then pending, but was afterwards to be considered. A matter may be "to be afterwards considered" that is pending at a given time.

It is next urged that the indictment fails to state what acts Lonergan was to do or omit to do. In considering this objection it may be well to examine the statute with care. It is divided into two parts—the first is directed against a person who bribes or offers a bribe to a member of certain designated boards, with intent "to corruptly influence such member in his action on any matter or subject pending before, or which is afterwards to be considered by, the body of which he is a member." It appears from the indictment that the bribe was given with the intent to influence Lonergan in his vote and action as a member of said board of supervisors on the described application for the described franchise, and, we think, sufficiently shows that the act intended to be influenced was an official act. We know as a matter of law that the board of supervisors of the city and county of San Francisco has jurisdiction to grant franchises to maintain and operate telephone systems in said city and county. A vote by a member of said board as such on an application therefor would necessarily be an official act. To require the pleader to state with extreme particularity the manner in which it was intended that the person bribed should act or vote in such cases as this would often defeat the purposes of the act. In the case of *People v. Ward*, 110 Cal. 369, 42 Pac. 894, cited by appellant, the defect in the indictment was that it charged that defendant did give a "bribe," without in any way specifying in what the bribe consisted. The indictment thus failed to state the facts as to the bribe, in accordance with subdivision 6 of section 7, and it was for this defect that the indictment was held to be bad. No such defect appears in the indictment in the case at bar. The motion in arrest of judgment was properly denied.

Over the objections of appellant the court permitted the prosecution to introduce evidence as to acts and doings of the Home Telephone Company of Oakland and its officers and agents. The effect of this evidence was to show that in 1902 one Mr. Beasley, an attorney of San Jose, acquired a franchise to operate and maintain a telephone system in the city of Oakland, where the Pacific States Telephone & Telegraph Company, of which defendant was vice president and general manager, had a telephone system, operated in connection with its system throughout the state; that Beasley was induced to procure such franchise by one Halsey, who was a general agent of said Pacific States

Telephone & Telegraph Company. This franchise was eventually assigned to the Home Telephone Company of Oakland. All the expenses of this telephone company, amounting to from \$12,000 to \$15,000, were furnished by Mr. Halsey. The evidence tended to show that the purpose of organizing this company, and procuring such franchise, was to forestall competition and opposition to the Pacific States Telephone & Telegraph Company.

Also, over the objection of appellant, the court permitted the prosecution to introduce a large amount of evidence in regard to proceedings had before the city council of the city of Oakland in the matter of the application of the Home Telephone Company of Alameda county to obtain a franchise for a telephone system in the city of Oakland. This evidence tended to show that the Pacific States Telephone & Telegraph Company, through its employees and an attorney employed for that purpose, opposed such application, and that its president, Mr. Sabin, who died before the bribery charged in this case occurred, signed a statement, which was read before the city council of Oakland, objecting and protesting against the granting of a franchise to the Home Telephone Company of Alameda county. At the instance of the local attorneys of the two companies a visit was made by certain members of the city council of Oakland to the city of Los Angeles, to examine the operations and workings of the different systems used in that city, and the expenses of such trip were borne equally by the two companies. It was shown that Mr. Glass met two of the councilmen of the city of Oakland at a lunch, arranged by the attorney of the Pacific States Telephone & Telegraph Company, and explained to them the merits of the system of his company (the manual system) over the system of the other company (the automatic system). Much other testimony concerning the Oakland proceedings was given over the objection of appellant. It is not suggested by any one that any of the proceedings in Oakland involved any criminal act by any person. Appellant does contend, however, that it was all irrelevant to the offense charged against defendant, and for which he was on trial, to wit, the bribery of Lonergan, as a member of the board of supervisors of the city and county of San Francisco, and for that reason should not have been permitted. It appears to us to be so. As a general rule, evidence of the commission of a different offense cannot be admitted in proof of the offense for which the defendant is on trial, and this rule excludes all evidence of collateral facts or matters which are incapable of offering a reasonable presumption or logical inference as to the principal fact or matter in dispute. *People v. Lane*, 100 Cal. 379, 34 Pac. 856; *People v. Hurley*, 126 Cal. 351, 58 Pac. 814; *People v. Sharp*, 107 N. Y. 427, 14 N. E. 319, 1 Am.

St. Rep. 851; *People v. Tucker*, 104 Cal. 440, 38 Pac. 195.

People v. Sharp, supra, is a very pertinent case in support of the contention of appellant. In that case the defendant was on trial for giving a bribe to a member of the common council of the city of New York, with intent to influence him as such member regarding an application for a franchise to construct a street railway desired by defendant. The trial court allowed evidence of an attempt to bribe an attaché of the Legislature concerning a bill that would eventually aid him in procuring the franchise concerning which he was charged with bribing the New York councilman, or, as stated in the argument addressed to the court: "Jacob Sharp was accused and brought to trial for bribing the aldermen of the city of New York, and by that means procuring the grant of a valuable right. Evidence was offered to show that not long before he had attempted to bribe another official person to do an act which, as he thought, would promote the scheme which he had so long pursued." The court held the action of the trial court to be error.

The case of *People v. Hurley*, 126 Cal. 351, 58 Pac. 814, is also a bribery case. Defendant was a member of a nominating convention, and was charged with offering to receive a bribe from one Imrie to vote for him for the nomination for school superintendent. The court allowed evidence that he offered to accept a bribe as a member of the same convention from another candidate for the same office, and for this error alone the judgment was reversed. The court said: "The court erred in receiving the testimony. There was no connection between the interview with Miss Thompson and that with Mr. Imrie. The only effect would be to show that he was likely to ask other candidates for a consideration for his vote or influence, or, as said by the district attorney, 'it will tend to show whether or not he approached this other candidate'; but if it had that tendency it was only because he had shown himself capable of perpetrating such offenses. There is no necessary or logical connection between the two cases." So in the case at bar, there is no necessary or logical connection between the fact that defendant, or the company of which he was general manager, attempted to prevent a rival company from obtaining a franchise in Oakland, and that he or his company attempted to forestall competition in Oakland, and the offense charged that he bribed a member of the board of supervisors of the city and county of San Francisco to prevent a rival company from getting a franchise in the city and county of San Francisco.

The attorneys for the prosecution concede that the evidence did not tend to show that the defendant committed any crime in connection with the attempt to forestall and prevent competition in Oakland, but they

claim that the evidence was admissible for the purpose of showing defendant's motive. To this we cannot agree. By no reasonable hypothesis can it be said that the proceedings in Oakland furnish or prove a motive for the bribery of Lonergan. There was no causal connection between the two proceedings. Undoubtedly the primary motive for the several different proceedings was the same, to wit, the advancement of the interests of defendant's company by preventing competition. But the connection between such motives is no different from the connection that exists between the motives for several distinct larcenies committed by the same person, the motive in each case being pecuniary gain for the perpetrator of the larcenies. The defendant had the right to be tried upon the issue made by the indictment and his plea of "Not guilty," and to have all irrelevant and immaterial matters excluded from the jury, as its only effect would be to cloud the issue and injure defendant. The rule that the evidence shall be confined to the point in issue is elementary even in civil cases. In criminal cases, where the liberty of the defendant is involved, and where collateral matters often influence the jury, the necessity for the rule is much stronger. The defendant is expected to come into court prepared to meet the charge in the indictment, but cannot expect to be prepared with evidence as to any collateral matter. The rule is well established that such evidence is not admissible unless it conduces to the proof of a pertinent hypothesis which, if sustained, would logically influence the issue. To admit evidence of collateral matters that do not tend to prove either the issue, the motive, the guilty knowledge, or the probability of a theory, or the identity of the defendant, would be but to oppress the defendant by trying him on a case as to which he has not been notified, and for the trial of which he is not prepared. The indictment charges the defendant with giving a bribe in March, 1906, to a supervisor in the city and county of San Francisco. Any person of ordinary understanding would at once say that defendant had no notice by the indictment as to the many acts and the conduct of the Home Telephone Company of Oakland, in another county, which took place in 1902.

That evidence as to offenses, other than the one for which defendant is being tried, may be given to show a motive for the commission of the crime is not doubted. But the motive for the commission of the crime charged must grow out of the collateral crime. Such are *People v. Cook*, 148 Cal. 341, 83 Pac. 43; *People v. Brown*, 130 Cal. 594, 62 Pac. 1072. It is not sufficient that both crimes spring from the same motive. If so, one charged with a particular larceny might be proved guilty of many other larcenies, for all spring from the same motive—the desire for gain. So, too, a collateral

al crime may be proved against a defendant which shows the intent with which he did the act under investigation (*People v. Wilson*, 117 Cal. 688, 49 Pac. 1054; *People v. Valliere*, 123 Cal. 576, 56 Pac. 433), or that directly tends to show that the defendant committed the crime of which he stood charged (*People v. Rogers*, 71 Cal. 565, 12 Pac. 679).

There is nothing in *People v. Craig*, 111 Cal. 460, 44 Pac. 186, that supports the contention of respondent that this evidence was admissible. In the *Craig* Case defendant had testified that the killing of his wife, for which he was being tried, was accidental. To rebut this the people were allowed to prove that immediately after killing his wife he drove to the house of her father and mother, and at once deliberately killed them both. It was held that this, in connection with evidence of previous threats made by him against his wife and her family, tended to show that the killing of his wife was not accidental, but was in pursuance of a previous plan. The facts of the *Craig* Case bear no similarity to the conditions of this case in the matter now under discussion. The evidence as to the Oakland proceedings was clearly irrelevant to the charge upon which defendant was being tried, and the rulings permitting its introduction were clearly erroneous.

Upon the trial, evidence was given that 10 of Lonergan's fellow members of the board of supervisors were bribed in the same manner, for the same purpose, at about the same time, and by the same person, as Lonergan. Appellant insists that the court erred in allowing this evidence over his objections.

We have before stated that, as a general rule, evidence of a different offense may not be given against a person charged with a particular crime; but, as we have also before stated, there are exceptions to this rule. Where facts concerning the other offense tend in themselves to prove the defendant guilty of the offense for which he is being tried, they may be proven. The mere fact that such evidence tends to prove defendant also guilty of another crime does not exclude it, if relevant to the charge for which he is on trial. The evidence as to the bribery of the other supervisors, we think, is well within this exception to the general rule. It is not claimed by the people that defendant personally bribed Lonergan, or any other member of the board. Any money that was paid for such purpose was paid by one Halsey, who was shown to be a general agent of the Pacific States Telephone & Telegraph Company, with the special duty of attending to matters pertaining to opposition to the company. It was the theory of the people that the bribery of Lonergan was in pursuance of a conspiracy on the part of defendant and Halsey and one Zimmer, auditor of the company, to defeat the application of

the Home Company by bribing the board of supervisors; that is, a working majority thereof. The bribery of Lonergan was but a part of the whole—was one step in a proceeding having one purpose and object. It was shown that checks of the company aggregating between \$40,000 and \$50,000 were drawn at the request of Zimmer about the latter part of February, 1906. To whom they were payable was not shown. No vouchers were furnished for these checks, and they were simply carried on tags. These tags, as well as the checks, were destroyed in the great fire of the following April. Statements of banks, however, showed that checks of the company aggregating \$50,000 were paid, or the amounts thereof withdrawn from the accounts of the company as follows: Feb. 23, 1906, \$5,000, \$5,000, \$10,000; Feb. 24, 1906, \$10,000, \$10,000; and Feb. 26, 1906, \$10,000.

The statements from the banks show many other withdrawals, but these items are significant as being in round thousands, and as corresponding in the total to the amounts paid the supervisors. The evidence shows that for a few days only, but covering the 23d and 24th days of February, 1906, Halsey engaged three rooms in the Mills building. The application of the Home Telephone Company was to come up for action before the board of supervisors on Monday, the 26th day of February, 1906. (The board consisted of 18 members, and it required at least 10 to constitute a majority.) Lonergan testified that on Saturday, February 24, 1906, he visited Halsey at the rooms in the Mills building, found one Kraus, an assistant to Halsey, there in one room, scantily furnished, and was by him shown into an adjoining room, also scantily furnished, where he met Halsey, who gave him \$4,000 in currency, and told him to vote to defeat the ordinance granting the Home Telephone Company a franchise. He took the money home and gave it to his wife, who testified that about that time her husband handed her \$4,000 in currency. Eight of the other supervisors testified to going singly to Halsey's rooms in the Mills building a few days before the 26th day of February, 1906, and receiving money in currency to vote against the application of the Home Telephone Company for a franchise. Each went into Halsey's room alone, and was paid by Halsey in currency to oppose the application of the Home Telephone Company, and took his departure. No other person other than Halsey and the supervisor being paid was present at any payment. Two other supervisors were paid \$5,000 in currency, each a little later, by Halsey for their friendship to his company, in the matter of the application of the Home Telephone Company. The total of the payments was \$50,000, exclusive of \$1,000 paid Lonergan some days prior to his visit to the Mills building. These payments were all made to

carry out one plan and purpose—to secure a majority of the votes of the board of supervisors to defeat the application of the opposition company. Several of the bribed supervisors returned to Halsey in currency a part of their bribes, aggregating \$7,500. It was shown that a similar amount (\$7,500 or \$10,000), also in currency, was returned to the cashier of the company by Halsey, and credited in reduction of the amounts charged on the tags above referred to. No rational person, with knowledge of the facts concerning the visits of, and payments to, the supervisors other than Lonergan, on learning that Lonergan also visited Halsey at the time he did, and where he did, and about the same time handed his wife \$4,000 in currency, but would be impressed with the belief that Lonergan also obtained such currency from Halsey, and for the same purpose as his fellows; and this belief would be engendered without any direct evidence of any payment to Lonergan.

The facts testified to by these witnesses, in connection with other facts above mentioned, tended to show that Lonergan was bribed, and with money drawn from the funds of the Pacific States Telephone & Telegraph Company, by Halsey. "If several and distinct offenses do intermix and blend themselves with each other, the details of the party's whole conduct must be pursued." Lord Ellenborough in *The King v. Whitley*, 1 Lead. Crim. Cas. 185. The several bribes were to secure one result, and were part and parcel of one scheme. That the testimony in question was properly admitted is amply sustained by the following authorities: *People v. Rogers*, 71 Cal. 565, 12 Pac. 679; *People v. Cook*, 148 Cal. 341, 83 Pac. 43; *People v. Craig*, 111 Cal. 460, 44 Pac. 186; *People v. Mollineux*, 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. 193; *People v. Wood*, 3 Parker, Cr. R. (N. Y.) 681; *People v. Murphy*, 135 N. Y. 455, 32 N. E. 138. The theory of the prosecution in offering said evidence, and of the court in receiving it, was that the evidence is sufficient to charge defendant with criminal responsibility for the various acts of Halsey; and the views we have expressed are based upon such theory, but we do not intimate our views as to the sufficiency of the evidence to support it.

Appellant urges that error was committed in overruling his objection to a question put to the witness King, a director of the Pacific States Telephone & Telegraph Company, as to whether he knew that a salary of \$1,200 or \$1,250 a month was paid to Abraham Ruef during the period covering the pendency of the application of the Home Telephone Company for a franchise, but as the answer was in the negative no harm was done by the ruling, even if it be conceded to have been erroneous.

The court did not err in allowing the district attorney, over the objection of defendant, to prove by Mr. Pillsbury the conversa-

tion held between him and the defendant concerning the employment of Mr. Ruef. Mr. Pillsbury was the head of the law department of the company; and in answer to the question objected to testified: "I called Mr. Glass' attention to something I had seen in the papers to the effect that Mr. Ruef was employed, or was to be employed, as attorney for the company, and asked him what there was in it, and he told me that Mr. Ruef was employed. That was about November, 1905. * * * I asked him if Mr. Ruef was employed. He said he was. I told him if Mr. Ruef was to be a member of the law department of the company that it would eliminate me from it, or to that effect, and he said Mr. Ruef was not employed to represent the company in connection with my department, and had nothing to do with it. That was the substance of it."

The evidence relied upon by the prosecution to connect defendant with the bribery of Lonergan was entirely circumstantial, and depended largely upon showing that he was connected with and a party to a scheme to bribe a working majority of the board of supervisors in relation to the application for the franchise which had been pending before the board for several months before the bribery was consummated.

Defendant had already drawn out from the witness Bixton evidence to the effect that Mr. Ruef was the boss of the board of supervisors, with a representative thereon who had distributed bribe money to the members of the board in reference to another ordinance. Another witness, Supervisor Phillips, testified that he had been offered a bribe by Halsey to stand by his company. Phillips answered that he could not do so unless released by the administration, or Mr. Ruef, and then left Mr. Halsey. Later in the day Halsey telephoned to him to come to the Mills building, which he did. Halsey then stated to him that from what he knew Ruef was favorable, and Phillips then agreed to stand with him, and received \$2,500 in currency, and a promise of \$5,000 when the Home Telephone ordinance was defeated. The prosecution had the right to contend that, from the conversation testified to by Mr. Pillsbury, the defendant was responsible for the employment of Ruef. Where circumstantial evidence is relied on to connect a defendant with a given crime, much must be left to the discretion of the trial court in admitting it. It is not necessary that each circumstance, of itself, would to every person appear to connect the defendant with the offense. It is sufficient if such circumstance, considered in relation to other facts and circumstances in evidence, may fairly tend to such result.

We do not think there is any merit in the contention made by appellant of variance between the crime charged and the crime proved. The claim of a variance as to the subject-matter for which the money was paid

to influence Lonergan, is sufficiently answered by what we have said as to the sufficiency of the indictment.

As to the amount of money paid, the indictment charges a payment of \$5,000. The proof showed a payment to Lonergan of \$1,000 on one day, with a promise of \$4,000 more, for Lonergan's friendship for the Pacific States Telephone & Telegraph Company, which was in fact paid a few days later. Proof of the payment of either \$1,000 or \$4,000 would have supported the substance of the charge in this regard. Proof of the larceny of \$4,000 or \$1,000 would sustain a charge of the larceny of \$5,000. So it is perfectly clear to us that under a charge of paying \$5,000 as a bribe, proof of the payment of such sum in two payments under an agreement to pay and to receive \$5,000, as a bribe to do a certain thing, presents no question of variance as to the thing paid as the bribe.

Defendant requested the court to give to the jury certain instructions, numbered 4 and 5, as follows:

"(4) You have no right to indulge in any presumption or inference unfavorable to the defendant because of the refusal of any witness to testify, or the failure of any witness to testify for the prosecution."

"(5) The refusal of an alleged co-conspirator, or agent of the conspiracy, who has been placed on the witness stand, and refused to testify, should not be considered by the jury in determining the guilt or innocence of the defendant, and the jury should not presume from such refusal to testify that the testimony of the witness, if given, would be against defendant."

Both of these instructions state a correct rule of law; and that they were pertinent to the case is shown by the following circumstances: The case was submitted to the jury on the evidence introduced by the prosecution, no evidence being introduced by defendant. Evidence had been introduced tending to show that one E. J. Zimmer was the auditor of the Pacific States Telephone & Telegraph Company; that the checks, aggregating between \$40,000 and \$50,000, upon which the prosecution claimed the money had been drawn, with which Lonergan and his fellows had been bribed, were drawn by order of said Zimmer, and were delivered to him. When delivered to him the checks bore the signature of the treasurer of the company, but required to be further signed, by any one of the following names: "Henry T. Scott, President," "E. J. Zimmer, for the President," or "Louis Glass, Vice President." The prosecution called E. J. Zimmer as a witness, and put to him the following questions: "What were your duties as auditor?" "You testified fully before the grand jury in this matter, did you not, Mr. Zimmer?" "Mr. Zimmer, did you answer that question before the grand jury, that I have just asked you here,

to wit, as to what your duties were as auditor of that company?" Mr. Zimmer refused to answer each of these questions, upon the ground that it would have a tendency to subject him to punishment for a felony. He was not compelled to answer.

In the closing argument the attorney of the people claimed that the evidence showed that Zimmer, Glass, and Halsey were each guilty of bribing Lonergan; and with reference to Zimmer he used this language: "Mr. Zimmer's name appears on the indictment as a witness before the grand jury. You have not heard what he testified to. You have not received any intimation of what he testified to, although I would have been justified, in making my opening statement in this case, to have said to you what I expected to prove by E. J. Zimmer, whom I called as a witness in this case. I did not do it, because I want to play the game square. I would have had a right to say what I expected to prove, because I had a right to expect that every citizen in the state of California would perform his duty and comply with the social compact by which he receives protection to his life, his property, his wife and his children. I had a right to expect that when Mr. Zimmer was called upon this stand as a witness, he would tell what he knew, and not protect crime by the claim that it might tend to incriminate himself. But, as I say, out of a spirit of fairness, I did not say anything in my opening statement as to what I did expect to prove by Mr. Zimmer, and therefore there is nothing before you." This language was well calculated to impress upon the jury that the evidence that Zimmer refused to give would have tended to prove the defendant guilty; that his refusal to tell what he knew was to "protect crime." No objection appears to have been made to these remarks of the district attorney, and we only advert to them because they emphasize the necessity that the requested instructions should have been given. In refusing to testify Zimmer was in the exercise of a clear right given to him by the Constitution of the state and the statute, for which under the law no inference against the defendant may be drawn.

The precise point involved in the refusal to give the instructions now under discussion was decided in *People v. Irwin*, 77 Cal. 494, 20 Pac. 60, where the court said: "The court also erred in refusing to instruct the jury that the refusal of the alleged conspirators, who had been placed on the witness stand and declined to testify, should not be considered by the jury in determining the question of guilt or innocence, and that the jury should not presume from such refusal to testify that the testimony, if given, would be against the defendant."

The language of the refused instruction numbered 5 is taken almost literally from the language above quoted. It contains a cor-

rect statement of the rule of law applicable to the condition of this case, irrespective of the remarks made by the district attorney, and these remarks made it all the more necessary that the requested instructions, or one embodying the rule stated, should have been given. The court erred in refusing to give the requested instructions. *People v. Irwin*, supra. See, also, *People v. Opie*, 123 Cal. 294, 55 Pac. 989; *Phelin v. Kenderdine*, 20 Pa. 354; *Beach v. U. S. (C. C.)* 46 Fed. 754.

The court did not err in refusing an instruction requested by the defendant, to the effect that, in passing upon the credibility of witnesses, the jury have the right to take into consideration their motives, fears, or hopes, if any have been proved. This was sufficiently given by the court in reading to the jury section 1847 of the Code of Civil Procedure. "Fears or hopes" but express an amplification of "motives," and really add nothing to the meaning of section 1847.

In addition to the points discussed in this opinion, appellant has urged that the evidence is not sufficient to support the verdict of guilty. Inasmuch as the judgment and order must be reversed for the errors above noted, and the case remanded for another trial, we do not deem it necessary to pass upon this question.

The judgment and order are reversed, and the cause remanded for a new trial.

D. M. Delmas, T. C. Coogan, H. C. McPike, and C. W. Cross, for appellant. U. S. Webb, Atty. Gen., William H. Langdon, Dist. Atty., Francis J. Heney, Asst. Dist. Atty., John O'Gara, Asst. Dist. Atty., and Wm. Hoff Cook, Asst. Dist. Atty., for the People.

HENSHAW, J. A hearing before this court was granted from the decision rendered by the Court of Appeal of the First appellate district. Upon due consideration we adopt the opinion and views of the Court of Appeal saving upon two propositions which will hereinafter be noted. Amplification of certain of the propositions discussed and decided by the Court of Appeal is called for in answer to the considerations pressed upon this court in the petition for rehearing.

1. A vast mass of evidence was introduced in this case which, for brevity, may be designated evidence touching the Oakland franchise. Admittedly, the transactions covered by this evidence, in point of time, long antedated any of the occurrences properly embraced within the charge of bribery. Admittedly, also, the transactions were entirely separate and distinct, the earlier one having no causal connection with the latter. By the Oakland evidence it was sought to be shown that the telephone company with which defendant Glass was connected, in an endeavor to prevent competition in the city of Oakland, and to exclude from that territory the Home Telephone Company, its

competitor, and an applicant for a franchise, had itself, through a third person—"a dummy"—secured a franchise, and had aided and abetted in the organization of a corporation which did not enter the field of competition, and was not designed to enter the field of competition, but was organized and kept in existence for the purpose of holding the franchise and raising objection to the issuance of a third franchise to the Home Telephone Company, upon the ground that two companies were already in the field and that it was useless and injurious to them that a franchise should be issued to a third corporation. Most of what was done in this regard was done not by Mr. Glass but by Mr. Sabin, the then president of the company. To the repeated objections of the defendant's counsel to the introduction of this vast mass of testimony, the only reason assigned by the court for its admission is found in the statement that "it (the evidence) was all addressed to the question of the activities of this defendant in the corporation during the period that is material here." This language lacks in lucidity much to be desired. The only "activities" of the defendant which could be legitimately inquired into under this charge of bribery were activities having a bearing thereon and a connection therewith. The only "period that is material here" is the period from the formation of the alleged conspiracy to bribe the San Francisco supervisors down to and including the criminal accomplishment of the conspiracy upon which this charge of felony is based. It should seem unnecessary to state—but apparently it is not—that a multitude of acts, facts and happenings upon which men base their opinions and judgments of their fellow men do not come within the definition and scope of evidence as known to our law. If a man is informed, and believes his informant, that another man is dissolute, is a gambler, is an associate of known thieves, is a petty larcenist, and makes his home in a house of prostitution, he will justly look upon such a person with suspicion, will properly govern his dealings and relations with that person by this information, and would most naturally say, if he learned that the man had been arrested for burglary, that "it was to be expected." Yet, upon the trial of that man for burglary, no word of these matters would be admissible against him. Not because they would not have a tendency to show that a man of such character would be much more likely to commit the given offense than would a man of proven upright and honorable life, but because the law, for reasons good and sufficient unto itself, has declared that a man shall be put upon trial for but one offense, and that he shall not be embarrassed by being called upon to defend or exculpate himself, or to explain any damaging act or fact which is not embraced

within the charge he is called upon to meet. The law will not even permit a defendant's reputation to be assailed unless he shall himself have made that reputation an issue in the case. This, perhaps undue tenderness, goes to the extent that his guilt of petty offenses may not even be shown, and in his impeachment it may be established against him only that he has been previously convicted of a felony. It would, no doubt, have made most potently against this defendant in the minds of the jurors if, for example, it could have been shown that in this separate and distinct Oakland transaction he had bribed the councilmen there. But no one has been bold enough to assert that such evidence would be admissible, and the decisions of every court, including our own, are against its admissibility. Not only is the prosecution thus forbidden to prove another crime, but the law does not sanction the introduction of evidence falling short of crime and designed merely to degrade and prejudice the defendant in the minds of the jury. *Commonwealth v. Jackson*, 132 Mass. 16; *People v. Molneux*, 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. 193. As has been said, the language of the court holding that it was permissible to show "the activities of the defendant during the period that is material here" is not illuminating, nor is it adopted by the people in their briefs. By the people it is contended, first, that the evidence is admissible as showing identity of plan; second, as showing motive; and, third, if inadmissible, still, as the evidence did not tend to prove any other crime against the defendant, its admission was without injury. The people's brief declares it to be admissible as showing "identity and plan." We construe this to mean identity "of" plan, because, of course, the identity of the defendant was never for a moment in question. Identity of plan must mean a desire and effort upon the part of the Pacific States Telephone & Telegraph Company to exclude competition in Oakland, and the same desire and effort displayed to exclude competition in San Francisco. But indisputably there was no identity of plan. It is not contended that in any of the Oakland transactions any crime was committed, while the contention is that in the San Francisco transaction crime, and nothing but crime, was contemplated and perpetrated.

As to the second reason assigned—that of motive—there never was any doubt, never any question, never any suggestion from any source whatsoever, but that if this crime was committed, it was committed for the sole and single purpose of preventing competition. Indeed, the uncontradicted evidence of the supervisors, if direct evidence upon so plain a proposition was needed, was all to this effect. A boy of ten years might justly be regarded as gravely deficient in intellect who would need any enlightenment

upon so plain a proposition. In fact, so far from the question of the motive ever having been in doubt, it would call for the acutest ingenuity to conceive of any other motive than this most obvious one. Yet, nevertheless, it is said that this vast mass of evidence, dealing with transactions wholly detached in time and place, is admissible as establishing the motive which prompted the defendant to commit an alleged crime, separate and distinct from the Oakland transactions in time, in place, and in methods. The real reason why the evidence was offered is most obvious. It was not offered to show motive. It was not offered to show identity and plan or identity of plan. These are the veriest pretences. It was designed to besmirch and degrade the defendant and to be made use of in argument, to show that the defendant had gone to the length of organizing a fraudulent corporation, and by secret device and artful chicane had endeavored to prevent honest competition; that the defendant had gone to the border line of crime in the Oakland transaction and found, that stopping there, his efforts to prevent competition were without success. What more natural, therefore, than that when the same problem arose in San Francisco, the defendant, finding even the efforts of fraud and trickery unavailable, should have stepped over the line and become a lawbreaker and a criminal? Such, we say, was the obvious purpose for which the evidence was introduced, and this the briefs of the people here on file establish. For in those briefs, while endeavoring to support the admissibility of the evidence on the grounds above stated, it is said that if "the evidence also casts suspicion on defendant he cannot be heard to complain." In the history of the transactions Glass is charged with having organized this "bogus" company. There is described the policy of the Pacific States Telephone & Telegraph Company employing political bosses and paying salaries to supervisors. It is directly stated that "the history of the contest waged against the Home Company in Oakland shows so clearly Glass' activity in his company's behalf; * * * these and many other circumstances lead irresistibly to the conclusion that Louis Glass, vice president, acting president, and general manager of the Pacific States Telephone & Telegraph Company, aided, abetted, advised, directed, and encouraged Halsey to pay the bribe to Lonergan." And, finally, again, quoting from the people's brief it is said, "To Glass, this experience in Oakland must have taught a bitter lesson. For one thing, Beasley's 'bogus' company had proved a losing investment—no small consideration, for the executive committee had listened very reluctantly when Glass had personally pleaded for its succor. But the lesson stamped indelibly on his mind must have been that the Home Telephone Company

could not be kept out of San Francisco except by drastic measures." That this evidence was potent for the purpose of degrading the defendant in the eyes of the jurors will at once be conceded. That it had a tendency to inflame the mind of the jurors against the defendant by showing that in the past he had resorted to the arts of trickery and fraud to prevent honest competition, is quite apparent. That men in the everyday affairs of life would have been influenced by such evidence is unquestionably true. But these things go to establish merely the wrong which its admission worked upon the defendant, and not its admissibility. It was not admissible. Clearly, in the everyday affairs of life, if it should be established to the satisfaction of a jury that upon another and distinct occasion a defendant had offered or solicited a bribe, it would have great weight with a jury in determining whether in the instance charged he had been guilty of the offense. It would establish, at least, that he was the sort of man who would be willing to do this criminal act. Such was the line of reason and argument here employed. Yet such matters are never legal evidence. In discussing precisely such a case, where evidence had been admitted against the defendant charged with bribery, of a former act of like character, the court of appeals of New York says: "The mental ability and disposition of the defendant to commit a crime of this sort, while it might persuade a jury, raises no legal presumption. * * * Yet the inference drawn by the prosecuting officer, and permitted by the court, left it for the jury to say that the desire of Sharp, manifested by the offer of a bribe in one instance, was the same desire which led to the actual giving of a bribe in the other; hence that the two crimes had the same origin. * * * It was put in near the beginning of the trial, and the impression then made must have continued with the jury, and in their minds colored and deepened, if it did not distort, the subsequent evidence. It did indeed cast a dark shadow upon the defendant's character. It not only tended very strongly to prove the defendant guilty; it was absolute proof, but it was of a different crime from that charged. It was offered and received directly on the main issue, and was of great and persuasive force against him. Such evidence is uniformly condemned, as tending to draw away the minds of the jurors from the real point on which their verdict is sought, and to excite prejudice, and to mislead them. It was improperly received, and the exception to its admission well taken." *People v. Sharp*, 107 N. Y. 427, 14 N. E. 319, 1 Am. St. Rep. 851.

Of the third proposition that the evidence, even if erroneously admitted, was without prejudice to the defendant, the argument of the people adverted to in this brief should be sufficient to show the untenableness. But,

moreover, the rule does not limit the exclusion of such evidence only to transactions which amount to crime. It includes all evidence which, as here, would have a tendency to degrade the defendant, to arouse the prejudice of the jury, to divert their minds from the real issues in the case, or to persuade them by matters not judicially cognizable, that the defendant, for reasons other than those contained in legitimate evidence, was more likely to have committed the offense. *People v. Molineux*, 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. 193. Quite apposite in this connection is the following language of the Circuit Court of the United States in *Miller v. Territory of Oklahoma*, 149 Fed. 330, 79 C. C. A. 268, where that court says: "The foregoing incident strikingly illustrates where the responsibility for the miscarriage of justice in criminal prosecutions should sometimes be placed, instead of imputing the reversal of convictions by the appellate courts to what is properly termed 'mere technicalities.' The zeal, unrestrained by legal barriers, of some prosecuting attorneys, tempts to an insistence upon the admission of incompetent evidence, or getting before the jury some extraneous facts supposed to be helpful in securing a verdict of guilty, where they have prestige enough to induce the trial court to give them latitude. When the error is exposed on appeal, it is met with the stereotyped argument that it is not apparent it in any wise influenced the minds of the jury. The reply the law makes to such suggestion is that, after injecting it into the case to influence the jury, the prosecutor ought not to be heard to say, after he has secured a conviction, it was harmless. As the appellate court has not insight into the deliberations of the jury room, the presumption is to be indulged, in favor of the liberty of the citizen, that whatever the prosecutor, against the protest of the defendant, has laid before the jury, helped to make up the weight of the prosecution which resulted in the verdict of guilty."

2. Upon the question of the admissibility of the testimony touching the employment of Ruef and the salary paid to him by the company of which defendant was manager, the Court of Appeal goes no further than to hold that the prosecution "had the right to contend that from the conversation testified to by Mr. Pillsbury the defendant was responsible for the employment of Ruef." It does not, however, saving in this inferential way, discuss or pass upon the admissibility of the evidence itself. It was clearly inadmissible, and the purpose of its offer was, of course, identical with the offer of the Oakland testimony—to degrade the defendant and prejudice him in the eyes of the jury. By the people it is argued that the evidence was admissible because "the defendant was the first to make Abraham Ruef a circumstance in the case"; that "the evidence was therefore admissible as tending to show prep-

aration." It is further stated that the evidence was admissible because it tended to show a connection between Halsey and Glass, and, finally, that it was admissible as tending to show the motive of the defendant in the bribery of Lonergan. "Ruef, being the boss of the board of supervisors, and the application of the Home Telephone Company being before the board, it is not believable that the desire of defeating that ordinance did not enter into the payment of that large salary to Ruef." But it is not contended even by the prosecution that Ruef was in any way employed in the bribery of the supervisors, or that the salary was paid to him for any such purpose. Not only is this so, but it is affirmatively made to appear that Ruef opposed the desires of the Pacific States Telephone & Telegraph Company and was actively instrumental in seeing that its rival, the Home Telephone Company, secured its franchise. Thus, it is said in respondent's brief: "It must have been clear to any observer, long before the caucus, that Ruef, despite his liberal monthly salary, was not favorable to the Pacific States. It seems from the record that the Home Telephone Company also spent money very freely."

It being therefore in evidence, and, indeed, asserted by the prosecution that Ruef was not employed by defendant in furtherance of the conspiracy to bribe the supervisors, that he took no part in the matter of their bribery, that his services were actively enlisted on behalf of the opposition company, what of bearing upon this case could this evidence of his employment establish, what could have been its purpose other than as has been said, the purpose of degrading defendant and inflaming the minds of the jurors against him? The reasons assigned for the admissibility of this evidence were without substantiality. Respondent asserts that the evidence was admissible because "defendant was the first to make Abraham Ruef a circumstance in this case." All that there is in this regard is that in the cross-examination of one of the people's witnesses, Supervisor Bixton, his testimony appears to the following effect: "The Republican boss of the board, Boss Ruef, and James L. Gallagher distributed money to the members of the board—a certain gratuity—with reference to the passage of that ordinance." The ordinance here referred to had nothing to do with telephone matters. It scarcely merits the reply that such a statement elicited upon cross-examination of a witness for the people is no justification for the introduction of the evidence to show that "Boss Ruef" was employed by defendant's company, and inferentially by defendant upon matters and things wholly disconnected with the charge under investigation. Nor can it be perceived why the evidence was admissible as tending to show any connection between Halsey and Glass, nor how it can show such connection. As to its being admissible to show the "mo-

tive of the defendant in the bribery of Lonergan," as has been said, it was never contended by the people that Ruef was employed by the defendant or by his company to bribe these officers, or that he took any part in such bribery, and how, therefore, evidence of the employment of Ruef could by any possibility show "the motive of defendant in the bribery of Lonergan" cannot be comprehended. The record itself, however, resolves all these questions and establishes that the real purpose was that indicated. When objection was made to the introduction of this evidence the following colloquy took place: "The Court: What is the purpose of that, Mr. Heney? Mr. Heney: The purpose is to show that Mr. Glass informed this witness that Abraham Ruef was employed by the company during that period of time." Here was the purpose of the offer, stated in simple and direct terms. It was to show the employment under the indicated circumstances as the "foundation of an argument" against the character of Glass, and to prejudice the jury against him by showing that he had taken Ruef into the employ of the company.

3. Under objection and exceptions of defendant, evidence was introduced of the bribery and the payment of moneys by Halsey to certain other supervisors. This evidence as to each of these transactions was admittedly evidence of a separate and distinct crime. It is so declared by the respondent. It was admissible, as contended for by respondent, and as discussed in the opinion of the Court of Appeal, not as proving separate and distinct crimes, but as showing that the specific act of bribery charged was but a part execution of one conspiracy, a scheme which contemplated the bribery of a sufficient number of supervisors to prevent the granting of the franchise. Indisputably the evidence was not admissible generally, nor was it admissible to show that the defendant probably committed the crime with which he was charged, by showing that at other times he had committed like crimes. The court itself upon this evidence declared as follows: "Evidence of alleged payments to other supervisors received as tending to show identity of plan and motive and to trace the alleged bribe fund of fifty thousand dollars, of which the five thousand dollar bribe alleged in the indictment herein was claimed to be a part." The reasons thus given are sound in point of law. They themselves establish that the evidence was before the jury for consideration for these limited purposes only. Being before the jury for these limited purposes, the evidence was of course not before the jury for any other purpose. Yet, when defendant proposed instructions directing the jury as to the limits within which the evidence could be considered by them, one and all, the court refused these instructions. The first was in the following language: "It is not proper to show that the defendant was

guilty of some other offense, for the purpose of raising a presumption, either of law or of fact, of his guilt in the case under consideration." The court refused to give this instruction upon the ground that it was "not justified by the evidence; no evidence received for such purpose." The instruction is unimpeachable in point of law. It is the exact language of this court in *People v. Sears*, 119 Cal. 267, 51 Pac. 325. The evidence, though admissible for but the limited purpose indicated, was by the court admitted generally. It was most proper, therefore, for the defendant's counsel to seek to have the jury instructed as to the sole purpose or purposes for which it could be considered. One of the purposes for which it could not be considered was undoubtedly the purpose embraced in the instruction. And yet the court refused to give it solely on the ground that, in its own mind, it had not received the evidence for that purpose. But how, unless the court informed the jury that it had not received it for that purpose, was the jury to know that it was not to be considered for that purpose? Surely, when the court confines its ruling to a general declaration that "the objection is overruled," the jury is not in a position to know, unless informed in terms by the court, that it is not to consider the evidence generally. Neither jury nor counsel thus being enlightened by the court as to the purpose for which it considered the evidence admissible, defendant's counsel proposed several other instructions upon the same subject. For instance, the following: "Testimony has been introduced by the prosecution which it is claimed tends to show the commission of other acts or offenses by the defendant similar to those charged in the indictment. I charge you that this evidence was admitted for the sole purpose of proving guilty intent, motive, or guilty knowledge of the defendant, and that it can be considered by you for no other purpose." This instruction was refused by the court under its statement that "it was not warranted by any claim, theory, or evidence presented during the trial as to other offenses. Evidence not so limited or admitted to prove guilty intent." And yet, when we turn to the brief of the people, we find vigorous argument that the evidence was offered and was properly admitted to prove motive and guilty intent. In various other ways counsel for defendant, left groping in the dark, endeavored by pertinent instructions to have the court limit the consideration of this evidence of other crimes to specific purposes. One and all the court refused to give these instructions, and of its own initiative gave no instruction whatsoever limiting the purpose for which the evidence should be considered by the jury, notwithstanding that the court by its indorsement on the refused instructions declared that it was received only as tending to show identity of plan and motive and to trace the alleged bribe fund of

fifty thousand dollars. On this appeal it is not contended that evidence of the other crimes was generally admissible to prove the crime charged, but the people rest upon the proposition that the refusal of the first instruction quoted was justified because it was upon a "mere abstract question of law," and that the refusal to give the other instructions was justified "because the evidence was not admitted for the sole purpose of proving guilty intent, motive or guilty knowledge," but was admitted "also to show a single design, purpose and plan, and to identify and connect the defendant with the bribery of Lonergan by means of the fifty thousand dollar bribe fund." As has been said, defendant's counsel could not know, and were not able to find out the specific purposes for which the court admitted the evidence, since it was by the court admitted generally. The court alone knew the limited purposes which, in its own mind, it believed justified the admission of the evidence. It became the plain duty of the court under these circumstances to have instructed the jury, and to have limited its consideration of the evidence to these specific purposes, and this duty became the more imperative when defendant's counsel were seeking, with all the knowledge they possessed, to have the consideration of the evidence so properly limited. "When evidence of other crimes is admitted, it should be carefully limited and guarded by instructions to the jury, so that its operation and effect may be confined to the legitimate purposes for which it is competent." 12 Cyc. 631. In *Commonwealth v. Shepard*, 1 Allen (Mass.) 575, Bigelow, Chief Justice, says, speaking upon the admission of evidence of other offenses: "It is a dangerous species of evidence not only because it requires a defendant to meet and explain other acts than those charged against him and for which he is on trial, but also because it may lead the jury to violate the great principle that a party is not to be convicted of one crime by proof that he is guilty of another. For this reason, it is essential to the rights of the accused that when such evidence is admitted it should be carefully limited and guarded by instructions to the jury, so that its operation and effect may be confined to the single and legitimate purpose for which it is competent." In our state, in *People v. Cook*, 148 Cal. 334, 83 Pac. 43, it is said: "It was of the highest importance to the defendant in this case, as it always is to any defendant in any case in which evidence of a distinct offense has been admitted for the purpose of showing motive to commit the crime charged that the jury should be cautioned not to consider such evidence for any but the limited purpose for which it has been admitted, and we cannot see that the instruction as presented contained a single word beyond what the defendant had a right to request. The court, however, refused the instruction, and its refusal is justified on the ground that

another instruction framed by the judge on the same point was given. It is true that the instruction given stated the law correctly; but it was brief, general, and colorless in comparison with the instruction asked, and had the effect of minimizing the importance of a consideration which could not have been stated with too much emphasis. This instruction as asked should have been given." The distinction between the Cook Case and the case at bar is that in the Cook Case the court did give an instruction, though it was characterized by this court as being "brief, general, and colorless." In the case at bar the court refused to instruct the jury upon the subject at all.

4. In addition to what the Court of Appeal says in its discussion touching the error of the trial court in refusing to give instructions proposed by defendant, to the effect that the jury had no right to indulge in any presumption or inference unfavorable to the defendant because of the refusal of any witness to testify, or the failure of any witness to testify for the prosecution, it is to be borne in mind that the argument of the prosecuting attorney against the defendant for the refusal of Zimmer to testify, contained not only a severe arraignment of the defendant, but implication and insinuation that the testimony if given would have been unfavorable to the defendant. The method which the defendant's counsel took to set the jury right upon this matter was the approved method—of proposing timely instructions to the jury to disregard the objectionable remarks. *Johnson v. Union Pacific R. R. Co.*, 35 Utah, 285, 100 Pac. 390. It will be remembered that Zimmer refused to testify upon the ground that his testimony would incriminate, not Glass, but himself. Says the Supreme Court of the United States: "No inference should have been permitted to be drawn against the defendant because of the assertion by the witness of this right to protect himself. He was called by the government. If he had testified, his testimony might have been in favor of the defendant, though criminating himself. It might have entirely exonerated the defendant. To infer that the very opposite would have been or might have been the effect of his testimony, had it been given, was unwarranted." *Beach v. United States* (C. C.) 46 Fed. 754. That the principles of law contained in the proposed instructions were unimpeachable is not questioned. In justification or excuse of the court's refusal, it is said only that injury was not worked to the defendant, because the substance of the instructions was contained in instructions which the court actually gave. But when reference is had to these instructions, the giving of which it is asserted saves the error, it is found that they amount to no more than this, that in varying form the jury is told that it is to consider only the evidence in the case, and is not to consider evidence which has been excluded

or ordered stricken out by the court, and that the jury is cautioned to distinguish carefully between the facts testified to by the witnesses and the statements made by counsel as to what facts have been proved. It is inconceivable that any one can assert that such colorless and characterless instructions containing no direct reference to this subject, meet a case where the attorney for the people has been arguing, in violation of the law, as to what the witness would have testified to, if he had testified, and that the testimony would have been hostile to the defendant. If this, indeed, be the rule, then all antecedent authority and precedent must be cast aside, and notwithstanding the mandatory declaration of the Code that judges must instruct the jury on all pertinent matters of law, when requested so to do, and notwithstanding the concession here made that these were pertinent and important principles of law, it will suffice in the future to say that if the judge tells the jury that they are to consider the evidence, and only the evidence, admitted in the case, his full duty to a defendant has been performed. Let one instance of the working of such a rule as is here contended for suffice. The defendant exercising his constitutional right does not testify in his own behalf. The prosecuting officer argues vehemently that he fails to take the witness stand because he knows he is guilty, and that if he did take the witness stand, on cross-examination he would prove that he was guilty, and that the jury is therefore justified in finding him guilty, from the fact that he has failed to testify. Defendant's counsel proposes an instruction to the effect that no inference adverse to the defendant is to be drawn from his failure to testify. The court refuses to give this instruction, and this court, following the rule here contended for, would have to hold that the instruction of the court to the jury that it was to consider only the evidence adduced in the case embraced the matter of the proposed rejected instruction, and was therefore all that the defendant was entitled to. If justification for the court's refusal may be found in the one case, it may equally be found in the other. The illustration is no more extreme than is the matter at bar.

For these reasons, in addition to those given in the opinion of the Court of Appeal, the judgment and order are reversed and the cause remanded.

We concur: MELVIN, J.; LORIGAN, J.

BEATTY, C. J. I concur in the judgment of reversal and in most particulars in the opinion of Justice HENSHAW. I shall, if other pressing duties permit, present my views in a separate opinion.

SLOSS, J. I concur in the judgment of reversal upon the ground, solely, that the court erred in admitting testimony concern-

ing the Oakland transactions in 1902. This testimony related to matters extraneous and collateral to the main charge, and having, so far as I am able to see, no reasonably direct tendency to show the commission by the defendant of the offense charged, or a motive on his part for its commission. Nor can it be said that this testimony, if its admission was error, did not harm the defendant. Even though his conduct with regard to the Oakland franchise did not constitute a crime, it included acts which might well be regarded as discreditable. The natural effect of such testimony would be to prejudice his case in the minds of the jury.

On each of the other points discussed in the opinion of Mr. Justice HENSHAW, I agree with the dissenting members of the court that no prejudicial error was committed.

SHAW, J. I dissent from the judgment of reversal. The evidence of the conversation between Pillsbury and Glass showed the familiarity of the latter with the inside doings of the company, and was competent for that purpose, as was fully shown in Justice Hall's opinion. The evidence of the bribery of the other supervisors, as Justice Hall shows, tended directly to prove the giving of money to Lonergan, which was the specific crime charged. This takes it out of the rule requiring cautionary instructions as to evidence admitted for a limited purpose. The refusal to instruct specially as to the Zimmer episode was fully covered by the instructions given. Any intelligent juror would know therefrom that Zimmer's refusal to testify could not be considered. The misconduct and ulterior purposes of counsel for the prosecution, about which so much is said, is foreign to the case, so far as this court is concerned. Misconduct is not assigned as error.

With regard to the Oakland franchise, a mass of evidence was given concerning the previous course of the Pacific States Telephone & Telegraph Company toward the rival concern. Large quasi public corporations operating over an entire state are more like governmental bodies than like natural persons. They act in accordance with fixed, permanent rules and orders, akin to laws. Their methods cannot be judged by the same standards as those of individuals. The evidence as to the Oakland matters showed a settled policy and design by said company to vigorously oppose the competing company at all points, justifying an inference that there were rules and orders to that effect which its officers were expected to follow. Glass must have been aware of this, and it would naturally incite him to more than ordinary zeal in endeavoring to stamp out the beginnings of competition in his own company's most valuable territory, the city of San Francisco. It had a direct legal tend-

ency to prove the motive to bribe the supervisors, if he was willing to resort to such practices, and it was admissible for that purpose. The fact that such motive would be obvious would not render proof of it incompetent.

I concur: ANGELLOTTI, J.

(158 Cal. 721)

BLAIR v. HAZZARD. (L. A. 2,147.)
(Supreme Court of California. Dec. 2, 1910.)

1. TRUSTS (§ 191*)—WILLS—CONSTRUCTION.
Where real estate was devised to trustees with power to sell, and directions to apply the proceeds to certain valid trusts, the trustees took the legal title with power to convey, subject only to administration.

[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 191.*]

2. TRUSTS (§ 200*)—CONVEYANCE BY TRUSTEE—DEEDS—UNTRUTHFUL RECITAL.

Where trustees had legal title to real estate, with power to convey subject only to administration, the fact that a deed untruthfully recited that the superior court had authorized them to sell the property, and that they were selling pursuant to and "in accordance with the authority, power, and discretion in the aforesaid decree and order" of the court, did not impair the validity of the deed.

[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 200.*]

3. EXECUTORS AND ADMINISTRATORS (§ 271*)—ADMINISTRATION EXPENSES—PROPERTY LIABLE—LAND CONVEYED BY TRUSTEES—ADVERSE POSSESSION.

Where trustees with power of sale under a will conveyed the property before the administration was closed, the grantee took title subject to administration to the same extent as the grantee of a devisee, as provided by Code Civ. Proc. §§ 1452, 1581; and hence could not acquire title by adverse possession as against the administrator with the will annexed, so as to relieve the property from the demands of administration.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 271.*]

4. ADVERSE POSSESSION (§ 4*)—PROPERTY OF ESTATE.

Title by adverse possession cannot be acquired against administrators or executors.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 21, 22; Dec. Dig. § 4.*]

5. EXECUTORS AND ADMINISTRATORS (§ 315*)—DECREE OF DISTRIBUTION—MUNIMENT OF TITLE.

A decree of distribution of property belonging to a decedent's estate, and passing to an heir or devisee, is a muniment of title of the highest value.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 315.*]

In Bank. Appeal from Superior Court, San Diego County; N. H. Conklin, Judge.

Action by Robert Blair against George W. Hazzard, administrator with the will annexed of the estate of S. S. Clark, deceased, to quiet title. Judgment for plaintiff, and defendant appeals. Modified.

Haines & Haines, for appellant. Collier, Smith & Hoff, for respondent.

HENSHAW, J. This is an action to quiet title.

In 1873 S. S. Clark died testate leaving real estate situated in the county of San Diego. His will was originally admitted to probate in Hamilton county, Ohio, and subsequently ancillary letters of administration with the will annexed issued from the probate court of San Diego county to Henry Pearce as sole executor. Henry Pearce continued so to act as the executor until his death in 1888. The land here in controversy was a part of the property of Clark's estate and by his will was devised to Henry Pearce, Christopher Cockrill, and Mary Clark, as cotrustees with the power of sale. Subsequent to the death of Pearce the surviving trustees sold the property to plaintiff for full value. At the time of their sale the property had not been distributed to them as trustees, nor has it since been distributed to them or to Blair as their grantee. In fact, upon the death of Pearce, administration of the estate was suspended until March, 1905, some 17 years after this sale, when appellant was appointed administrator. This administrator concedes the validity of the deed by the trustees to carry title to Blair, but insists that the title and right of possession were subordinate to the requirements of administration, that the title was taken subject to administration, and that thus the estate controls the title for the purposes of distributing the property and subjecting it to its proper share of the expenses of administration which, in this case, there admittedly being no creditors' claims, means merely administrator's fees, attorney's fees, and necessary probate fees. Thereupon plaintiff brought this action to quiet title, charging in two counts, first, title under the deed, second, by adverse possession. The defendant joined issued upon the asserted title by adverse possession, admitting legal title by virtue of the trustees' deed and alleging, as above set forth, that such title was taken in subordination to the statutory right of administration. The court found that the superior court of San Diego had never appointed Christopher Cockrill or Mary Clark, or either of them, trustees of the estate of Clark, and that it never made an order or decree authorizing or empowering them, or either of them, to make the conveyance, but that Blair paid for the property full value, believing that he was acquiring good and complete title thereto, that he entered under a claim of right based upon his deed and continued in possession of it, paying all taxes thereon and holding it under his claim of title adversely to the whole world. It concluded that Hazzard, as administrator, had no right, title, or claim upon the property for the purposes of administration, or for any other purpose whatsoever, and the decree followed accordingly. Upon this appeal, it is insisted that the trustees who executed the deed to Blair were devisees of the fee of the property, and they took the legal title there-

to upon valid trusts and with power to sell, and that their sale carried title, notwithstanding it was not preceded by an authorizing order or followed by a confirmatory order of the court of probate. Over these propositions there is no controversy; the question in dispute being simply this: Did the title which plaintiff thus acquired, or his asserted title by adverse possession, relieve the land from its share of the burdens of administration?

By the bill of exceptions it is declared that the real property here in question "was devised * * * to Henry Pearce, Christopher Cockrill, and Mary Alnette Clark, as cotrustees with power to sell and with directions to apply the proceeds of said sale to certain valid trusts." The questions of the validity of the trusts and of the power to sell being thus eliminated, the trustees unquestionably took legal title with power to convey that title subject to administration. *Jordan v. Fay*, 98 Cal. 264, 33 Pac. 95; *Martinovich v. Marsicano*, 137 Cal. 354, 70 Pac. 459. The deed, it is true, recites that the superior court of San Diego made its order authorizing the trustees to sell, and further recites that they are selling "pursuant to and in accordance with the authority, power, and discretion, in the aforesaid decree and order of the superior court," and these recitals the court found to be untrue, but, nevertheless, that would not impair the validity of the trustees' deed which, in terms, is a deed, by the trustees of the estate of Sydney S. Clark, deceased, under the last will and testament of Sydney S. Clark, deceased, and which they could validly execute without order of court. *Estate of Delaney*, 49 Cal. 76; *Estate of Williams*, 92 Cal. 183, 28 Pac. 227, 679; *Morfew v. S. F. & S. R. R. Co.*, 107 Cal. 587, 40 Pac. 810; *Estate of Pforr*, 144 Cal. 121, 77 Pac. 825; *Estate of O'Conner*, 2 Cal. App. 475, 84 Pac. 317. The deed is executed by the grantors as trustees and conveys the title which as devisees they took under the will of Clark. It will not be disputed that a grantee of a devisee under a will takes title subject to administration. Code Civ. Proc. §§ 1452, 1581.

The case thus presented is one where the grantee believed he acquired absolute title to real property, since he would not have paid its full value otherwise, and where, in fact, he did acquire the title of the estate thereto, including the right of possession with the one statutory reservation, that the property was still subject to the demands of the estate and of its representatives for the purposes of the administration. The grantee enters under this deed; exercises the fullest dominion and control over it. He probably was in ignorance of the liabilities which the statute imposed upon his title, namely, that it was subject to the demands of administration, and thought that he was holding adversely to the whole world, including the estate from which his title was derived.

The question is, Can a devisee of an estate or a grantee of a devisee entering into possession of realty by virtue of title actually or colorably derived from the estate, and asserting title from no other independent source, acquire, under these circumstances, a title against the estate by adverse possession so as to relieve the property from the statutory requirement that it shall be subject to the demands of administration? This question must be answered in the negative. First, because to answer it otherwise would be to repudiate, indeed, to obliterate, the provisions of the Code which contemplate and declare that throughout administration and until the close thereof, whether the real property be in the possession of the executor or administrator or in the possession of devisees or heirs, it shall be subject to administration and chargeable with its proportionate share of the expenses of administration. If a sale becomes necessary, it may even be retaken from the heir or devisee and sold to the extinguishment of his title. It is to be remembered that it is merely through the indulgence of the present law that the heir or devisee is entitled to possession at all until after distribution (*Meeks v. Hahn*, 20 Cal. 628), and it was never in the contemplation of the law that by granting the favor to the heir or devisee of possession during administration, it should be made possible to set up in hostility to the estate a title by adverse possession which would thus defeat one of the primary objects of probate, namely, that all the property of the deceased, saving such as is exempt from execution, should be first chargeable with his debts.

From the very nature of the case, title by adverse possession cannot be acquired against the administrator or executor. Such a title would be as foreign to our law as would be the claim of a tenant that he had acquired title by adverse possession against his landlord while holding under strict tenancy. The entry of a devisee or heir under such circumstances and his holding after, as matter of law, cannot be in hostility to the estate's rights. By the very language of the law it is in subordination to those rights. The administrator's or executor's possession never has been and never will be construed as possession in hostility to the heir or devisee, per contra, the possession of the heir or devisee, while the estate is in the course of administration, can never be construed to be in hostility to the rights over that property with which the law clothes the estate. And from practical considerations it becomes also apparent that title by adverse possession cannot thus arise. Everything which the devisee in possession does by way of dominion, ownership, and exclusive control he has a perfect right to do, so far as the estate is concerned, and in the doing of these things does not trench upon or interfere with

any of the rights which the statute has reserved to the estate. There is nothing therefore, and can be nothing, to put the administrator upon notice that the devisee is claiming in hostility to him. The devisee may, as in this case, honestly believe that he is holding against all the world, including the estate, but in truth he is holding against all the world except the estate, since under the law his whole title is subordinate to the estate's rights. There is therefore, and can be in the nature of things, no such hostility between the legal rights of the devisee or heir in possession and the administrator or executor which can start the statute of limitations to running in favor of or against either. A decree of distribution is a muniment of title of the highest value. Through such decrees, and through such decrees only, can the titles of land be justly established. This court has upon many occasions countenanced and approved the completion of the administration of estates when that administration, after suspension, has been resumed for no other purpose than to enter a decree of distribution giving peace and security to title. *Estate of Hinckley*, 58 Cal. 518; *Estate of Pina*, 112 Cal. 14, 44 Pac. 332; *Estate of Strong*, 119 Cal. 663, 51 Pac. 1078; *Goad v. Montgomery*, 119 Cal. 552, 51 Pac. 681, 63 Am. St. Rep. 145; *Toland v. Earle*, 129 Cal. 148, 61 Pac. 914, 79 Am. St. Rep. 100.

For these reasons the trial court is directed to modify its judgment in accordance with the foregoing, by holding that the property in the complaint set forth is still subject to the legal requirements of the estate of Clark, for the purposes of and in due course of administration.

We concur: SHAW, J.; LORIGAN, J.; MELVIN, J.; SLOSS, J.; ANGELLOTTI, J.

(158 Cal. 727)

RANDOLPH v. LINDSAY. (L. A. 2,336.)

(Supreme Court of California. Dec. 2, 1910.
Rehearing Denied Dec. 31, 1910.)

1. MINES AND MINERALS (§ 83*)—CONTRACTS.

Plaintiff, defendant, and another, in order to develop certain mines which they had acquired and conveyed to a corporation, erected a stampmill and, when the ore proved insufficient, plaintiff and defendant agreed that the company should work other mining territory in the vicinity of the mill, and that to enable it to do so, plaintiff and defendant would advance money from time to time, and that either would pay to the other any sums necessary to equalize between them the advances so made. On December 4th, plaintiff wrote defendant stating that he had advanced a certain amount over that advanced by defendant and requesting the latter to make payment equalizing such excess, or give notes therefor, to which defendant replied on December 6th, stating that he was not paying the company's debts without security and a plain understanding with the stockholders, and that he was surprised that plaintiff should assume to advance money on his account without his consent, as he was able

to do his own advancing, and that he did not care to go any further with the deal looking to the purchase of a mine which plaintiff had stated in his letter, in connection with his request for payment by defendant, that he was contemplating purchasing for the company, without some thorough understanding. Held, that defendant's letter was a repudiation of any agreement made between him and plaintiff to equalize the advances made by them, and a refusal by defendant to be bound thereby in the future.

[Ed. Note.—For other cases, see *Mines and Minerals*, Dec. Dig. § 83.*]

2. MINES AND MINERALS (§ 83*)—RESCISSION—EFFECT.

While defendant was not bound to continue the agreement for the equalization of advances between himself and plaintiff longer than he desired, he was bound thereby as to advances made after his letter rescinding the contract, which were incurred on account of obligations assumed before his repudiation thereof, or for the purpose of completing the transaction begun theretofore, which could not be abandoned without substantial loss.

[Ed. Note.—For other cases, see *Mines and Minerals*, Dec. Dig. § 83.*]

In Bank. Appeal from Superior Court, Los Angeles County; George H. Hutton, Judge.

Action by Epes Randolph against Lycurgus Lindsay. From a judgment for plaintiff and an order denying a motion for a new trial, defendant appeals. Reversed.

Harris & Swanwick and Hunsker & Britt, for appellant. Eugene S. Ives and Gibson, Trask, Dunn & Crutcher, for respondent.

SHAW, J. Appeals by defendant from the judgment and from an order denying his motion for a new trial.

The plaintiff sued to recover \$26,784.62 alleged to be due for money paid by plaintiff for the defendant under two special contracts. It is contended by the appellant that the findings as to the amount due plaintiff are not sustained by the evidence.

Randolph, Lindsay, and one Mackay, acquired certain gold mines in Mexico, which they conveyed to a corporation organized by them named the Llanos de Oro Mining & Milling Company, with a capital stock of \$4,000,000, divided into 400,000 shares of the par value of \$10 each. In consideration of the conveyance of the mines, the three parties received the entire capital stock of the company in equal shares. In order to get the gold from the mines, it was necessary to expend a large amount of money in the erection of a stampmill and in development work. Randolph and Lindsay, as managers of the company, undertook to raise the required funds by means of notes of the company. It was agreed between the three that in placing these loans each payee was to receive, as a bonus, four dollars in stock for each dollar loaned, the stock required for that purpose being contributed in equal amounts by the three interested parties. Mackay,

however, was not expected to, and did not, procure any loans or otherwise aid in financing the concern. The sum of \$446,300 was raised in this manner and expended on the mines prior to April 21, 1906. The stampmill was not finished, and it was necessary to raise more money to carry the enterprise to completion and fruition. Randolph had already advanced for the company sums amounting to \$20,250. The complaint alleges, and the court finds, that on or about April 21, 1906, the plaintiff and defendant agreed with each other that the corporation should continue to carry on its business and plans of development and equipment, and that to enable it to do so they would advance for it the necessary funds, share and share alike, and would pay, share and share alike, any and all debts of the company incurred by reason of carrying on its business and plans aforesaid, and that each would pay to the other whatever sum of money was necessary to equalize their respective advances. It is claimed by the appellant that this does not cover the amounts previously advanced by Randolph, as aforesaid, which amounts were included in the judgment. As we have concluded that the judgment and order must be reversed for other reasons to be presently stated, we need not consider this point. We state the facts aforesaid because they tend to explain the subsequent transactions.

In July or August, 1906, the mill was completed and upon a thorough milling test of the ore it turned out to be too poor to be worth working. In other words, the enterprise proved to be a failure. The mines were shut down. It is alleged, and the court, in effect, finds that to meet this emergency and retrieve the disaster as far as might be, the plaintiff and defendant, in October, 1906, agreed with each other that the company should explore and seek for mines or mining territory in the vicinity of the mill, which could be treated profitably by the mill, or which could be purchased, leased, or used in connection therewith, and that they would advance to the company, from time to time, such money as might be required therefor, share and share alike, would pay, equally, all debts of the company incurred in so doing, and that either would pay to the other whatever sums were necessary to equalize between them the advances so made for the company.

The findings as to the amounts advanced by Randolph included the sum of \$23,294.82, composed of numerous items of advances made by Randolph from December 24, 1906, to July 16, 1907. It is contended by the appellant that the agreement of October, 1906, was abrogated by him on December 6, 1906, and that he is therefore not bound to equalize the advances of Randolph made after the said date. This claim appears to be well founded. On December 4, 1906, Randolph

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

sent a letter to Lindsay containing a statement showing that he, Randolph, had advanced for the company to that date, under both agreements, a total sum of \$69,812.87, and that Lindsay had advanced only \$31,230, Randolph's excess being \$38,582.87, and asking Lindsay to advance immediately as much to equalize them as he could spare, or to make a 12-months' note for the difference, so that the money could be raised on it for the company's use. He also said he was taking steps to procure the Cerro Colorado mine for the Llanos Company. On December 6, 1906, Lindsay answered by letter, saying, "I am not paying Llanos debts without some security and a plain, fair understanding with the stockholders. * * * I am surprised that you should assume to advance money on my account and without my consent. I am able to do my own advancing * * * Referring to the Sierra Colorado mine, would say, after your letter to-day, I do not care to go any further with the deal, or any other deal, without some thorough understanding." This was a repudiation of the agreement which Randolph claimed to exist and upon the faith of which he had been acting. It implied a denial of the making of such agreement, and it was, in effect, a refusal to be bound by it in the future. In his testimony Randolph refers to the letter of December 6th as a letter "repudiating all our arrangements." Randolph replied by letter on December 14, 1906, to the effect that he had been of the opinion that a kind of copartnership was developing between them, but that if Lindsay's idea of the relations between them was different, as his letter indicated, the various matters could be readily adjusted. There were no further negotiations between them on the subject and Lindsay did not thereafter consent to be bound for any further advancements.

There is nothing in the evidence to explain the purpose for which the subsequent advances by Randolph were made, except his general statement that the money was expended by him in pursuance of the agreement of October, 1906, and for the benefit of the Llanos Company, and that in paying out the several sums he relied on the promise of Lindsay to reimburse him to the extent necessary to make their advances equal. If any of the subsequent advances were made on account of obligations incurred before Lindsay's repudiation of the agreement, or in the completion of enterprises or transactions begun before, and which could not be stopped or abandoned without substantial loss, perhaps Lindsay would be liable to Randolph for one-half thereof, under the agreement, notwithstanding his withdrawal therefrom. As to such matters, he could not withdraw without a rescission. No rescission is pleaded in the answer and the evidence does not show an attempt to rescind. But there was

nothing in the agreement that bound Lindsay to continue its existence longer than he chose. He could terminate it any time and thereupon he would be exempt from liability for future advances by Randolph for new deals or transactions. It was for Randolph to prove, if he could, that the advances subsequent to December 6th were made on account of previous obligations or previous uncompleted transactions or enterprises. The evidence is silent on the subject. The finding, so far as these items are concerned, is not sustained by the evidence.

Inasmuch as there must be a new trial, we consider it unnecessary to discuss or determine the other questions presented. They may not arise upon a second trial, and the issues may be changed.

The judgment and order are reversed.

We concur: SLOSS, J.; ANGELLOTTI, J.; LORIGAN, J.; MELVIN, J.

(158 Cal. 740)

In re CHAPMAN'S ESTATE. (S. F. 5301.)
(Supreme Court of California. Dec. 3, 1910.)

1. EXECUTORS AND ADMINISTRATORS (§ 178*)—
RIGHTS OF WIDOW—MONTHLY ALLOWANCES.

The court in probate proceedings ordered the payment of \$40 a month to the widow as a family allowance, beginning March 6, 1907. The administratrix filed her final account on October 4, 1907, and on February 7, 1908, the court made a final order discontinuing the family allowance, after October 4, 1907, the date of the order settling the final account, and on October 9, 1908, the administratrix filed a supplemental account including an item for family allowance accruing from September 6, 1907, to October 6, 1908. *Held*, that the widow was entitled to the monthly allowance for the month ending October 6, 1907.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 178.*]

2. EXECUTORS AND ADMINISTRATORS (§ 510*)—
PRESUMPTIONS—INSUFFICIENCY OF RECORD.

Where the record on appeal from orders settling an administratrix's supplemental final account and directing distribution does not contain the evidence upon which the court acted in discontinuing a family allowance to the widow after October 4, 1907, the date of the order settling the administratrix's final account, the Supreme Court will presume that the family allowance for the month ending October 6, 1907, to which the widow was legally entitled, was included in the final account settled on October 4, 1907.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 510.*]

3. EXECUTORS AND ADMINISTRATORS (§ 194*)—
ORDERS APPEALABLE.

An order made by the court in probate proceedings after the administratrix's final account was settled, discontinuing a monthly family allowance to the widow, was appealable.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 723; Dec. Dig. § 194.*]

4. EXECUTORS AND ADMINISTRATORS (§ 510*)—
PRESUMPTIONS.

Since under Code Civ. Proc. § 1704, orders in probate proceedings need not recite the existence of the facts upon which the jurisdiction to

make them depends, where the order discontinuing a monthly allowance to a widow recited that it was made upon good cause, and the record on appeal from orders settling the administratrix's supplemental final account and directing distribution does not show whether notice was given the widow of the order discontinuing the allowance, the rule which presumes on collateral attack that the court had jurisdiction to make an order unless the contrary appears from the record, applies, so that the Supreme Court will presume that notice of such order was given the widow.

[Ed. Note.—For other cases, see *Executors and Administrators*, Dec. Dig. § 510.*]

In Bank. Appeal from Superior Court, Santa Clara County; J. B. Welch, Judge.

In the matter of the estate of John Chapman, deceased. From orders settling the supplemental final account, and directing distribution of the estate, the widow appeals. Affirmed.

J. H. Russell and E. L. Rhodes, for appellant. Henry French, for respondents.

SHAW, J. This is an appeal by the widow of the deceased, who is also the administratrix of the estate, from orders settling the supplemental final account and directing distribution. The only ruling complained of is the refusal to allow credit in the supplemental account for the amount of the monthly family allowance which accrued during the period intervening between the date of the settlement of the final account filed with the petition for distribution and the date of the supplemental final account.

The deceased died on March 6, 1907, leaving surviving as heirs at law, besides his widow, a sister and the descendants of a deceased sister. The widow was duly appointed administratrix of his estate. On May 31, 1907, the court made an order for the payment of \$40 a month to the widow, as a family allowance, beginning on March 6, 1907. On September 23, 1907, the administratrix filed her final account, and a petition for the distribution of the estate, alleging that the deceased left no children or surviving collateral relatives and that she, as his widow, was the only heir. On October 4, 1907, the final account was settled showing a balance of \$2,741.95 for distribution, consisting entirely of money. The sister and descendants of the deceased sister appeared and contested the petition for distribution, and a delay of one year ensued before the matter of the contested heirship was decided. On February 7, 1908, the court made an order that the family allowance be discontinued from and after October 4, 1907, the date of the order settling the final account. On October 9, 1908, the widow, as administratrix, filed a supplemental account showing the expenditure of \$73.52 in costs of administration and claiming credit for \$520, on account of the family allowance accruing from September 6, 1907, to October 6, 1908. The

order of October 9, 1908, appealed from, settled this account as presented, "with the exception of the item for family allowance," leaving a balance of \$2,668.43 which was ordered distributed to the heirs.

On the facts as above stated it would appear that the widow was entitled, in any event, to the \$40 for the month extending from September 6, 1907, to October 6, 1907. But, as no bill of exceptions showing the evidence upon which the court acted is presented, we must presume that the allowance for that month was included in the final account settled on October 4, 1907.

The appeal is based on the proposition that the order of February 7, 1908, discontinuing the family allowance from and after October 4, 1907, was absolutely void because the court had no power to make it. This contention is founded on the assertion that it was made ex parte, and without any notice to the widow. The record contains nothing to that effect. The order recites that it was made upon good cause, but neither the recital, nor anything else in the record before us, states anything at all on the question whether or not notice thereof was given. Orders in probate proceedings need not recite the existence of the facts upon which jurisdiction to make them depend. Code Civ. Proc. § 1704. The order was appealable and it has become final. The attack upon it was and is wholly collateral. The presumption in regard to such orders, upon such collateral attack, is the same as in other cases; the jurisdiction of the court to make them is presumed, unless the contrary appears from the record, or from competent evidence in a proper attack. Upon this record we must presume that the necessary notice was given, and that the order discontinuing the family allowance was valid and binding. That item was therefore properly rejected.

The orders are affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.; LORIGAN, J.; HENSHAW, J.

(158 Cal. 731)

POTRERO NUEVO LAND CO. v. ALL PERSONS CLAIMING ANY INTEREST IN OR LIEN UPON THE REAL PROPERTY HEREIN DESCRIBED, OR ANY PART THEREOF. (S. F. 5,130.)

(Supreme Court of California. Dec. 2, 1910.)
1. RECORDS (§ 18*)—Lost Records—ACTIONS—AFFIDAVITS.

St. Ex. Sess. 1906, c. 59 (McEnerney act), creates a system of procedure to establish title to real property where the public records have been destroyed, requiring an affidavit to be attached to the complaint containing a full and explicit showing of the period during which plaintiff has enjoyed his estate, and concerning the person or persons "from whom obtained," etc. Held, that an affidavit merely declaring that the title to the property was conveyed by

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the state to P. in 1855, and by him through divers mesne conveyances to plaintiff who was the owner and holder thereof, and has been for the last 10 years or more, did not fully show how long plaintiff had owned and enjoyed the property, nor describe or characterize the person from whom the title was obtained.

[Ed. Note.—For other cases, see Records, Cent. Dig. §§ 36-43; Dec. Dig. § 18.*]

2. RECORDS (§ 18*)—POSSESSION—ACTION—LANDLORD AND TENANT—RELATION.

St. Ex. Sess. 1906, c. 59 (McEnerney act), creates a system of procedure to establish title to real property, where the public records have been destroyed, by any person who claims an estate of inheritance, or for life in, and who is by himself or other person, holding under him in actual or peaceable possession of any real property. *Held* that, where certain land in controversy was granted to the city of San Francisco for 99 years by Act March 26, 1851 (St. 1851, c. 41), and thereafter the state's reversion in fee was conveyed to plaintiff's prior grantor subject to the remainder of the 99-year term as authorized by Act May 18, 1853 (St. 1853, c. 160), plaintiff held such an estate in the land as entitled him to sue to establish his title, though the technical relation of landlord and tenant did not exist between plaintiff and those in possession holding under the term.

[Ed. Note.—For other cases, see Records, Cent. Dig. §§ 36-43; Dec. Dig. § 18.*]

Melvin, Henshaw, and Lorigan, JJ., dissenting in part.

In Bank. Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by the Potrero Nuevo Land Company against all persons claiming any interest in or lien on certain lands described in the complaint. From a judgment dismissing the complaint, plaintiff appealed. The judgment was reversed in department, after which a rehearing was had in bank, where the department's opinion was disproved, and the judgment affirmed.

See, also, 155 Cal. 371, 101 Pac. 12.

The following is the opinion in department of Melvin, J. (concurring in by Henshaw and Lorigan, JJ.):

"An action was commenced under the so-called McEnerney act to establish plaintiff's title to certain property in the city and county of San Francisco; to determine adverse claims to said realty; and for general relief. Upon motion the complaint was dismissed, and this appeal is taken from the order of dismissal. The grounds of the motion were: First, that the estate claimed by plaintiff is not an estate for the establishment of title to which an action of this kind may be brought; second, that plaintiff does not appear to be in the actual and peaceable possession by itself or its tenants holding under it, of the premises to which plaintiff seeks to establish its title; third, that the affidavit of plaintiff does not set forth or show when or from whom the Potrero Nuevo Land Company acquired its title to the described premises. The asserted title of plaintiff derived by mesne conveyances from one John Bensley was to an es-

tate of inheritance in certain 'Beach and Water Lots,' the complaint alleging that the corporation plaintiff succeeded to such title after its sale by commissioners to Bensley under the act of May 18, 1853, and the supplemental statute of May 1, 1855.

"By the act of March 26, 1851 (St. 1851, p. 307), the state granted to the city of San Francisco the 'use and occupation' of certain 'Beach and Water Lots' for a period of 99 years from and after the passage of the act. By a subsequent statute of May 18, 1853 (St. 1853, p. 219), it was provided that commissioners to be appointed by the Governor should sell the remaining interest of the state in these lots 'after the expiration of the estate or term granted or mentioned' in said act of March 26, 1851. The act of 1855 (St. 1855, c. 181) wrought a change in the personnel of the board of commissioners. Plaintiff asserts title to the fee formerly held by the state subject to the tenancy for 99 years of the city and those deriving title under it. Defendants claim the right to the 'use and occupation' of various parcels of the property founded upon the act of 1851, and some of them also declare that they hold their portions of the land in fee.

"The lower court in granting the motion to dismiss held that, while plaintiff's estate was one of inheritance, it could not maintain the suit; that in addition to such an interest it must be in the actual and peaceable possession of the property; that the grantees of the city are not tenants of the state nor grantees of the state; and that, as no one will have possession under the reversionary right of the state until 1950, the plaintiff cannot now be in occupation of the property by its tenants or otherwise.

"We find ourselves unable to agree with these conclusions. The state having disposed of the fee, subject to the use and occupation for 99 years, its grantees or their ultimate successors in interest occupy the exact position of ownership formerly held by the state. Undoubtedly, the city and its successors to the estate for years hold the property subject to this reversionary interest. It makes no difference that their term is a very long one. They hold the land subject to the title in fee, precisely as they would possess it under a lease for a year or any other short term, because an estate for years is a leasehold interest, and is personal property. *Jeffers v. Easton, Eldridge & Co.*, 113 Cal. 352, 45 Pac. 680; *Summerville v. Stockton Milling Co.*, 142 Cal. 529, 78 Pac. 243. To be sure there was no contract of rental between plaintiff and defendant, but the sale of the term for years under the act of March 26, 1851, was in itself a contract of rental, and the state (the landlord) was entitled under the act to 25 per cent. of the money realized from such sale; but aside

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

from this the relation of landlord and tenant may arise without rent reserved. Taylor in his work on Landlord and Tenant, § 14, says: 'The relation of landlord and tenant subsists by virtue of a contract express or implied, between two or more persons for the possession of lands or tenements.' And Martindale on Conveyancing, § 293, says: 'The relation of landlord and tenant may arise by implication or by the act or operation of law.' Section 1 of the McEnerney act provides that, 'Any person who claims an estate of inheritance or for life in, and who is by himself or his tenant or other person holding under him in the actual or peaceable possession of any real property' may bring an action of this kind. St. Ex. Sess. 1906, p. 78. We see no logical escape from the doctrine that the relation of landlord and tenant exists; that the possession of the latter is that of the former; and that appellant has the right to maintain this action.

"There is no merit in respondents' contention that the motion to dismiss was properly granted because appellant failed to disclose by its affidavit fully and explicitly 'the character of his estate, right, title, interest or claim in, and possession of property, during what period the same has existed and from whom obtained.' Section 5, McEnerney Act. The affidavit did show 'that said title to said property was sold and conveyed by the state of California to one John Bensley in 1855, and by him, through divers mesne conveyances, conveyed to said plaintiff, who is now the owner and holder thereof, and has been for the last ten years.' This, we think, was amply sufficient for the purposes of the remedial act here considered.

"The order from which this appeal is taken is reversed."

A. Everett Ball, for appellant. Page, McCutchen & Knight, C. Irving Wright, Thomas, Gerstle, Frick & Beedy, Stoney, Rouleau & Stoney, and F. J. Castelhun, for respondents.

HENSHAW, J. Appellant brought its action under the McEnerney act to establish its title to certain beach and water lots in the city and county of San Francisco. By the act of March 26, 1851, the Legislature granted to the city of San Francisco the use and occupation of said land for the term of 99 years from the date of the act. Under the statute of May 18, 1853 (St. 1853, p. 219), commissioners were appointed who should sell, and did sell, the remaining interest of the state in these lots "after the expiration of the estate or term granted or mentioned in the act of 1851." Plaintiff is the purchaser of the fee disposed of by the state in subordination to the 99-year term, tenancy or estate, and will not be entitled to actual possession as contradistinguished from any constructive possession, through the tenants of the 99-year term, until March 26, 1950. The court

sustained a general demurrer to the complaint and dismissed the action. Plaintiff appeals, and there are presented for consideration two questions: (1) Whether under the facts stated plaintiff had a possession sufficient to satisfy the requirements of the McEnerney act (*Lofstad v. Murasky*, 152 Cal. 64, 91 Pac. 1008), and so to entitle it to prosecute this action; and (2) whether the affidavit required to be filed with the complaint satisfies the act, which exacts that such affidavit shall fully and explicitly set forth "the character of his (plaintiff's) estate, right, title, interest or claim in and possession of the property during what period the same has existed and from whom obtained."

The McEnerney act was emergency legislation, containing certain novel features.¹ It is not, of course, to be condemned for these reasons, but they are sufficient to demand of the court scrupulous care in considering the provisions when the provisions themselves are attacked, or request is made that construction should be given to them. For these reasons a rehearing was granted from the department decision.

1. A fundamental provision of the act is that it is available only to such person as "by himself or his tenant or any other person holding under him is in the actual and peaceable possession of the land." Can it be said that the relation of landlord and tenant, within the meaning of the McEnerney act, exists between the owner of the reversionary fee and the owner of the 99-year term? In the very broadest acceptance of the meaning of the phrase "landlord and tenant" that relationship may be said to exist. But the question is whether it exists within the purview of the act. Thus Smith in "*Landlord and Tenant*," after mention of the fact that under the common law every one is a tenant, since there is no allodial property, proceeds as follows: "I need not, however, tell you who must be all familiar with the use of those terms, that when we speak of 'landlord and tenant,' even among lawyers, we use these words in a much narrower sense than that which I have just described. For instance, when we use the words 'landlord and tenant' we do not mean to express the species of relation which subsists between the sovereign and a subject, for instance, the Duke of Wellington, who holds his estates of her Majesty by the service of presenting yearly a banner in lieu of all other rents and services; nor do we, I think, ever intend to express the sort of relation that exists between the reversioner and the particular tenants under a settlement where no rent is reserved or any service rendered, although a tenancy doubtless exists between them. For instance, if I convey lands to A. in tail, keeping the reversion myself, there is no doubt that A. becomes my tenant, though I reserve not a sixpence of rent, nor ask for any covenant on his part to perform

any of the ordinary duties of a tenant, and though he might destroy my interest the next day if so minded. But though, as I have said, he is my tenant in strict law, this is not the sort of tenancy we mean when we use the words 'landlord and tenant.' It is very difficult to express in terms the precise idea which we attribute to those words. But I think I am not far wrong in saying that, when we speak of 'landlord and tenant' we have the notion in our minds of a tenancy limited in point of duration within some bounds not so extensive as to render the landlord's interest practically worthless and accompanied by some remunerating incidents to the reversion, such as a rent, or at all events a fine in lieu of one, and also by certain obligations such as covenants, or, where the tenancy is not evidenced by some instrument under seal, agreements for the performance of the duties usually required from persons taking the description of property demised; and as these are the sort of tenancies which give rise to the great mass of practical questions involved in the law of landlord and tenant, it is to these that I intend almost exclusively to direct my remarks." And, says Washburn (Real Property [4th Ed.] 315): "This relation of landlord and tenant does not embrace that between sovereign and subject, nor between the reversioner and him who enjoys the particular estate on which the reversion depends, where no rent is reserved, although a kind of tenancy subsists between them."

A consideration of the acts of the Legislature in disposing of these beach and water lots and of the decisions of this court in relation thereto make plain, we think, the fact that the relation of landlord and tenant in its true sense, even as used "among lawyers" does not exist. By the act of 1851 the state granted the use and occupation of these lands to the city and county of San Francisco for the term of 99 years, with authorization to the city to sell and dispose of its holdings, requiring only that, upon so doing, it should pay into the state treasury 25 per cent. of the moneys received from such sales. Clearly in this there was no design of establishing between the state and the city the relation of landlord and tenant, and less design than that relation should exist between the state and any person to whom the city in turn might convey its interest. The subsequent act of 1853 merely empowered commissioners to sell the state's interest at public auction. And still less apparent is any intent or design to create such a relationship by substitution of the purchaser at the auction for the state of California. In *Holladay v. Frisbie*, 15 Cal. 635, a creditor of the city had attached the city's interest in certain beach and water lots, and the question arose as to how the city's title to the 99-year term was affected by the provision that it should pay one-fourth of the proceeds of the property to the state.

It was declared that this provision created a mere contractual obligation upon the part of the city, and was not a condition to the grant, and that "the interest of the city in the beach and water lot property is a legal estate for ninety-nine years." Such a decision is foreign to the conception that the relationship of landlord and tenant existed between the state and the city. It is concluded, therefore, that the relation of landlord and tenant, within the meaning of the McEnerney act, does not exist between the holder of the reversionary fee and the holder of the 99-year term in the beach and water lots of the city and county of San Francisco. And as the McEnerney act contemplates "actual possession" either by plaintiff, by his tenant, or by some person holding under him, and as plaintiff's possession is based wholly upon that of his asserted tenant for years, since such tenancy does not exist, it necessarily follows that plaintiff does not come within the purview of the act, and is not entitled, therefore, to maintain this action.

2. The affidavit accompanying the complaint in this instance declared merely "that said title to said property was sold and conveyed by the state of California to one John Bensley in 1855, and by him through divers mesne conveyances conveyed to said plaintiff, who is now the owner and holder thereof and has been for the last ten years and more." A requirement of a full and explicit showing of the period during which a plaintiff has enjoyed his estate, and a full and explicit showing of the person or persons "from whom obtained" is not met by the affidavit here presented. To say that one has owned an estate for 10 years and more is not fully and explicitly showing how long in fact he has owned and enjoyed it. And a statement that one acquired title by "divers mesne conveyances" from one John Bensley, to whom the state conveyed the property in 1855, is not a full and explicit showing, description or characterization of the person "from whom obtained." The provision of the statute requiring a full and complete statement in these particulars is manifestly designed for the benefit of the defendants, in enabling them, by verifying plaintiff's claim, to prevent fraud and safeguard their own rights. For these reasons a full and fair compliance with the provisions is a just exaction from every plaintiff.

For the foregoing reasons, the judgment appealed from is affirmed.

I concur: LORIGAN, J.

SHAW, J. (concurring). I concur in the judgment solely on the ground that the affidavit accompanying the complaint is defective as stated in the second part of the foregoing opinion.

Upon the question first considered in the opinion, I am unable to agree with the conclu-

(158 Cal. 702)

SMITH v. CITY OF LOS ANGELES et al.
(L. A. 2,240.)(Supreme Court of California. Dec. 1, 1910.
On Rehearing, Dec. 31, 1910.)1. TAXATION (§ 421*)—ASSESSMENT—VALIDITY
—NONCOMPLIANCE WITH STATUTE.

An assessment is void which does not conform to Pol. Code, § 3650, requiring land to be listed by the assessor by township, range, section, or fractional section, and when it is not a congressional division or subdivision, by metes and bounds, or other description sufficient to identify it, giving an estimate of the number of acres, not exceeding 640 acres in each tract.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 720-735; Dec. Dig. § 421.*]

2. PUBLIC LANDS (§ 24*)—SURVEY.

Rev. St. § 2395 (U. S. Comp. St. 1901, p. 1471) requires public lands to be divided by north and south meridian lines, and by others crossing them at right angles so as to form townships of six miles square, and requires the townships to be subdivided into sections containing 640 acres each, by running each way parallel lines at the end of every two miles and by marking on each of such lines at the end of every mile, requires the sections to be numbered from 1 to 36 respectively, and also requires the plat to be made of the township and the fractional part thereof, and the subdivisions thereof. *Held* that, even after a principal meridian and a base line are established and the exterior lines of the township surveyed, the sections or subsections do not have a legal existence, until they are established by an approved survey under authority of Congress.

[Ed. Note.—For other cases, see *Public Lands*, Cent. Dig. §§ 31, 32; Dec. Dig. § 24.*]

3. TAXATION (§ 421*)—ASSESSMENT—IDENTIFICATION OF LAND ASSESSED—SUFFICIENCY OF ASSESSOR'S MAP.

Pol. Code, § 3658, requires the board of supervisors to furnish the assessor with maps, plat books, etc., for the use of his office which shall show the private land owned in the county, and, if surveyed under the authority of the United States, the divisions and subdivisions thereof. Section 3634 provides that if the owner fails to make a statement when requested, describing his land in parcels and subdivisions, the assessor may obtain an order for the survey of such land, defining the subdivisions. Section 3654 requires the map, books, etc., to be returned to the county assessor's office and kept there for future reference after delivery to the clerk of the board of supervisors for equalizing assessments, and provides that in the meantime the map, books, etc., must be left in his office for the inspection of persons interested. Section 3650 requires land to be listed by the assessor by township, range, section, or fractional section, and when it is not a congressional division or subdivision, by metes and bounds, or other description sufficient to identify it. The assessor's map of land assessed, which was a part of a ranch, shows the outlines of only a part of the ranch, which were crossed by north and south and east and west lines, dividing the part platted into equal sections inside such outlines and into fractional sections adjacent to the exterior boundaries thereof, but such sectional lines were not founded on a survey by the owner, assessor, or otherwise, nor did it appear that they corresponded with the section lines outside the ranch, or to be located by any visible mark, being merely arbitrary lines drawn thereon, but the number of acres inclosed within some of the lines were marked on the map. *Held*, that the assessor's map did not identify the land assessed by sectional lines, metes or bounds, or otherwise, the

sion there reached. The act is entitled: "An act to provide for the establishment and quieting of title to real property in case of the loss or destruction of public records." The first section limits its application to instances where the public records of titles have been lost or destroyed by "flood, fire, or earthquake." Section 18 limits its application, in point of time, to proceedings begun under it before July 1, 1909, afterwards extended to January 1, 1911. It is well known that it was enacted to enable persons owning lands in San Francisco, where all the public records had been destroyed by the great fire of April, 1906, to obtain title of record, which would serve as a substitute for the destroyed record of the instruments on which the title depended. By its precise terms, a part only of which is quoted in the foregoing opinion, it declares that the relief provided therein may be obtained by "any person who claims an estate of inheritance, or for life in, and who is by himself or his tenant, or other person, holding under him, in the actual and peaceable possession of any real property" in the county. I agree that the procedure prescribed in the act should be followed closely. But with respect to the persons who may obtain its benefits, I believe that it should receive a broad and liberal construction, one that would include every person who might be benefited by the relief provided, rather than one which would exclude any such person or class of persons. The above language makes it applicable to the case of any person who claims an estate of inheritance and who, by himself or by another holding under him, is in actual and peaceable possession. The relation of landlord and tenant, in its narrow meaning, is not essential. One may be in actual possession by another holding under him, without that other person being his tenant in the ordinary sense and without the technical relation of landlord and tenant existing between them. One who holds a particular estate for years by grant, is, by a very common use of language, said to be holding under his grantor, although there is no obligation to pay rent in any form. In like manner, he would be holding under the grantee of the remainder. Such remainderman would be entitled to take advantage of the act to establish a record title to the remainder. If this were not so, then every landowner who may have conveyed to another an estate for years running beyond the time to which the act is extended, and who has not reserved any rent in the conveyance, is deprived of the benefits of the act.

We concur: ANGELLOTTI, J.; SLOSS, J.

MELVIN, J. (dissenting). I dissent and adhere to the department opinion previously prepared by me.

sectional lines shown not representing an actual survey; and hence the assessment was void.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 720-735; Dec. Dig. § 421.*]

4. TAXATION (§ 810*)—ACTION—SUFFICIENCY OF EVIDENCE.

In an action to quiet title to realty based upon title under a tax sale, evidence *held* to sustain a finding that the property assessed was not sufficiently identified by extrinsic evidence to enable the owner to determine from an inspection of the map what part of his land was attempted to be assessed.

[Ed. Note.—For other cases, see *Taxation*, Dec. Dig. § 810.*]

5. TAXATION (§ 805*)—SALE—REDEMPTION—LIMITATION.

Under Code Civ. Proc. § 315, prohibiting a suit by the people in respect to realty by reason of the right or title of the people thereto, unless such right or title accrued within 10 years before the action was begun, an action against a city to quiet title to land, claimed to have been sold under a void tax sale, was not void where less than five years had elapsed from the date of the sale to the state up to the commencement of the action.

[Ed. Note.—For other cases, see *Taxation*, Dec. Dig. § 805.*]

6. TAXATION (§ 627*)—ASSESSMENT—IRREGULARITIES—EFFECT.

Under Pol. Code, § 3885, providing that no assessment or act relating to the assessment or collection of taxes shall be illegal for informality, or because it was not completed within the time required by law, a sale of land for taxes was not invalid because the delinquent tax list was published one day after the date required by section 3764, or because a statement attached to the published delinquent list was not verified by affidavit.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1280; Dec. Dig. § 627.*]

7. TAXATION (§ 627*)—SALE—INVALIDITY.

That the delinquent list did not comply with the form prescribed by Pol. Code, § 3764, did not render the tax sale invalid.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1280; Dec. Dig. § 627.*]

Beatty, C. J., dissenting.

In Bank. Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by J. H. Smith against the City of Los Angeles and another. From a judgment for defendants, plaintiff appeals. Affirmed.

C. S. McKelvey and Smith, Miller & Phelps, for appellant. Leslie R. Hewitt, City Atty., and Emmet H. Wilson, Chief Deputy City Atty., for respondent city. J. W. McKinley, for respondent Griffiths.

PER CURIAM. The decision of the District Court of Appeal for the Second district, in this cause, was vacated and the cause transferred to this court, mainly for the purpose of further considering the sufficiency of the assessor's map, made under the provisions of section 3658 of the Political Code, as a means of identification to supply the defects in the descriptions of land in the assessment and the tax deeds. The trial court found that it was not sufficient and we are

satisfied that we cannot disturb that finding. The opinion of Justice Allen, in the District Court of Appeal, is appended hereto and adopted as the opinion of this court.

Concerning the assessor's map we add the following: The section provides that the board of supervisors "must provide and furnish the assessor with the proper books, blanks, maps and plat-books for the use of his office. Such maps and plat-books shall show the private lands owned or claimed in the county, and if surveyed under the authority of the United States, the divisions and subdivisions thereof, with their acreage, according to such survey; if held under Spanish grant, the exterior boundaries of such grants, the divisions and subdivisions, and number of acres claimed." It also provides that the state board of equalization "may require such map and plat-books to be indexed to show owner's names, give correct description for assessment, show improvements and assessed value."

There is no evidence nor claim that the state board ever required any of these things. The copy of the map contained in the transcript shows that it does not comply with such requirements, if they were made, except that the number of acres inclosed by some of the lines marked thereon are indicated by figures followed by the letter "A." The map shows the outlines of a part of the Rancho Los Feliz, but not all of it. These are crossed by north and south lines and east and west lines, dividing the portion platted into squares of equal size inside and fractional parts of squares next to the exterior bounds. There is no evidence that these lines are founded on any survey or that the rancho was ever surveyed and subdivided into lots corresponding to these squares by the owner, or by the assessor, or at all. Section 3629 of said Code authorizes the assessor to exact a statement from each landowner containing an exact description of his lands in parcels and subdivisions, not exceeding 640 acres each. Section 3634 provides that if the owner fails to do this, or fails to give a sufficient description, the assessor may obtain from the superior court an order requiring the county surveyor to survey the land and define the subdivisions for the assessor. There is no evidence that this was done or that the assessor's map represents any such survey. The maps and plat books provided for by section 3654 were not intended to represent any actual survey or surveys. The owners are not consulted in their preparation nor allowed any opportunity to see that they are correct, and they are not binding upon him. They are mere compilations embracing the entire county made under the direction of the board of supervisors, or by the assessor, upon such information as may be at hand. They are designed merely to facilitate the business of the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

office, as a convenient exhibition of all the lands in the county to which the officers can refer in the daily routine of business. It is not shown that the subdivisions indicated on the map by the parallel lines have ever been marked on the ground, or that they coincide with the section lines outside the rancho, or that they can be located by any visible marks or monuments or at all. They are mere arbitrary lines drawn on paper in some office without any reference whatever to actual conditions on the premises. Some one has copied a part of the map of the rancho attached to the record of the patent, and has drawn these lines across his copy, so as to make a picture such as might be shown by a map of a part of the congressional townships in which the rancho lies, if such townships had ever been surveyed, subdivided, and mapped through said rancho. As a matter of fact, they never were so surveyed. The picture has no counterpart on the surface of the land. It cannot serve to identify the land, for the location of the tracts indicated cannot be ascertained.

Opinion of the District Court of Appeal.

The action was one instituted by plaintiff against defendants to quiet title to certain described real estate, plaintiff's title resting upon sales of the premises on account of the nonpayment of delinquent taxes, the validity of which is the sole matter in controversy.

The court finds that plaintiff had no right, title, or interest in said property, and rendered judgment against plaintiff for costs. From this judgment, plaintiff appeals upon a bill of exceptions.

The facts as presented by the record are these: The Rancho Los Feliz was granted by the Mexican government in 1843 to one Verdugo, which grant in 1854 was by the land commissioners confirmed, and upon appeal from such confirmation the District Court of the United States for the Southern district of California, in its December term in 1856, affirmed the decree of said commissioners to the extent of $1\frac{1}{2}$ leagues, the exterior boundaries whereof were defined by the record of juridical possession on file in said case, and the title of said Verdugo was decreed good and valid. Thereafter, in 1871, a patent was issued by the government of the United States to the said Verdugo to the premises so included in said grant and subsequently confirmed, which patent certified that a plat and survey of said lands had been deposited in the general land office, whereby it appears that said claim had been designated as lot No. 38, in township 1, north of range 13 west, lot No. 38 in township 1, north of range 14 west, lot No. 38 in township 1, south of range 13 west, and lot No. 37 in township 1, south of range 14 west, San Bernardino meridian, containing 6,647.46 acres of land. A copy of such plat and survey was attached to such patent and made part there-

of. An examination of such plat shows that the lots No. 38 north of the base line, and being the portion of the rancho in which is situated the property in dispute, were not surveyed or divided into sections. The only lines of survey marked thereon affecting the property in controversy being the base line, a line marking the southerly boundary of sections 13 and 14, a line extending southerly from the southerly line of sections 13 and 14 along the westerly line of rancho to a point at and below the southerly limit, and the township line extending north and south dividing township 13 west from township 14 west. No lines marked or corners appear on the map indicating any survey of east and west lines through any of the territory lying between the base line and the southerly line of sections 13 and 14, which, if the sections were full, would be a distance of three miles. It is true that there appears upon the profile in that portion marked "lot 38" in township 14 west in the southerly part thereof, the word and figures "section 36," and near the center thereof "section 25," and north of the northerly line of the rancho the word and figures marked "section 24," but nothing appears as indicating the dividing line between the respective sections. Again, lot 38 in township 1, north of range 13 west, which extends from the base line northerly at least $2\frac{1}{4}$ miles, and is almost equal in width with the other lot 38, has only one section marked thereon, being designated "section 31," the area of which it is obvious from the profile must exceed in extent two congressional sections. It further appears from the record that under these conditions the lands in question were by the assessor listed for taxation, and described in such assessment and in all proceedings thereafter leading up to and including the deeds to plaintiff as "Ro Los Feliz, 265 acs. being fractional sec. 24 T. 1. N. R. 14, W." in one deed, and in the other deed, "Ro Los Feliz 599 acs. being fractional sec. 25, T. 1. N. R. 14 W." there having been a separate deed for each parcel. The taxpayer named in the assessment owned at the time thereof the whole of the Los Feliz rancho. After the assessment for taxation, the taxpayer conveyed a large part of such rancho, including the premises in controversy, to defendant city, the same to be used for park purposes, which conveyance was made March 5, 1898, and the defendant city has ever since been in possession thereof, claiming ownership and making improvements thereon. The attempted sales to the state, on account of delinquent taxes, were made on July 2, 1898, and the time for redemption expired July 3, 1903. No redemption being made, the state sold the property to plaintiff on June 30, 1905. This action was commenced January 3, 1907, and the judgment herein rendered January 7, 1908.

The principal question involved upon this appeal is, Was the land assessed for the

purpose of taxation under a description sufficient for its identification? Section 3650 of the Political Code of this state provides that property shall be listed by the assessor in accordance with the following method: Land, by township, range, section, or fractional section, and when such land is not a congressional division or subdivision, by metes and bounds, or other description sufficient to identify it, giving an estimate of the number of acres, not exceeding in each and every tract 640 acres. Any assessment not in conformity with this section is wholly void. *Palomares Land Company v. Los Angeles County*, 148 Cal. 536, 80 Pac. 931.

It is insisted by appellant, that, fairly considered, the map and profile attached to the patent literally divided these premises into congressional subdivisions, and therefore the description in the assessment is technically correct. With this we cannot agree. Assuming that, notwithstanding the particular description in the decree of confirmation, the record of juridical possession on file in said case and the intendments in favor of every judgment, section 8 of the act of July 23, 1866 (*Zabriske's Land Laws of the United States*, page 571), and not sections 6 and 7 of the act of 1864, apply to this grant, and that it was the duty of the Surveyor General to cause the lines of the public surveys to be extended through such lands, nevertheless, we think it clear from the plat and profile that such survey as provided by the act of 1866 was never in fact made.

Section 2395, Rev. St. (U. S. Comp. St. 1901, p. 1471) provides: "The public lands shall be divided by north and south lines run according to the true meridian, and by others crossing them at right angles so as to form townships of six miles square. * * * Third. The township shall be subdivided into sections containing as nearly as may be 640 acres each, by running through the same each way parallel lines at the end of every two miles; and by marking on each of such lines at the end of every mile. The sections shall be numbered respectively, beginning with the No. 1 in the northeast sections and proceeding west and east alternately through the township with progressive numbers until the 36 be completed. * * * Eighth. * * * He shall also cause a fair plat to be made of the townships and fractional parts of townships contained in the lands described, the subdivisions thereof, and the mark of the corner."

It is said by our Supreme Court in *Bullock v. Rouse*, 81 Cal. 594, 22 Pac. 920: "Even after a principal meridian and a base line have been established, and the exterior lines of the township have been surveyed, neither the sections nor their subdivisions can be said to have any existence until the township is divided into sections and quarter sections by an approved survey. The

lines are not ascertained by the surveyor, but they are created. * * * The tract has no separate legal identity until the survey is made and approved under the authority of Congress."

Appellant further contends that, conceding that no such division into congressional subdivisions was ever had, nevertheless, it was competent to show by evidence aliunde facts from which the identity of the land assessed could be determined, and accordingly offered in evidence a map prepared for the assessor under the provisions of section 3658, Political Code, from which map it appears that the Los Feliz rancho is divided into sections not in conformity with the plat attached to the patent, but by arbitrary lines, and not by fixed congressional districts, and it is claimed that this map identifies the lands assessed beyond the possibility of question. This map is not recorded. There is no provision of law for its record, and it purports upon its face to create for the purposes of assessment that which does not in fact exist. The rule laid down in *Best v. Wohlford*, 144 Cal. 737, 78 Pac. 293, is that evidence may be received for the purpose of showing the sufficiency of identification, and whether the description of the land is sufficient to identify it, is a question of fact to be determined from the evidence presented on that issue; that parol proof may be resorted to for the purpose of applying the terms of the description to the face of the earth but no further, and that it cannot supply any deficiencies in the metes and bounds. Applying this rule, the assessor's map could not be placed upon the surface of the ground for the purpose of identifying sections which did not in fact exist. It is not possible to make a description of a tract clear and definite when such tract has no description of the kind and character sought to be defined. The assessor's map could not create a congressional subdivision, and it contains nothing which would establish the identity of the tract or parcel of land sought to be assessed, either by metes and bounds or other descriptive statements designating the property, so that the part of the Los Feliz rancho sought to be charged with the tax could be ascertained—a necessary thing in proceedings to enforce the collection of a tax. *Labs v. Cooper*, 107 Cal. 657, 40 Pac. 1042.

The trial court impliedly found that this extrinsic evidence offered did not so identify the property sufficiently to enable the owner to determine from any inspection of it what part of his land was so sought to be assessed, and we think this finding of fact should not be disturbed. The trial court further found that the defendant city had been in the quiet and peaceable possession of all the real property described in the said amended complaint, and hereinbefore described, holding and claiming it adverse to plaintiff and adverse to all other persons for

more than five years prior to the commencement of this action. We think this finding and the fact upon which it is based is insufficient to establish a prescriptive title in the defendant. Were it conceded that the state acquired a title thereto by the tax proceedings in the deed of the sale for delinquent taxes, as against the state the period of the bar, "section 315, Code Civ. Proc.," is 10 years, and as against the plaintiff five years from the period of the acquisition of title, less than five years elapsing from the date of the sale to the state up to the commencement of the action, we think there is no merit in the claim of prescriptive title alone as supporting the judgment. *Wilhoit v. Tubbs*, 83 Cal. 287, 23 Pac. 386.

Respondent further criticises the proceedings of the officers in and about the assessment and sale of the property in that the delinquent tax list was sought to have been published on the 6th day of June, 1898, a day succeeding the time when the publication is required by section 3764, Political Code. We think this contention is answered in the case of *Buswell v. Supervisors*, 116 Cal. 354, 48 Pac. 227, where it is said "that the provisions as to the time upon which or within which acts are to be done by a public officer, regarding the rights and duties of others, are directory unless the nature of the act or language of the Legislature makes it clear that the time fixed is by way of limitation," in support of which, section 3885 of the Political Code is cited, which section provided that "no assessment or act relating to assessment or collection of taxes is illegal on account of informality or because the same was not completed within the time required by law." This section, we think, applies as well to the criticisms made on account of the fact that the statement attached to the published delinquent list was not sworn to; that is to say, there was no affidavit attached showing its verification.

The point made by respondent as to the form of the tax collector's deed has been made and disposed of by the decision in *Bank of Lemoore v. Fulgham*, 151 Cal. 234, 90 Pac. 936.

Respondent presents no authority in support of its proposition that the sale was invalid, by reason of the fact that the delinquent list did not comply with the form required by section 3764, Political Code. This question, we think, has been disposed of in the case of *Carter v. Osborn*, 150 Cal. 620, 80 Pac. 608.

As a summary, therefore, we are of opinion that for the reason that the property was not assessed by a description sufficient for identification, the assessment and all proceedings thereunder were void, and that plaintiff was not shown to have any title or

interest in the property, and the finding of the trial court in that regard must be sustained.

BEATTY, C. J., not participating.

On Rehearing.

PER CURIAM. Rehearing denied.

BEATTY, C. J. (dissenting). I have always been of the opinion that the property involved in this action was sufficiently described in the assessment, and but for the fact that I was absent at the time the opinion of the court was filed, I should have expressed my dissent at that time.

The denial of the petition of plaintiff for a rehearing enables me to record my dissent.

(14 Cal. A. 393)

WITTER v. REDWINE. (Civ. 749.)

(Court of Appeal, Third District, California. Oct. 29, 1910.)

1. NEW TRIAL (§ 163*)—ORDER—OPERATION.

Where an order granting a new trial does not specify the particular ground on which it is based, it will be affirmed if it can be justified on any of the grounds urged.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 330-332; Dec. Dig. § 163.*]

2. NEW TRIAL (§ 68*)—APPEAL AND ERROR (§ 979*)—GROUNDS—INSUFFICIENCY OF EVIDENCE.

The granting or denying of a motion for a new trial because the verdict is contrary to the evidence is largely within the discretion of the trial court, and its action will not be reversed, unless its discretion has been abused.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. § 130; Dec. Dig. § 68; * *Appeal and Error*, Cent. Dig. §§ 3871-3873; Dec. Dig. § 979.*]

3. NEW TRIAL (§ 70*)—INSUFFICIENCY OF EVIDENCE—REVIEW.

Where a new trial was demanded on the ground that the evidence was insufficient to sustain a verdict and that the verdict was contrary thereto, the trial court could not rest on a conflict in the evidence, but must weigh the evidence, and if the judge is not satisfied with the verdict and is convinced that it is clearly against the weight of the evidence, it is his duty to set it aside.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 142-148; Dec. Dig. § 70.*]

Appeal from Superior Court, Sonoma County; Emmet Seawell, Judge.

Action by Von B. Witter against Georgia Redwine. From an order granting plaintiff a new trial after verdict for defendant, she appeals. Affirmed.

T. J. Butts, for appellant. Lucien Fulweiler, for respondent.

BURNETT, J. The action was brought to recover money claimed to have been loaned by plaintiff to defendant. A general verdict was rendered by a jury in favor of defendant, and a motion by plaintiff for a new trial was granted by the trial court. From this order the defendant has appealed. The mo-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

tion was based upon several grounds, among which was specified the insufficiency of the evidence to sustain the verdict. The order of the trial court was as follows: "This cause is before the court on a motion for a new trial on the grounds of newly discovered evidence and insufficiency of evidence, etc. The court is of the opinion that a new trial should be granted, and it is so ordered."

The court, as will be observed, did not specify the particular ground upon which the order was based, and it is therefore indisputable that said order must be affirmed, if it can be justified upon any of the grounds upon which the motion for a new trial was made. There can be no doubt that the order of the court may be justified upon the ground of the insufficiency of the evidence to sustain the verdict. The rule, as to this, is stated in *People v. Flood*, 102 Cal. 332, 36 Pac. 663, as follows: "If one of the grounds of the motion for a new trial is that it is contrary to evidence, and the order does not specify the ground upon which the new trial is granted, it must be held that, if there is any ground upon which it can be sustained, it must be affirmed; and that, as the granting or denying a motion for a new trial upon the ground that the decision or verdict was contrary to evidence is largely within the discretion of the trial court, its action will not be reversed, unless its discretion in this respect has been abused, whether this be the only ground upon which the motion is made, or one of the several statutory grounds."

It is equally clear that we cannot say that the court below abused its discretion in granting the motion for a new trial. This follows from the consideration that the evidence was conflicting, and we must assume that the showing made by the parties carried conviction to the mind of the trial judge that the verdict was wrong. Holding to this belief, it was the duty of the trial court to grant the motion for a new trial. Appellant admits that "there is a direct conflict between the testimony of the plaintiff and the testimony of the defendant," but she contends that "the jury were the sole judges of the facts and of the credibility of the witnesses, and they observed them and their manner of testifying, and where there is a substantial conflict of the testimony, the verdict should not be disturbed, as the preponderance of the evidence was in favor of the defendant." She has, however, entirely mistaken the rule by which the trial court is governed in reviewing the sufficiency of the evidence on a motion for a new trial. The question has been recently discussed by this court in the case of *Kramm v. Stockton Electric Railroad Company*, 10 Cal. App. 271, 101 Pac. 914, and therein it is held, in accordance with the statement of the rule by the Supreme Court in various cases, that "the trial court cannot rest upon a conflict in the

evidence, but must weigh and consider the evidence for both parties, and determine for itself the just conclusion to be drawn from it. If the judge is not satisfied with the verdict, and is convinced that it is clearly against the weight of the evidence, it is his duty to set it aside, even though there may have been some conflict in the testimony." While we are not in a position to pass upon the veracity of the witnesses and do not undertake to do so, we can readily understand how the trial court, exercising a just and wise discretion, may have reached the conclusion, from observing the manner of said witnesses and the apparent probability of their statements, that the plaintiff's testimony was true and that he would be greatly wronged if the verdict were permitted to stand.

There was a sufficient specification of the insufficiency of the evidence, and, as the action of the court upon this ground was warranted and decisive of the controversy, the other questions incidentally discussed by counsel need not be considered.

The order granting the motion for a new trial is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

(18 Idaho, 714)

McGRANE v. COUNTY OF NEZ PERCE.

(Supreme Court of Idaho. Dec. 1, 1910.)

(Syllabus by the Court.)

1. ELECTIONS (§ 176*)—SECRECY OF BALLOT—NUMBERING OF BALLOTS—CONSTITUTIONAL PROVISIONS.

Section 1, art. 6, of the Constitution provides that: "All elections by the people must be by ballot. An absolutely secret ballot is hereby guaranteed, and it shall be the duty of the Legislature to enact such laws as shall carry this section into effect."

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 176.*]

2. ELECTIONS (§ 176*)—SECRECY OF BALLOT—NUMBERING OF BALLOTS—CONSTITUTIONAL PROVISIONS.

Under the provisions of section 1, art. 6, of the state Constitution, it would not be within the power of the Legislature to authorize and direct the numbering of ballots to be used at an election.

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 176.*]

3. ELECTIONS (§§ 194, 186*)—SECRECY OF BALLOT—EFFECT OF DISTINGUISHING MARK.

Under the provisions of section 408, Rev. Codes, "no ballot must be used or counted at any election, except the legal ballot printed by the county auditor, * * * and distributed according to law by the distributing clerk within the polling place. And no ticket must be distributed by the distributing clerk, or permitted to be used by the election officers, which has any mark or thing on the back or outside thereof, whereby it might be distinguished from any other ballot legally used on the same day."

[Ed. Note.—For other cases, see Elections, Dec. Dig. §§ 194, 186.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

4. ELECTIONS (§§ 194, 186*)—SECRECY OF BALLOT—EFFECT OF DISTINGUISHING MARK.

Where an auditor of a county furnished ballots to the election officers of the several precincts of his county, and the ballots so furnished had been numbered consecutively from 1 to 15,000, and the number contained on each ballot corresponded with the number on the stub to that ballot, and the error, mistake, or wrongful act in numbering the ballots was not known to the electors, and the same was done without their knowledge or consent, and no opportunity was presented to the electors for having the error corrected, and the election was held by using such ballots in the several precincts of the county, the election will not be held void, either upon the ground that the numbering was an invasion of the constitutional secrecy of the ballot guaranteed to the people nor upon the ground that the ballots contained distinguishing marks.

[Ed. Note.—For other cases, see Elections, Dec. Dig. §§ 194, 186.*]

5. ELECTIONS (§ 194*)—SECRECY OF BALLOT—EFFECT OF DISTINGUISHING MARK.

The prohibition contained in section 408 of the Rev. Codes, against election officers furnishing the electors with ballots containing distinguishing marks, is directed against the officers charged with the preparation and furnishing of the ballots, and directs and commands the officers as to the manner and method of discharging their public duties, but the statute nowhere prescribes that the penalty for violating this duty or a failure to faithfully discharge it shall be visited upon the electors, or avoid the election.

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 194.*]

6. ELECTIONS (§ 186*)—SECRECY OF BALLOT—EFFECT OF DISTINGUISHING MARK.

To hold that the numbering of ballots by the election officers, who are charged with the preparation and distribution of election supplies and ballots, has the effect of rendering an election void would place it within the power of the officers to disfranchise the entire electorate of their county, and prevent the holding of a valid and legal election, and would turn this statute safeguarding the elective franchise into an instrument of injustice and disfranchisement.

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 186.*]

7. ELECTIONS (§ 162*)—SECRECY OF BALLOT—CONSTITUTIONAL GUARANTY — STATUTORY PROVISIONS—PURPOSE.

The purpose of the constitutional guaranty of "an absolutely secret ballot" and the statutory provisions against "distinguishing" marks on ballots is not so much to prevent marks and characters on ballots, whereby it would be possible to distinguish the ballot of a particular elector, as it is the aim to prevent fraud, corruption, intimidation, and oppression in elections, and to so guard and hedge about the individual elector that he may vote his individual, conscientious, and deliberate judgment without fear of any one calling him to account therefor, and to prevent the corrupt voter from selling his vote and furnishing to the purchaser satisfactory visual evidence of the casting of the vote, in accordance with the contract.

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 162.*]

Appeal from District Court, Nez Perce County; Edgar C. Steele, Judge.

Action by James B. McGrane against the County of Nez Perce. Judgment for defendant, and plaintiff appeals. Affirmed.

Charles L. McDonald and Eugene A. Cox, for appellant. D. C. McDougall, Atty. Gen., O. M. Van Duyn, J. H. Peterson, Asst. Attys. Gen., and Dwight E. Hodge, Pros. Atty., for respondent.

AILSHIE, J. On the 15th of January, 1909, the commissioners of Nez Perce county made and entered an order calling an election in the county of Nez Perce to determine whether or not intoxicating liquors should be sold as a beverage in that county. The election was called to be held on the 9th day of March following. Ballots printed under the direction of the county auditor, and by him distributed to the election officers of the several precincts of the county, were in the following form:

No. 3,403. Nez Perce County Local Option Election, March 9th, 1910.	No. 3,403.
	Local Option Election.
	"Shall the sale or disposal of intoxicating liquors as a beverage be prohibited in the County of Nez Perce, Idaho?"
	<div style="display: flex; justify-content: space-around;"> <div style="border: 1px solid black; padding: 2px 10px;">Yes.</div> <div style="border: 1px solid black; padding: 2px 10px;">No.</div> </div>

The dotted line indicates the division between the ballot and the stub.

This ballot complied with the requirements of law, with the exception that it should not have been numbered. The statute (section 405, Rev. Codes) provides for numbering the stub, but does not authorize the numbering of the ballot. According to the complaint, the fact that the ballots had been numbered was not discovered by the electors generally, or by any one except the auditor and printer, and possibly some of the election officers, prior to the opening of the polls on election day. The election was held, and resulted in 3,444 votes being cast in favor of the proposition submitted and 2,612 votes against it. The record shows that 10,388 qualified electors were registered and were entitled to vote at this election, and that the total number of votes cast was 6,050.

It is alleged that this ballot did not afford the plaintiff and the electors generally of Nez Perce county the right of a secret ballot, and that it was in violation of section 1, art. 6, of the state Constitution, which provides: "All elections by the people must be by ballot. An absolutely secret ballot is hereby guaranteed, and it shall be the duty of the Legislature to enact such laws as shall carry this section into effect." It is also alleged that since these ballots were numbered consecutively from one to somewhere in excess of 15,000, and were distributed in consecutive order, it was possible for the election officers and others to identify the ballot

cast by any elector and thereby destroy the secrecy of the ballot guaranteed to the elector by the Constitution. It is also alleged that this means of identification resulted in intimidating some voters, so that they refused to vote at all, while others were not able to vote their deliberate convictions for fear of their ballots being identified and thereby exposing them to censure and obloquy from those who voted differently or who were advocating the opposite side of the question. It is further alleged that these numbers constituted identifying and distinguishing marks on the ballots in violation of the statute. Section 408, Rev. Codes.

The defendant demurred to the complaint and the demurrer was overruled, and judgment was thereupon entered against the plaintiff, from which this appeal has been prosecuted.

Now, in the first place, the Constitution of this state (section 1, art. 6, *supra*) guarantees to the electors "an absolutely secret ballot," and counsel argue that the Legislature could not constitutionally enact an election law which would provide for and authorize the numbering of ballots, and that if the Legislature could not authorize such a ballot, it must necessarily follow that election officers, exercising the political power of the state, cannot furnish the electors with such ballots, and thereby deprive them of the absolute secrecy of their ballots. This proposition requires a brief analysis to detect whether it be sound or faulty. In the outset, it is perfectly safe to say that the Legislature would have no authority under this constitutional guaranty to require the numbering of the ballots. The authorities to that effect are quite uniform. *Brisbin v. Cleary*, 26 Minn. 107, 1 N. W. 825; *Ritchie v. Richards*, 14 Utah, 345, 47 Pac. 679; *Williams v. Stein*, 38 Ind. 89, 10 Am. Rep. 97; *Smith v. Pease*, 27 N. Y. 45, 84 Am. Dec. 242; *Paine on Elections*, c. 453; *McCreary on Elections*, §§ 194, 195, 400, and 413. Now that it must be conceded that the Legislature could not, in the exercise of its constitutional power, direct the numbering of ballots, the final and decisive question recurs: Is an election valid where the ballots have been numbered without the knowledge or consent of the electors, and the electors themselves are innocent and free from fault?

The local option statute (section 10, Laws 1909, p. 13) makes the general election laws applicable to the printing of tickets and furnishing supplies in connection with holding an election. See *Gillesby v. Board of Com'rs*, 17 Idaho, 586, 107 Pac. 71. Section 408 of the Revised Codes provides that: "No ballot must be used or counted at any election except the legal ballot printed by the county auditor * * * and distributed according to law by the distributing clerk within the polling place. And no ticket must be distributed by the distributing clerk, or permitted to be used by the election officers,

which has any mark or thing on the back or outside thereof whereby it might be distinguished from any other ballot legally used on the same day. * * * No elector shall be permitted to vote any other ballot than the one he received from the distributing clerk." It is alleged and conceded that these ballots were furnished by the county auditor and were the only ballots furnished for this election. All the ballots used throughout the county were open to the same objection, namely, that they were numbered. No two ballots contained the same number, but the numbering was consecutive from 1 to 15,000, and the ballots were furnished to the different precincts in books of 100 each. The ballot in each instance contained the same number contained on the stub from which that ballot was taken. Again, it must be conceded that under the provisions of this statute (section 408), the auditor was forbidden to furnish ballots that were numbered, and likewise the election officers were forbidden to distribute to the electors ballots that contained distinguishing marks. These numbers were not on the back of the ballots. There was, in fact, no distinguishing mark on the back of the ballot; the numbering was on the face of each ballot. The question of numbered ballots has frequently been before the courts of states where a secret ballot is guaranteed, and so we turn to the decisions for light on this question.

In *Farnham v. Boland*, 134 Cal. 151, 66 Pac. 200, the Supreme Court of California had under consideration the question as to whether a ballot should be counted where the numbered stub had been left attached to the ballot, thus furnishing the same facilities for identifying the ballots as was furnished in this case. The court said: "We hold that these ballots were properly counted, and likewise those were properly counted which the officers of election placed in the ballot box without first tearing therefrom the numbers attached. It is quite apparent that these violations of the law arose from the carelessness of the election officers. Such carelessness or malconduct upon the part of those officers may render them liable to severe penalties, but that is all. The law as to identifying marks refers to marks made by the voter, and it is only marks made by him that demand the rejection of the ballot. After citing many cases to the point, this court said in *People v. Prewett*, 124 Cal. 13, 56 Pac. 621: 'The principle underlying these decisions is that the rights of the voters should not be prejudiced by the errors or wrongful acts of the officers of election, unless it shall appear that a fair election and an honest count were thereby prevented.'"

The same question again arose in California in the case of *Freshour v. Howard*, 142 Cal. 501, 77 Pac. 1101, and the court quoted with approval from *Farnham v. Boland*, and also from *People v. Prewett*, 124 Cal. 13, 56 Pac. 621, and said: "The failure or neg-

lect, through ignorance or carelessness on the part of the precinct election officers, to remove the number of the ballot, did not have the effect to make the ballot illegal on the ground of a distinguishing mark placed thereon by the voter."

As late as 1909, the question of numbered ballots came before the Supreme Court of New York in *Re Town of Groton*, 63 Misc. Rep. 370, 118 N. Y. Supp. 417, over an election wherein the ballots were numbered on the back. The court in disposing of the matter said: "These ballots were all alike in the respect complained of, those cast for and those against the propositions. The election officers counted them all, determined that they were valid; no one raising an objection or suggestion to the contrary. The ballots plainly disclosed to each voter this defect, and every voter could plainly see the error in the printing of the ballot; but it does not appear that any one made objection. Quite possibly the voters favoring license, or the advocates and leaders of that side of the questions, thought the defect would tend to their advantage; and perhaps it did. At any rate, they did not protest to the election officers, either before or at the canvass of the votes. They waited until the votes were cast and all counted and allowed, and until the result was declared and the official certificate thereof made and filed, showing a majority for 'no license,' and that the petitioner and those favoring license were defeated. Then they made their protest and complaint. Manifestly their protest should not be allowed, unless the law requires it. Section 88 of the election law (Laws 1890, p. 947, c. 909) provides for the correction of the ballots when the error is timely brought to the attention of the officer charged with the duty of preparing them. It cannot be the purpose of the law to afford an opportunity for those interested in the result to proceed to a vote and count, without objection or protest, and then, when the result is adverse to their wishes, to give them another chance upon a palpable error which could have been corrected had they called attention to it; but, aside from the absurdity of such a holding, the principles enunciated in *People ex rel. Hirsh v. Wood*, 148 N. Y. 142, 42 N. E. 536, are applicable to this proceeding and sufficient to require a denial of this application. It is there said (page 146 of 148 N. Y., page 537 of 42 N. E.): 'We can conceive of no principle which permits the disfranchisement of innocent voters for the mistake or even the willful misconduct of election officers in performing the duty cast upon them.'"

In *Winn v. Blackman*, 229 Ill. 198, 82 N. E. 215, 120 Am. St. Rep. 237, decided in 1907, the Supreme Court of Illinois was called upon to determine what constituted distinguishing marks, as the same were contained on ballots used at a general election. In the course of a somewhat extended and

interesting discussion of the matter, the court said: "The distinguishing mark prohibited by the law is such a mark as will separate and distinguish the particular ballot from other ballots cast at the election. It is some sort of a mark put upon the ballot to indicate who cast it and to furnish the means of evading the law as to secrecy. * * * In order to warrant the rejection of a ballot because of a distinguishing mark, the court should be able to say that such mark was placed there by the voter for the purpose of distinguishing his ballot from others."

In *McClelland v. Erwin*, 16 Okl. 622, 86 Pac. 287, the Supreme Court of Oklahoma, in considering what constituted a distinguishing mark made on a ballot, said: "We think that, to constitute a distinguishing mark, the mark, whether made by the use of a letter, figure, or character, should be such a mark as shows an intention on the part of the voter to identify or distinguish his particular ballot from others of this class, and any mark inadvertently made on a ballot, or made through carelessness or ignorance, which does not show upon the face of the ballot that such mark was made with the intention of distinguishing that ballot from others of the same class, or that that result would be accomplished by the mark, should not be treated as a distinguishing mark. Human experience teaches us that it is often very difficult to preserve absolute cleanness and neatness of the ballot; that in marking the various names on the ballot with the device provided by the election officers, a man will, through inadvertence or carelessness, place a stamp where it is not intended to be, and on discovering the error will immediately correct it, and at the same time this inadvertent or careless marking will not be done with the intention of identifying this particular ballot, nor will such be the result, nor do we think that the law should be so strictly construed as to render, in the absence of fraud, such a ballot illegal."

The same court, as late as 1908, in *Town of Eufaula v. Gibson*, 22 Okl. 507, 98 Pac. 565, quoted and approved the foregoing language from the *McClelland Case*, and in course of the opinion added the following observation: "A voter ought not to be disfranchised and his ballot rejected where, as in this case, an election official improperly marks or numbers it, when it is not shown when it was done, or that it was done with the connivance, consent, or knowledge of the voter, and for the purpose of distinguishing it."

Connecticut was one of the first states of the Union to adopt what is popularly known as the Australian ballot system, and in view of that fact it is worth while observing that in the case of *Coughlin v. McElroy*, 72 Conn. 99, 43 Atl. 854, 77 Am. St. Rep. 301, the court in considering distinguishing marks affecting the secrecy of the ballot, said: "Marks

upon the face of ballots, which appear or are shown to have been made accidentally and not for the purpose of indicating the voter, and changes for the existence of which a reasonable explanation consistent with honesty and good faith either appears upon the face of the ballot or is shown by proof, do not render the ballots void." And to the same effect was the holding of the Supreme Court of Nebraska in *State v. Russell*, 34 Neb. 116, 51 N. W. 465, 15 L. R. A. 740, 33 Am. St. Rep. 625, wherein it was said: "It is not every mark by means of which a ballot might subsequently be identified which is a violation of the statute. The mark prohibited by law is such a one, whether letters, figures, or characters, as shows an intention on the part of the voter to distinguish his particular ballot from others of its class, and not one that is common to and not distinguishable from others of a designated class." In *Pennington v. Hare*, 60 Minn. 146, 62 N. W. 116, the Supreme Court of Minnesota says: "In the eighth precinct of the ward, 93 ballots were cast and counted for the appellant, and 42 for the respondent, which had been numbered without the knowledge of the electors casting them, by the judges of election, by reason of a misunderstanding of the law on their part. These ballots were properly counted for the respective parties. To hold otherwise would place it in the power of the election officers to disfranchise electors at their pleasure." See *Parker v. Hughes*, 64 Kan. 216, 67 Pac. 637, 56 L. R. A. 275, 91 Am. St. Rep. 216; *Perkins v. Bertrand*, 192 Ill. 58, 61 N. E. 405, 85 Am. St. Rep. 315; *Carwile v. Jones*, 38 Mont. 590, 101 Pac. 153; *People v. Wood*, 148 N. Y. 142, 42 N. E. 536; *Peabody v. Burch*, 75 Kan. 543, 89 Pac. 1016.

Authorities might be multiplied to the foregoing effect, and it will be noted from an examination of them that while they all hold that numbering or other distinguishing marks on a ballot is contrary to both the letter and spirit of the law guaranteeing a secret ballot, nevertheless this alone will not justify the rejection of the ballot upon the canvass of votes, unless it appears that the numbers were placed there either by the voter for the purpose of designating and distinguishing his vote, or by some one else, with his knowledge and consent, and with the intention of accomplishing such purpose.

While our statute (section 408, supra) prohibits the election officers furnishing or distributing ballots containing such distinguishing marks, they have nevertheless done that very thing in connection with holding the election now under contest. It is not difficult to say in advance of their action what they should have done and should not have done. The law is clear, and it was the unmistakable duty of the officers to follow its mandates, but we are now confronted with a condition and not a theory. They have acted, and the election has been held. The electors have cast their votes. The electors have al-

ready been subjected to the predicament of casting their votes under circumstances which, at least, rendered it possible for the secrecy of their ballots to be invaded. This was done solely by and through either the negligence or wrongful act of the printer or officers charged with the preparation and furnishing of the ballots. The law does not say that an election shall be void under such circumstances. It does not speak of the condition after it has arisen, but contains directions and commands to the officers as to how they shall act and these directions and commands are given in advance of the election. After all these things have occurred, the question arises as to whether the court shall visit the results and penalties of the negligence or wrongdoing of the election officers upon the innocent electors and declare their votes illegal and the election void, and thereby rob the people of their right of suffrage until the time arrives for another election. The question is simply reduced to this: Shall the electors be visited with two invasions of their rights instead of one? Shall they be deprived of the right of suffrage for the time being, because their officers have acted negligently or wrongfully in the preparation of ballots, or shall the election be sustained and the penalties, if any, be visited upon the parties responsible for the errors or wrongs which have been committed? The same rule that will apply to numbered ballots in this election will necessarily apply in a general election. Now, if a general election is to be held void on account of such an error on the part of the election officers, which extended throughout the county and into every precinct thereof, we would have the anomalous condition of the officers of a county, who might not have succeeded in being renominated for their respective offices, or who feared they might not be re-elected, furnishing the electors with numbered ballots, so as to avoid the entire election, and thereby enable the officers to hold over for two years in the very offices for which the election is being held to elect their successors. This would be allowing the officers to profit by their own mistake or wrong, and placing a double penalty upon the people. Under the laws of this state, a general election can only be held biennially, and so, if it is not held on the day fixed by law, there will be no other general election for two years thereafter, and in the meanwhile the old officers will hold until their successors are elected and qualified. Section 32a, Rev. Codes.

While we are obliged to condemn in unqualified terms the ballots used in this election, and hold that they were not in conformity with law in that they were numbered, we also hold that the electors of Nez Perce county were not chargeable with this error or mistake, and that the wrong of the officers cannot be visited upon the electors, so as to deprive them of the right of suffrage, where the electors themselves have not been

parties to the wrong. Two wrongs will no more make a right in law and government than in morals. To follow up the wrongful preparation of ballots with setting aside the election would only be adding another injury to an already outraged electorate.

Attention is also called to the provisions of section 407 of the Revised Codes, which provides as follows: "Whenever it shall appear by affidavit that an error or admission has occurred in the publication of the names or descriptions of the candidates nominated for office, or in the printing of the tickets, the probate court of the county may, upon application of any elector, by order, require the county auditor or municipal clerk to correct such error, or to show cause why such error should not be corrected." This section provides for the correction of just such errors as occurred in this case, on application to the probate judge of the county. Of course, according to the allegations of the complaint, the electors did not discover the error until the polls had opened, and, of course, the provisions of this section would not have been available to accomplish any real results at this present election. It does show, however, that the purpose of the lawmakers was to provide for correcting such errors and mistakes as this that might occur in the preparation of ballots.

At this point, it is well to observe that no contention is made that the secrecy of the ballot of any elector was actually invaded, or that the vote of any person has been in fact identified or disclosed. The whole complaint made is that it was rendered possible, and not that the thing was actually accomplished, nor is it contended that it was done with a purpose of invading the secrecy of the ballot, or that the printer who printed the ballots or the officers who furnished them did so wrongfully, intentionally, or criminally, or that it was anything other than a negligent act or mistake. While the Constitution guarantees "an absolutely secret ballot," it is nevertheless true that "absolute" secrecy is practically impossible under the prevailing method of printed ballots, which are delivered to the elector and which he is permitted to handle, and on which he may mark his choice with a pencil. The law tells him just where and how he shall mark his choice of candidates, and the statute of this state also directs that there shall be a blank column printed on the ballot wherein the elector can write the names of any persons he desires for any particular offices, and it is also true that in many of the precincts of the several counties no nominations for precinct officers are usually made, and the electors are authorized to write upon the ballot in the proper place their choice for justices of the peace and constable. Now, it is quite clear that the handwriting of almost any elector may be identified, not only by the person himself, but by others who are acquainted and familiar with his

handwriting. It is not only true that identification may be had through this means, but it may be made by the manner or method of marking the ballot, and yet those marks may have been made in substantial compliance with the statute. Again, the man fresh from the field, the forge, the carpenter shop, or the mason's trade, may leave the imprint of his fingers on his ballot, so that not only he, but the election officers and bystanders, may be able to identify the ballot, and still this has been done unintentionally and innocently, and without any purpose or intent of leaving distinguishing marks upon the ballot. The purpose of the law in pronouncing against distinguishing marks and requiring secrecy was to guard against the corrupt voter selling and delivering his vote to the vote purchaser, so that he might not identify the article that he was selling to the purchaser. A man who will corrupt a voter will not trust to the mere word of that voter as to whether he has delivered the vote according to contract. He will want some visual evidence of the performance of the contract before he parts with the consideration. These are some of the things the law intends to protect the people at large against, and at the same time it intends to guard the individual elector from intimidation and undue influence and greater temptation than he is able to withstand. It leaves the voter so that he does not run the risk of losing a position, being thrown out of employment, or subjected to various annoyances on account of having cast his vote in a given way, or having failed to vote as he had promised to do. Under this method, there is no way of knowing whether he will vote as he promises, and but little inducement for extracting from him a promise at all.

We conclude that the judgment of the trial court should be affirmed, and it is so ordered. Costs awarded in favor of respondent.

SULLIVAN, C. J., concurs.

(19 Idaho, 43)

McDANIEL et al. v. MOORE.

(Supreme Court of Idaho. Dec. 10, 1910.)

(Syllabus by the Court.)

1. MINES AND MINERALS (§ 23*)—ASSESSMENT WORK—RIGHTS OF CO-OWNERS.

Under the provisions of section 2324, Rev. St. U. S. (U. S. Comp. St. 1901, p. 1426) where a co-owner of a mining claim fails to do his assessment work or fails to contribute his proportion of the expenditure required in doing such work, his co-owners who have performed the labor may give such delinquent personal notice in writing or by publication, as provided in said statute, and if at the expiration of 90 days such delinquent should fail or refuse to contribute his proportion of such expenditure, his interest in the claim shall become the property of his co-owners who made such expenditures, and the defaulting co-owner is not personally responsible for any part of the as-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

assessment work, under the provisions of said section.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. §§ 51-59; Dec. Dig. § 23.*]

2. MINES AND MINERALS (§ 23*)—IMPROVEMENTS—LIABILITY OF COTENANTS.

There is no implied contractual relation between cotenants and tenants in common, and one cotenant cannot bind the other without his consent for the expenses incurred in developing or improving their common mining property; but the delinquent cotenant may ratify such expenditure, and thereby become liable for his proportional part thereof.

[Ed. Note.—For other cases, see *Mines and Minerals*, Dec. Dig. § 23.*]

3. APPEAL AND ERROR (§ 171*)—MINES AND MINERALS (§§ 38, 44*)—REVIEW—ASSESSMENT WORK—PATENTS.

The issues made by the pleadings were, whether the defendant had performed or paid his part of the assessment work on said mining claim, and whether a patent was issued to all of the parties to this suit for said mining claim by the government, and this appeal must be decided upon the theory of the case made by the pleading and proof. *Held*, that the evidence shows or tends to show that the defendant failed to pay for his proportional part of the assessment work, at least for the years 1904 and 1905, and for his proportional part of the expense of procuring a patent, and the presumption arising from the issuance of a patent is that all of the requirements of the law in regard to its issuance have been complied with.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1053-1069, 1161-1165; Dec. Dig. § 171; * *Mines and Minerals*, Cent. Dig. § 130; Dec. Dig. §§ 38, 44.*]

4. MINES AND MINERALS (§ 38*)—ASSESSMENT WORK—LIABILITY OF CO-OWNERS.

Held, that the evidence tends to establish that there was an implied promise on the part of the defendant to pay his proportionate part of said expenses.

[Ed. Note.—For other cases, see *Mines and Minerals*, Dec. Dig. § 38.*]

5. TRIAL (§ 165*)—APPLICATION FOR NONSUIT.

On application for a nonsuit, the defendant is deemed to admit all of the facts which the evidence tends to prove.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 373, 374; Dec. Dig. § 165.*]

Appeal from District Court, Idaho County; Edgar C. Steele, Judge.

Action by S. C. McDaniel and others against A. W. Moore. Judgment for defendant, and plaintiffs appeal. Reversed and remanded.

L. Vineyard, for appellants. W. H. Casady, for respondent.

SULLIVAN, C. J. This action was brought to recover \$215.55 with interest thereon at the rate of 7 per cent., one-third of the total cost and expense of doing assessment work upon the Tennessee lode mining claim situated in Robbins mining district in Idaho county, and of procuring a patent from the United States for said mining claim.

The answer admits that the defendant is the owner of an undivided one-third interest in said lode mining claim and denies that the plaintiffs laid out or expended for assess-

ment work on said mining claim any sum whatever; denies that defendant ever authorized plaintiffs to procure a patent from the government for said mining claim and avers that defendant performed his proportion of the annual assessment work upon said mining claim for the three years mentioned in said complaint. Upon the issues thus made the cause was tried by the court with a jury. Plaintiff McDaniel testified on behalf of appellants that the respondent Moore owned one-third of said mining claim; that he and Wadham, as coplaintiffs, expended on said claim for the years 1903, 1904, and 1905, \$100 for each year; that they thereafter procured a patent from the government, and that the cost of said patent, amounting to \$345.65, was paid by himself and coplaintiff; that the defendant Moore had refused to pay any part of said expenses and refused to have anything to do with the patent proceedings, stating that "he didn't care to; that there was not \$500 worth of work done on said claim." The deposition of plaintiff Wadham was introduced on the trial, in which he testified that said mining claim had been patented and was patented at the expense of McDaniel and himself; that witness had paid \$248.90 for patent expenses; that the defendant Moore never contributed or paid any part of this money for the patent. On cross-examination he testified that defendant Moore never agreed nor consented to the procurement of the United States patent for said mining claim and did not to his knowledge protest against its procurement; that he never made any objections to the patent proceedings; that defendant Moore did his proportion of the annual labor for 1903, but did not do his proportion for 1904 and 1905. Plaintiffs' counsel thereupon introduced and read in evidence the patent of the government of the United States to C. V. Wadham, S. C. McDaniel, and A. W. Moore for the Tennessee lode mining claim, dated December 16, 1907, which patent describes the claim and states that the patentees had duly entered the claim and had paid for the same as required by law, and had fully complied in all respects with the law in procuring said patent. Said patent is duly recorded in the record of patents in the recorder's office of Idaho county. Thereupon plaintiffs rested. Counsel for respondent moved the court for a judgment of nonsuit, which motion was sustained and judgment of nonsuit entered. This appeal is from the judgment.

The first error assigned is, that the court erred in granting the motion for a nonsuit. It is contended by counsel for appellant that the evidence shows the plaintiff expended \$645.65 in order to hold and patent said mining claim, one-third of which the defendant is liable for, provided the evidence was relevant and competent to prove an implied liability against the defendant Moore for money

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

paid for annual work done on said mining claim and to procure a patent therefor in his interest, and for his benefit as a co-owner of the claim. The question presented is: Was the evidence given on behalf of the plaintiffs relevant and competent to support an implied liability against Moore, the defendant?

It is contended by counsel for respondent that respondent cannot be held responsible for the assessment work on an unpatented mining claim, and that the remedy pointed out by section 2324, Rev. St. U. S. (U. S. Comp. St. 1901, p. 1426) is the exclusive remedy in such cases; that the defaulting co-owner is not personally responsible for any part of the assessment work. As a general proposition, that is true. Counsel also contends that there is no implied contractual relation between cotenants and tenants in common; that one cotenant cannot bind the other without his consent for the expense incurred in developing and improving the common property, but must recoup, if at all, from the profits derived from the property. As a general proposition, that contention is correct.

In *Welland v. Williams*, 21 Nev. 230, 29 Pac. 403, the court had under consideration the liability of a cotenant for the cost of improvements put upon the common property, and in the course of the opinion said: "In the absence of an express or implied agreement between cotenants that the expense of improvements made by one of them upon the common property is to be repaid, it is clear, under the authorities, that neither can maintain an action against the other to recover any portion of such expense. *Freem. Coten.* § 262; *Calvert v. Aldrich*, 99 Mass. 74 [96 Am. Dec. 693]; *Alleman v. Hawley*, 117 Ind. 532, 20 N. E. 441." And held that circumstances may exist which amount to a ratification of such expenditure, and in such case the cotenant is liable.

But in the case at bar, the question is presented, whether there is an implied liability on the part of the defendant to pay to the appellants his proportional part of the cost of the assessment work, as well as his proportional part of the cost and expense of procuring the patent. The respondent does not plead in his answer as a defense said section 2324, Rev. St. U. S. (U. S. Comp. St. 1901, p. 1426), but avers that he has performed his part of the assessment work on said Tennessee lode for the years 1903, 1904, and 1905. He also denies that the plaintiffs procured a patent for said mining claim from the government. The testimony of McDaniel shows that the defendant did not pay his part of the cost of the assessment work for the years 1903, 1904, and 1905, while the testimony of Wadham shows that he did not pay it for the years 1904 and 1905. The testimony clearly shows that a patent was issued to the respondent and the appellants

by the general government for said mining claim, and that the plaintiffs paid the cost and expense thereof. The record shows that the respondent contended that sufficient work had not been performed upon said claim to satisfy the requirements of the statute for procuring a patent. But it appears that the government did issue a patent, and the presumption is that all of the requirements of the law had been complied with as to the amount of work required to be done upon the claim before a patent would issue, and that the assessment had been annually done, that the citizenship of the applicants was shown, and that every requirement of the law had been complied with. That being true, there was sufficient evidence introduced on the part of the plaintiffs to show an implied promise on the part of the defendant to pay his proportional part of said expenses. This court has held in a number of cases that a cause should not be taken from the jury on motion for a nonsuit when there is any evidence whatever tending to establish the material allegations of the complaint, and that after the plaintiff has introduced his evidence and rested his case, on application for a nonsuit he admits all of the facts which the evidence tends to prove. Later *v. Haywood*, 12 Idaho, 78, 85 Pac. 494. The evidence on the part of plaintiff at least made a prima facie case. That being true, the court erred in taking the case from the jury.

The judgment must therefore be reversed, and the cause remanded for a new trial. Costs are awarded to the appellants.

AILSHIE, J., concurs.

(19 Idaho, 71)

BRINTON v. STEELE et al.

(Supreme Court of Idaho. Dec. 16, 1910.)

(Syllabus by the Court.)

1. QUIETING TITLE (§ 1*)—NATURE OF ACTION—ADDITIONAL RELIEF.

Held, that this is an action to quiet title and that the title to the land in dispute is the principal issue in the case.

[Ed. Note.—For other cases, see *Quieting Title*, Dec. Dig. § 1.*]

2. INJUNCTION (§ 5*)—ELEMENTS OF WRIT.

Under the provisions of section 4287, Rev. Codes, an injunction is a writ or order requiring a person to refrain from a particular act. It is a writ to restrain a contemplated act, and not a writ commanding a person to do a certain act.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. § 4; Dec. Dig. § 5.*]

For other definitions, see *Words and Phrases*, vol. 4, pp. 3610-3612; vol. 8, p. 7688.]

Appeal from District Court, Nez Perce County; Edgar C. Steele, Judge.

Action by Caleb Brinton, attorney in fact for Thomas W. Jones, against Wesley Steele and N. M. Beggeman. Judgment for defend-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ants, and plaintiff appeals. Reversed and remanded.

Ben F. Tweedy, for appellant. Geo. W. Tannahill and S. O. Tannahill, for respondents.

SULLIVAN, C. J. This action was brought to quiet title to a triangular piece of land lying between lots 12 and 13, block 30, in the city of Lewiston, a strip 11 feet wide at the south end and terminating in a point at the north end; and for the purpose of obtaining a permanent injunction against the defendant restraining him from using what was intended as a private way extending from Ninth street over original lot 13 in said city, which private way has been subdivided into lots and designated as lots 4, 21, 22, 23, and 24, being subdivisions of a part of said lot 13, block 30; and also to restrain the defendant from other acts with reference to trespass upon said premises; and to enjoin said defendant from maintaining or using sewer and water pipes across a part of said real estate; and for what the pleader demands as a mandatory injunction commanding said defendant to remove certain buildings, fences, and water and sewer pipes from the real estate owned by the appellant; and to forever enjoin him from putting or laying any sewer or water pipes upon said real estate, and for \$1,000 damages. The answer put in issue the main allegations of the complaint, and averred that the defendant was the owner in fee of said triangular strip of land, and prays that plaintiff take nothing by this action, and that the defendants have judgment for costs.

Upon the issues thus made the court made finding of facts whereby it was found that the evidence was insufficient to entitle the plaintiff to any relief whatever, and judgment was entered in favor of the defendants. The decision of the court proceeded upon the theory that this was not an action to quiet title; that it was only an action for a permanent injunction. The court was clearly in error in that regard, as this action is for the purpose of quieting title as well as for a permanent injunction. The court in its written opinion stated as follows: "There are two reasons why the court feels that it should not grant an injunction prohibiting the use that is shown of the said strip by Steele. The title to this strip is in dispute, and seriously so. Steele claims the strip to be his, and Brinton, as attorney in fact, claims it belongs to Thomas W. Jones." As stated there by the trial court, the title to said triangular strip of land is seriously in dispute, both plaintiff and defendant claiming title thereto. That issue is the leading issue in the case, and under the pleadings it was the duty of the court to determine ownership of said triangular strip of land, and,

after determining the ownership, to determine whether the plaintiff was entitled to an injunction with regard to any of the acts of alleged trespass made against the defendant.

So far as the sewer and water pipes are concerned, which are laid in the ground, the plaintiff could not be required to remove them by injunction; but if a proper case is made against defendant, he may be restrained from making further use of them. Under the laws of this state, an injunction is a writ or order requiring a person to refrain from a particular act (section 4287, Rev. Codes), and not a writ or order requiring a person to do a certain act. *Wilson v. Boise City*, 7 Idaho, 69, 60 Pac. 84.

It will not be necessary to go any further into the details of said case. What we have said will indicate to the trial court the theory upon which the case must be tried and determined.

The judgment is reversed and the cause remanded, with direction to grant a new trial. Costs are awarded to the appellant.

AILSHIE, J., concurs.

(19 Idaho, 75)

NORTHERN PAC. RY. CO. v. KOOTENAI COUNTY et al.

(Supreme Court of Idaho. Dec. 17, 1910.)

(Syllabus by the Court.)

1. TAXATION (§ 390*)—RAILROAD PROPERTY—MODE OF ASSESSMENT.

Under the provisions of sections 1710-1715, inclusive, of the Revised Codes of this state, it is provided that all railroad property used in connection with maintaining and operating a main track or main line of railroad, including the right of way, stations, and superstructures upon the right of way, side tracks, switches, turnouts, "second tracks," "rolling stock," and franchises, within the state, shall be estimated and valued together as a whole for the full length of the line within the state, and that the total valuation so ascertained shall be divided by the total number of miles of "main track" or "main line" in ascertaining a uniform valuation per mile for the full length of such main line or main track within the state and in each county, city, incorporated town, or assessment district, and that each mile thereof shall bear the same valuation as every other mile of such "main line" or "main track."

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 652-659; Dec. Dig. § 390.*]

2. TAXATION (§ 390*)—RAILROAD PROPERTY—MODE OF ASSESSMENT.

The state board of equalization, in valuing and assessing railroad property under the provisions of the statute of this state (sections 1710-1715, inclusive, Rev. Codes), are authorized, directed, and required to value and assess "main line or main track," and to cause such valuation and assessment to be certified to the auditors of the several counties, and they have no power or authority to separately value and assess "second track" as a separate and independent railroad property, or to certify such an assessment.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 652-659; Dec. Dig. § 390.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

3. TAXATION (§ 610*)—SUIT TO REMOVE CLOUD OF INVALID ASSESSMENT — NECESSITY FOR DOING EQUITY.

Where it appears that the state board, by error or mistake, have failed to include an item of railroad property designated as 5.67 miles of "second track" within the total valuation of the property of such company for the purpose of ascertaining the valuation per mile to be placed on the main track of such road, but, on the contrary, have certified the same down as an independent assessment, and the railroad company seeks to remove the cloud of such invalid assessment from its property and to enjoin and restrain the taxing officers from collecting such tax or holding a lien therefor against the property, and it appears that the company has not in fact paid its proportionate part of taxes for the year upon such piece or parcel of property, it will be required to do equity before it can take a decree clearing its title, and must accordingly pay to the county the proportionate share of taxes on the specific piece of property to which the county would have been entitled by reason of the total mileage or main line of road within its borders, had the state board of equalization complied with the statute in including the valuation of such property within the total valuation of the railroad company's property.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1244; Dec. Dig. § 610.*]

Appeal from District Court, Kootenai County; Robert N. Dunn, Judge.

Action by the Northern Pacific Railway Company against the County of Kootenai and others. Judgment for defendants, and plaintiff appeals. Reversed and remanded, with directions.

Edward J. Cannon, James E. Babb, and R. L. Black, for appellant. C. H. Potts, Pros. Atty., for respondents.

AILSHIE, J. This is an action that was instituted by the Northern Pacific Railway Company to quiet its title to 5.67 miles of its railway track and remove the cloud therefrom, and to enjoin and restrain the taxing officers from proceeding further for the collection of a tax levied and assessed against the property. The court sustained a demurrer to the complaint, and the company thereupon appealed.

It seems that in the year 1909 the state board of equalization valued and assessed the property of the Northern Pacific Railway Company, and caused the same to be certified by the State Auditor to the auditor of Kootenai county as follows:

"Railway Lines.				
Counties.	Mileage.	Rate per Mile.	Valuation.	Total Valuation.
Kootenai				
Northern Pacific Railway Co.,	24.34	16,000	\$39,440
Northern Pacific Railway Co., Ft. Sherman Branch,	13.65	6,500	83,735	
Northern Pacific Railway Co., 'Second Track'	5.67	3,000	45,360."	

The auditor of Kootenai county thereupon caused the same to be extended on the

assessment books of the county for the year 1909 as follows:

"Statement of Taxes of the Northern Pacific Railway Company for 1909.

24.34 miles of main line, \$16,000; total, \$389,440.

'Second Track' 5.67 miles, \$3,000 per mile; Total value, \$45,360."

The appellant paid its taxes on all the property assessed against it except this 5.67 miles of "second track." It now contends that the state board of equalization had no authority, power, or jurisdiction to assess separately, and as such, any mileage whatever of "second track," and that the assessment and certification of the same was without jurisdiction and furnishes no authority whatever for the taxing officer to collect the same or hold it against the company as a lien, cloud, or incumbrance on its property.

The statutes of the state bearing on the subject are as follows:

Section 1710, Rev. Codes, provides that: "The state board of equalization shall have exclusive power to assess and value for purposes of taxation all telegraph and telephone lines and the 'railroad track' and 'rolling stock' and franchises of all persons, companies, or corporations owning, operating or constructing any telegraph or telephone lines, or railroads wholly or partly within this state. For the purposes of this chapter, 'railroad track' shall be deemed to include the right of way, station, and other necessary grounds, superstructures upon such right of way, station and other grounds, and all other immovable property used, operated, or occupied by any person, company or corporation, owning, operating or constructing any line of railroad, wholly or partly within this state, and reasonably necessary to the maintenance and operation of such road." Then follows the definition of what shall constitute "rolling stock," and this in turn is followed by the direction that all property belonging to railroad corporations not included within the terms "railroad track" or "rolling stock" shall be assessed by the county assessor as other property is assessed within the county.

Section 1713, Rev. Codes, provides as follows: "The president, secretary, superintendent or other principal accounting officer of any person, company or corporation, owning, constructing or operating any telegraph or telephone line or railroad wholly or partly within this state, shall list for assessment and taxation all the following described property belonging to, owned, occupied or operated by such person, company or corporation in this state, viz.: The whole number of miles of telegraph or telephone line, the number of wires, the number of instruments, the number of miles of railroad track (main, side and second tracks and turnouts being separately stated), the prop-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

erty held for right of way, the amount and character of improvements, and the stations located on the right of way; and under the head of 'rolling stock' shall list all movable property owned, used, occupied or operated in connection with any railroad, wholly or partly within this state. Such lists shall specifically show the number of miles of such telegraph and telephone line or of 'main track' in each county, district, city and incorporated town or village through which such line or railroad passes. And all such lists shall be verified by the oath of such president, secretary, superintendent or other principal accounting officer making the same."

Section 1714 provides that: "The said board shall determine the total value of each railroad by adding together the value of the franchise, 'railroad track' and 'rolling stock' thereof, and shall apportion such total value among the several counties into or through which the main line of such railroad passes, in proportion to the total length of such line in the several counties respectively."

Section 1715 provides that when the total valuation of railroad property has been determined and assessed in accordance with the provisions of section 1714, "the state auditor shall prepare a statement to be sent to each county in which such * * * railroad property may be situated, specifying the number of miles of such line or road within the county, the assessed value per mile and the number of miles of main line or main track in each district, city or incorporated town therein."

Reading these several sections of the statute together, and following the directions of section 1714, supra, it will be observed that it is the intention and direction of the statute that all railroad property comprising right of way, stations, and superstructures upon the right of way, side tracks, switches, turnouts, and second tracks, rolling stock and all such property, including the franchises used by any one line of road, shall be ascertained, estimated, and valued as a whole for the full length of the line within this state, and the total valuation so found is to be divided by the total number of miles of "main track" or "main line" so as to have a uniform valuation per mile throughout the "main line or main track" in each county, city, incorporated town, or assessment district. The validity of this method of assessment has frequently been before the courts and has received a very careful and extended consideration and review, and has been sustained as constitutional and valid legislation. *State v. Black*, 72 Neb. 402, 100 N. W. 952, 69 L. R. A. 447; *Adams Express Co. v. Ohio State Auditor*, 165 U. S. 194, 17 Sup. Ct. 305, 41 L. Ed. 683.

As we understand the statutes above cited, it is the duty of the state board of equaliza-

tion to ascertain the total value of the main line or track, stations, switches, turnouts, "second tracks" and right of way, and other appurtenances, all of which comprise what the statute terms the "railroad track" and add thereto the value of the "rolling stock" and franchises, and to assess the main line the amount per mile which, if multiplied by the total number of miles of main line, will equal the total valuation of the property so ascertained. And when the valuation and assessment have been made, the certification to each county is for so many miles of "main line or main track" at such sum per mile as the board has valued the property. When the board makes such valuation and assessment, it is to be presumed that they have followed and complied with the law in computing all the appurtenances and incidents which go to make up the "railroad track" or "main line." When, therefore, the board certified so many miles of Northern Pacific "second track" they were clearly certifying something that the law had required them to value and compute in the total estimate of valuation of railroad property in ascertaining the value per mile to be placed on the main line or track. Had they simply certified so many miles of road, then the law would have raised the presumption, in the absence of a contrary showing on the face of the record, that they meant "railroad track or main line" as specified and defined by the statute, but where they specifically designated that it was "second track" that overcomes the presumption that the mileage certified is that contemplated by the statute. It has been urged, however, by counsel for respondent that the property in question designated as "second track" is in fact main track or main line and was entitled to be valued and assessed as such. However that may be in point of fact, it is clear from the record here that the state board of equalization did not so consider it. On the contrary, they have, so far as the record discloses, found that it was "second track" and not main track or main line. The demurrer should have been overruled.

Since this case must be reversed and the county will be entitled to answer plaintiff's complaint and further proceedings may be had, it is necessary for us to make one further observation. The fact that the state board of equalization certified 5.67 miles of "second track" valued at \$8,000 per mile, to our minds refutes the presumption that they complied with the law in including this 5.67 miles of second track in the grand total of the Northern Pacific property when ascertaining the rate per mile at which the main line should be assessed. It follows, therefore, that if this attempted assessment of 5.67 miles at \$8,000 per mile amounting to a total assessed valuation of \$45,360 is to be held void, the company will thereby escape its taxes for the year 1909 on this assessed

valuation. This is a suit in equity, whereby the plaintiff seeks to remove a cloud from its title and to enjoin and restrain the taxing officers from holding the same against its property or further attempting to collect the tax. There is a moral obligation resting on the owners of all taxable property to pay their respective shares of the burdens of government, whether the tax has been regularly or irregularly levied and assessed. The maxim of law, however old, is still sound and wholesome, that he who seeks equity must first do equity. Applying that rule here, the appellant company should be required to pay to Kootenai county the proportionate share of this tax to which the total mileage of main line in Kootenai county would have entitled the county under the statute (sections 1713, 1714, 1715, and 1716 of the Revised Codes). *Couts v. Cornell*, 147 Cal. 560, 82 Pac. 194, 105 Am. St. Rep. 168.

The judgment is reversed and the cause is remanded, with direction to the trial court to overrule the demurrer and allow the defendant to answer. Costs awarded in favor of appellant.

SULLIVAN, C. J., concurs.

(49 Colo. 208)

NAPIER et al. v. GLENWOOD LIGHT & WATER CO.

(Supreme Court of Colorado. Dec. 5, 1910.)

1. WATERS AND WATER COURSES (§ 152*)—ADJUDICATION OF WATER RIGHTS—APPEAL—STATUTES.

The regulations prescribed by Rev. St. 1908, §§ 3307-3310, for the taking and perfecting of an appeal from a judgment rendered in a proceeding under section 3280 for an adjudication of the water rights of the parties, are mandatory, and cannot be waived or ignored by the parties.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. § 152.*]

2. WATERS AND WATER COURSES (§ 152*)—ADJUDICATION OF WATER RIGHTS—APPEAL—STATUTES.

Under Rev. St. 1908, § 3308, requiring the publication of a copy of the order allowing an appeal from the judgment adjudicating water rights in a proceeding under section 3280 in a public newspaper in the county into which the water district may extend, a publication in a newspaper in one county, while the district court of another county had exclusive jurisdiction of the proceeding, is insufficient, though the water district embraced such counties and other counties, and where the time fixed by section 3309 for publishing the notice in the proper county has elapsed the appeal must be dismissed.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. § 152.*]

3. WATERS AND WATER COURSES (§ 152*)—ADJUDICATION OF WATER RIGHTS—APPEAL—STATUTES—"PROCEEDING."

Rev. St. 1908, § 3308, providing for the publication of a copy of the order allowing an appeal from a judgment in a "proceeding" under section 3280, applies, not only to a proceeding to change the point of diversion of wa-

ter, but also to a proceeding for original adjudication of a water right.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. § 152.*]

For other definitions, see *Words and Phrases*, vol. 6, pp. 5631-5638.]

Appeal from District Court, Eagle County; Charles Cavender, Judge.

Proceedings between B. T. Napier and others and the Glenwood Light & Water Company. From a judgment for the latter, the former appeal. Dismissed.

John L. Noonan, S. J. De Lan, and John A. Rush, for appellants. Wm. O'Brien and C. W. Darrow, for appellee.

CAMPBELL, J. The judgment appealed from was rendered in a statutory proceeding instituted under section 3280, Rev. St. 1908, for an adjudication of the water rights of appellee, who was petitioner below. The only method of review of such judgments is by appeal, the taking and perfecting of which are regulated by sections 3307-3310. Such regulations are mandatory, and cannot be waived or ignored by the parties.

Among other things imposed upon an appellant is the duty, under section 3308, to cause a certified copy of the order allowing the appeal to be published in the same manner as are the notices prescribed by section 3286, which is by publishing the same "in one public newspaper in such county into which such water district may extend" once each week for four successive weeks. Proof of such publication is, by section 3287, the sworn certificate of the publisher. The only publication of the order allowing the appeal in this case was in a public newspaper of Garfield county, and the only proof of publication the sworn certificate of its publisher. The water district in question, No. 43, embraces portions of Eagle, Garfield, Routt, and Grand counties. The proceeding was instituted and the judgment rendered in the district court of Eagle county, which the parties concede was the court having exclusive jurisdiction thereof. Publication of notice and proof of the same were not in accordance with this imperative requirement. In *Wadsworth Ditch Co. v. Brown*, 39 Colo. 57, 88 Pac. 1060, the precise question was before the court and determined. It was there held that the notice should be published in a public newspaper of the county in which is held the court that has jurisdiction to adjudicate, and in which the proceeding was properly begun. Under this ruling, since the district court of Eagle county had exclusive jurisdiction of the proceeding, which was therein begun, publication of the copy of the order allowing the appeal should have been made in some newspaper of that county. As appears in the opinion in the *Wadsworth Case*, the contention between the parties there was whether the notice should be published in

one paper in each county comprising the district, or only in one newspaper of that county in which the proceeding was properly pending. Manifestly, publication of the order in a newspaper of Garfield county was not a compliance with this mandatory provision of the statute.

The appellants seek to escape the force of the decision in the Wadsworth Case by trying to draw a distinction between a special proceeding, to change the point of diversion, such as that was, and a special proceeding, like the one at bar, for original adjudication of a water right. So far as the question of publication is concerned, there is no distinction whatever, because the statute governing the publication is the same, and it applies to both proceedings. The language above quoted, taken from the statute, does not mean one thing when applied to the one proceeding and an entirely different thing when applied to the other. Inasmuch as the time fixed by section 3309 for publishing the notice in the proper county and filing proof thereof in the Supreme Court has long since elapsed, which time limit is mandatory, the appeal must be dismissed. *Needle Rock Ditch Co. et al. v. Crawford-Clipper Ditch Co.*, 32 Colo. 209, 75 Pac. 424; *Baer Brothers Land & Cattle Co. v. Wilson et al.*, 32 Colo. 500, 77 Pac. 245.

Appeal dismissed.

MUSSER and HILL, JJ., concur.

(49 Colo. 203)

WEBSTER v. RHODES.

(Supreme Court of Colorado. Nov. 7, 1910.)

1. ATTORNEY AND CLIENT (§ 150*)—COMPENSATION OF ATTORNEY—COMPROMISE BY CLIENT.

Where an attorney agrees to carry on a certain action to its close for an agreed compensation, if successful, and the client, on his own motion, compromises the suit after the attorney has begun his services, the client is liable for the agreed compensation, where, through the efforts of the attorney, he was able to receive as much or more by the compromise than he could have received from the successful outcome of the litigation.

[Ed. Note.—For other cases, see *Attorney and Client*, Cent. Dig. §§ 354-357; Dec. Dig. § 150.*]

2. ATTORNEY AND CLIENT (§ 158*)—COMPENSATION OF ATTORNEY—COMPROMISE BY CLIENT UNDER QUANTUM MERUIT.

Where an attorney and client agree upon a certain compensation to be paid to the attorney for performing certain services in an action, and the client compromises and dismisses such an action without fault on the part of the attorney, the attorney is entitled to sue on a quantum meruit for services already performed.

[Ed. Note.—For other cases, see *Attorney and Client*, Cent. Dig. § 361; Dec. Dig. § 158.*]

3. TRIAL (§ 139*)—QUESTIONS FOR JURY.

In an attorney's action for services, in which defendant filed a counterclaim for plaintiff's failure to perform his duty in unrelated matters, the issue on the counterclaim was

properly taken from the jury, where no showing was made of any damage to defendant.

[Ed. Note.—For other cases, see *Trial*, Dec. Dig. § 139.*]

4. TRIAL (§ 168*)—INSTRUCTIONS TO JURY—DIRECTING VERDICT—EVIDENCE NOT CONFLICTING.

Where there is no substantial conflict in the evidence, and the court would be obliged to set aside a different one, it is proper for the court to direct a verdict.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 341, 376-380; Dec. Dig. § 168.*]

Error to District Court, Larimer County; *James E. Garrigues*, Judge.

Action by L. R. Rhodes against Samuel F. Webster. From a judgment for plaintiff, defendant brings error. Affirmed.

Thomas J. Leftwich, Newton W. Crose, and William B. Lymer, for plaintiff in error. L. R. Rhodes, pro se.

CAMPBELL, C. J. Plaintiff Rhodes, who is an attorney at law, brought this action to recover from defendant Webster for professional services rendered. The first cause of action in the complaint in substance alleges that defendant employed plaintiff to bring an action in the district court to recover money which defendant claimed was due him, and to defend an action, if such should be brought against defendant by one Harris, and for such services it was agreed that plaintiff should receive \$150, if successful in such litigation; that in pursuance of the employment plaintiff brought the suit, and made the necessary preparations for defending the anticipated action by Harris. After such suit in behalf of the defendant was brought, a compromise of the same was made by defendant in this, and defendants in that, action, and a settlement was also made between this defendant and Harris of the controversy between them. All of these matters were adjusted to defendant's satisfaction; he getting all of his claims and demands that he would have received had the suit been conducted to a successful termination. The second cause of action sets up the same employment, the rendering of the same service to the satisfaction of defendant, and that the value thereof is \$150. Defendant, by his answer, while admitting the employment, denies that the contract set up in the first cause of action was performed as alleged, and denies the value of the services alleged in the second cause. By way of counterclaim, he sought to recover damages from plaintiff on account of negligence and unskillful professional conduct by plaintiff in other unconnected transactions. Upon the hearing, and at the close of the evidence, the court withdrew from consideration of the jury the counterclaim and directed them to return a verdict for plaintiff in the sum of \$150.

We think this judgment was right. There-

is no substantial controversy as to the material facts. The employment is admitted. That plaintiff brought the suit contemplated by the contract and stood ready to defend the anticipated suit of Harris are also admitted. The defendant by his own act compromised the subject-matter of the litigation included in the suit which was instituted, and thereby received everything that he would have got had the suit been successfully prosecuted by plaintiff. Indeed, the evidence is that defendant received, as a result of the compromise, more than he would have obtained had the suit been prosecuted to a successful termination. As no suit was brought by Harris against this defendant, and as plaintiff stood ready at all times to defend the suit had it been brought, the contract as to that part was unquestionably performed. But defendant argues that the receipt by him, as the result of a compromise which he himself effected, under the advice and with the assistance of plaintiff, of all that he would have secured had the litigation resulted in his favor, is not the same as if that litigation had been successfully prosecuted in court; that the contract must be proved as specifically alleged to entitle plaintiff to recover; that when, with plaintiff's consent, the compromise was effected after the suit was brought, this was an abrogation of the contract, and plaintiff must recover, if at all, for his services upon a quantum meruit. To this proposition is cited *Harris v. Root*, 28 Mont. 159, 72 Pac. 429; and *Coram v. Ingersoll*, 148 Fed. 169, 78 C. C. A. 303. If the contract involved in the *Root* Case be, as defendant says, in principle the same as that in the case in hand, the decision by the Supreme Court of Montana would seem to uphold defendant's contention. The United States Circuit Court of Appeals in *Coram v. Ingersoll*, though it considered the case of *Harris v. Root*, did not announce such doctrine, though it decided that the question sought to be litigated in the federal court was *res judicata* by the judgment in the Montana case. If, however, it could be considered as approving the doctrine of the Montana court, it was overruled by the Supreme Court of the United States in a writ of certiorari, reported as *Ingersoll v. Coram*, in 211 U. S. 335, 29 Sup. Ct. 92, 53 L. Ed. 208. In that controversy Colonel Ingersoll was engaged as counsel, on a contingent fee, to conduct litigation to a successful termination in the contest of the probate of a will. On the trial of the contest, the jury disagreed. Pending preparation for a second trial, an agreement of compromise was made by which Ingersoll's clients received even a larger portion of the estate than would have come to them had the contest been successfully litigated. The Supreme Court of the United States held that, though the contract was not literally performed, in that the litigation was not successfully prosecuted to a

termination in court, yet, since the parties for whom the contest was waged received, through Ingersoll's efforts, as the result of a compromise which was satisfactory to them, more than they would have got had a favorable verdict been returned by a jury, the contract must be considered as performed and the plaintiff entitled to his agreed compensation. Applying that doctrine to the case in hand, it would seem that by the contract here, under the undisputed evidence, there being no substantial controversy between plaintiff and defendant respecting the same, plaintiff is entitled to a judgment, since his client got all he demanded.

If, however, there is any question about this, then, according to defendant's own contention, plaintiff might recover upon a quantum meruit under the second cause of action. The proof, without dispute, sustains this count, for plaintiff performed the specified part of the professional service for defendant which was agreed upon, and stood ready to perform the remainder, which was rendered useless and waived by defendant's own acts, and the evidence shows that the amount for which the court directed a verdict is a reasonable compensation therefor.

The matters set up in the counterclaim did not arise out of the transaction set forth in the complaint as the foundation of plaintiff's claim, neither are they connected with the subject of the action. It is doubtful if the cause of action attempted to be set up therein is based upon a contract at all, although it pretends to be a claim for damages arising out of a breach of an attorney's contract for professional services. It may be that defendant could sue either upon contract or in tort. Examination of the counterclaim leads to the conclusion that he seeks a recovery on the ground of plaintiff's negligence and has counted upon the tort. However that may be, whether the counterclaim pleads a breach of a contract or sets up plaintiff's negligence, there was no testimony whatever that defendant suffered any damage, and the court was right in withdrawing the counterclaim from the jury.

As to the propriety of the practice pursued by the court in directing a verdict in plaintiff's favor, upon his complaint, we observe it is the rule in this jurisdiction, that where, as here, there is no substantial conflict in the evidence, and the court would be obliged to set aside a different verdict if it was returned, it is its duty to direct a verdict. *Livesay, Adm'r, et al. v. First National Bank*, 36 Colo. 526, 532, 86 Pac. 102, 6 L. R. A. (N. S.) 598, 118 Am. St. Rep. 120; *Murphy v. Cobb*, 5 Colo. 281; *Vote v. Karrick*, 13 Colo. App. 388, 58 Pac. 333; 23 Am. & Eng. Enc. of Law (2d Ed.) p. 561; 6 Enc. P. & P. 678, 679.

The judgment is right and must be affirmed.

Affirmed.

MUSSER and WHITE, JJ., concur.

(49 Colo. 186)

CREE v. LEWIS.

(Supreme Court of Colorado. Dec. 5, 1910.)

1. TRUSTS (§ 1*)—DEFINITION.

A trust, in its simplest form, is that relation between two persons by virtue of which one of them holds property for the benefit of the other.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 1; Dec. Dig. § 1.*]

For other definitions, see *Words and Phrases*, vol. 8, pp. 7116-7124; vol. 8, p. 7822.]

2. JURY (§ 14*)—RIGHT TO JURY TRIAL—SUIT TO ENFORCE TRUST.

Where plaintiff sued to enforce a contract by which, in consideration of certain advances by him, he was to receive one-fifth of defendant's stockholding in a corporation, plaintiff's suit was in equity to enforce a trust and was not triable by jury, under Civ. Code, § 173, providing that in actions to recover specific real or personal property with or without damages, or for money claimed to be due on a contract, or as damages for breach of contract, or for injuries, an issue of fact must be tried by a jury, but in other cases issues of fact must be tried by the court, etc.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. § 70; Dec. Dig. § 14.*]

3. TRUSTS (§ 374*)—ENFORCEMENT—RELIEF AWARDED.

Where plaintiff sued to establish and enforce a trust, equity had jurisdiction, though plaintiff also asked for a money judgment, under the rule that when equity has jurisdiction of a cause for one purpose, it may retain such jurisdiction to determine the entire controversy.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. §§ 607-612; Dec. Dig. § 374.*]

4. ACTION (§ 25*)—EQUITY OR LAW—ISSUES.

Where plaintiff, claiming to be the owner of a certain interest in defendant's stockholdings in a corporation, sued to recover the value thereof, and alleged that defendant without plaintiff's consent had received and invested plaintiff's share of the stock in certain real estate, taking title thereto in his own name, and prayed that his judgment for money be declared a lien on the premises, and that they be sold to enforce the same, plaintiff's suit was in equity, on the theory that he sought to impress the property with an equitable lien in the nature of a resulting trust, to the extent that his money was used for the purchase thereof.

[Ed. Note.—For other cases, see *Action*, Cent. Dig. §§ 124-145, 147-149, 156-159; Dec. Dig. § 25.*]

5. FRAUDS, STATUTE OF (§ 129*)—SALE OF GOODS—EXECUTED CONTRACT.

A contract to sell plaintiff a one-fifth interest in defendant's stockholdings in a certain corporation, in consideration of an advancement then or thereafter made, and a cancellation of a claim, held by plaintiff against defendant, was not within the statute of frauds after plaintiff had performed by a payment of the price.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 287-292; Dec. Dig. § 129.*]

6. TRUSTS (§ 374*)—ACTIONS—RELIEF.

Defendant having sold plaintiff an interest in defendant's stockholdings in a corporation, thereafter received plaintiff's share of the value of such stock and converted the same by investing it in real estate without plaintiff's consent, and delayed an accounting by misrepresenting to plaintiff that he had not yet received the whole sum to which he was entitled. *Held*, in an action to establish and enforce a trust of

such fund, that equity had discretion to require defendant to pay damages equal to the legal rate of interest in addition to the amount plaintiff was entitled to, as compensation for plaintiff's loss of the use of his part of the fund.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. §§ 607-612; Dec. Dig. § 374.*]

7. TRUSTS (§ 110*)—EVIDENCE.

Evidence in an action to enforce a trust held to sustain a finding that defendant, in consideration of certain advances made by plaintiff and the cancellation of a debt from defendant to plaintiff, transferred to him a fifth interest in defendant's stockholdings in a corporation, and that plaintiff was entitled to recover the value thereof.

[Ed. Note.—For other cases, see *Trusts*, Dec. Dig. § 110.*]

Appeal from District Court, Pueblo County; John H. Voorhees, Judge.

Action by J. A. Lewis against I. B. Cree. Judgment for plaintiff, and defendant appeals. Affirmed.

Devine & Dubbs, J. W. Preston, and H. C. Vidal, for appellant. Hartman & Ballreich, for appellee.

GABBERT, J. Appellant was the owner of 2,000 shares of the capital stock of the Shurtleff Consolidated Gold Mining Company. Either by mistake or intention, the stock book of the company purported to show that he had received a certificate for his stock, which was not the fact. The company officials, however, declined to issue him a certificate, unless he furnished an indemnifying bond. Appellee claims that appellant represented to him that he was without funds to prosecute an action against the company to compel it to issue him a certificate, and offered that if he would advance him \$150 and cancel an account for \$45 which he held against the appellant, that the appellee should have a one-fifth interest in the stock and the proceeds thereof. Appellee also claims that he accepted the offer, and advanced the money and canceled the account, as agreed. Thereafter appellant brought suit in mandamus against the company to compel the issuance of a certificate representing his stock. He was successful in his suit, and the certificate was issued and delivered to him with the understanding and agreement, according to the claim of appellee, that it was to remain in the name of the appellant, but was to be delivered to him, the appellee, and kept by him. Subsequently, the appellant received in the way of royalties from the property of the company various sums, aggregating \$4,803, and later received something over \$46,000 for his share of the proceeds of a sale of the property of the company, as represented by his stock. Appellee, as plaintiff, then brought suit to recover from the appellant, as defendant, one-fifth of the money thus received, basing his right of action primarily upon the contract which he claimed to have

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

made and fulfilled with the defendant, as above mentioned.

The main issue of fact under the pleadings was, whether or not the parties had entered into this contract. The plaintiff claimed that the action was equitable, and therefore triable to the court. The defendant claimed that the suit was one at law, and that he was therefore entitled to a trial by jury. The court called a jury as advisory, and submitted certain questions for their determination. The jury failed to agree, whereupon the court discharged them, found the issues for plaintiff, and rendered judgment for him for his share of the amount received by the defendant in the way of royalties and proceeds from a sale of the property of the company, together with interest. Further relief was also granted, which will be considered later. From this judgment, the defendant has brought the case here for review on appeal.

The first point made by his counsel is, that the court erred in not allowing him a jury trial. Section 173 of our Civil Code provides that: "In actions for the recovery of specific real or personal property, with or without damages, or for money claimed as due on contract, or as damages for breach of contract, or for injuries, an issue of fact must be tried by a jury, unless a jury trial is waived, or a reference is ordered as provided in this Code. In other cases issues of fact must be tried by the court, subject to its power to order any such issue to be tried by a jury, or to be referred to a referee, as provided in this Code."

Under this section, counsel for the defendant contends that the case was triable before a jury, for the reason that it was an action at law, in that the complaint alleged either a breach of the alleged contract made by the defendant to turn over one-fifth of his stock in the Shurtieff Company, or for money had and received by the defendant for the plaintiff, or for damages for the conversion of the stock or money of plaintiff by the defendant.

According to the averments of the complaint, a one-fifth interest in the shares of stock standing in the name of defendant was the property of plaintiff. A trust, in its simplest form, is that relation between two persons by virtue of which one of them holds property for the benefit of the other. That is precisely what plaintiff alleged; that is to say, by the averments of his complaint he charged that his interest in the stock represented by the certificate issued in the name of the defendant was held in trust for him by the latter, and that he was entitled to recover the money received thereon. In brief, his action was to establish and enforce a trust. Such an action is a suit in equity, and under the last paragraph of the Code above quoted, the issues were triable to the court. True, plaintiff demanded and was giv-

en a money judgment, but this relief depended upon the establishment of a trust. In other words, if he failed to establish that shares of stock evidenced by the certificate issued to and in the name of defendant belonged to him, then his action would fail; so that the basis of his action was, that the stock in question was held by the defendant in trust—purely a suit in equity. It is also true that the principal question of fact upon which depended the issue of trust was the simple one of whether the contract upon which plaintiff relied was entered into with the defendant; but the right to have an issue of fact tried by a jury is not determined by the nature of the issue, but by the character of the action in which such issue is joined. That is to say, if an issue of fact relates to or involves a trust which the party tendering it is attempting to establish, it is triable to the court. *United Coal Co. v. Canon City Coal Co.*, 24 Colo. 116, 48 Pac. 1045; *Danielson v. Gude*, 11 Colo. 87, 17 Pac. 283.

The fact that plaintiff asked for a money judgment is by no means decisive that the action was one at law. If he established the trust upon which he relied, then he was entitled to recover from the defendant the money which he had received on account of the stock held in trust for the plaintiff. Courts of equity do not, however, try cases by piecemeal. It has been settled by repeated decisions, that when a court of equity has jurisdiction of a cause for one purpose, it may retain such jurisdiction for the purpose of deciding the whole controversy, and determining the rights of the parties before it, notwithstanding that for a part of such relief the complainant might have a remedy at law, and thus establish purely legal rights and grant legal remedies, which would otherwise be beyond the scope of its authority. *Packard v. King*, 3 Colo. 211; *Schilling v. Rominger*, 4 Colo. 100; *Whitsett v. Kershow*, 4 Colo. 419; *United Coal Co. v. Canon City Coal Co.*, supra; 1 *Pomeroy's Equity Jurisprudence*, § 181.

But even if it could be successfully contended that the case stated, in so far as it sought to hold the defendant responsible for the money received on account of the stock which plaintiff claimed to own, was not of itself a case in equity, he pleaded further facts which made the case one in equity by alleging, in substance, that defendant, without his (the plaintiff's) consent, invested his share of the money represented by the stock in question in certain real estate, taking the title thereto in his (the defendant's) name. From these averments a resulting trust in favor of plaintiff was stated, for the reason that if one take unto himself a title to real estate which he has purchased with the money of another, he is a trustee for the true owner. *First National Bank v. Bissell* (C. C.) 4 Fed. 604. So that, under the averments of the complaint with respect to the allegations relating to the purchase of real estate, the

title thereto was held in trust by the defendant for the use of plaintiff, if he established his right to a share of the money which he claimed the defendant had received for the pro rata share realized from royalties and a sale of the company, as represented by the stock which he claimed belonged to him.

Based on these averments, plaintiff prayed that the judgment for money to which he claimed to be entitled be decreed a lien upon the premises in question, and that they be sold under the order and direction of the court for the purpose of satisfying such lien. This was proper and equitable relief, if plaintiff established facts upon which his right thereto was based. Wrongfully converting funds which belong to another does not create the relation of debtor and creditor, and nothing more. The owner of such funds may resort to a suit in equity to recover them, if the facts justify that character of action. Where the money of one is wrongfully used by another for the purchase of real estate, the party to whom such money belongs may impress the property so purchased, so long as it stands in the name of the wrongdoer, with an equitable lien in the nature of a resulting trust to the extent his money was used in its purchase. *Moore v. Stinson*, 144 Mass. 594, 12 N. E. 410; *Atkinson & Co. v. Ward*, 47 Ark. 533, 2 S. W. 77. So that, with respect to the real estate, the action was to establish and enforce a trust based upon the ground that defendant had invested in real estate funds belonging to the plaintiff, which was a case in equity, independent of whether the facts upon which the ownership of the money so invested was determined made a case in equity or one at law. The fact that plaintiff might have contented himself with an action in assumpsit to establish and enforce his rights, did not destroy his right to resort to a court of equity in order to do so. In the circumstances of this case, the choice of remedies rested with him.

It is next urged that the contract is void under the statute of frauds. In support of this proposition, section 2025, *Mills' Ann. St.*, is relied upon, which, in substance, provides that contracts for the sale of goods or chattels for the price of \$50 or more shall be void, unless such contract be made in writing, and subscribed by the party to be charged therewith, or unless the buyer shall accept and receive part of such goods, or unless he shall at the time pay some part of the purchase money. According to the complaint, the money which plaintiff agreed to pay was paid by him and received by the defendant, and the contract between them in all respects executed. From the testimony on the part of the plaintiff, part of the money was paid by him at the time the contract was made, and the contract was subsequently executed; consequently, the statute of frauds does not apply for two reasons: (1) Its provisions were complied with; and (2) an oral agreement, although unenforceable by reason of the statute

of frauds, is no longer affected by the statute when it has been performed by the parties. 20 Cyc., 302; *McLure v. Koen*, 25 Colo. 284, 53 Pac. 1058.

It is also urged that the court erred in allowing plaintiff to recover interest from July 1, 1904, to the date of the decree, or in allowing any interest upon plaintiff's claim. The court found from the testimony that defendant had received a specified sum on account of royalties from the sale of the property of the company, and that plaintiff was entitled to have and recover from the defendant one-fifth of this sum, less a small amount theretofore paid, together with interest thereon at the rate of 8 per cent. per annum from the 1st day of July, 1904. It is urged that fixing the date for the beginning of plaintiff's claim to interest is arbitrary, and is not supported by the record. The testimony on behalf of the plaintiff does not sustain this contention. Plaintiff knew that in 1903 the defendant had received a large part of the money represented by the stock in controversy, but the latter persuaded plaintiff to wait for his proportion because the full payment had not been made. As late as June, 1905, the defendant informed the plaintiff that he had not yet received all of the money to which he was entitled, although it appears he did actually receive it in June, 1904. It also appears, as we understand the record, that prior to June, 1904, defendant had invested in real estate from the moneys received on account of the stock a sum largely in excess of plaintiff's share. So that, according to the testimony on behalf of the plaintiff, the defendant cannot complain that he was adjudged to pay interest from July 1, 1904, if he was liable for interest at all, or its equivalent as damages, which is the next question we shall consider.

On behalf of the defendant it is urged that under our statute plaintiff was not entitled to interest. Accepting this as correct, it by no means follows that the court erred in awarding plaintiff a sum equal to the legal rate of interest on the amount which it was adjudged he was entitled to recover from the defendant. The defendant, instead of paying to plaintiff his pro rata share of the money to which he was entitled, invested it in real estate—in brief, converted it to his own use. Independent of contract or statute, a court of equity in its sound discretion may require one who has converted to his own use the funds of another to pay damages equal to the legal rate of interest, as compensation to the complainant for the loss of the use of his funds. *Filmore v. Reithmann*, 6 Colo. 120; *Cooper v. Hill*, 94 Fed. 582, 36 C. C. A. 402; *New Dundenberg M. Co. v. Old*, 97 Fed. 150, 38 C. C. A. 89. For further authorities bearing on the subject, see *Omaha & Grant S. & R. Co. v. Tabor*, 13 Colo. 41, 21 Pac. 925, 5 L. R. A. 236, 16 Am. St. Rep. 185; *Sutton v. Dana*, 15 Colo. 98, 25 Pac. 90; *Perkins v. Marrs*, 15 Colo. 262, 25 Pac. 168; *Sylvester v. Craig*, 18 Colo. 44, 31 Pac. 387.

Counsel for defendant cite *Dexter v. Collins*, 21 Colo. 455, 42 Pac. 664, *Hilburn v. Mercantile National Bank*, 39 Colo. 189, 89 Pac. 45, and *Young v. Kimber*, 44 Colo. 448, 98 Pac. 1132, in support of their contention that interest should not have been allowed. These cases are clearly distinguishable from the one at bar, for the reason that they do not involve a misappropriation of funds.

The final question urged upon our attention is, that the findings and decree of the court are not sustained by the evidence, in so far as it relates to the contract which plaintiff claims to have entered into with the defendant and performed. Plaintiff testified positively and unequivocally that the contract upon which he relies was made as set out in his complaint, and fully performed by him. His testimony was corroborated by several disinterested witnesses. Notwithstanding that the evidence was clear on the part of plaintiff on the subject of the contract, it is claimed that it is so improbable and absurd because of the inadequacy of the consideration therefor, that his testimony should not be believed. These were matters for the trial judge to consider; but, aside from this, the record does not show such gross inadequacy of consideration for the contract as to justify the conclusion that the parties never entered into it. At the time the contract was made, the property of the Shurtleff Company only showed assay values. Its value was entirely prospective; consequently, the stock of the company possessed but a nominal value per share.

The defendant claims that prior to the date when he commenced his suit in mandamus, he had been offered a large sum for his interest in the property. This offer was made at a time when the property was showing ore which was afterwards exhausted. After that it did not become valuable by the discovery of ore bodies until a considerable time subsequent to the date when the contract between the parties was made. Certain it is, according to testimony introduced, that defendant was unable to secure, either by way of loan or sale of an interest in his stock, a sufficient sum to enable him to prosecute his suit against the company. This indicates that it was not regarded as of much value. The action by defendant to compel the issuance of a certificate to him was commenced and tried in the county court of Teller county. In his complaint filed in the case, which was verified, he alleged that the value of the stock represented by the certificate to which he was entitled did not exceed \$2,000. His share of the stock was one-third of all that had been issued. This statement does not indicate that he regarded either the property or his stock of any great value. On the contrary, it tends strongly, to say the least, to corroborate the testimony of the wife of plaintiff, to the effect that the defendant considered the value of the stock as prospective only, by what he

said when he obtained his certificate and handed it to her husband: "Here, old boy, take this stock and take good care of it. It may be worth something to you and I some time, but I don't believe there is a pound of ore in that mine."

It is not to be denied that plaintiff is receiving a very large return upon his investment, but that is not a reason why his contract should not be enforced. He took the chance of losing his investment entirely. If defendant had not been successful in his suit against the company to obtain his certificate to pay the expense of which plaintiff furnished the money, his investment would have been a total loss. That defendant so regarded it is well illustrated by the testimony of the wife of plaintiff, as to what defendant said when her husband paid the first money on the contract, which, she says, was as follows: "Now, I want you both to understand that if I get anything, you are taking chances with me; if I get nothing, you get nothing, but if I get my stock, Mr. Lewis—Al—is to have a fifth interest in my stock." Again, if a certificate for the stock was obtained, then the result of plaintiff's venture depended entirely upon what the mine might develop in the future.

Much stress is laid upon the fact that plaintiff waited for a considerable time for his share of the money represented by his interest in the stock after it was received by the defendant before commencing suit, but that is fully explained in his testimony. He was induced to wait upon the representation of the defendant that he had not as yet received all the money to which he was entitled, and that he would settle with him as soon as it was all paid. We find in this case, like all others of a similar character, a decided conflict in the testimony on the subject of the contract upon which plaintiff based his right to the relief granted him by the trial court, but this conflict was decided in favor of the plaintiff, and, under repeated decisions, we will not disturb such findings where the testimony, as it is in this case, is amply sufficient to sustain them.

The judgment of the district court is affirmed.

Judgment affirmed.

CAMPBELL, C. J., and MUSSER, J., concur.

(49 Colo. 170)

WHITE v. NUCKOLLS

(Supreme Court of Colorado. Dec. 5, 1910.)

1. INJUNCTION (§ 180*)—PLEADING—DEMURRER—CONTINUANCE AFTER SUSTAINING DEMURRER.

When a demurrer to a complaint upon which an injunction is issued is sustained, the court may in its discretion continue the injunction pending an amendment to the complaint.

[Ed. Note.—For other cases, see Injunction, Dec. Dig. § 180.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

2. APPEAL AND ERROR (§ 1043*)—HARMLESS ERROR.

The erroneous issuance of an interlocutory injunction, if it does not prejudice the complaining party, is not ground for reversal of the final judgment, so that if the judgment on the merits was correct, in a suit to establish priorities to water rights and enjoin defendant from infringing plaintiff's rights, or if the court did not err in the proceedings under the preliminary injunction, to defendant's prejudice in the final adjudication, any error in refusing to dissolve a preliminary injunction granted upon sustaining a demurrer to the complaint, with leave to amend, was immaterial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4119; Dec. Dig. § 1043.*]

3. INJUNCTION (§ 219*)—GROUNDS—VIOLATION OF INJUNCTION—INJUNCTION ON INSUFFICIENT COMPLAINT.

Where the case made by the complaint authorized injunctive relief if the facts alleged were sufficient, so that a decree based on the complaint would not be actually void, a violation of an injunction issued thereon constituted contempt of court, though the complaint was insufficient.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 441; Dec. Dig. § 219.*]

4. PLEADING (§ 248*)—AMENDMENT—CAUSE OF ACTION.

The original complaint in an action to enjoin defendant from preventing plaintiff from diverting water alleged that plaintiff diverted the waters of a stream through two ditches known as the "L" and "H" ditches, and that it was diverted directly from the stream by the L ditch, and a part thereof discharged into a reservoir from which it was taken by the H ditch, and the second amended complaint alleged that water was diverted from the stream wholly by the L ditch. *Held* that, even if the evidence showed that the L ditch was constructed after the commencement of the action, the second amended complaint did not change the cause of action; the issue being the prior right to use water from the stream, and not the ownership of the ditches.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 686-709; Dec. Dig. § 248.*]

5. WATERS AND WATER COURSES (§ 152*)—WATER RIGHTS—SUITS TO ESTABLISH—ALLEGATIONS OF COMPLAINT.

In a suit to prevent defendant from diverting water and from interfering with plaintiff's use for domestic and irrigation purposes of a certain number of cubic feet of water a second, the complaint must allege facts showing plaintiff's right to the water claimed, and that such right was prior and superior to defendant's right.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 156, 157; Dec. Dig. § 152.*]

6. WATERS AND WATER COURSES (§ 151*)—RI-PARIAN RIGHTS—ABANDONMENT—NONUSER.

Nonuser of an appropriation of water is not an abandonment thereof, unless the intention to abandon exists.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 155; Dec. Dig. § 151.*]

7. WATERS AND WATER COURSES (§ 152*)—WATER RIGHTS—ESTABLISHMENT—PROCEEDINGS—BURDEN OF PROOF.

One claiming water rights by reason of the abandonment thereof by another has the burden of establishing such abandonment.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 152.*]

8. APPEAL AND ERROR (§ 1011*)—FINDINGS—CONCLUSIVENESS—CONFLICTING EVIDENCE.

A trial court's findings on conflicting evidence cannot be disturbed by the Supreme Court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.*]

9. WATERS AND WATER COURSES (§ 152*)—WATER RIGHTS—DECREE—CONSTRUCTION.

In a suit to enjoin defendant from diverting water and from interfering with plaintiff's use for domestic and irrigation purposes of 1½ cubic feet of water a second from a certain stream, the decree gave plaintiff the exclusive right to use one cubic foot of water per second, and made such right superior to defendant's right and prohibited him from taking any water therefrom which would result in depriving plaintiff of her adjudged rights, and enjoined him from so obstructing the stream as to accomplish the same result. *Held*, that since the law embodies in every decree establishing water rights a limitation in time and volume of the rights adjudged, to the extent of the needs of the successful party, and for the purposes named, the decree, construed in view of such limitation, gave plaintiff the prior use of water from the stream for domestic and irrigation purposes to the extent of one cubic foot per second when that volume was required to supply plaintiff's needs, and permitted defendant to divert the waters subject to such rights in plaintiff.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 152.*]

Error to District Court, Pueblo County; John H. Voorhees, Judge.

Suit by Emma Tolle Nuckolls against Crum White. Judgment for plaintiff, and defendant brings error. Affirmed.

S. Harrison White, for plaintiff in error. Devine, Dubbs & Preston and H. P. Vorles, for defendant in error.

GABBERT, J. The parties to this proceeding each claim priorities to the use of water from a natural stream known as "Long Branch," and the important question presented for the determination of the court below was which party had the prior right to the use of such water.

Defendant in error, plaintiff below, instituted an action to enjoin plaintiff in error, as defendant, from diverting and interfering with her use for domestic and irrigation purposes of 1½ cubic feet of water per second of time from the stream in question. On filing the complaint, a temporary injunction was issued and served upon defendant, enjoining him from diverting the waters of the stream to the detriment of plaintiff pending a determination of the case upon its merits. Thereafter such proceedings were had as resulted (1) in adjudging the defendant guilty of contempt for violating the temporary injunction; and (2) on trial of the issues made by the pleadings judgment was rendered to the effect that plaintiff was entitled to the use of one cubic foot of water per second of time for domestic and irrigation purposes from the waters of Long

Branch creek, in advance of the right of the defendant. The latter has brought the case here for review on error. The defendant filed a general demurrer to the original complaint, and gave notice that an application would be made to dissolve the injunction based upon the demurrer. The demurrer was sustained, and leave granted to the plaintiff to amend her complaint, but the court refused to dissolve the injunction. It is urged that the court erred in refusing to dissolve the writ. The prevailing doctrine now is that, when a demurrer to a complaint upon which an injunction is issued is sustained, the court in its discretion may continue the injunction pending an amendment to the complaint. 2 High on Injunctions, § 1594; 10 Enc. Pl. & Pr. 983. There are authorities, also, holding that the injunction still stands, although the order granting leave to amend is silent as to its effect upon the injunction. High, *supra*. Aside from this, interlocutory orders on injunctions, even if erroneous, which do not prejudicially affect the substantial rights of the complaining party, do not justify the reversal of the final judgment. *Dunne v. Stotesbury*, 16 Colo. 89, 26 Pac. 333; *Roberts v. Arthur*, 15 Colo. 456, 24 Pac. 922; *Carson Mining Co. v. Hill*, 7 Colo. App. 141, 42 Pac. 678. And so, if it should appear that the judgment on the merits is correct, or that the court did not err in any of the proceedings had under the preliminary writ to the prejudice of defendant in the final adjudication, the question of whether or not the court erred in refusing to dissolve it is of no material moment.

Plaintiff filed an amended complaint within the time fixed by the court. Thereafter the defendant violated the injunction, and was cited for contempt. On hearing he was adjudged guilty, and a fine imposed. Counsel for defendant urges that because the demurrer had been sustained to the complaint on which the injunction was issued, the writ was of no further force or effect, and also contends that failure to obey a void writ is not contempt. Counsel for plaintiff suggests that these questions cannot be reviewed in connection with the final judgment, but are only reviewable in a special proceeding for that purpose. Waiving this proposition, we are of the opinion that the court did not err in adjudging the defendant guilty of contempt. As above stated, and for reasons there given, the injunction was still in force, and, although the complaint on which it was issued may not have stated facts sufficient to justify its issuance, it was not for that reason void. The case attempted to be stated by plaintiff belonged to a class in which the court could grant equitable relief, through injunctive process, and, although the complaint may not have stated facts sufficient to justify its issuance, it was not void, and a violation of its mandates was contempt. *Tebbetts v. People*, 31 Colo. 461, 73 Pac. 869.

Over the objection of the defendant, plaintiff was permitted to file a second amended complaint. This, it is urged, was error, for the reason that thereby an entirely different cause of action was stated from that originally pleaded. In the original complaint it was alleged that plaintiff diverted the waters of the stream through two ditches known as the "Long Branch" and "Hill"; that the water was diverted directly from the stream by the Long Branch ditch, part of which was discharged into a reservoir from which it was taken by the Hill ditch. According to the averments of the second amended complaint, the water was wholly diverted by the Long Branch ditch. Because of this difference between the two complaints, it is contended that the cause of action was changed, and that from the testimony it appears the latter ditch was constructed after the commencement of the action, which is a different case from that originally stated. The testimony does not sustain this contention, but, even if it did, neither the second amended complaint nor the testimony shows that the cause of action was changed by the amended pleading. The ultimate question involved from the inception of the case was priority to the use of water from Long Branch creek. The ownership of the conduits through which the water was diverted from the stream was not in controversy. A mere change in the averments with respect to the channel through which plaintiff conducted her priority did not change her cause of action. Both complaints, though differing somewhat in their averments, were directed to the same ultimate fact, namely, the prior right of plaintiff to the use of water from Long Branch creek as against the right of the defendant to the waters of that stream. Consequently the amended complaint in question did not depart from the cause set up in the original complaint, although it may have appeared that subsequent to the commencement of the action the conduit through which the plaintiff conducted the water represented by her priority was changed. *Davidson v. Fraser*, 36 Colo. 1, 84 Pac. 695, 4 L. R. A. (N. S.) 1126.

Counsel for defendant urge upon our attention the proposition that, even if the second amended complaint stated a new cause of action, the defendant waived the right to raise the question of departure by answering thereto, and going to trial on the merits. Authorities cited, namely, *Scovill v. Glasner*, 79 Mo. 449, *Grotte v. Nagle*, 50 Neb. 363, 69 N. W. 973, *Sauter v. Leveridge*, 103 Mo. 615, 15 S. W. 981, and *Grymes v. C. F. Liebke Hdwre. M. & L. Co.*, 111 Mo. App. 358, 85 S. W. 946, hold, in effect, that when a defendant, instead of standing on an objection to an amended complaint or motion to strike, based upon the ground that it states a new cause of action, takes issue thereon and goes to trial, he waives the error, if any, in the

respect named, for the reason, as stated, in substance, by some of the authorities discussing the question, the defendant should not be permitted to make the trial court a place of chance, and then ask for a review when he has failed on another accepted issue. We do not deem it necessary, however, to express any opinion on this proposition, although it was referred to in *Messenger v. Northcutt*, 26 Colo. 527, 58 Pac. 1090.

It is also contended that the second amended complaint does not state a cause of action. It is undoubtedly true that, in order to entitle plaintiff to the relief demanded, it must appear from the averments of her pleadings that she had a right to the water in controversy, that such right was prior and superior to that of the defendant, and that it was necessary to allege the facts upon which her claim to these rights was based. Without entering into details, we think it sufficient to say that the complaint fully complies with the rules of pleading in cases of this character.

On behalf of defendant it is also claimed that the evidence does not support the decree. The testimony is somewhat voluminous, and we do not deem it necessary to state it in detail. In substance, on behalf of plaintiff, it is that she and her predecessors in title had used for domestic and irrigation purposes a volume of water from Long Branch creek equal to that decreed her each year since 1872 down to and including the year 1901, when the defendant attempted to totally deprive her of the right thus acquired by taking out a ditch above the headgate of her ditch. There is doubtless some conflict on this subject in the testimony of the witnesses for the respective parties, and as to whether the water in question was used during certain years; but there is nothing to establish an abandonment upon the part of plaintiff. Nonuser of an appropriation of water is not of itself sufficient to establish abandonment. The intention to abandon must also be present. *New Mercer D. Co. v. Armstrong*, 21 Colo. 357, 40 Pac. 989. The burden of proof to establish abandonment of a water right is upon the party asserting it—*Platte Valley I. Co. v. Central Trust Co.*, 32 Colo. 102, 75 Pac. 391—in this case, the defendant. Whatever conflict there was in the testimony bearing on the issues of fact between the parties the trial court resolved in favor of plaintiff, and we cannot disturb these findings.

The decree is to the effect that plaintiff shall have the exclusive right to the use of one cubic foot of water per second of time from Long Branch creek for domestic and irrigation purposes; that this right is paramount and superior to any claim or right to the use of the water of that stream by the defendant; that he shall not take any water

from the stream which will result in depriving plaintiff of her rights as adjudged; and that he is forever enjoined and restrained from maintaining any dam or obstruction in the stream which interferes with the flow of water in its natural channel to the headgate of plaintiff's ditch, to the extent of the volume to which she is adjudged entitled. The decree then recites: "It is further ordered, adjudged, and decreed by the court that the defendant Crum White shall have the right to use and flow through the headgate of said Long Branch ditch No. 2 from said Long Branch one cubic foot of water per second of time as of priority September, 1901, but that his use of said water shall not in any manner or way interfere with the use of water on the part of the plaintiff as hereinbefore set forth."

It is urged on behalf of the defendant that this decree is erroneous, because the right to the exclusive use of water is not recognized, and that the decree does not designate the volume awarded for irrigation purposes, nor the amount for domestic use, and that the decree is not qualified in any manner as to the time plaintiff shall have the right to the use of water for the purpose for which it is decreed. A right to the use of water is limited in time and volume to the extent of the needs of the party in whose favor such right is established for the purpose named. The law reads this limitation into decrees establishing such right. *Medano Ditch Co. v. Adams*, 29 Colo. 317, 68 Pac. 431. With this limitation imposed by law, the gist of the decree is that plaintiff, as against defendant, is entitled to the prior use of water from the stream for domestic and irrigation purposes to the extent of one cubic foot per second of time when required to supply the needs of her rights as fixed by the decree, and that subject to these rights the defendant may divert the waters of the stream. In other words, the defendant is only enjoined from taking water from the stream when the same is required for use by plaintiff for irrigation or domestic uses, to the extent of the volume awarded her.

The judgment of the district court is affirmed.

Judgment affirmed.

CAMPBELL, C. J., and HILL, J., concur.

(83 Kan. 630)

CENTRAL NAT. BANK OF CARTHAGE,
MO., v. GUTHRIE MOUNTAIN
PORTLAND CEMENT CO.

(Supreme Court of Kansas. Nov. 23, 1910.)

1. APPEAL AND ERROR (§ 492*)—STAY ORDER—PURGING CONTEMPT—RESTORATION OF STATUS.

A technical contempt by a sale of property under an execution notwithstanding a stay order was purged on the participants causing

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

everything to be undone that had taken place after the granting of the order, and restoring the original status.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2281; Dec. Dig. § 492.*]

2. APPEAL AND ERROR (§ 477*) — SUPREME COURT—JURISDICTION—STAY.

Under Gen. St. 1868, c. 27, § 1 (Gen. St. 1909, § 2362), providing that, during the pendency of an appeal, the Supreme Court may make an order suspending further proceedings in the trial court, the Supreme Court had jurisdiction to stay execution on a judgment appealed from, where it appeared essential to preserve the existing status.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2247-2249; Dec. Dig. § 477.*]

3. APPEAL AND ERROR (§ 478*)—STAY PENDING APPEAL—EX PARTE ORDER.

An ex parte order may be granted suspending proceedings pending appeal, where immediate action is necessary; any injustice done thereby being subject to immediate correction on a motion to set the order aside.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2250; Dec. Dig. § 478.*]

4. APPEAL AND ERROR (§ 482*)—SUBSEQUENT PROCEEDINGS BY TRIAL COURT—STAY OF EXECUTION.

Where it was claimed that property had been sold on execution notwithstanding an appeal, and the question was thereupon raised as to whether such sale was valid, a stay of proceedings pending the appeal would be so modified as to permit the presentation of such question to the trial court; that being the most convenient forum.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2259-2263; Dec. Dig. § 482.*]

Appeal from District Court, Bourbon County.

Action by the Central National Bank of Carthage, Mo., against the Guthrie Mountain Portland Cement Company. Judgment for plaintiff, and defendant appeals. On motion to set aside stay order. Denied. Order modified.

John E. Hessin and Charles H. Winston, for appellant. C. E. Hulett, McReynolds & Halliburton, and Hubert Lardner, for appellee.

PER CURIAM. On January 25, 1910, in an action upon a promissory note the Central National Bank of Carthage, Mo., obtained a judgment against the Guthrie Mountain Portland Cement Company, which included an order for the sale of attached property. On August 3d an execution was issued, under which other property was seized and advertised to be sold at 10 o'clock on the morning of August 25th. At that time a sale was made to W. C. Gunn, the validity of which is denied by the defendant on the ground that before it took place an appeal had been taken and a stay bond given. The appeal was perfected August 24th, and a statutory stay bond was filed and approved by the clerk of the district court on August 25th, but whether before or after 10

o'clock is disputed. On August 26th, a justice of this court, on application of the defendant, granted an order staying all proceedings in the district court pending the determination of the appeal. On September 19th the plaintiff filed in the district court a motion to confirm the sale, and the next day an order was made sustaining the motion and directing the disbursement of the proceeds. On September 30th a citation was issued from this court against the defendant and others to show cause why they should not be deemed to be in contempt for having proceeded with the litigation in the district court after the stay had been granted. Upon a hearing it developed that the proceedings had been taken in good faith, in the belief that they did not contravene the stay order. The court, however, held that belief to be erroneous, and the participants were adjudged to have been guilty of a technical contempt, from which they were purged upon their causing everything to be undone that had taken place after the granting of the stay order, thus restoring matters to the condition that existed on August 26th.

The case now comes up for hearing on a motion of the plaintiff to set aside the stay order granted August 26th, upon the ground that it was contrary to the statutes and without authority of law. As the only question raised concerns the power to make such an order, under the circumstances the motion must be denied. The statute provides that during the pendency of the appeal the Supreme Court "may make an order suspending further proceedings in the court below." Gen. St. 1868, c. 27, § 1; Gen. St. 1909, § 2362. And it is a necessary incident to the exercise of appellate jurisdiction that the reviewing court shall be able by appropriate action to preserve an existing status, so that when an appeal is decided the fruits of the decision shall not be lost because in the meantime conditions have changed. See 2 Cyc. 891, 892; 20 Encyc. Pl. & Pr. 1237, 1238, 1246. If an appeal could be determined immediately upon being perfected no occasion would arise for any interlocutory order in this court. But, for reasons beyond the control of the court or the parties, an interval of several months must ordinarily elapse before the case can be considered on the merits. Whenever it appears probable that some intervening change of condition may render the final judgment ineffectual the practice is to make an order designed to prevent that result. Such orders are made by one or more justices as well as by the court, and occasionally, where immediate action seems necessary, without notice to the adverse party. Any injustice done by an ex parte order can readily be corrected upon a motion to set it aside, its effect being merely to suspend proceedings until a fuller inquiry can

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

be had. In this case no application has been made to discharge the stay order on any ground except the want of authority to make it.

In the argument it was suggested that the order of this court has deprived the plaintiff of the right to invoke the statute (Code 1909, § 589) authorizing leave to be granted, in actions on a contract for the payment of money only, for the enforcement of a judgment notwithstanding a stay bond, upon the giving of security for restitution. Granting that this action was originally one to which that statute applied, a new question has now arisen—whether a valid sale of property on execution has already been made in satisfaction of the judgment, the plaintiff maintaining the affirmative. Until that question is settled it is manifest that a new execution ought not to issue. Inasmuch as the sale was made after appellate jurisdiction had attached by the perfecting of the appeal, the question whether a stay had already become operative through the giving of a bond by the defendant might under some circumstances be determined by this court in the first instance. The district court, however, affords a more convenient forum for the investigation of that matter. To the end that the entire controversy may be settled as speedily as practicable, the stay order heretofore granted is now modified so far as to allow motions to confirm and to set aside such sale to be presented and passed upon by the district court, the judgment rendered in that connection not to be carried out until further order of this court, provided any party, including the purchaser at such sale, shall, within five days of its rendition, appeal therefrom and give a bond, in an amount and with securities to be approved by this court or some justice thereof, conditioned for the payment of all damages that may be occasioned to the opposing party or to such purchaser by the delay if the decision is affirmed. If such an appeal is taken it will be consolidated with that now pending, and the hearing will be advanced to as early a time as conditions will permit.

(18 Wyo. 481)

MAKI v. STATE.

(Supreme Court of Wyoming. Jan. 3, 1911.)

1. WITNESSES (§§ 88, 300*)—COMPETENCY—ACCUSED.

While the defendant in a criminal case is a competent witness in his own behalf, it is optional with him whether he will testify or not.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 243, 244, 1042, 1042½; Dec. Dig. §§ 88, 300.*]

2. HOMICIDE (§ 223*)—EVIDENCE—TESTIMONY OF ACCUSED AT INQUEST—ADMISSION.

Where, at a coroner's inquest, defendant before testifying was advised of his rights and

duly cautioned, his testimony thereafter, given voluntarily, is admissible against him.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 466; Dec. Dig. § 223.*]

3. HOMICIDE (§ 223*)—EVIDENCE—TESTIMONY OF ACCUSED AT INQUEST.

Accused while under arrest for homicide was taken before a coroner's inquest and asked whether he wanted to testify, but was not informed that he was not required to testify or warned that his evidence would be used against him, nor was he represented by counsel. Held that, in the absence of such information and caution, his evidence given at the inquest would be presumed to have been involuntary and inadmissible.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 466; Dec. Dig. § 223.*]

Error to District Court, Uinta County; David H. Craig, Judge.

Charles Maki was convicted of manslaughter, and he brings error. Reversed.

H. E. and H. R. Christmas, for plaintiff in error. W. E. Mullen, Atty. Gen., for defendant in error.

SCOTT, J. An information was filed in the district court of Uinta County on November 4, 1908, charging Charles Maki with the crime of murder in the first degree. He was duly arraigned, pleaded not guilty, and was subsequently tried and found guilty of manslaughter. He filed a motion for a new trial which was overruled, judgment was pronounced against him upon the verdict, and he brings error.

1. The plaintiff in error was sworn and testified as a witness at the coroner's inquest. The coroner testified as a witness at the trial on behalf of the state, and inquiry was made as to statements made by the plaintiff in error in his evidence given at the inquest. The defendant was permitted to interrogate the witness as to the conditions under which he so testified. Upon the answers to such interrogatories, the defendant objected to the witness testifying to what he said under oath at the coroner's inquest, for the reason that his statements were not voluntarily made, but were made at a time when he was under arrest for the crime charged in the information and had not been apprised by the coroner that he was under no obligation to testify, and that if he did testify at such inquest his statements might be used against him upon his trial. The objection was overruled and an exception reserved.

The evidence of the coroner shows that the plaintiff in error was under arrest at the time he gave his evidence before the coroner for killing the deceased, whose dead body and the nature of the death was then the subject of the coroner's inquest. He was not informed that what he said might be used against him upon his trial, nor was he advised of his rights in the matter, nor does it appear that he had the benefit of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

counsel. Under such circumstances, it is contended by the defendant that evidence of what he then and there testified to under the surrounding conditions was inadmissible as evidence against him upon the trial. This evidence was material. It tended to show that he was present with the deceased at the time and place when the latter received his death blow. The evidence was largely circumstantial, and the defendant did not testify as a witness upon the trial.

The right of the state to use this evidence turns upon the question as to whether it was voluntarily given by the plaintiff in error at the coroner's inquest. If it is not stamped with that essential requirement, then it was inadmissible and prejudicial, for it was one of the constitutional rights of the defendant that he should not be compelled to testify against himself. Section 11, art. 1, of the Constitution. It is the general rule that self-criminating statements are not per se admissible over objection, when the evidence discloses that the defendant was in custody for the crime charged at the time of making such statements, unless shown to have been voluntarily made. Under this rule, there is no presumption that such statements are voluntarily made, but, on the contrary, the presumption is the other way, and upon the trial of an accused the burden is upon the state, seeking to prove such statements, to show their voluntary character. It is impossible to show this where the accused is under arrest for the crime under investigation by the coroner's jury, and upon such investigation the criminating statements were made under oath without also showing that he had the benefit of counsel or was fully informed of his rights. He was not here told that he need not make a statement or might make a statement or be sworn as a witness, and that if he made a statement, whether under oath or not, it might be used against him if subsequently tried upon the charge for which he was then under arrest, and that he could do as he pleased about the matter. It is true that the coroner testified that the accused voluntarily gave his evidence, but he also said, in answer to an inquiry propounded by the court as to what he said to the accused before the latter testified, and as to what the accused said, "I just merely asked him if he wanted to testify, and my recollection is he stated he did. I believe that was all that was said." Upon the inquiry of the coroner the accused, being then under arrest for the crime being investigated, was brought before the coroner's jury, and, without being informed of his rights or warned that his evidence might thereafter be used against him, was sworn as a witness and gave the evidence which was introduced upon the trial, over the objection that it was not shown to be of that voluntary nature to entitle it to admission.

The word "voluntary," as applied to evi-

dence given by one at a coroner's inquest, who is not under arrest, but who knew he was under suspicion of having perpetrated the homicide under investigation, and who was subpoenaed as a witness and afterward charged and tried for such homicide, is learnedly discussed in *Tuttle v. People*, 33 Colo. 243, 79 Pac. 1035, 70 L. R. A. 33. In that case the court adopts the definition of what constitutes a voluntary statement used in this sense as given in *State v. Clifford*, 86 Iowa, 550, 53 N. W. 299, 41 Am. St. Rep. 518, as follows: "A statement, to have been voluntarily made, must proceed from the spontaneous suggestion of the party's own mind, free from the influence of any extraneous, disturbing cause." The court proceeds to discuss the way of determining whether such extraneous, disturbing cause exists in a given case, which would exclude such statement from the inhibition of the Constitution, and lays down the rule that the surrounding circumstances must govern in each particular case. It was there held that the refusal of the witness to testify, or had he claimed his constitutional right not to testify, would probably, owing to the surrounding conditions, have subjected the defendant to immediate arrest upon the charge of murdering the deceased, and that evidence given under such conditions must be held to have been, not voluntary, but under the influence of a disturbing cause. In *1 Greenleaf on Evidence*, 225, it is said with reference to this subject: "The manner of the examination is therefore particularly regarded; and if it appears that the prisoner had not been left wholly free, and did not consider himself to be so in what he was called upon to say, or did not feel himself at liberty to wholly decline any explanation or declaration whatever, the examination is not held to have been voluntary." In the case before us, there was no expression of a desire or willingness on the part of the prisoner to testify, until it was drawn from him by a question from the coroner. The suggestion was not therefore spontaneous and springing out of the prisoner's mind, but came from and through the inquiry of the coroner, and under conditions that a refusal to testify would constitute a powerful incentive in the minds of the officers of the law to continue his incarceration.

The defendant in a criminal case under our statute is a competent witness in his own behalf. It is optional with him whether he will avail himself of the right. Under the common law he could not testify as a witness, though his confessions or criminating statements, if voluntarily made, could be used as evidence against him. The rule surrounding such confessions or admissions that developed under the common law have been extended and applied, in cases where the common-law disability has been removed by statute, to confessions or criminating state-

ments made under oath by the accused, who is then under arrest, though the courts differ as to whether a criminating statement so made at a coroner's inquest, irrespective of its voluntary character, is admissible at all. The great weight of authority and the trend of the later decisions is to the effect that if he has been advised of his rights and duly cautioned and he then testifies voluntarily, his evidence is admissible against him. *People v. McMahon*, 15 N. Y. 384; *People v. Mondon*, 103 N. Y. 211, 8 N. E. 496, 57 Am. Rep. 709; *People v. Chapeau*, 121 N. Y. 266, 24 N. E. 469; *People v. Wright*, 136 N. Y. 625, 32 N. E. 629; *Lyon v. People*, 137 Ill. 602, 27 N. E. 677; *Wood v. State*, 22 Tex. App. 431, 3 S. W. 336; *State v. Garvey*, 25 La. Ann. 191; *Steele v. State*, 76 Miss. 387, 24 South. 910. The object and purpose of warning the accused under such circumstances is two fold: First, that it may be brought home to his mind that what he says under oath may be used against him and being so informed, that he may be free to act as he pleases; and, second, that a legal proceeding may not be converted into an inquisition. It is true that every one is presumed to know the law and to assume the consequences of his own acts, and upon this theory it was held by the Supreme Court of Missouri that the evidence of one not under arrest, who admitted the killing and voluntarily appears and testifies before a coroner's jury, may be used against him in the absence of a showing that the coroner informed him of his rights. *State v. Mullins*, 101 Mo. 514, 14 S. W. 625. This and other Missouri cases (*State v. Young*, 119 Mo. 495, 24 S. W. 1038; *State v. David*, 131 Mo. 380, 33 S. W. 28) are distinguishable upon the facts from the case before us, for in each of those cases the defendant was not under arrest at the time he gave his testimony at the coroner's inquest.

In *State v. Young*, supra, notwithstanding that he was not under arrest, the defendant being an ignorant German boy, who at the time of the inquest was under suspicion of having committed the homicide and without the aid or advice of counsel, and not having been informed of his rights by the coroner, gave his evidence. It was held that such evidence could not be subsequently used against him on his trial for the homicide. In *Shoeffler v. State*, 3 Wis. 823, the statement under oath of the defendant in the form of a deposition was taken before the coroner at the inquest and reduced to writing at a time when the defendant was not under arrest, but under suspicion in the neighborhood of having committed the homicide for which he was subsequently tried and convicted. He was neither cautioned nor informed of his right to decline to answer any question. His evidence was held admissible, because the defendant was not at the time charged with the commission of

the crime. In *Clough v. State*, 7 Neb. 320, 339, the record did not show that the defendant was under oath at the time he made the statements before the coroner's jury, and they were held to have been properly admitted. In *State v. Young*, 60 N. C. 126, the prisoner was arrested as a witness, brought before the coroner's jury, and subjected to a rigid examination. The evidence was held to be not voluntarily given and for that reason inadmissible against the prisoner upon a trial for the homicide. The last three cases are distinguishable upon the facts from the case here presented, where the defendant was in the custody and charged with the crime at the time he gave his evidence before the coroner's jury. While the decisions are not in harmony as to the rights of one who is not under arrest for the crime under investigation at the time he gives his evidence before a coroner's jury as a witness, they are practically unanimous as to one who is under arrest and charged with the commission of the homicide at the time he is sworn and gives evidence before such jury. The person so under arrest and charged with the commission of the homicide, and who is without counsel, is entitled to be informed of his right to decline to be a witness, or to answer any question, and properly cautioned as essential elements in determining the voluntary character of his statements then and there made. He is physically restrained of his liberty. In that sense he is not free to do and act as he pleases, and there is a very natural presumption that this restraint extends to and affects his mind to the extent that he would not freely say or admit those things which might thereafter be used as evidence against him. This presumption is not, however, conclusive, but may be overcome if it be made to appear from the evidence that after being cautioned and informed as to his rights, the prisoner voluntarily submits himself to examination under oath. Until he is so informed and cautioned, the law does not recognize his mind to be sufficiently free from the impending peril of his situation so as to entitle his statements to admission as evidence against him. Not alone upon the question that they may be untrue, but that the mind must also be left free to act with knowledge of the possible consequences.

We are of the opinion that the court committed prejudicial error in admitting, over the objection of the plaintiff in error, the evidence of his statements made under oath before the coroner's jury, at a time when he was under arrest and charged with the commission of the homicide, and in the absence of any caution or information as to his rights.

2. It is assigned as error that the evidence is insufficient to support the verdict. It is unnecessary to review the evidence upon this assignment, and it would be improper for us

to do so, as the judgment will have to be reversed and a new trial awarded for the error previously discussed.

Reversed.

BEARD, C. J., and POTTER, J., concur.

(61 Wash. 164)

SEXSMITH v. BROWN et ux.

(Supreme Court of Washington. Dec. 12, 1910.)

APPEAL AND ERROR (§ 263*)—LAW OF CASE—INSTRUCTIONS NOT EXCEPTED TO.

Instructions not excepted to become the law of the case on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1516-1532; Dec. Dig. § 263.*]

Department 1. Appeal from Superior Court, Douglas County; R. S. Steiner, Judge.

Action by William A. Sexsmith against George A. Brown and wife. Judgment for plaintiff, and defendants appeal. Affirmed.

Canton & Hensel, for appellants. W. A. Reneau, for appellee.

RUDKIN, C. J. This action was instituted by the plaintiff to recover from the defendants the sum of \$373.50, according to the terms and conditions of a certain promissory note, executed by the latter in favor of the former, on the 28th day of July, 1902. The sole issue in the case was presented by a plea of payment. The case was tried before a jury, and from a judgment in favor of the plaintiff, according to the prayer of his complaint, this appeal is prosecuted.

The promissory note in suit was secured by a chattel mortgage on certain horses and other personal property belonging to the appellants, who offered testimony tending to show that on or about the 1st day of September, 1903, they sold and delivered to the respondent four head of these horses and a set of double harness in full payment and satisfaction of the note and mortgage. The respondent, on the other hand, offered testimony tending to show that the horses and harness were turned over to him as mortgagee, with authority to sell and dispose of the same and apply the proceeds of the sale on the note and mortgage; that the horses were taken from his possession by the sheriff of Douglas county under and by virtue of writ of attachment issued against the property of appellants, and were thereafter sold by the sheriff to satisfy a judgment rendered against the appellants in the attachment suit.

On the issues thus presented the court instructed the jury as follows: "This narrows this controversy between these two parties down to a single question: Did Sexsmith accept and receive the horses and harness in question in satisfaction and full payment of his said note and mortgage

against Brown? If you find, from a fair preponderance of the evidence, that Sexsmith and Brown mutually agreed that Sexsmith should take the four horses and the harness in question as and for his own property, and in consideration thereof release Brown from any further obligation on said note and mortgage, and that in pursuance of such an agreement Brown delivered the horses and harness to Sexsmith for the purpose of extinguishing the debt evidenced by the note, and that Sexsmith accepted the property for the same purpose, then I instruct you that the note and mortgage would be fully paid and satisfied, and your verdict should be for the defendant Brown. In such case the title to the horses and harness would pass to Sexsmith—they would become his property solely and exclusively—and if the horses were afterwards taken from him, rightfully or wrongfully, the loss would be his, and not Brown's. On the other hand, if Sexsmith did not take the horses in satisfaction of the note against Brown, but took possession of them merely as mortgagee, for the purpose of selling them only, and applying the proceeds on the note, and they were afterwards taken from him and lost to him, without any fault of his own, then I instruct you there would be no payment of the note in question, and your verdict should be for the plaintiff, Sexsmith. If, as claimed by Sexsmith, he took possession of the horses as mortgagee only, and they were afterwards taken from him by the sheriff under a writ of attachment based on a suit then pending against Brown by a third party, then I instruct you that Sexsmith would have been entitled to recover the property from the sheriff by appropriate action in this court, and thereafter sell the horses under his mortgage lien, had he chosen to do so; but he would have been under no obligation to prosecute such an action by reason of any duty resting upon him as mortgagee. He would have had the right, if he saw fit to do so, to waive his mortgage and the lien created thereby, and rely solely and exclusively on his note."

These instructions were not excepted to, and have become the law of the case, so that we are not called upon to determine whether any other or higher duty devolved upon the respondent as a mortgagee in possession than that imposed by the court below. Under these instructions the jury found that the horses and harness were not turned over or delivered to the respondent in payment or satisfaction of the debt, and their finding is supported by competent testimony. This, under the charge of the court, has the only issue in the case.

The matters set forth in the affidavits of jurors filed in support of the motion for a new trial so manifestly inhere in the verdict that the assignment of error based on the

order denying the new trial requires no special consideration.

Finding no error in the record, the judgment is affirmed.

FULLERTON, GOSE, MOUNT, and PARKER, JJ., concur.

(61 Wash. 179)

ALLEN v. CHEHALIS LUMBER CO.

(Supreme Court of Washington. Dec. 12, 1910.)

1. MASTER AND SERVANT (§§ 101, 102*)—INJURIES TO SERVANT—DUTIES OF MASTER—SAFE PLACE TO EAT LUNCH.

In the absence of special contract, a master owes no duty to a servant to provide a suitable place for the servants to eat their lunch; the master's entire duty being to keep the approaches to the mill over which the servants are required to go to reach their places of work in such a condition as to enable them to go and return in reasonable safety, in case they desired to eat their lunch at a place selected by themselves.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. §§ 101, 102.*]

2. MASTER AND SERVANT (§ 89*)—INJURIES TO SERVANT—DANGEROUS PLACE.

Plaintiff, a planerman in defendant's mill, working at night, was about to eat his lunch while the mill was shut down for that purpose, when he was approached by the watchman, who told him there was a much more comfortable place to eat lunch in the dry kiln, and offered to take him to it. This he did, and on returning alone plaintiff, while walking along certain platforms, failed to note the exact dimensions of the connecting walk, or missed the walk entirely, and fell to the ground, receiving an injury. Held that, since the watchman had no power or authority to direct plaintiff's movements, the invitation to plaintiff to eat his lunch in the dry kiln was not a command of the master, and that defendant was therefore not liable.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 155; Dec. Dig. § 89.*]

Department 1. Appeal from Superior Court, Lewis County; A. E. Rice, Judge.

Action by Henry Allen against the Chehalis Lumber Company. From a judgment for plaintiff, defendant appeals. Reversed.

Dysart & Ellsbury, C. D. Cunningham, and W. W. Langhorne, for appellant. Harmon & Hull, for respondent.

FULLERTON, J. The respondent recovered against the appellant for personal injuries, and this appeal was taken from the judgment entered in his favor. The record discloses that the appellant owns and operates a sawmill, consisting of the mill proper, in which the machinery for manufacturing lumber was contained, and of a dry kiln used for drying lumber after it had been cut into dimension stuff. Both the mill and dry kiln were surrounded in part by lumber platforms built on the same level and on a level with the floor of the mill, but some 11 feet above the ground. The platforms did not touch each other, the distance between them at the nearest point of approach being 18

feet. Across this space two walks had been constructed. The first was a walk some 6 feet in width, constructed on a level with the tops of the platforms, and was used as a passageway for footmen as well as for the purpose of trucking lumber from one platform to the other. It was fastened at one end by hinges to the platform on which it rested, and so arranged as to be lifted up at the other end; the purpose of this being to get it out of the way of cars which were sometimes run along a track laid on the ground midway between the two platforms. The second walk was a way for footmen only. It was elevated sufficiently high to permit cars to pass under it, with steps leading up to it, and was guarded by railings sufficient to make it a safe passageway.

The respondent entered the employment of the appellant on November 9, 1908. He was employed as a planerman; his duty being to operate a planer, which was located in the mill proper. The mill was lighted by electricity generated from a dynamo connected with the power that operated the mill machinery, and in consequence the lights went out whenever the machinery was shut down. At midnight it was customary to shut down the mill for half an hour in order to give the employes an opportunity to eat their meals. The respondent, during the time of his employment, brought a lunch with him and ate it by the light of a lantern. On the night of the 17th of November, the mill stopped as usual, and the respondent proceeded with his coemployes to eat his lunch near the planer. At that moment the night watchman of the mill came along, and told the men that a much more comfortable place to eat their lunch was at the dry kiln, and offered to pilot them to it. The men expressed their willingness to accompany him, and were taken to a place near the kiln; the way leading across the walk connecting the platforms before mentioned. While the men were eating their lunches, the night watchman left them to attend to his ordinary duties. After the lunch had been finished, and while the mill was still dark, the men started to return to their place of work. They had with them but the single lantern. The respondent led the way, walking slightly in advance of the man who carried the lantern. On reaching the edge of the platform, he failed to note the exact dimensions of the connecting walk, and either missed the walk entirely, or walked diagonally across a corner of it. The result was that he fell to the ground below and received the injury for which he sues.

The respondent rests his right to recover on the contention that he was ordered and directed by the mill company, through its night watchman, to eat his midnight meal at the dry kiln, and that the company had not furnished him with a reasonably safe

way from his place of work to the kiln. We can find, however, nothing in the record which supports this contention. The record makes it plain that the night watchman had no power or authority to direct the movements or control the work of the planerman. While they each received their orders from a common source, their duties were separate and distinct, and neither was expected to interfere with the work of the other. The invitation given the respondent by the night watchman to eat his lunch at the dry kiln was not, therefore, a command of the master, and the master was not responsible for the accident that befell him while upon the way.

But it is said that the master owed the respondent the duty to provide him with a suitable place to eat his lunch, and that no such place was provided, other than the one at the dry kiln. But this duty would not devolve upon the master, in the absence of a special contract. Undoubtedly the appellant owed the respondent the duty to keep the approach to the mill, over which the respondent was required to go to reach his place of work, in such a condition as to enable him to go and return with reasonable safety, in case he desired to eat his lunch at a place selected by himself; but this was the extent of its liability in that regard on a mere contract of hire. It did not owe him the duty of providing for him a suitable place in the mill in which to eat his lunch.

The judgment appealed from will be reversed, and the cause remanded, with instructions to enter a judgment in favor of the appellant to the effect that the respondent take nothing by his action.

RUDKIN, C. J., and GOSE, MOUNT, and PARKER, JJ., concur.

(61 Wash. 321)

MARGETTS v. LINDSEY.

(Supreme Court of Washington. Dec. 21, 1910.)

PARTNERSHIP (§ 227*)—SALE OF INTEREST.

Where a seller of an interest in a firm business and the buyer were strangers and no confidential relations existed between them, and the buyer had the means of ascertaining the value of the business from an examination of the books of the firm, the contract of sale would not be set aside on the ground of the fraudulent representations of the seller as to the income of the business.

[Ed. Note.—For other cases, see Partnership, Dec. Dig. § 227.*]

Department 2. Appeal from Superior Court, Spokane County; Wm. E. Huneke, Judge.

Action by F. R. Margetts against E. R. Lindsey. From a judgment for plaintiff, defendant appeals. Affirmed.

W. H. Plummer, for appellant. Charles P. Lund, for respondent.

DUNBAR, J. This action was brought by the respondent against the appellant, to recover \$500, interest and attorney's fees, upon five promissory notes, executed by the appellant E. R. Lindsey to the respondent F. R. Margetts, each of said notes being for the sum of \$100 and dated January 12, 1909, due and payable respectively on March 12, 1909, April 12, 1909, May 12, 1909, June 12, 1909, and July 12, 1909. The complaint was in the usual form in a suit on promissory notes, alleging their execution and default in the payment, demanding the amount of the notes with interest, and attorney's fees, \$500. The answer admitted the execution of the notes, denied that there was anything due, and set up as an affirmative defense, that the notes were given as part payment of the purchase price for respondent's half interest in the court reporting business of Pelletier & Margetts in the city of Spokane, Wash., that on or about the 8th day of January, 1909, at the special instance and request of respondent, appellant gave up his business in the city of Vancouver, British Columbia, and came to Seattle, where Margetts met him, and there negotiations were had which resulted in appellant's purchasing the interest of Margetts in said reporting business, agreeing to pay him therefor \$1,300, \$50 of which was then and there paid, that thereafter Lindsey and his wife moved to Spokane, when \$650 more was paid, and the contract of sale entered into, that during the negotiations which were had between Margetts and Lindsey in Seattle, Margetts misrepresented the condition of said reporting business, lied to and deceived appellant by purporting to show in writing the amount of money that had been received by the firm of Pelletier & Margetts during the 20 months previous to said time, and lied to and deceived him in other ways, that upon discovering the false and fraudulent representations, he immediately rescinded the contract, and tendered to Margetts said business and the contract, asked that the said notes be canceled, and that appellant have judgment for the amount of money which he had paid. The case was tried by the court and findings made in favor of plaintiff. The findings of fact and conclusions of law as found by the court were excepted to. Judgment was entered for the amount prayed for, and from such judgment this appeal is taken.

Upon the conclusion of the testimony, the court remarked: "I am convinced from the testimony here that there is no evidence of any fraud on the part of Mr. Margetts, either actual or constructive"; and further said that he had not any hesitancy at all, from the evidence, in finding for the plaintiff and against the defendant. From a review of the testimony, we think the court was amply justified in coming to this conclusion. Conceding the truth of the statement made

by the appellant, that the respondent in the conference held by them in Seattle had misrepresented the financial standing of the partnership, although this is denied by Margetts, all the testimony, including that of the appellant, shows that he had ample opportunity to investigate the financial standing and past history and future prospects of the business before the final consummation of the purchase. It appears from the testimony of the appellant himself, brought out on cross-examination, that about a month before his conference with the respondent at Seattle, he had visited Spokane during the apple show there; and while he faintly denied that he was looking around then for a location contemplating his removal from Vancouver, it does appear that several times he visited the office of Pelletier & Margetts; that he talked with them about the reporting business in Spokane; that he had under consideration a purchase of the reporting business of one Mrs. Scott, and that he talked with Margetts and Pelletier about Mrs. Scott's business, they stating that they were very anxious to get Mrs. Scott out of the reporting business in Spokane; that after he went home and before receiving the letter from Margetts which finally led up to the execution of the contract, he sent Mrs. Scott an offer for her business. It also appears that, after arriving in Spokane, on the day on which the contract was executed, he received certain of the books of the firm from Margetts, and took them to his rooms at the hotel, where he and his wife were stopping; and while he says that he did not remember telling Margetts at about 3 o'clock in the afternoon that he had examined these books, the whole testimony shows that he had to a certain extent examined them, and that if he had not, it was his own fault. It is true, he stated that he had only the ledger and the cashbook at the hotel with him, and that he could not tell definitely about the business of the concern without the daybook. But there is nothing to show that he could not have received the daybook by asking for it, and it was not until about half past 7 o'clock that evening that he finally paid over the \$600 and entered into the contract.

In addition to this, one of the notes which was executed fell due on February 12, 1909, and that note was paid by him to Margetts without any objection, on the date of its maturity, after he had been engaged in the business as an active partner for one month. Again, on February 23d. he wrote to Margetts asking for an extension of time for the payment of the next note, which would fall due on the 12th of March following. This extension being refused on March 2, 1909, he wrote to the respondent that, on account of fraud and misrepresentation perpetrated upon him, he tendered back the business of court reporting, and demanded the return of

his money. He, however, brought no action to rescind the contract or to affirm it and sue for damages, but contented himself with continuing in the business, and receiving the benefits of the business until the notes had matured and this suit was brought. It is true, he says that, after he went into the office, he found that the business was not such as it had been represented to be, and that the books showed that they had not received the amount for the past 20 months that it had been represented to him that they had received, and that he did not have access to the daybook, so that he could ascertain this fact, until about the time when he had refused payment on the notes. This testimony was very vigorously denied by both Margetts and Pelletier. Mr. Pelletier, when asked if he had heard the testimony to the effect that Lindsey had asked him for the books, and that he told him that there was no use examining them, that the statement made by Mr. Margetts was correct, responded: "Yes, I heard that testimony, and it is absolutely false. He never called on me for the books when I made any statement of that kind at all. The first time he called on me for the books, I gave him the key then." Witness further states, that the desk to which he had given him the key was a roller top desk, that all the books pertaining to the business were in the drawers, which were opened when the roller lid was let down, and all the circumstances surrounding the case point to the truthfulness of the testimony of Mr. Pelletier. Even accepting his own statement, appellant could not prevail. The parties to the contract were strangers, no confidential relations existed, the means of ascertainment were available, and by entering into an investigation which ordinary prudence would suggest, the approximate value of the business could have been determined. Under such circumstances the law will not sanction the abrogation of a written contract.

Affirmed.

RUDKIN, C. J. and CROW, CHADWICK, and MORRIS, JJ., concur.

(61 Wash. 348)

LYON v. SPARKS et ux.

(Supreme Court of Washington. Dec. 23, 1910.)

SCHOOLS AND SCHOOL DISTRICTS (§ 8*)—
BOARD OF CHILDREN—VALUE OF SERVICES—
QUESTION FOR JURY.

Where, in an action for board and lodging furnished defendant's boys at a boarding school, there was evidence that the food furnished was insufficient in quantity and unwholesome in character, the amount plaintiff was entitled to recover was for the jury.

[Ed. Note.—For other cases, see Schools and School Districts, Dec. Dig. § 8.*]

Department 1. Appeal from Superior Court, Spokane County; Wm. A. Huneke, Judge.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Action by James Lyon against O. M. Sparks and wife. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Gleeson & Morton, for appellant. R. L. Edmiston, for respondent.

PER CURIAM. Respondent brought this action to recover for the value of services rendered at the instance of the appellants O. M. Sparks and wife. The cause was tried to a jury. At the close of defendants' evidence, the court directed a judgment in favor of the plaintiff for the amount prayed for in the complaint. The defendants appeal.

It appears that Prof. Saylor and wife were conducting a boarding school for boys in Spokane. A statement in the form of a catalogue had been issued, which contained the terms upon which boys would be cared for, as follows: "Board, tuition and personal care, \$400 for the school year; payable one-half at the entrance and one-half January 20. A reduction of \$50 to parents paying the whole school year in advance. Also reduction of ten per cent. for brothers. Bills not promptly paid subject to sight draft. No reduction for premature withdrawal. Washing fifty cents per dozen. A deposit is required to keep up incidentals. An itemized account will be rendered." Two boys of the appellants entered the school about the 1st of September, 1908. They remained until the following December, when one of the boys was discharged, and the other was taken away from school. The appellants did not make the payment in advance. They made no deposit for incidental expenses. Prof. Saylor advanced to the boys while they were in his care \$39.78, for laundry and incidental expenses. After the boys were taken away, the appellants neglected and refused to pay for the time the boys were in school, or to reimburse Prof. Saylor for the money he had advanced. The claim was assigned to the plaintiff, who brought the action to recover for the value of the services, alleged to be \$258.85, and the money advanced, making a total of \$327.63. The answer of the defendants admitted that the boys were in the school for the time alleged, but denied that defendants were indebted upon the claim; and as an affirmative defense alleged that the food furnished to the boys was impure, unwholesome, and unfit to be eaten, and that the defendants had been damaged in the sum of \$1,000 thereby. This affirmative defense was denied. Upon the trial of the cause, Prof. Saylor testified to the facts substantially as alleged in the complaint. The only defense offered by the appellants was evidence to the effect that the food furnished to the boys was insufficient in quantity, and that some of it was unfit to be eaten. After this testimony was introduced, the respondent moved the court to discharge the jury and

render judgment for the plaintiff. This motion was sustained, and the court entered a judgment for the plaintiff for the full amount claimed.

We have no doubt that the respondent was entitled to a judgment for the reasonable value of the services rendered to the boys, but the jury should have passed upon that question under the facts testified to. If the food furnished to the boys was in fact insufficient and unwholesome, the services were no doubt worth less than if the food was wholesome and abundant. The court was not justified, we think, in taking this question away from the jury.

The judgment is therefore reversed, and the cause remanded for a new trial.

(61 Wash. 255)

DELASKI et al. v. NORTHWESTERN IMPROVEMENT CO.

(Supreme Court of Washington. Dec. 16, 1910.)

1. TIME (§ 10*)—EXCLUDING LAST DAY—SUNDAY—FILING STATEMENT OF FACTS.

Under Rem. & Bal. Code, § 252, providing that in computing the time in which an act is to be done, if the last day falls on a Sunday, it shall be excluded, where the day to which time for filing the statement of facts is continued is a Sunday, it is to be excluded, and filing on Monday is in time.

[Ed. Note.—For other cases, see Time, Cent. Dig. §§ 47-48; Dec. Dig. § 10.*]

2. APPEAL AND ERROR (§ 614*)—STATEMENT OF FACTS—EVIDENCE—CERTIFICATE.

As evidence may be set forth in the statement of facts in a condensed and narrative form, the certificate that it contains "all the material evidence and testimony introduced on the trial" is sufficient.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2708-2713; Dec. Dig. § 614.*]

3. MASTER AND SERVANT (§ 278*) — COAL MINES—INSUFFICIENT VENTILATION — EVIDENCE.

That the operator of a coal mine did not, as required by Rem. & Bal. Code, § 7381, make a sufficient amount of air circulate through a room in the mine, is sufficiently shown by evidence that the brattices, hung across the gangway for such purpose, were torn and defective, and that a miner in the room died from coal gas poisoning, and another was sick for several hours from such cause.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 278.*]

4. MASTER AND SERVANT (§ 265*) — COAL MINES—DEPTH OF ROOMS—WRITTEN PERMISSION—BURDEN OF PROOF.

The extension, more than 60 feet from the gangway, of a room in a coal mine, being shown in an action against the operator of the mine for the death of an employe, the operator has the burden of showing the written permission for the extension, without which it is prohibited by Rem. & Bal. Code, § 7382.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 265.*]

5. MASTER AND SERVANT (§ 118*) — NEGLIGENCE OF MASTER—COAL MINES—STATUTORY PROVISIONS.

Noncompliance with Rem. & Bal. Code, § 7381, requiring the operator of a coal mine to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

make a sufficient amount of air circulate through rooms therein, and with section 7382, prohibiting the extension, more than 60 feet from a gangway, of a room in the mine, is negligence per se.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 209; Dec. Dig. § 118.*]

6. MASTER AND SERVANT (§ 118*)—INJURY TO SERVANT IN COAL MINES—LIABILITY OF MASTER—STATUTES.

Laws 1888, c. 21, § 15 (Pierce's Code, § 6523), part of an act in relation to coal mines, declaring the liability for injury from "violation of this act," if not superseded by a later act, has no application to violation of provisions of later acts on the subject.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 118.*]

7. MASTER AND SERVANT (§ 201*)—INJURY TO SERVANT — CONCURRING NEGLIGENCE OF MASTER AND FELLOW SERVANT.

A master guilty of concurring acts of negligence is not relieved of liability for death of an employé because of negligence of a fellow servant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 515-534; Dec. Dig. § 201.*]

8. MASTER AND SERVANT (§ 201*)—INJURY TO SERVANT—NEGLIGENCE OF FELLOW SERVANT —RULES OF MASTER.

It is an answer to the contention that the death of an employé in a coal mine from gas was caused by the negligence of fellow servants in violating a rule of the operator against blasting during certain hours that the rule had been habitually violated for three months immediately preceding.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 201.*]

9. MASTER AND SERVANT (§ 289*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.

It is a question of fact, and not of law, whether an employé in a coal mine, who, 15 minutes after he heard a blast in the mine, and saw smoke, returned to work in his room, and worked there 45 minutes, and then, when trying to get to the gangway, was overcome by gas, was guilty of contributory negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089-1132; Dec. Dig. § 289.*]

Department 1. Appeal from Superior Court, King County; Boyd J. Tallman, Judge.

Action by Mary Delaski and others against the Northwestern Improvement Company. Judgment for defendant. Plaintiffs appeal. Reversed, with directions for new trial.

W. R. Bell, for appellants. Carroll B. Graves and Charles H. Winders, for respondent.

GOSE, J. The appellants are, respectively, the surviving wife and minor children of John Delaski, deceased. They brought this action to recover damages sustained by reason of the death of the husband and father, alleging that his death was caused by the inhalation of poisonous gases negligently permitted to accumulate in the coal mine of the respondent. At the close of the appellants' evidence, a judgment of nonsuit was entered. This appeal followed.

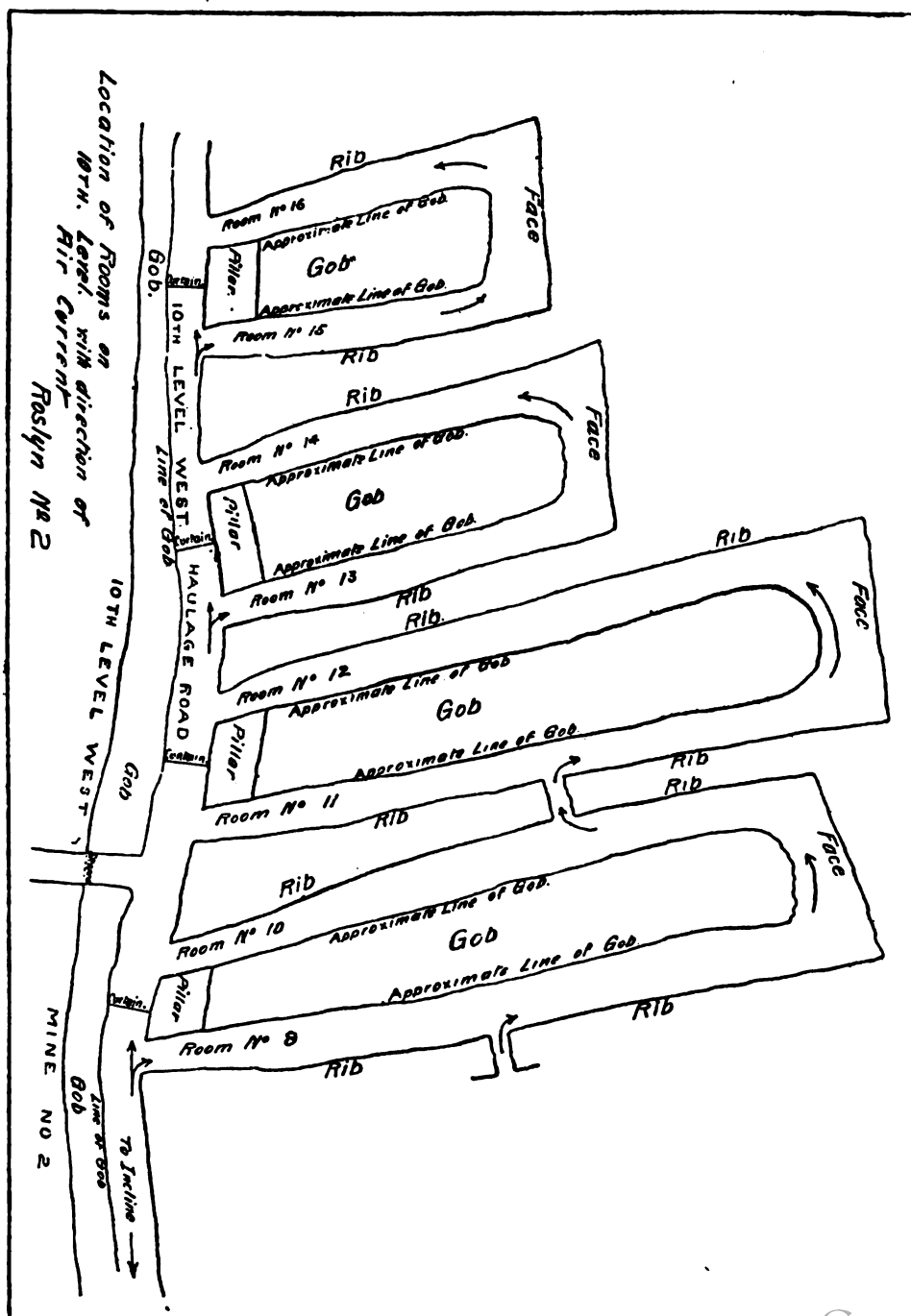
The respondent has moved that the statement of facts be stricken and the judgment affirmed. The grounds of the motion are (1) that the statement was filed on the 91st day after the entry of the judgment; and (2) that the certificate of the judge is defective, in that he only certified that the statement contains "all the material evidence and testimony introduced upon the trial." A part of the evidence set forth in the statement is in a condensed and narrative form. On the 2d day of August, which was the eighty-fourth day after the time for taking the appeal had commenced to run, an order was entered giving the appellants until the 8th day of August, which was the ninetieth day, in which to file and serve a statement of facts. The 8th day of August fell upon Sunday, and the statement was filed and served the following day. Where the last day for the performance of an act falls upon Sunday, it is excluded in the computation of time. Rem. & Bal. Code, § 252; Rogers v. Trumbull, 32 Wash. 211, 73 Pac. 381; Bank of Shelton v. Willey, 7 Wash. 535, 35 Pac. 411; Spokane Falls v. Browne, 3 Wash. St. 84, 27 Pac. 1077. This court has held that the testimony may be certified in the narrative form, and that a certificate like the one in the case at bar meets the requirements of the statute. Murray v. Shoudy, 13 Wash. 33, 42 Pac. 631. The motion to dismiss is denied.

The record presents the following material facts: The deceased, an experienced miner, was 35 years of age, and on the morning of the day of his death, which occurred in the afternoon of August 8, 1905, was in good health. He and his minor son, 12 years of age, were working in a coal mine at Roslyn, called mine No. 2, in room 14, on the tenth level. At 12 o'clock they retired to the entry, or incline as it is called in the testimony, to eat their lunch, and returned to their work in room 14 about 15 minutes later. When they had reached the gangway going to their lunch, they heard a blast or shot in room 10. As they returned to their work, they observed smoke coming from rooms 11 and 12 and in the gangway. The face of the coal in room 14 where they were working was 137 feet distant from the gangway, and there was no connecting crosscut from room 12. About a half hour after they returned to their work, the boy became sick and dizzy, and his father directed him to go to a point near the gangway where they had left a bucket containing coffee, and get a drink. As he was returning, his father called to him for a drink, and the boy returned to get the coffee. The father fell about 15 feet from the face of the coal where he had been working before the boy could return to him, was taken out of the mine in an unconscious condition, and died about four hours later without having re-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

gained consciousness. He was proceeding toward the gangway when he fell. The evidence tends to show that his death was caused by the inhalation of poisonous gases. He and the boy had worked in rooms 13 and 14 for about three months before the accident occurred. The foreman had directed the employes not to fire shots between shifts. The day shift was from 8 a. m. to 4:30 p. m. Notice to that effect was posted on the

outside of the mine. The brattices or canvas curtains, which were hung from the roof across the gangway between rooms 13 and 14, were torn and defective. Their purpose was to deflect the air current from the gangway into and through the several rooms. It was the duty of the fire boss to see that they were kept in repair. The appended map will illustrate the working plan on the tenth level:



What we have called the gangway is designated on the map as "Haulage Road" and "10th level." The coal cars are operated along this passageway. The brattices extend from the ceiling or roof of the mine to the floor of this passageway.

We think the record discloses at least two statutory breaches of duty upon the part of the respondent. The statute (Rem. & Bal. Code, § 7381) provides that the owner, agent, or operator of every coal mine shall provide in the mine "a good and sufficient amount of ventilation for such persons and animals as may be employed therein, the amount of air in circulation to be in no case less than 100 cubic feet per minute for each man, boy, horse, or mule employed in said mine, and as much more as the inspector may direct, and said air must be made to circulate through the shafts, levels, stables and working places of each mine." Section 7382 provides that "no heading shall be driven more than sixty feet from the face of each chamber, breast, or pillar, unless for the reason that he deem the same impracticable the inspector gives permission in writing to extend the distance beyond sixty feet." Neither of these provisions was complied with. As we have pointed out, there is evidence from which it may be inferred that the air was not made to circulate through rooms 13 and 14. The brattices or curtains, designed to accomplish this purpose, were defective. The respondent argues that there is no evidence that the air was not properly deflected in and around rooms 13 and 14. It seems to us that the fact that the brattices were torn and defective, that one man lost his life, and that the boy became sick and remained sick and confined to his bed for some hours from inhaling poisonous gases is most convincing evidence that the air was not made to circulate where they were working. It is said that there is no evidence that the respondent did not have written permission from the inspector to extend rooms 13 and 14 more than 60 feet from the gangway or level. The fact that it was so extended, and that there were no crosscuts, was, however, shown. If the respondent had the written permission to so extend the rooms, it has the burden upon it of showing that fact. *Sackman v. Thomas*, 24 Wash. 660, 64 Pac. 819. The provisions of the statute measure the respondent's duty. The Legislature, in recognition of the hazards of working in coal mines, has made careful provisions for their inspection, and imposed imperative duties upon those who own and operate them. The purpose of the law is to provide a reasonably safe place for the men to work. A failure to observe these provisions is negligence per se. *Green v. Western American Company*, 30 Wash. 87, 70 Pac. 310; *Hall v. West & Slade Mill Co.*, 39 Wash. 447, 81 Pac. 915; *Whelan v. Washington Lumber Company*, 41 Wash. 153, 83 Pac. 98; *Pachko v. Wilkeson Coal & Coke Company*, 46 Wash. 422, 90 Pac. 436; *Som-*

mer v. Carbon Hill Coal Company, 89 Fed. 54, 32 C. C. A. 156. As was said in the *Sommer Case*, the law is, "in effect, the measure of that reasonable care which the owner or operator of a coal mine is required to take to avoid responsibility for injuries to workmen arising from accidents," and the duty is a nondelegable one. The appellants have cited *Laws 1888*, p. 41, § 15 (*Pierce's Code*, § 6523). This section of the statute has not been carried into either *Ballinger's Code* or the *Rem. & Bal. Code*, and, if not superseded by the *Laws 1891*, p. 152 et seq., has no application to any act of negligence charged or proven in the case at bar. Its provisions are expressly limited to "violations of this act." The other provisions of the statute to which we have adverted are taken from later acts.

It is said that, if any negligence is shown, it is the negligence of a fellow servant, occasioned by the violations of a working rule promulgated by the respondent and known to all of its servants. There are two answers to this contention: (1) It is shown that the respondent was guilty of concurring acts of negligence. *Sipes v. Puget Sound Electric Railway*, 54 Wash. 47, 102 Pac. 1037. (2) That the rule of the company had been habitually violated for three months immediately preceding the death of the deceased. The evidence in support of the latter statement is as follows: "Q. What was the practice or habit or were the men accustomed to shoot off blasts or shots during shifts while the men were at work? A. They were doing it at the noon hour. Q. How long had they done that? A. Well, since I had been there. Q. That you say was about three months? A. Yes, sir. Q. And where would they get their supply of powder for that purpose? A. They bring it every day. Q. The company supplied that? A. No, sir; they supplied their own powder. Q. They supplied their own powder, and that had been going on for three months? A. Yes, sir. Q. On your level—on the tenth level? A. Yes, sir." "Evidence of the habitual violation of a rule with the knowledge of the employer is admissible to prove the abrogation of such rule. But evidence of a custom in violation of a rule will not be received unless it is shown that the custom has existed for such a length of time as to create a presumption of acquiescence therein by the defendant and knowledge thereof by the plaintiff." 6 *Thompson, Commentaries on Law of Negligence*, § 7773. See, also, 1 *Labatt, Master & Servant*, pp. 516, 517, § 232; *Driver's Adm'r v. Southern Ry. Co.*, 103 Va. 650, 49 S. E. 1000.

Finally, it is contended that the deceased was guilty of contributory negligence which precludes a recovery. The argument is made that because he resumed work at 12:15 o'clock and continued at work until about 1 o'clock, having heard the shot at 12 o'clock, and having seen the smoke a few minutes later, his conduct does not measure up to the stand-

ard of the average prudent man, and that his contributory negligence should be ruled against appellants as a matter of law. We have seen that he was trying to get to the gangway when overcome with gas. The mere fact that he remained at work a moment too long cannot as a matter of law bar a recovery. His conduct and his duty cannot be measured with such nicety. *Pachko v. Wilkeson Coal & Coke Company*, supra; *Hall v. West & Slade Mill Co.*, supra. *Pugh v. Oregon Improvement Company*, 14 Wash. 331, 44 Pac. 547, 689, and *Hughes v. Same*, 20 Wash. 294, 55 Pac. 119, cited by the respondent, are not in point. In these cases the undisputed evidence showed that nearly a half hour elapsed between the time the men were notified of the fire in the mine and to leave the mine, and the shutting down of the fan, and that all the miners could have gone out of the mine in less than half that time. The negligence relied upon in those cases was the shutting down of the fan by the superintendent of the mine. The cases cited by the respondent from other jurisdictions are so variant upon the facts that they are not in point, and a discussion of them would extend this opinion to an unreasonable length. The argument that the torn and defective brattices and the absence of crosscuts between rooms 12 and 13 were not the proximate cause of the death of the deceased, but that the proximate cause of his death was his own negligent conduct, presents questions of fact rather than law.

The judgment is reversed, with directions to grant a new trial.

RUDKIN, C. J., and FULLERTON, MOUNT, and PARKER, JJ., concur.

(61 Wash. 176)

A. D. McADAM, Inc., v. RUSSELL.

(Supreme Court of Washington. Dec. 12, 1910.)

CONTRACTS (§ 295*)—BUILDING CONTRACTS—SUBSTANTIAL PERFORMANCE.

Plaintiff, a contractor, had substantially complied with his contract to erect an addition to a building for defendant for the sum of \$490, where the only thing left to be done was the putting of saddle boards on the ridge of the roof, the entire cost of which work was only \$1, and it appeared that such boards were not put on all houses, were not called for in the specifications, and that it was a matter of choice whether or not they should be put on.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 1353; Dec. Dig. § 295.*]

Department 2. Appeal from Superior Court, Snohomish County; Daniel H. Carey, Judge.

Action by A. D. McAdam, Incorporated, against C. E. Russell. Judgment for plaintiff, and defendant appeals. Affirmed.

Padgett & Bell, for appellant. Robert McMurchie, for respondent.

PER CURIAM. This was an action brought by the plaintiff to recover the contract price agreed to be paid by defendant, in the sum of \$490, upon the completion of an addition to a certain building, besides the sum of \$5 as an extra. After the building was substantially completed, the plaintiff claiming that it was completed according to the contract on July 28, 1909, and the defendant claiming that there had been some slight failure to complete the building, it was destroyed by fire on August 2d, without fault of either party it is conceded. The defendant refused, on demand, to pay the contract price for the building. Trial was had, and a verdict rendered in favor of the plaintiff.

Appellant assigns as error some of the instructions of the court. But we think the instructions correctly stated the law, with the possible exception of the use of the words "preponderance of testimony" in one of them; and we feel certain, from an examination of the whole instruction, that the jury were in no way misled by this. In any event, they become immaterial, for the reason that this case really presents a question of law rather than of fact, as under the conceded facts the only thing that was left to be done by the contractor was the putting of what are called "saddle boards" on the ridge of the roof. While we think the jury rightly reached the conclusion from the evidence that such boards were not necessary for the completion of the building, and were not within the contemplation of the contract, at the most this was too trifling a matter for the law to take notice of; the testimony being that the whole cost of the saddle boards, including labor and material, would not exceed \$1. The testimony shows that these boards were not put on all houses. They were not called for in the specifications, and it was a matter of choice whether or not they should be put on. At most it was a trifling omission, and we think one which was seized upon by the appellant to aid him in escaping from the payment of a just debt.

The judgment is affirmed.

(61 Wash. 326)

DAHLSTROM v. INLAND BOX & MFG. CO.

(Supreme Court of Washington. Dec. 21, 1910.)

1. APPEAL AND ERROR (§ 930*)—REVIEW—CONFLICTING EVIDENCE.

On review of the sufficiency of conflicting evidence to support a verdict for plaintiff, the testimony most favorable to plaintiff must be accepted.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 8755-8761; Dec. Dig. § 930.*]

2. MASTER AND SERVANT (§ 278*)—INJURIES TO SERVANT—ACTIONS—SUFFICIENCY OF EVIDENCE.

In an action by a servant for injuries received while operating a rip saw, evidence held not to show how the accident occurred, so that

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

there could be no recovery on the ground of improper or inadequate instructions by the master.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 278.*]

Department 2. Appeal from Superior Court, Spokane County; J. Stanley Webster, Judge.

Action by Arthur Dahlstrom, a minor, by John A. Dahlstrom, his guardian ad litem against the Inland Box & Manufacturing Company. Judgment for plaintiff, and defendant appeals. Reversed, with directions to dismiss.

Alfred M. Craven, for appellant. William A. Montan and Danson & Williams, for respondent.

RUDKIN, C. J. On the afternoon of June 21, 1909, the plaintiff entered the employ of the defendant in its box factory in the city of Spokane. At the time of his employment the plaintiff was a few months under the age of 17, but was of fair size, and of at least average intelligence for one of his years. For the first hour or so in the afternoon he was engaged in carrying lumber into the mill and piling box material. Immediately thereafter the foreman set him to work at a rip-saw, such as is in common use in an establishment of that kind. The table supporting the rip-saw was about 3 feet by $4\frac{1}{2}$ feet in dimensions, and $2\frac{1}{2}$ or 3 feet high. The saw itself, which was 12 inches in diameter, was attached to an arbor underneath the table, so that the blade extended $1\frac{1}{2}$ inches above the plane of the table. A spreader stood nearly upright behind the saw, and a circular guard $1\frac{1}{2}$ inches in width extended from the spreader over the top of the saw, $1\frac{1}{2}$ inches above the teeth. A gauge stood out from the saw 10 or $10\frac{1}{2}$ inches, to regulate the width of the material to be ripped or trimmed. At the time of receiving the injuries complained of the plaintiff was engaged in trimming box material. The pieces upon which he was working were 18 inches in length, 10 or $10\frac{1}{2}$ inches in width, and substantially 1 inch in thickness. It was the duty of the plaintiff to trim the pieces down to this width, and in order to accomplish this it was necessary to rip an inch or more off the edge of each board. After he had been engaged in this work for some time, and had trimmed perhaps 100 pieces, his hand in some manner unknown and unexplained came in contact with the saw, causing injury to the thumb and little finger, for which a recovery was sought in this action. The defense was a denial of negligence on the part of the defendant, and a plea of assumption of risk and contributory negligence on the part of the plaintiff. The trial resulted in a judgment in favor of the plaintiff in the sum of \$2,000, from which the defendant has appealed.

The only assignment of error we deem it

necessary to discuss or consider is based on the insufficiency of the evidence to justify the verdict and judgment. The complaint alleged that the saw table was rough and uneven; that the saw was old, rusty, and dull, and improperly set; and that the guard was old, worn, rusty, flimsy in construction, and vibrated excessively when the saw was in motion—but all these charges were wholly abandoned at the trial, and the sole ground of negligence now relied on to support the judgment is the placing of the respondent at work about dangerous machinery, without adequate instructions to protect him against the dangers incident to his employment. There was a conflict in the testimony as to the character and extent of the instruction actually given, and we must therefore accept the testimony most favorable to the respondent on that issue. He admits that the foreman shoved at least two boards or pieces through the saw in his presence, showed him how and where to place his hand, and cautioned him to keep his fingers away from the saw. The following testimony given by the respondent will show the uncertainty existing in his own mind as to the cause of the accident, or the manner in which the injury was inflicted:

"Q. You had sawed this board, this board in question, I believe you had sawed this board, which is marked 'Plaintiff's Exhibit 1,' completely through, hadn't you? A. Yes, sir. Q. And you knew your work was done in respect to this board, and you had reached for another board? A. Yes, sir. Q. And then you noticed for the first time that your hand was injured? A. Yes, sir. Q. So that any difficulty you had in pushing the board through that you testified to, would have nothing whatever to do with your injury, would it? A. I don't know. Q. Well, you had sawed the board completely through? A. Yes, sir. Q. Now, how near— Just show us again how you placed your hand when you were sawing that board? A. Just like that. (Illustrating.) Q. Your hand was not within three or four inches, then, of the line of the saw, was it? A. No, sir. Q. If you had placed your hand over on the edge of the board, your hand would have been at least eight inches from the saw, would never have come nearer than eight inches to the saw, would it? A. No, sir. Q. That is the way you were doing, or told to do, wasn't it? A. He told me to place my hand here, did not say how far to keep it away from there; just to keep my thumb away from there. Q. He told you to be sure to keep your thumb away from the saw? A. Yes, sir. Q. And when you started to saw these boards, you were putting your hand way over as far as you could from the saw? A. Yes, sir. Q. And you did that all the while? A. Yes, sir. Q. You placed your hand as far on the edge of the board as you could, in

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

order to do your work? A. Yes, sir. Q. And that is what you were told to do? A. Yes, sir. Q. Mr. Hicks told you to do that? A. Yes, sir. * * * Q. Now, you are satisfied that you had sawed the strip completely off of this board when you were injured, are you? A. Yes, sir. Q. And you are satisfied that you had reached for another board over on your left? A. Yes, sir. Q. You had reached for another board? A. Yes, sir. Q. And then it was that you noticed that your right hand was injured? A. Yes, sir. Q. Have you any idea how long you were injured before you noticed it? A. No, sir. Q. Well, you hadn't sawed many boards, had you? A. I sawed about a hundred. Q. Yes, but you hadn't sawed many boards before you noticed this injury, after you were injured and before you noticed the injury? A. I hadn't sawed any boards after I was injured. Q. And you think you had your hand away four or five inches from the saw? A. Yes, sir. Q. You don't know how your hand got to the saw? A. No, sir. Q. Can't imagine? A. No, sir. Q. Can't imagine how it could have got on top of the saw by reason of the hood? A. No, sir. Q. And the whole thing is a mystery to you, isn't it? A. Yes, sir. Q. You were doing all that you could do to keep from being injured? A. Yes, sir."

Under the foregoing facts it is the merest speculation to say that the injury resulted from a failure to give adequate or proper instructions. There was nothing inherently or necessarily dangerous in the work about which the respondent was engaged. The saw was small and thoroughly and completely guarded, so far as its efficiency would permit. The danger zone was limited. The boards were 10 inches in width, and it was not necessary for the respondent to bring his hand within less than 5 or 6 inches of the saw while shoving the material through. The operation was simple, and the instructions given were explicit and ample, if followed. The respondent placed his hand as directed, and nothing unusual or out of the ordinary happened while the board was passing through the saw. He did not know how or when the injury happened, and it would be the height of folly for either court or jury to attempt to answer these questions. If we cannot say how the accident happened, how can we say that it was the result of improper or inadequate instructions? If it was all a mystery to the respondent, could it be less of a mystery to the jury? If we were to indulge in speculation, the most reasonable inference is that the respondent in some manner thrust his hand into the saw beneath the guard when reaching for a board, a danger open and apparent to him, and a danger against which he was duly cautioned. Respondent relies largely on the rule announced in *Wikstrom v. Preston Mill Co.*, 48 Wash.

164, 93 Pac. 213, and *Von Postel v. Lake Sammamish Shingle Co.*, 51 Wash. 262, 98 Pac. 665, but these cases do not warrant a recovery here. In the *Wikstrom* Case the saw was out of repair, and of a much more dangerous character, and the operator's hand was thrown into the saw involuntarily, because he did not know how to operate it. The facts in the *Von Postel* Case were somewhat similar. Here there was no defect in the saw or in the surroundings, and there is nothing to show that the respondent's hand was thrown into the saw by reason of the manner in which he was attempting to operate it, or because he did not have adequate or proper instructions.

For these reasons, we are of opinion that the testimony did not warrant the submission of the case to the jury, and the judgment is accordingly reversed, with directions to dismiss the action.

CHADWICK, CROW, DUNBAR, and MORRIS, JJ., concur.

(61 Wash. 378)

PETERSON v. ST. FRANCIS HOTEL CO.
(Supreme Court of Washington. Dec. 30, 1910.)

1. BROKERS (§ 57*)—SALE OF PROPERTY—ACTS OF OWNER.

An owner of property placed in the hands of a broker for sale could not, by undertaking to sell at a less price than the one given the broker and on other terms, deprive him of the benefit of his contract, or the right to recover the reasonable value of his services in promoting the sale.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 66, 67, 72; Dec. Dig. § 57.*]

2. WORK AND LABOR (§ 14*)—CONTRACTS—WAIVER.

A broker may waive his contract for commissions, and sue for the reasonable value of his services.

[Ed. Note.—For other cases, see *Work and Labor*, Cent. Dig. §§ 29-33; Dec. Dig. § 14.*]

Department 2. Appeal from Superior Court, King County; R. B. Albertson, Judge.

Action by C. F. Peterson against the St. Francis Hotel Company. Judgment for plaintiff, and defendant appeals. Affirmed.

G. E. Steiner, for appellant. Howard H. Startzman and Frank Hammond, for respondent.

MORRIS, J. On June 7, 1907, appellant listed its hotel, the St. Francis, with respondent for sale. The contract of listing was the usual broker's contract. It fixed the terms at \$65,000, of which \$43,000 was to be paid in cash, and the balance by assuming an indebtedness on the furniture of \$22,000. The time of the contract was 27 days, and thereafter until withdrawn by 10 days' written notice. The commission was fixed at \$3,000. In October following a Mrs. Johnson called at the hotel and was shown

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

through it by Mr. Kennedy, its manager, and a price of \$60,000 given her. When she left, Mr. Kennedy called the respondent by telephone, gave him Mrs. Johnson's address, and asked him to call upon her and endeavor to bring about a sale. Respondent did so, and endeavored to effect a sale of the hotel. In doing so he discouraged her from negotiating for the sale of another hotel she had been negotiating for, and, after some conversation relative to the hotel and its furniture, suggested she call upon Mr. Rankin, who held a conditional sale agreement covering the furniture, and made an appointment with her at his office for the following day. Mrs. Johnson called on Mr. Rankin, learned the situation as to the furniture, and, without again negotiating with respondent, called on Mr. Kennedy, and thereupon entered into negotiations with him for the purchase. Respondent notified Mr. Kennedy of the result of his call upon Mrs. Johnson, and also informed him of her failure to keep her appointment on the following day. Mrs. Johnson, during her negotiations with Mr. Kennedy, spent several days watching the operation of the hotel, examining its books, inspecting the premises, and informing herself generally as to the existing situation, and finally purchased the same for \$55,000. Three thousand dollars was paid in cash, the indebtedness for the furniture assumed, and the balance secured by promissory notes; the change in the price being made without the knowledge of the respondent. In the meantime Mr. Kennedy had called respondent to the hotel, told him Mrs. Johnson had made an offer of \$55,000, and said on that basis he would not be willing to pay \$3,000 commission, and some conversation was had relative to an understanding of what the commission would be if the sale went through, but nothing definite was determined. Mr. Kennedy also called at respondent's office, and they had several conversations over the telephone in regard to the same matter. Being unable to bring about an adjustment of the matter, respondent finally brought suit, and was awarded judgment in the sum of \$1,625, and defendant appeals.

The court arrived at the amount of the judgment by following the established custom of brokers at Seattle, computing 5 per cent. on the first \$10,000, and 2½ per cent. on the balance. The errors suggested are in the findings of fact. We are not disposed to disturb the court's findings upon controverted questions of fact, unless the record presents manifest error. We find none such here, and a reading of the testimony convinces us the judgment is right. Appellant unquestionably sought the aid of respondent in making the sale to Mrs. Johnson. It recognized a value in respondent's services in endeavoring to reach an agreement with him as to what it should pay. In undertaking to

sell at a less price than the one given to respondent, and at other terms, it could not deprive respondent of the benefit of his contract. He was still entitled to his commission, to be determined by the terms of sale agreed upon between appellant and its vendee. *Lawson v. Black Diamond Coal Co.*, 53 Wash. 614, 102 Pac. 759.

In this case the recovery sought was the reasonable value of the services. The respondent could to that extent waive his contract, and recover the reasonable value of his services, which, according to the testimony, is the amount fixed in the judgment, and the same is affirmed.

RUDKIN, C. J., and CHADWICK, DUNBAR, and CROW, JJ., concur.

(61 Wash. 330)

In re CITY OF RENTON.

CITY OF RENTON v. DYKEMAN et al. (Supreme Court of Washington. Dec. 21, 1910.) EMINENT DOMAIN (§ 224*)—ASSESSMENT OF DAMAGES—NEW TRIAL.

The amount of damage landowners would suffer by a city's condemnation of a right to take water from a creek flowing through their lands being solely a question of fact for the jury, the court properly denied such landowners a new trial after a verdict in their favor for \$1 each, not clearly against the weight of the evidence, because he did not believe justice had been done on the sole ground that he differed from many of the witnesses.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 574-579; Dec. Dig. § 224.*]

Department 2. Appeal from Superior Court, King County; Robert H. Lindsay, Judge pro tem.

Proceedings by the City of Renton to condemn the right to take water from a creek flowing through the lands of R. T. Dykeman and others. From a judgment awarding nominal damages only, Dykeman and others appeal. Affirmed.

Farrell, Kane & Stratton, for appellants. Paul W. Houser and L. Frank Brown, for respondent.

MORRIS, J. The city of Renton instituted a condemnation suit against appellants, seeking to acquire the right to take water from a creek flowing through appellants' lands. Trial was had, and verdict in the sum of \$1 each awarded appellants. They made a motion for a new trial, which was denied. The court, in denying appellants a trial, incorporated his decision in the record, as follows: "Superior Court, King Co., Wash. In the Matter of the Petition of the City of Renton. No. 67,178. The court, in denying the motions for a new trial in all the cases where Farrell, Kane & Stratton represented the respondents, stated that, in view of the fact that it is the undoubted law of this state that the jury are the sole judges of the facts,

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and that as I view the law as expressed by our Supreme Court, that where the jury has once passed upon the facts that the court is only justified in granting a new trial where the verdict of the jury is contrary to the weight of the evidence, I am constrained to overrule the motions for new trial, although as an individual I do not think that justice has been done by any of the verdicts, and this solely because I differ with many of the witnesses who testified in the case. Each of the respondents excepts to above, and excepts to the ruling of the court in denying his motion for a new trial. Exception allowed. The above is hereby made a part of the record herein. Dated Jan. 3, 1910. Robert H. Lindsay, Judge pro tem. Present: Attorneys for all parties." This ruling is the error complained of.

If the court below indicated his opinion by the language used, and we assume he did, no other ruling was possible. The question was solely one of fact, and it was of no consequence that the court differed with some of the witnesses as to the extent of the damage. This is not an unusual thing in trials of this character. But, inasmuch as our system makes the jury the arbiter of such questions, their decision, when there is no error in the submission, is final. The case here is not within *Clark v. Great Northern Ry. Co.*, 37 Wash. 537, 79 Pac. 1108. In that case the court below indicated he made his ruling because of his belief in a lack of power to do otherwise. This court held he had the power to grant a new trial, where the verdict was contrary to the weight of the evidence. The court below, in the case at bar, correctly thus states the law in his ruling as set forth. He does not hold the verdict is contrary to the weight of the evidence, but announces that he differed with many of the witnesses. This would be no reason for any interference with the verdict, unless he went further, and was of the opinion that it was clearly contrary to the weight of the evidence.

Judgment affirmed.

RUDKIN, C. J., and DUNBAR, CROW, and CHADWICK, JJ., concur.

(61 Wash. 375)

CAVELIN v. STONE & WEBSTER ENGINEERING CORPORATION et al.

(Supreme Court of Washington. Dec. 29, 1910.)

1. MASTER AND SERVANT (§ 279*)—FELLOW SERVANTS' INCOMPETENCY—EVIDENCE.

In an action to recover for personal injuries, evidence held insufficient to show that a bricklayer employed with others in laying a brick wall was incompetent to stretch the line to which the bricks were laid, so as to render the master liable for the injuries received by a fellow servant in consequence of his method of stretching the line.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 973-980; Dec. Dig. § 279.*]

2. EVIDENCE (§ 570*)—EXPERT EVIDENCE—WEIGHT.

Expert testimony on a subject of common knowledge, and contrary to what is known by all men, is not entitled to weight.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2395; Dec. Dig. § 570.*]

3. MASTER AND SERVANT (§ 196*)—FELLOW SERVANTS—WHO ARE.

Bricklayers engaged in laying a brick wall, are fellow servants while stretching and fastening a line extending along the wall, to which the brick are laid.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 486-488; Dec. Dig. § 196.*]

4. MASTER AND SERVANT (§ 278*)—INJURY TO SERVANT—NEGLIGENCE—EVIDENCE.

Where, in an action for injuries to a bricklayer, caused by a nail holding one end of the line to which the brick were laid flying out and striking him, there was evidence that it was customary for the master to furnish such appliances, but none that he did furnish them, and a witness for the servant testified that it was customary for the servants to get their own nails and to select such as they might choose, there was no evidence of negligence of the master, though the nail in use was in fact insufficient.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954-977; Dec. Dig. § 278.*]

Department 1. Appeal from Superior Court, King County; R. B. Albertson, Judge.

Action by Carl Cavelin against the Stone & Webster Engineering Corporation and another. From a judgment for defendants, plaintiff appeals. Affirmed.

Heber McHugh, John T. Casey, and Milo A. Root, for appellant. Farrell, Kane & Stratton and Kerr & McCord, for respondents.

RUDKIN, C. J. On the 29th day of June, 1909, the plaintiff, the defendant Melburg, and a number of fellow workmen, in the employ of the defendant Stone & Webster Engineering Corporation, were engaged in laying brick in the wall of the ninth story of the Henry building in the city of Seattle. The wall in question was about 40 feet in length, and 10 or 12 masons in all were engaged in the work. A line was extended along the outer edge of the wall, from one end of the stretch to the other, to which the brick were laid. This line was fastened at one end by a small wire nail inserted in the mortar between the brick, and to a similar nail or spike at the opposite end. Every time a row or tier of brick was laid it became necessary to raise the line for the next tier, and the change was made by the two men at the end of the line. This duty was not assigned to any particular employees, but devolved upon whomsoever happened to be working at the end of the line when it became necessary to make the change. As soon as a tier of brick was completed, a warning or command was given by the man at the "tie-end" of the line, or by some of the oth-

er workmen, to raise the line, whereupon the man at the "stick-end" would remove the nail from the wall and reinsert it at the proper place, after which the line was drawn tight, and fastened by the man at the opposite end. Shortly after the noon hour on the above date a command was given to raise the line and the plaintiff undertook the performance of that duty. After he had inserted the nail between the brick, the line was drawn tight by the man at the opposite end, and the nail flew out, striking the plaintiff in the eye and causing the injury for which a recovery was sought in this action. At the close of the plaintiff's testimony, the court directed a nonsuit from which this appeal is prosecuted.

Many delinquencies on the part of the master were charged in the complaint, but we will consider such only as are relied on in support of the appeal. These are, first, that Otto Melburg, "the tie-end man," whose act caused the injury complained of, was reckless, incompetent, and habitually careless in the performance of his duty, and that such incompetency was known, or should have been known, to the respondent corporation, by the exercise of reasonable care and diligence on its part; second, that Melburg was a vice principal; and, third, that the small nail furnished by the master was unsafe and insufficient for the purpose for which it was furnished and used. The only evidence offered tending to show the incompetency of Melburg, or knowledge of such incompetency on the part of the master, was some slight testimony to the effect that "he appeared to be nervous," "in a hurry about his work," and had broken the line and pulled the nail on one or two previous occasions. Such testimony in our opinion is utterly insufficient to show incompetency in a common mason or bricklayer. He was not employed to operate or handle dangerous agencies or dangerous machinery, and had only been engaged in this particular work for an hour or two at best before the accident. The duty assigned him was such as falls to the lot of every workman. There was nothing unusual or dangerous about it, and no special skill or experience was requisite to its safe and proper performance. True, there was some testimony tending to show that it required some experience to qualify one to properly perform this simple task, but it is a matter of common knowledge, known to all men, that it requires no peculiar skill or knowledge to qualify one to safely stretch a small line 40 feet in length, and so-called expert testimony to the contrary imposes too great a tax on the credulity of either court or jury.

Nor is there any merit in the claim that Melburg was a vice principal. The complaint proceeded upon the theory that he was a fellow servant, negligently employed or retained, and this theory is manifestly correct,

so far as his mere relations to the appellant were concerned. *Jock v. Columbia & Puget Sound R. Co.*, 53 Wash. 437, 102 Pac. 405; *Desjardins v. St. Paul & Tacoma Lumber Co.*, 54 Wash. 283, 102 Pac. 1034. If two men thus employed are not fellow servants, that doctrine is indeed abrogated in this state. If the act of stretching a line for bricklayers is the act of the master, and cannot be delegated, the cost of superintending the construction of a building, would exceed the cost of construction itself.

If we concede that the nail in use was insufficient for the purpose, there is no testimony in the record tending to show that it was actually furnished by the master. There was testimony tending to show that it is customary for the master to furnish such appliances, but none that the master did in fact furnish it. One of the witnesses for the appellant testified that it is customary for the men to get their own nails, and to select such as they may choose about the works. In the absence of testimony tending to show whether the nail was furnished by the master, or selected by some fellow servant, we cannot indulge in presumptions or assume that the respondent corporation was negligent. Some questions of concurring negligence are discussed in the briefs, but if there was no negligence on the part of the respondent corporation, there could be no concurring negligence. There was perhaps sufficient testimony tending to show negligence on the part of Melburg to go to the jury, but there is no assignment of error on that point, and no discussion of that question in the briefs.

The judgment of the court below is therefore affirmed.

MOUNT, GOSE, PARKER, and FULLERTON, JJ., concur.

(61 Wash. 368)

MERRITT v. HIBBARD et al.

(Supreme Court of Washington. Dec. 29, 1910.)

1. FRAUD (§ 41*)—ACTIONS—SUFFICIENCY OF COMPLAINT.

In an action for alleged deceit and fraud in inducing plaintiff to advance money for purchase of a timber claim, the complaint held sufficient on general demurrer on the theory of a conspiracy of defendants to defraud plaintiff.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 36, 37; Dec. Dig. § 41.*]

2. FRAUD (§ 54*)—ACTION—ADMISSIBILITY OF EVIDENCE.

In an action for alleged fraud practiced upon plaintiff by defendants, inducing him to advance money for the purchase of a timber claim to be sold to the stepfather of one of the defendants, which defendant was alleged to have announced to plaintiff that his stepfather would buy the claim at a price greater than that which plaintiff was to pay for it, evidence of the value of the claim was admissible, since, if the claim, in fact, had but little value, and defendants knew it, such fact would tend to show that the defendant making the representation of his stepfather's intent to buy,

never intended to have his stepfather actually purchase the claim, and to show that the other defendants would likely know of such intent of their codefendant.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 50, 51; Dec. Dig. § 54.*]

3. APPEAL AND ERROR (§ 977*)—REVIEW—NEW TRIAL.

To reverse an order granting a new trial after a nonsuit, it must appear that upon no possible theory could plaintiff recover.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3865; Dec. Dig. § 977.*]

Department 1. Appeal from Superior Court, King County; J. T. Ronald, Judge.

Action by C. B. Merritt against George J. Hibbard and others. There was a judgment, for nonsuit and from an order granting a new trial, certain defendants appeal. Affirmed.

McBurney & Cummings and Reed & Hardman, for appellants. Heber McHugh and John T. Casey, for respondent.

PARKER, J. By this action the plaintiff seeks to recover damages from the defendants A. L. Grandy, George J. Hibbard, and John F. Reed, which, it is alleged, resulted to plaintiff from deceit and fraud practiced upon him by the defendants, inducing him to advance the sum of \$3,000, for the purchase price of a certain timber claim. The defendant Reed demurred to the complaint. His demurrer being overruled, he answered denying the acts of fraud and deceit charged against him. The defendant Hibbard answered separately denying the acts charged against him. The defendant Grandy is not a party to this appeal, so we are not concerned with the disposition of his contentions by the trial court. The cause proceeded to trial with a jury, against all of the defendants, and at the conclusion of the evidence introduced in behalf of the plaintiff the court granted a nonsuit in favor of all of the defendants. Thereafter the plaintiff moved for a new trial, which motion was granted. The defendants Hibbard and Reed have appealed from the order granting a new trial.

The first general contention made by counsel for appellants is that the trial court erred in overruling the demurrer to the complaint, and in admitting evidence over appellants' objection made upon the ground that the complaint failed to state a cause of action. The complaint is of considerable length and there may be some things in it which would render it objectionable and vulnerable to attack in some manner, but we are now only concerned with its sufficiency as against a general demurrer, since that is the form of attack made both by the demurrer and the objection. It alleges in substance the following: All of the defendants were engaged in buying and selling

timber land in this state at and prior to the time of the commission of the acts complained of. At the same time plaintiff and defendant Grandy were copartners engaged in selling timber lands in this state. All of the parties had their places of business at Seattle. In 1906, plaintiff met one M. L. Fitch, a timber buyer of Grand Rapids, Mich. Plaintiff was then informed by Fitch that he would buy any good timber lands in this state which plaintiff or his firm could procure for him. Plaintiff was also then informed by Fitch that he would have to return to and remain in Michigan and would be represented in this state by defendant Hibbard, who was a stepson of Fitch. Plaintiff was also then informed by Fitch that he would buy timber lands on the cruise of one J. A. Withrow, a timber cruiser living in Clallam county; and thereafter Fitch did invariably buy timber lands on the unverified cruise of Withrow until August 9, 1907. During this period plaintiff and his firm procured many timber claims for Fitch by the following course of business, which was well known to defendants: "After being advised that a tract of timber was for sale, said Hibbard would inform plaintiff that Fitch had written him, said Hibbard, to buy it at a certain price and that the money to pay for the same would be sent to the State Bank of Seattle, or to the Port Angeles Bank, as soon as the claim was secured, and said Hibbard would tell plaintiff to buy said tract for said Fitch and have a nominal consideration of five or ten dollars inserted and have the said deed run to blank grantee, and then have the deeds so made out deposited in one of the banks as aforesaid, all of which plaintiff would do, and said deeds would remain in the bank until the money would arrive from said Fitch. That there was always more or less time elapsed between the order by Hibbard and the arrival of the money at the bank, but the same invariably came prior to said 9th day of August, 1907, and upon its arrival the said money was paid over to the respective grantors on the order or instructions from plaintiff. That plaintiff had nothing to do with the examination of abstracts. That in the purchase of said tracts, arranging payments therefor, securing deeds and fixing prices, plaintiff acted solely on the statements of said Hibbard." In cases where haste was necessary Hibbard communicated with Fitch by telegraph. Some time prior to August 9, 1907, the claim here involved was offered to defendant Grandy by an agent of defendant Reed for \$800, and thereupon Grandy agreed to buy the claim at that price, and was sent by the agent to Reed to close the deal. Grandy concealed from plaintiff all knowledge of this transaction, and secretly obtained knowledge from

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Reed that the land was worthless, and on August 9, 1907, Grandy knew that the land was without timber and worthless, and fraudulently concealed all such knowledge from plaintiff. Reed secured control of the claim from the owner for little or no consideration, and for a long time prior to August 9, 1907, he knew it was worthless. Hibbard having asked plaintiff to buy the claim from Reed, plaintiff advised with Grandy as a partner concerning it, when Grandy stated that he had no money himself, but advised plaintiff to use his own money, which Grandy knew plaintiff had, and to do as Hibbard directed, and there would not be much delay in getting a return of the money, as Fitch would take the land. Hibbard, acting in concert with the other defendants, stated to plaintiff that the claim was for sale and that Fitch had written to him that he would buy it and would pay as much as \$4,000; that he, Hibbard, had received a letter from Fitch inclosing a cruise of the timber on the land by Withrow, showing 6,500,000 feet of timber on it; that Reed held the claim for sale and urged plaintiff to buy it for Fitch; and that if plaintiff would raise the money and get the claim for \$3,000, Hibbard would allow \$3,500, and if plaintiff had to pay \$3,500, they would allow \$4,000 for the claim according to the instructions of the letter; that as soon as the price was fixed with Reed and the claim secured, Hibbard would wire Fitch and the money would be sent to the bank, not more than 15 days off at the longest. Believing these statements to be made in good faith and relying on them, plaintiff went to Reed and thereupon Reed falsely and designedly stated to plaintiff that the claim was already sold and that the price was \$3,000; that the purchaser had not yet paid anything down and that if plaintiff would pay for the claim first he could have it. Thereupon plaintiff went at once and told Hibbard of the statements of Reed. Thereupon Hibbard pretended to wire to Fitch that the price was \$3,500, and for him to send the money immediately to the bank. Hibbard again told plaintiff that he was anxious to get the claim, and urged plaintiff to raise the money. Relying upon these statements, on August 12, 1907, plaintiff paid to Reed \$3,000, and took a deed reciting a nominal consideration with the name of the grantee left blank as instructed. Fitch had not written to Hibbard and had not sent a cruise of the timber by Withrow, and had not told Hibbard to pay any sum for the claim, nor did Hibbard wire Fitch as he pretended to do, and all of the statements so made by Hibbard were false, and made by him to deceive and defraud plaintiff. The statements made by Reed to plaintiff to the effect that the claim was sold for \$3,000, to a purchaser who had not paid anything down, was false and made to mislead and deceive plaintiff.

The statements made by Grandy to plaintiff were also false and known to be such by Grandy. All of the defendants knew at the time that the claim was without timber and valueless and knew that plaintiff would rely on the statements of Hibbard; and plaintiff was induced thereby to part with his money, in the manner alleged. Plaintiff has at all times held the land for the benefit of the defendants. Plaintiff alleges that all of these false and fraudulent acts and representations were made by defendants for the common purpose of cheating and defrauding him. Plaintiff alleges in conclusion, "that by reason of the premises aforesaid, plaintiff has been damaged in the sum of \$3,000 besides costs and disbursements," and prays for judgment against all the defendants in that sum.

The learned trial court adopted the theory, upon the trial, that the complaint stated facts which would warrant a recovery upon the ground of conspiracy to defraud plaintiff. We think the complaint is good as against a general demurrer upon that theory. Some contention is made that the allegation of damage is not sufficient, since it is not specifically alleged that the claim is in fact worthless, but only that the defendants knew it was without value. Adopting the theory of the learned trial court, as we do, the question of value of the claim becomes of little or no consequence as a fact to be pleaded, because plaintiff is not claiming the land as his own. According to the complaint, it was never contemplated by him that the title should pass to him, but to Fitch, or whoever Fitch should designate as the grantee; the name of the grantee being left blank in the deed for that purpose. The value of the claim, as a matter of evidence, had some relevancy to the issues. If the claim in fact had but little or no value and defendants knew it, that fact would have a tendency to show that Hibbard never intended to have his stepfather, Fitch, actually purchase it, and would also tend to show that the other defendants would likely know of such intentions on the part of Hibbard; but that would not make plaintiff's measure of damages the difference between the actual value of the claim and the \$3,000 advanced by him for its purchase. Some contention is made that the principal representations relied upon by plaintiff, and inducing him to act, were promissory in their nature and related to future events, rather than to existing facts. We think such is not the case. The representations made by Reed all related to existing facts. The representations made by Hibbard to the effect that Fitch had written Hibbard that he would purchase the claim and pay as much as \$4,000 for it, and that Fitch had a cruise of the timber which he had sent to Hibbard made by Withrow showing it to be a valuable claim, clearly were intended as representations of

existing facts. These, together with Reed's representations as to the necessity of paying the entire purchase price of \$3,000 promptly, in order to get the claim, were well calculated, in view of the relation of the parties, as shown by the allegations of the complaint, to induce plaintiff to act as he did.

The next general contention is that the court erred in granting a new trial. This contention is based upon the alleged insufficiency of the complaint, which we have already noticed, and also upon the theory that the nonsuit was properly granted. The record does not disclose the theory of the learned trial court in granting a new trial. It may have been only because he concluded that he was in error in granting the nonsuit, or he may have concluded that he was in error in excluding certain evidence touching the actual value of the claim. Plaintiff attempted to prove that the claim was of no value. This proof was excluded by the court. We have seen that such proof was admissible; and while the record does not so show, it is probable that the trial court entertained this view upon disposing of the motion for new trial. We have read all of the evidence and are of the opinion that it was sufficient, especially with the offered proof of the small value of the claim, to require the submission of the cause to the jury upon the theory we have indicated. In any event, we cannot say from this record that the granting of a new trial was an abuse of discretion. In order to reverse this order we would have to conclude that upon no possible theory could plaintiff recover. The condition of the pleadings and the manner of trial rendered the issues and the theory of plaintiff's case somewhat confusing. We conclude, however, that the granting of a new trial was not erroneous.

The order is affirmed.

RUDKIN, C. J., and MOUNT, GOSE, and FULLERTON, JJ., concur.

(61 Wash. 28)

MERRILL v. JOHN B. STEVENS & CO.
(Supreme Court of Washington. Dec. 2, 1910.)

1. APPEAL AND ERROR (§ 1002*)—FINDINGS—CONCLUSIVENESS—CONFLICTING EVIDENCE.

A verdict on sharply conflicting evidence is conclusive on appeal.

[Ed. Note.—For other cases, see Appeal and Error. Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.*]

2. EVIDENCE (§ 89*)—FAILURE TO CALL WITNESS—PRESUMPTION.

Evidence explaining the absence of a material witness is admissible when failure to produce him would warrant an unfavorable inference against the party not producing him.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 111; Dec. Dig. § 89.*]

3. TRIAL (§ 46*)—RECEPTION OF EVIDENCE—FOUNDATION—SUFFICIENCY.

In an action for injuries to a servant, defendant was asked what effort, if any, he had made to find one V., which question was excluded. The question did not indicate that V. was present at the accident, and no statement was made when the question was asked showing V.'s relation to defendant and no showing as to what witness expected V. would testify to if present. Held, that it was not error to exclude it as immaterial.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 115, 117; Dec. Dig. § 46.*]

4. TRIAL (§ 260*)—INSTRUCTIONS—REPETITION.

In an action for personal injuries caused by the breaking of a plank on which plaintiff was standing, an instruction that if it was dangerous to step on it, and plaintiff knew that fact, or should have known it, then the jury should find for defendant, was refused; but the court instructed that where there were two methods of doing work, and one was safe and the other unsafe, and the servant chose the unsafe method, it was for the jury to determine whether he was negligent, and to compare what was done by him with what would have been done by a person of ordinary prudence. Held, that the instruction was properly refused; it being covered in substance by the instruction given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

5. MASTER AND SERVANT (§ 293*)—INJURIES TO SERVANT—NEGLIGENCE—INSTRUCTIONS.

In an action by a servant to recover for personal injuries, an instruction that, in determining the question of negligence, the jury should compare what was done or not done with what would have been done or left undone by a person acting with ordinary prudence, and that, if one acts as an ordinarily prudent man would act under the circumstances, he is not negligent, is not objectionable on the ground that the word "ordinarily" was misplaced, or that the instruction gave the jury a choice of tests in deciding on the question of negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1148-1161; Dec. Dig. § 293.*]

Department 2. Appeal from Superior Court, Pierce County; John A. Shackelford, Judge.

Action by I. B. Merrill against John B. Stevens & Co. From a judgment for plaintiff, defendant appeals. Affirmed.

Hudson & Holt, for appellant. Fitch & Jacobs, for respondent.

DUNBAR, J. At the time of the injury to respondent, appellant was conducting a warehouse in Tacoma, which had a platform from three to four feet in height above the ground, extending to within a few feet of the railroad track of the Northern Pacific Railway Company; and at that time was unloading a car load of oats in bulk from the car, and putting it into the warehouse. When the grain was loaded into the cars, a false door was placed on the inside of the facing of the real door. In order to empty the car, a hole was cut in the false door, at or near the bottom of it. Through this hole the grain passed into a hopper, from which it was conveyed by a mechanical process in-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

to the warehouse. When the car was placed at the proper location, so that the middle of the door was in a line with the middle of the hopper, the hopper would be lowered, and the hole would be cut in the door by some one who sat or stood on the hopper itself and bored holes with an auger until the opening was made. The hopper was planked up, and the respondent claims that he was hurt by the breaking of a plank or board which was nailed to the hopper, and upon which he stepped in the performance of his duty. The allegations of the complaint in this regard are, in substance, that the plaintiff was in the employ of the defendant on or about July 19, 1909, and had been ordered by the foreman in charge to assist in unloading a car of loose grain, which was to be done by means of the hopper of which we have spoken, and screw elevators, and appliances furnished by the appellant for said purpose; that while he was engaged in said work he was ordered to shut off the supply of grain coming from the car; that this was done by closing this door; that in obeying such order he moved the lever, shutting off the supply of grain from the hopper to the screw; that it then became necessary for him to shut off the supply of grain to the hopper, and, in order to do so, it was necessary for him to reach the car, and the only means provided for doing so was by stepping upon the framework of said hopper; that, as he stepped upon the framework of the hopper for said purpose, the same broke, precipitating him to the ground, and he was thereby injured; that the framework broke by reason of its being negligently and insecurely fastened and nailed, and by reason of its being inadequately constructed for the purpose for which it was used; that the manner in which he stepped upon the framework was that usually adopted by the employees of said defendant for such purpose, and was the only way provided whereby said grain could be shut off; that the plaintiff was using due care; that the framework of said hopper upon which plaintiff was required to step consisted of a board, of about one inch thick and twelve inches wide, nailed in a horizontal position on the frame of said hopper, secured by about four nails, one in either end near the lower edge of the board, and one in either end near the middle of the board; that the upper part of the board was not nailed or secured in any way, and, as he stepped upon said frame for the said purpose, said board split at about the point where it was nailed near the center of its width, and threw plaintiff's feet outward and toward the left, throwing him across the remaining part of the hopper frame. The answer admitted the employment, but denied any negligence in the construction of the hopper, or that plaintiff was injured in the manner described in the complaint, alleged that, if there were any dangers in the performance of the work, they

were open, notorious, obvious, and well known to the defendant, or that in the exercise of ordinary prudence and care they should have been known to him; that there was a safe way in which he might have performed the work in which he was then engaged, as well as an unsafe way; and that, with the knowledge of both ways, he voluntarily elected to perform the work in the unsafe way. The case was tried by a jury, and a verdict rendered in favor of the plaintiff. Motion for a new trial was made and denied, and judgment followed.

The principal contention in the argument and briefs of counsel for appellant is that the court erred in denying appellant's motion for judgment, both at the conclusion of respondent's testimony and at the conclusion of all of the testimony in the case. The manner in which the respondent received the injuries complained of, or the manner in which he was performing the work at the time of his precipitation from the frame of the hopper, was a question which was very strongly contested; it being contended by the appellant and many of his witnesses that the respondent in passing across the space had one foot on the platform and the other on the doorsill, that it was not necessary for him to step upon the frame of the hopper, and that he did not do so as a matter of fact. Special interrogatories were propounded to the jury on this question, the first being: "Do you find that he fell while he had one foot on the platform and the other on the doorsill of the car?" Second: "Do you find that he fell by reason of one of the boards of the framework of the hopper breaking?" The jury answered the first interrogatory "No," and the second "Yes." This renders unnecessary a discussion of these propositions. The other question of fact, viz., the manner in which this work could most safely and practicably be done, was also submitted to the jury and decided against appellant's contention.

It is claimed that the court erred in excluding the testimony of John B. Stevens, a member of the defendant corporation. When asked what effort, if any, he had made to find one John Vusard, this question was objected to by the court, and is alleged as error on the theory that where it is within the power of a party to produce evidence material to the controversy, and it does not do so, his failure to do so may be construed against him; that this applies particularly to those cases where the witness was in the employ of the party. Appellant cites 9 Enc. Ev. pp. 966-968, to sustain this contention. The rule is there laid down that evidence explaining the absence of a material witness is admissible when the failure to produce him would warrant an unfavorable inference; and there is no doubt of the soundness of that rule when it is applied to a proper case. The cases that are cited by the author to sustain this text, viz., *Brown v. Barse*, 10 App. Div.

(N. Y.) 444, 42 N. Y. Supp. 306, and Hall v. City of Austin, 73 Minn. 134, 75 N. W. 1121, lend no support to the contention in this case. In the first case the defendant was not present at the trial. The plaintiff testified to personal transactions with him, which the defendant would naturally have taken the stand to deny if the defense which he had pleaded was true. The court said that, in his absence, his counsel had a right to prove any fact the effect of which was to excuse his failure to attend and give evidence in his own behalf, because the nonattendance of an absent defendant who had a personal knowledge of the facts, if any, which constituted his defense, and his failure to testify, might properly be considered by the jury as bearing upon the strength of his case. In the second the plaintiff although in feeble health, appeared in court, and testified as a witness in her own behalf in her case in chief. In its defense the city introduced evidence as to certain statements alleged to have been made by her, and it was said that, if she had an opportunity to deny these statements and failed to do so, that fact would naturally be quite prejudicial to the whole case, and under the circumstances it was competent to prove that she was sick in bed and too ill to appear and testify in rebuttal. Many other cases may be found sustaining the same doctrine under various circumstances.

But in this case there was nothing to indicate that John Vusard had any special knowledge of the matters in controversy. The question did not even indicate that he had been present at the time of the accident, although it might appear in some other stage of the proceedings, or that he was in the employ of the appellant, or that, if he had been, how long a time it had been since the employment ceased. All that occurred was this: "Q. State to the jury what effort, if any, you have made to find one John Vusard, who was said to have been present at the time of this accident. The Court: I do not see how that is material. Mr. Holt: If you rule it out, I would like to save an exception. That is all. The Court: I rule it out, and you may have an exception." No statement was made to the court showing or claiming to show the relation in which Vusard stood to the witness; and no showing as to what the witness expected that Vusard would testify to if he were present. We think that, so far as the record shows, the court was right in holding that the question was immaterial. The appellant asked the court to instruct the jury as follows: "You are instructed, gentlemen of the jury, that, even if you should believe from a fair preponderance of the evidence that the framework of the hopper broke when the plaintiff stepped on it, yet if you further believe that on account of the manner in which the framework was constructed it was dangerous to step on it, and that the plaintiff knew that it was dangerous, or in the exer-

cise of ordinary care for his safety should have known, and that there was a safe way or ways in which the plaintiff might have performed his work, known to him, then you will find the verdict for the defendant, for the reason that the plaintiff in such case would be guilty of negligence himself, and the defendant cannot be held responsible for the plaintiff's own negligent choice of the manner in which he performed his work." This instruction was refused, and the refusal is assigned as error. There is probably no objection to this instruction if the substance of it was not given by the court on its own motion. The court, after instructing the jury on the general propositions involved in cases of this kind, guarding, we think, with care the rights of the appellant in every particular, proceeded as follows: "Where there are two methods by which an employé can do work, and both are equally available, convenient, and speedy, and one is safe and the other unsafe, and the employé of his own volition chooses the unsafe method and is injured, he is in law held to be guilty of contributory negligence. Where there are two methods of work, one safer than the other, and the methods are not equally available, convenient, and speedy, it is for the jury to say whether the employé, in choosing the less safe method was guilty of contributory negligence; and in determining this question you are to consider whether a person of ordinary prudence would or would not have acted as the employé acted." The court further instructed the jury: "The negligence alleged in plaintiff's complaint is that a plank on the side of the hopper frame was insecurely and improperly nailed. The way to determine whether any person has been negligent or not is to compare what was done by such person, or left undone by such person, with what would have been done or left undone by a person acting with ordinary prudence. If a man acts as an ordinarily prudent man would act under the same circumstances and conditions, there is no negligence. If a man fails to act as an ordinarily prudent man would under the same circumstances and conditions, there is negligence." It is contended by appellant that the instruction first quoted fails to state the law applicable to a case where one method was safe and the other was unsafe, but the unsafe one was more convenient than the safe one, and where the unsafe one was more convenient than the safe one and was selected by the servant. But we think the objections to all these instructions are hypercritical, and that the jury were not misled by any fine distinctions which might possibly be discovered by a very logical and astute mind and one skilled in detecting distinctions in language. This remark applies also to the criticism on the last instruction which we have quoted, where an objection is made that the word "ordinarily" is misplaced, and the court, instead of using the words "acting with prudence," uses the language, "a person of

ordinary prudence." It is claimed that these instructions to the jury gave them their choice of tests, viz., a test of a person acting with ordinary prudence; the test of the conduct of an ordinarily prudent person acting in manner not stated; the test of a person of ordinary prudence acting in some manner not defined. We think that these objections are too refined to have any practical weight. The instructions as a whole, it seems to us, squarely place the issues, the duty of the servant and the duty of the master, respectively, before the jury, and that the verdict was rendered under instructions which were in no way prejudicial to the appellant.

There being no error discoverable, the judgment will be affirmed.

RUDKIN, C. J., and CHADWICK and CROW, JJ., concur.

(61 Wash. 281)

BUDMAN v. SEATTLE ELECTRIC CO.

(Supreme Court of Washington. Dec. 20, 1910.)

1. MASTER AND SERVANT (§ 286*)—INJURIES TO SERVANT—JURY QUESTIONS.

In a servant's action for injuries through being struck by defendant street railroad's car while working on the track, whether defendant's motorman was negligent *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1032-1035; Dec. Dig. § 286.*]

2. MASTER AND SERVANT (§ 285*)—INJURIES TO SERVANT—JURY QUESTION.

In a servant's action for injuries through being struck by defendant street railroad's car, whether the position in which plaintiff was found showed that it was physically impossible for him to have been struck by the car in the manner claimed by him *held* for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1035; Dec. Dig. § 285.*]

3. NEGLIGENCE (§ 136*)—PERSONAL INJURIES—CONTRIBUTORY NEGLIGENCE.

In a personal injury action where the facts are admitted, whether the acts shown constitute contributory negligence is for the court.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 291; Dec. Dig. § 136.*]

Department 2. Appeal from Superior Court, King County; R. B. Albertson, Judge.

Action by Michael Budman against the Seattle Electric Company. Judgment for defendant, and plaintiff appeals. Reversed and remanded, with instructions.

Jay C. Allen, for appellant. James B. Howe and H. S. Elliott, for respondent.

DUNBAR, J. The Seattle Electric Company was operating its cars in Seattle on a line that is known as the "Wallingford line." Some gravel and sand had been thrown upon the track where this accident occurred for the purpose of repairing or raising the ties. The most of this gravel which had not been used had been removed. There was still a little left to be removed, and the plaintiff

was left by the foreman to remove it, when one of the cars traveling on that line struck him, causing the injury for which he sues to recover. The case was tried to a jury, and resulted in a verdict in favor of the plaintiff, upon which defendant moved for judgment notwithstanding the verdict, which motion was sustained. Judgment was rendered accordingly, and from such judgment this appeal followed.

The plaintiff was a foreigner, 59 years of age and a common laborer, and had been in the employ of the defendant company about a month. According to his testimony, he was working at the time on the track, and his work required him to be in a stooping position. While in such position, the car struck him without any notification of its approach. He testified that all the cars that had come down the track prior to the one that hurt him had rung a bell, thereby notifying him of their approach, but that this one did not; that it was a double track, and that there was another car that had just passed on the other track which he had noticed; that he did not hear the car approach which hurt him, and he had no notification in any way of its approach; that if he had been notified of the approach of the car, or had seen it, he would have run and escaped it. The motorman testified that he saw the plaintiff approaching the track with his shovel when he was about two car lengths from him; that he threw off the current to let the car drift until he could see whether the plaintiff was going to cross the track; that, when the plaintiff got within about three or four feet of the track, he stopped perfectly still, set his shovel down on the ground, with his right hand on the top of the handle of the shovel, and looked straight down at the ground; that he was ringing the gong at the time for the purpose of attracting his attention, and he supposed that the plaintiff knew that the car was coming; that he let the car coast right on up, and did not know anything more about it until he heard something which sounded as though something fell against the car, "like it was a piece of wood." Then, he says, he made an application of the air and stopped the car, stepped over to the side of the window, and looked out, and saw the man lying down there in the street. So that it will be seen that as to whether notification was given by the sounding of the gong or ringing of the bell was a question upon which there was direct conflict of testimony. There was another witness who testified that he heard the motorman ringing the bell. The conductor on the train at the time, while not directly testifying that no gong was rung, impliedly testified so by stating that, when he heard this collision, he touched the bell for the purpose of notifying the motorman to stop the car; as he did not know that there was any effort to stop it.

The record, excluding that portion which treats of the character of the injury, is meager, and we have examined it with care, and have been forced to the conclusion that on the question of the negligence of the motorman in running the car on to the appellant the testimony is so conflicting that it should have been submitted to a jury. If respondent was negligent, it was because it failed to perform a legal duty in this case—a duty owing to the appellant by reason of their mutual relations, or by the doing of something which it should not have done. The respondent cites many cases to sustain its contention that the testimony shows negligence on the part of the appellant as a matter of law, among them *Skinner v. Tacoma Ry. & Power Co.*, 46 Wash. 122, 89 Pac. 488, *Dimuria v. Seattle Transfer Co.*, 50 Wash. 633, 97 Pac. 657, 22 L. R. A. (N. S.) 471, *Helliesen v. Seattle Electric Co.*, 56 Wash. 278, 105 Pac. 458, and *Mey v. Seattle Electric Co.*, 47 Wash. 497, 92 Pac. 283, all cases, of course, which were decided by this court. The case of *Skinner v. Tacoma R. & P. Co.* decided that a person was guilty of contributory negligence as a matter of law when, on a dark night, he stepped in front of an approaching street car, 10 feet away, with its headlight burning, and running near the speed limit, where he knew that the cars were accustomed to meet, and where the approaching car was in open view for a considerable distance. In that case it will be observed that the controversy was between a pedestrian and the street car company; while, in the case at bar, it is between the street car company and an employé, who was ordered into the position which he occupied by the company, and who was in that particular place in the performance of his duty—an entirely different proposition from the case of a pedestrian who, as a matter of course, must exercise his own judgment in relation to dangers which may beset him when crossing the car lines. In *Mey v. Seattle Electric Co.* we held that a pedestrian was guilty of contributory negligence precluding a recovery where he walked on a street car track, in a city where cars were constantly passing, at a point where the sidewalk and a part of the street were fenced off or taken up with building operations, where there was room every few feet for him to get off the track to allow a car to pass, and he failed to keep on the lookout for cars coming up behind him. In that case it was said: "It also appears from uncontradicted testimony that there was a passage a portion of the way between the fencing which inclosed the sidewalk and the car line and where the débris was piled that was wide enough to allow pedestrians to pursue their way and the street cars to pass without injuring them, and that a portion of the way there was not room; and that also at the point where the plaintiff was injured there was room between a carriage or hotel bus

and the railroad track for a man to pass without being injured. This being true, it seems plain that it was the duty of the appellant while traveling in close proximity to this track in a place where he testifies he knew that cars were passing at short intervals to have exercised the ordinary caution of noticing, when he passed those points where there was not room for both man and car, whether there was any car which was liable to injure him." We hardly see how the doctrine announced in this case, where the cars had no notification of the presence of a pedestrian on their track, where there was no duty owing to the pedestrian excepting to travel within the time prescribed by the law, to keep the ordinary lookout and to protect the pedestrian after he was discovered upon the track, if possible, but where the duty was upon the pedestrian to keep off of the track at the place where he was injured, and where he had an opportunity to keep off of it and still pursue his journey, can have any application to the facts of this case. The other two cases cited announced the same principles. In discussing the case of *Helliesen v. Seattle Electric Co.* it was said: "We cannot understand how one looking for a car can fail to see a lighted car with its headlight thrown on the track ahead of it and only 42 feet away." In this case the testimony of the appellant was to the effect that he was not looking for the approach of this car, for the reason that the custom had been to notify him when the car approached; that, if he had to be constantly looking out for the car, he would not have been able to do much work. In the fourth case we decided that a pedestrian who was run down by a team at a street crossing was guilty of contributory negligence as a matter of law, where it appeared that he held an umbrella over his head in such a position as to prevent him seeing the approaching team, and where, if he had looked around, he could have seen the team. The case, it seems to us, is not in point under the circumstances shown in this case.

The case of *Quinn v. Boston Elevated R. Co.*, 188 Mass. 473, 74 N. E. 687, which, as is stated by the respondent in its brief, was quoted with approval by this court in the case of *Helliesen v. Seattle Electric Co.*, supra, was where the plaintiff was not in the employ of the railway company at all, but in another employment, and was engaged in patching the floor of Harvard Bridge. He was stooping down and marking a plank when the running board of the car struck him in the face. There is no showing in that case that there was any duty on the part of the railway company to notify him, or that there was any knowledge on its part that he would be at the place where he was hurt when the train passed such place. In closing the opinion of that case the court said: "On the uncontradicted evidence we are of the opinion that the judge was right

in directing a verdict for the defendant. The plaintiff was working in a dangerous place, and was looking out for himself. He knew the danger of being too near the rail, for he testified that he was struck by a car near the same place five years before."

Eddy v. Cedar Rapids & M. C. Ry. Co., 98 Iowa, 626, 67 N. W. 676, was a case where plaintiff was working on a street, and he had placed a plank on the top of some crossing sleepers to level them, when he pushed one out so far that the car knocked the plank against him and injured him. But even in that case the judgment was reversed on account of errors in the instructions given by the court in taking away from the jury questions which ought to have been submitted to them. The court, speaking of the instruction, said: "There is no ground upon which this instruction can be sustained. It was a question of fact for the jury to determine whether under all the evidence the motorman was negligent in not giving a signal, if it was found he failed to do so." But, in any event, the plaintiff in that case had no relations with the railway company, and they had nothing more than the ordinary duties to perform towards each other. The case of *Stenzhorn v. City Electric Ry. Co.*, 159 Mich. 82, 123 N. W. 621, was where a street sweeper was injured, and for the reasons announced in the other case it was held that it was his duty as a matter of law to notice when he got close enough to the track to be in danger. And so with all the other cases cited.

In the early case of *McQuillan v. Seattle*, 10 Wash. 464, 38 Pac. 1119, 45 Am. St. Rep. 799, where the question of contributory negligence had been taken from the jury and decided by the court, this court said, speaking through Judge Anders: "Generally the question of contributory negligence is for the jury to determine from all the facts and circumstances of the particular case, and it is only in rare cases that the court is justified in withdrawing it from the jury"—citing very many cases to sustain the announcement. It further said: "There are two classes of cases in which the question of negligence may be determined by the court as a conclusion of law, but we think the case in hand does not fall within either of them. The first is where the circumstances of the case are such that the standard of duty is fixed, and the measure of duty defined, by law, and is the same under all circumstances. * * * And the second is where the facts are undisputed and but one reasonable inference can be drawn from them"—citing *Cooley on Torts*, p. 670, and 2 *Thompson on Negligence*, § 1236. These principles of law have been adhered to by this court since their announcement in that case, and were reaffirmed especially in the case of *Burlan v. Seattle*, 26 Wash. 606, 67 Pac. 214, where it was held that in an action to recover for damages resulting from being

run down by a cable car, where there was some evidence that no gong was rung, it was error to nonsuit plaintiff, since it became the duty of the jury to determine what the fact was as to sounding the gong, and whether a failure to sound it constituted negligence under all the facts of the case. There it was said: "Under our system of jurisprudence, the jury is constituted the functionary which must pass upon these questions of fact. It is not a question of what may be our individual opinions as to the facts shown by the record. The law casts that duty upon the jury as a distinct and auxiliary branch of the court, and, unless the evidence shows negligence on the part of appellant as a matter of law, it is his right to have the facts submitted to a jury. This court has held that generally the question of contributory negligence is for the jury to determine from all the facts and circumstances of the particular case, and that it is only in rare cases that the court is justified in withdrawing it from the jury."

In this case the testimony was conflicting. The plaintiff was at his post of duty on the track, and, if the jury believed his testimony and not the testimony of the defendant in relation to a notice which was or was not given him, they would be justified in deciding that the motorman was guilty of negligence. We are not prepared to say from the testimony of the motorman alone that the jury would not have been justified in concluding that the motorman had willfully committed this injury upon the plaintiff after having been notified of his presence on the track. It will be conceded, of course, that he had no right to run the plaintiff down even though he were guilty of contributory negligence in being upon the track where he had no business to be. It is true that a very alert and intelligent man might not have been willing to rely upon the notice which the plaintiff claims that he was to receive by the ringing of the bell and the sounding of the gong when the car approached; but it is a matter of common knowledge that men possessing the brightest and most alert minds, or even minds of ordinary alertness, are not found in employments of this kind, and they must be tested with reference to the character of mind possessed by men engaged in such employment.

There is also a claim that the position in which the plaintiff was found after he was knocked down shows that it was physically impossible for him to have been struck by the car in the manner in which he says he was struck. But the question of whether it was a physical impossibility under all the circumstances was a question to be determined by the jury. The facts being admitted, it is for the court, of course, to determine whether the acts shown constituted contributory negligence. But they were not

admitted in this case, and were the subject of the controversy. It might be possible for a case to be presented where the facts would show conclusively that the claim of an individual was a physical impossibility. But such cases are rare, and, where an accident has occurred that nobody was an eyewitness to, the mere fact that a man is found lying in a certain position is not conclusive that he was not struck in any particular way. When forcibly struck, the body of a man is liable to be thrown or hurled or twisted so that he might alight in almost any conceivable shape; and in this case we think it was plainly for the jury to determine whether the claim of the plaintiff was physically impossible. For this reason, we think the court erred in granting the motion for judgment notwithstanding the verdict.

The judgment will be reversed, and the case remanded, with instructions to pass upon the motion for a new trial, on grounds other than the ones discussed in this opinion; and, if said motion is denied, to enter judgment in accordance with the verdict.

RUDKIN, C. J., and CROW, J., concur.

(61 Wash. 276)

BURNS v. BRADFORD-KENNEDY LUMBER CO.

(Supreme Court of Washington. Dec. 20, 1910.)

1. FRAUDS, STATUTE OF (§ 26*)—PROMISE TO ANSWER FOR DEFAULT OF ANOTHER—STATUTORY PROVISIONS—ORIGINAL OR COLLATERAL CONTRACT.

Defendant's agent went to plaintiff and gave him the measurements for a blowpipe system to be installed in the mill of a lumber company, and, on the suggestion by the plaintiff that the company was in poor financial standing, the agent voluntarily said: "Well, send the statement on to them, and we will pay the bill." This promise was never reduced to writing. It appeared that defendant had some interest in the mill to which the blowpipe system was furnished. Rem. & Bal. Code, § 5289, provides that every special promise to answer for the debt of another shall be void, unless in writing. *Held*, that the agent's promise was an original promise not within the statute, and that the defendant was liable.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. § 39; Dec. Dig. § 26.*]

2. CORPORATIONS (§ 432*)—REPRESENTATION BY AGENT—AGENT'S ACT WITHIN APPARENT AUTHORITY—EVIDENCE.

In an action against a corporation to recover for machinery purchased by its agent, evidence held sufficient to sustain the finding that the purchase was within the scope of the agent's actual or apparent authority.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 1737; Dec. Dig. § 432.*]

3. FRAUDS, STATUTE OF (§ 17*)—DEBT OR DEFAULT OF ANOTHER.

Where the leading object of a promisor is to subvert some interest or purpose of his own, then, notwithstanding that the effect is to pay

or discharge the debt of another, his promise is not within the statute.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 16, 17; Dec. Dig. § 17.*]

Department 2. Appeal from Superior Court, Spokane County; E. H. Sullivan, Judge.

Action by H. J. Burns against the Bradford-Kennedy Lumber Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Polindexter & Moore and Richard G. Hutchinson, for appellant. Barker & Barker and C. C. Upton, for respondent.

DUNBAR, J. The respondent is a resident of the city of Spokane, in the business of manufacturing blowpipes and attachments for sawmills in Spokane. The Dehlbom Lumber Company, at the time of the transaction out of which this suit grows, was engaged in the manufacture of lumber products in the state of Idaho. The appellant is a Nebraska corporation, having an office in the city of Spokane, engaged in buying and selling lumber, and one George P. Newmeyer was its agent. Newmeyer, according to his statement, went to respondent's factory and gave him the measurements for a blowpipe system to be installed in the Dehlbom mill, which it is conceded was of doubtful financial standing. According to the respondent's statement, Newmeyer met respondent in the city of Spokane and told him that he thought he would have a job for him. About a week later he went to respondent's place of business, and gave him the measurements for a blowpipe system to be installed in the Dehlbom mill. Respondent told Newmeyer that the Dehlbom company did not have good financial standing, and Newmeyer, without being requested by respondent, said: "Well, you send the statement on to them, and we will pay the bill." Newmeyer denies that he ever told respondent that appellant would ever pay the bill for the blowpipe system. The system was manufactured and installed in the lumber company's mill. The appellant refusing to pay for the same, this action was brought, and in answer to the complaint the appellant denied that it had ordered the said system, or had agreed to pay for the same. The case was tried to the court without a jury, and judgment was rendered against the appellant in the sum of \$348.64, with costs. From that judgment this appeal is taken.

There is no controversy over the value of the goods furnished. The findings of fact were made by the lower court, all of which were excepted to by the appellant, the main and material one being that on or about August 21, 1900, defendant, through its agent, George P. Newmeyer, ordered of plaintiff a certain blowpipe system, to be shipped and

installed in a certain sawmill at Copeland, Idaho, operated by the Dehlbom Lumber Company. Two questions are presented by the appeal in this case: (1) Was the promise of Newmeyer, if he did in fact promise, an original promise and valid and binding though oral, or was it a promise to answer for the debt of a third person, which, to be valid, would have to be in writing? and (2) was the purchase of machinery within either the actual or apparent scope of Newmeyer's authority as agent of appellant?

We think there is no question but that the second query must be answered in the affirmative. As to the first, our Code provides (section 5289, Rem. & Bal. Code) that "every special promise to answer for the debt, default or misdoings of another person" shall be void unless it is in writing. It is the contention of the appellant that the circumstances of this case bring it within the prohibition of the statute, and many cases are cited to sustain the general doctrine that where one agrees to pay for goods that are furnished to another, or where one says to the merchant, "Let Mr. Blank have what goods he wants and I will pay for them, or I will see that they are paid for," such promise falls within the statute. But all of these cases where the contract on the part of the avowing party embraces the expression "we will see that the account is paid," or words to that effect, are easily distinguishable from the case at bar. In those cases the contract is generally made by one party, and the other party vouches for the payment of the bill. But in this case, if the testimony of the plaintiff is true—and we have no reason to think that the court erred in finding in effect that it was—there was but one party who dealt with the plaintiff in this transaction, viz., Newmeyer. It was he who, meeting the respondent prior to the transaction, told him that he would have a job for him. It was he who a week later, went to his place of business and ordered the goods, and gave the measurements of the mill, and arranged for the shipping and installing of the system. Under such circumstances, defendant would have been liable as an original purchaser even without any express promise to pay. It is true Newmeyer was ordering it sent to another party or company, and it is also true that in connection with his promise to pay he directed respondent to send the bill to the lumber company. But this might well have been for the purpose of keeping their accounts straight with the lumber company, or even with the hope that the lumber company would pay the bill. These were matters between the defendant and the lumber company with which the respondent had no concern. The testimony shows that the appellant had transactions with the lumber company in which the lumber company was to furnish lumber to the appellant, and that it became necessary for appellant's own benefit to have this system

installed in the lumber company's mill. An excerpt from the testimony of the respondent is as follows: "Q. You said that Mr. Newmeyer told you something about the Dehlbom people being slow or skeptical. A. It seems they had lost confidence in their credit or something. Q. That was in connection with installing the blowpipe system? A. Yes, sir; and other equipment they wanted around there. It was not altogether on this. Q. What further did he say, if anything, in regard to putting in this system at that time? A. He was to put it in; that they had to have that put in in order to get their lumber out. He said they had been monkeying along all spring up to this time, and that they had not got it out; that their orders were piling in on them, and they could not get their orders out on time without this being put in, and he took it into his own hands to have it put in." So that it appears from the respondent's testimony, which we have indicated bears the impress of truth, that the appellant's agent on his own initiative proposed to get the respondent this job; that he went up to Idaho for the purpose of seeing about the installation of the system and of obtaining the measurements; that, when he came back, he went to the respondent and gave him the measurements with specific instructions to have it taken up to Idaho and installed; that he asked respondent what the cost of the work and material would be; that the respondent told him that, if they had to stop to figure, it would delay the execution of the work some; and that the agent did not wish the delay and ordered them to proceed at once with the work, which was done. There is probably no branch of the law that has furnished the courts with as many cases as the statute of frauds and the distinctions drawn by the courts have frequently been exceedingly shadowy. The circumstances in each case are a little different from the circumstances in other cases, so that it is difficult to lay down a controlling rule or to determine what state of facts constitutes a promise to answer for the debt of another. Of course, if the facts show that the promise is collateral, the statute is invaded if the promise is not in writing. Chief Justice Shaw in *Nelson v. Boynton*, 3 Metc. (Mass.) 399, 37 Am. Dec. 148, announces the rule as follows: In case one says to another, "Deliver goods to A. and I will pay you," it is binding, though by parol, because A., though he receives the goods, is never liable to pay for them. But if he says, "I will see you paid," or "I will pay if he does not," or uses equivalent words showing that the debt is in the first instance the debt of A., the undertaking is collateral, and not valid unless in writing. There is also another rule which is well established, viz., that where the leading object of the promisor is to subserve some interest or purpose of his own, notwithstanding the effect is to pay or discharge the debt of another, his promise is not within

the statute. As we interpret the testimony in this case, the obligation is binding on the appellant, and the judgment is therefore affirmed.

RUDKIN, C. J., and CROW, MORRIS, and CHADWICK, JJ., concur.

61 Wash. 291)

MAYER et al. v. JACOB.

(Supreme Court of Washington. Dec. 21, 1910.)
TRUSTS (§ 110*)—CONSTRUCTIVE TRUSTS—EVIDENCE.

Evidence held to show that plaintiffs and defendant purchased land in equal shares entitling plaintiffs on their paying their just proportion of the price to an undivided two-thirds of the property.

[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 110.*]

Department 1. Appeal from Superior Court, Clarke County; Donald McMaster, Judge.

Action by Carrie Mayer and another against Mike Jacob. From a judgment for defendant, plaintiffs appeal. Reversed, with directions.

Miller & Crass, for appellants. Bauer & Greene and Jas. P. Stapleton, for respondent.

GOSE, J. The complaint in this case alleges that the respondent holds title to an undivided two-thirds of lot 8, block 9, in the city of Vancouver, in trust for the plaintiffs. The case was tried to Judge McCredie, and upon his retirement was determined by his successor in office Judge McMaster upon the transcribed testimony. From a decree in favor of defendant, the plaintiffs have appealed.

A short time prior to November 8, 1908, the respondent began negotiations with a Mr. Rowley, the agent of the owners of the property, with a view to purchasing it. The selling price was \$16,000, but the terms were not stated. On November 8th the appellants and the respondent entered into an arrangement between themselves for the purchase of the property. It was then agreed that they would purchase it in equal shares. They were desirous of getting the price reduced and of arranging the terms of payment. They wanted to pay one-half the purchase price in cash, and to secure time on the remainder. With this object in view, the respondent renewed the negotiations with the agent the following morning. The latter first demanded that the entire purchase price should be paid in money, but, upon the refusal of the respondent to treat with him upon a cash basis, he later agreed that he would accept one-half in money and give time on the balance. The agent demanded the immediate payment of \$500 earnest money. The respondent told him that the appel-

lant Mayer would pay it, which she did a few minutes later. A receipt was given her in her name for the \$500, and a contract for the sale of the property was executed by the owners to the respondent. The parties to the action all live in Portland, Or., but the appellant Mayer is engaged in business at Vancouver, Wash. The earnest money was paid at Vancouver, in the forenoon of November 9th. About 6:30 o'clock on that evening, the respondent rang up the appellant Glicksman at Portland, and the latter said to him: "Well, Mike, we got a good buy. Carrie [meaning the appellant Mayer] just came over." The respondent replied: "I guess it's all off. I have somebody else." The appellant Glicksman then called Mrs. Mayer, who continued the conversation with the respondent. The latter then informed her that he had sold a half interest in the property to another party, and that he would send her a check for the money she had paid, to which she demurred. Later in the evening a check for the amount was tendered and refused. The respondent asserts that the arrangement of November 8th was merely provisional, and that the appellant Mayer refused to unite in the purchase the following day for the reason that the price was too high, that she advanced the money as a loan, he agreeing to repay it the same day, and that he called her in the evening to notify her that he would send her the check. His testimony, however, as to the conduct of the appellants when he told them that he had taken in another party, makes his statement of the case appear improbable. He says that, when he told the appellant Glicksman that the latter was not in on the deal, he seemed excited, and that the appellant Mayer, when informed of that fact, "commenced to holler," and that her first exclamation was, "You played me a dirty trick." Between 11 and 12 o'clock of that evening, he called the agent, Rowley, to the telephone, and inquired of him in whose name the contract was taken. It is highly improbable that the appellants would have manifested so much displeasure at his statement that he had sold a half interest in the property to another party if they had voluntarily refused to unite in the purchase a few hours earlier in the day. The appellants claim that they were purchasing the property with a view of organizing a corporation, and building and establishing a department store. The respondent both affirms and denies this statement. Indeed, it may be said that his testimony in some respects is wanting in candor and impressiveness, whilst the testimony of the appellants has the ring of truth. The appellant Mayer asserts that she advanced the \$500 earnest money upon the understanding with the respondent that the appellants and the respondent were purchasing the property in

equal shares. We have not overlooked the testimony of the respondent's witnesses Simon and Ball. They gave evidence as to what they heard the respondent say at the telephone on November 9th, and that he used the name "Carrie," the name employed by the friends of the appellant Mayer in addressing her. The appellants are relatives. The appellant Mayer is a kinsman of the respondent by marriage. The appellant Glicksman was upon terms of intimate friendship with the respondent, and the parties have all sustained confidential relations for many years. Viewing the testimony as a whole, considering the conduct of the parties and the inferences that may reasonably be deduced, we are convinced that the appellants have sustained the burden which the law puts upon the party having the affirmative. A lis pendens was duly filed on November 11, 1908. Pending the action, the lot was conveyed to the respondent.

The judgment is reversed, with directions to enter a decree declaring the appellants to be the owners in equal shares of an undivided two-thirds of the property, upon their paying into the registry of the court their just proportion of the purchase price with legal interest.

RUDKIN, C. J., and FULLERTON, PARKER, and MOUNT, JJ., concur.

(61 Wash. 336)

BIRRELL v. GREAT NORTHERN RY. CO.

(Supreme Court of Washington. Dec. 21, 1910.)

1. NEGLIGENCE (§ 67*)—CONTRIBUTORY NEGLIGENCE.

Negligence is a relative question, and one's conduct, in determining his contributory negligence, must be measured with the line of ordinary prudence under the circumstances.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 90, 91; Dec. Dig. § 67.*]

2. RAILROADS (§ 383*)—INJURIES TO PERSONS ON TRACK—CONTRIBUTORY NEGLIGENCE.

Even to a stranger the presence of a railroad track is itself a warning of danger, suggesting care to escape being struck by passing trains, and one who deliberately walks along a railroad track, or in such close proximity to the rails as to be struck by passing train without making use of his senses to apprise him of danger, is guilty of contributory negligence.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1305-1310; Dec. Dig. § 383.*]

3. MASTER AND SERVANT (§ 236*)—INJURIES TO EMPLOYE ON TRACK—CONTRIBUTORY NEGLIGENCE.

Where a railroad employé passing along a smooth path familiar to him and well traveled between two main tracks, six feet wide from tie to tie, having switch stands in its center line about 100 feet apart showing a light, which path would afford plenty of room between passing trains and was comparatively safe, left such path and proceeded along a path about six inches wide beyond the end of the ties along a track upon which switch engines ran at all

hours and was struck by a passing engine, he was guilty of contributory negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 739; Dec. Dig. § 236.*]

Department 2. Appeal from Superior Court, King County; R. B. Albertson, Judge.

Action by Anna Birrell against the Great Northern Railway Company. Judgment for defendant, and plaintiff appeals. Affirmed.

E. P. Dole, for appellant. F. V. Brown and Frederic G. Dorety, for respondent.

MORRIS, J. Appellant is the widow of J. W. Birrell, who was killed by being struck by an engine of the respondent company on December 26, 1909, and brings this action to recover for such death. Upon the trial below the court directed verdict and judgment for defendant, and plaintiff appeals.

The accident occurred in the railway yards at Seattle. Deceased was a dining car conductor, and had been directed to exchange cars with another conductor named Chapman. They finished checking up their cars which were lying in the coach yards, about one-quarter of a mile south from the union depot, and, having received the O. K. of the commissariat office, started north through the yards to reach the exit at the depot. It was then about 7 o'clock in the evening, and dark. As they walked north, they proceeded along what is known as the six-foot path, being a space between the two main tracks, six feet wide from tie to tie. In the middle of this path about every 100 feet was a switch stand, which showed different colored lights at night, indicating to the engineers of incoming and outgoing trains the condition of the numerous switches or tracks running from the main track. Deceased and Chapman had proceeded but a short distance on this path when a passenger train south-bound left the depot, and passed them on the left or west track. They knew that trains were due to arrive and depart at about that time, and they concluded between themselves that this six-foot path was too dangerous, and that it would be safer to turn to the right, cross the east track, and walk north along a path running at the east of this track. To the right of this track was a marsh, wet and muddy, to which the ground on the east slopes, the path being on the top of the slope and about two feet wide, and the same distance from the track to its outer edge. From this path the ground slopes sharply to the marsh. The ties extended about a foot or a foot and a half beyond or outside of the rails, so that this path was from 6 to 12 inches wide outside the ties. It was not lighted. They had proceeded about 50 yards, walking side by side, Chapman along the slope and deceased upon the path, when suddenly Chapman says he felt something brush his shoulder, and saw Birrell thrown under a switch engine which had approached from the south without warning of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

any sort, and that he neither heard the sound of its approach nor saw any flash or showing of headlight along the track. There was testimony to the effect that this path was much used by employes leaving the yards, and that it was regarded as a safe way. Chapman further testified that the switch engine proceeded about two lengths after striking Birrell, when it stopped, and the engineer came back and said he did not see anybody upon the track, and that he was "firing at the time." Deceased had been running out of Seattle for about 3 months, returning every fourth day, and remaining some 32 hours before again taking his run. Upon each of these occasions he would walk through this same yard in leaving and returning to his car. It also appeared in the testimony that "there are local trains going in and out, and also two through trains around about that time," and that switching engines "are running all the time. * * * They have to work night and day, * * * and are running backwards and forwards there all the time, * * * working up and down the yards all day and all night." These are the main facts upon which the court below adjudged deceased guilty of contributory negligence, and upon which the ruling appealed from is predicated.

In determining the question of contributory negligence, it is difficult to announce a rule which will alike fit all cases. As is said in *Keefe v. Seattle Electric Co.*, 55 Wash. 448, 104 Pac. 774, cited by appellant, negligence is a relative question, and the conduct of deceased must be measured with the line of ordinary prudence. "The facts declare the law in such cases," and "it all comes down to the question of ordinary care under the given circumstances," and "it is only when * * * the situation as to negligence is so plain, clear, and unequivocal as to admit of but one answer that the court may declare negligence as a matter of law." *Henry v. Seattle Electric Co.*, 55 Wash. 444, 104 Pac. 776. Applying these rules for the measurement of the conduct of deceased, to determine whether or not he acted as a man of ordinary prudence would have acted at such a time, in such a place, with such a knowledge of the conditions confronting him and to be anticipated, we can make but one answer, the same as made by the court below. The courts have said over and over in deciding cases of this character, and it is the undoubted law that men who know and appreciate the dangers of their surroundings cannot throw the entire burden of their safety upon others. Nature has given men senses to aid them in self-protection, and when, under such circumstances as we have before us, men refuse to employ or use such senses in their protection, they are guilty of such contributory negligence as to preclude a recovery in case of injury. Deceased and Chapman were in a place of comparative safety upon a hard, dry, smooth-surfaced path, 6 feet wide from tie to tie, between two parallel tracks, having switch

stands in its center line about 100 feet apart, showing a light—a path familiar to them and doubtless often traveled, the path which naturally would suggest itself as the path to reach the exit. This is apparent from the fact that they took this path without any discussion as to the proper path to take, and it did not occur to them that it was dangerous until the train passed them on the west track, going south. Chapman testifies that the ordinary engine would extend a foot and a half over the rails; switch engines still farther. That would be about the distance of the ties beyond the rails, so that, if two trains should pass each other, a person walking on this path would have a safety zone approximately six feet wide, with its center line fixed by the lights of the switch posts. If such a path suggested danger to deceased because of the frequent passing of trains or switch engines on its parallel tracks, what greater safety could there be in the path chosen in its stead, approximately six inches wide beyond the end of the ties which extended from one foot to a foot and a half beyond the rail, giving a space two feet wide on top, then sloping sharply to the water, with no lights to guide one? If there was danger in the six-foot path from passing engines, because of the extension of the engine beyond or over the rails, it is difficult to see how there could be less danger walking on this second path, upon a space two feet wide, with a companion closely upon the right, walking upon the slope to the marsh, and the track closely upon the left, a space that must necessarily be swept by any passing engine; and then walking on with, so far as this record shows, no look to the rear to discover the possible approach of "local trains going in and out, and also through trains around about that time," or of switch engines "running backwards and forwards there all the time * * * up and down all day and all night."

To voluntarily leave a place of comparative safety (although it is apparent that there was, either night or day, no place of safety in that yard, except to the person using due care and caution), and take a position of apparent danger, has of itself often been declared such contributory negligence as will defeat recovery. Such rule, while authoritative, is not controlling here, as the negligence of deceased is to be attributed to his lack of caution and prudence as he proceeded along the east track, without taking any precaution for his safety, as much if not more than in leaving the six-foot track. Even to a stranger the presence of the track itself was a warning of danger, suggesting care to escape being struck by passing trains; and it has been often held that one who deliberately walks along a railroad track without making use of his senses to apprise him of danger is guilty of negligence. *D. & R. G. R. Co. v. Buffehr*, 30 Colo. 27, 69 Pac. 582; *Mo. Pac. R. Co. v. Moseley*, 57

Fed. 921, 6 C. C. A. 641; Gulf, C. & S. F. R. Co. v. Wilkins (Tex. Civ. App.) 32 S. W. 351; Neal v. Carolina Central R. Co., 126 N. C. 634, 36 S. E. 117, 49 L. R. A. 684; Spaven v. Lake Shore & M. S. R. Co., 130 Mich. 579, 90 N. W. 325; Davis v. B. & M. R. Co., 70 N. H. 519, 49 Atl. 108. In the Neal Case, supra, the court says: "We know that it has been held in many cases that a railroad company is liable for damages for carelessly and negligently running over and killing or injuring persons on its road in which it appeared that the persons killed or injured were also guilty of negligence. But there is a distinction, and we think upon examination that it will be found that, where the company has been held liable, it is in cases where the party injured was not upon equal opportunities with the defendant to avoid the injury and in cases where there was something suggesting to the defendant the injured party's disadvantage." The advantage, if any, here was with the deceased. He knew the switch engines were upon the track, constantly passing up and down. The engineer of a switch engine would have no reason to anticipate any one in the yard, or in such close proximity to the track as to be injured by the passing engine, except the employees of the railway companies, who knew the danger of the situation and would take due care to protect themselves. This distinguishes this case from *Averbuch v. G. N. Ry. Co.*, 55 Wash. 633, 104 Pac. 1103, relied upon by appellant. That was a crossing case, where the advantage of the situation was in favor of neither party, and where there was evidence that the plaintiff could not see the approaching train by reason of intervening obstacles; the question of negligence in approaching the crossing being for the jury where each party was equally bound to anticipate the presence of the other. Neither can appellant rely upon *Roth v. Union Depot*, 13 Wash. 525, 43 Pac. 641, 44 Pac. 253, 31 L. R. A. 855, as the ruling there in so far as it touches the question of contributory negligence is based upon the fact that the injured child was of tender years, and not held to the same degree of care as an adult. The same is true as to *Steele v. Northern Pacific Ry. Co.*, 21 Wash. 287, 57 Pac. 820.

The same reasoning which establishes the negligence of the respondent fixes the negligence of the deceased. If it was negligence for the engineer to run his switch engine without keeping watch ahead to guard against striking pedestrians whom he had reason to anticipate might be walking upon this path, it was equally culpable and negligent for deceased to walk along the track as he did, without taking heed of the presence of switch engines. The same situation presented itself to both deceased and the engineer. If the one must take heed of men walking

along or upon the track, the men so walking must take heed of the switch engines. That one walking along the track in such close proximity to the rails as to be struck by passing trains, without taking precaution for his safety, is guilty of contributory negligence, is established by many authorities. *Heflinger v. Minn. L. & M. Ry. Co.*, 43 Minn. 503, 45 N. W. 1131; *Gulf, C. & S. F. Ry. Co. v. Wilkins* (Tex. Civ. App.) 32 S. W. 351; *Tucker v. B. & O. Ry. Co.*, 59 Fed. 988, 3 C. C. A. 418; *Scott v. Pa. Ry. Co.*, 130 N. Y. 679, 29 N. E. 289; *Holmes v. S. P. C. Ry. Co.*, 97 Cal. 161, 31 Pac. 834; *Hill v. Ind. & V. Ry. Co.*, 31 Ind. App. 93, 67 N. E. 276; *Mizzell v. Southern Ry. Co.*, 132 Ala. 504, 31 South. 86; *Sharp v. Mo. Pac. Ry. Co.*, 161 Mo. 214, 61 S. W. 829; *Aerkfetz v. Humphreys*, 145 U. S. 418, 12 Sup. Ct. 835, 36 L. Ed. 758, and many others. *Thompson on Negligence*, § 1796, sums up the rule in this language: "Standing or walking so near the railway track as to be struck by a passing engine or train, or as to be drawn under the wheels by the atmospheric suction made by the train when in full motion is an act of folly of pretty much the same nature as standing or walking upon the track itself, and the courts, with great uniformity, characterize it as contributory negligence such as will prevent a recovery of damages by the person so injured, or by his personal representatives if he is killed." Such is the rule in this state. *Baker v. Tacoma Eastern R. Co.*, 44 Wash. 575, 87 Pac. 826, where the deceased when struck was crossing a track in a locality similar to the one here, having many tracks upon which engines were constantly passing and repassing. *Anson v. N. P. Ry. Co.*, 45 Wash. 92, 87 Pac. 1058, where the plaintiff was walking near the track and was struck by a passing engine. *Raines v. G. N. Ry. Co.*, 53 Wash. 570, 102 Pac. 431, where a fireman was cleaning out his engine on a side track, standing so near the main track that he was struck by a passing engine. *Woolf v. Wash. Ry. & Nav. Co.*, 37 Wash. 491, 79 Pac. 997.

Counsel for appellant says *Birrell* was not a railroad man, but a caterer; that he was not a trespasser, nor a licensee, but was using the railroad right of way as a way of necessity. So far as the facts before us are concerned, this is immaterial. We see no distinction in determining which of the above terms correctly defines the deceased. He was there. He knew the local situation. He knew he was in a position of great danger, calling for the exercise of caution and prudence on his part. He did not exercise such caution and prudence, and his failure to do so defeats recovery.

The judgment is affirmed.

RUDKIN, C. J., and CHADWICK, CROW, and DUNBAR, JJ., concur.

(61 Wash. 269)

HECKERT v. HILSCHER.

(Supreme Court of Washington. Dec. 20, 1910.)

1. APPEAL AND ERROR (§ 1002*)—REVIEW—VERDICT ON CONFLICTING EVIDENCE—CONCLUSIVENESS.

A verdict based on conflicting evidence will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.*]

2. DIVORCE (§ 249*)—AGREEMENT AS TO DISPOSITION OF PROPERTY.

A note, executed by a husband to his divorced wife under an agreement for the adjustment of their property rights, provided that the interest should be paid on the 1st day of every month, and if not paid before the expiration of 90 days from said 1st day, the whole sum was to become due and collectible at the option of the holder. The note, with stock as collateral security, was deposited with a trust company under a contract providing that, should the maker of the note fail in his obligations, and should the payee therein become entitled to receive the stock or to enforce payment of the note, then the trust company should hold the stock and note subject to such legal action as the payee might take. Held that, to bring about a forfeiture on default, the payee was required to take some affirmative step to show her intention or option to take advantage of the default, time not being the essence of the contract, and the commencement of an action by her would not be a sufficient declaration of forfeiture, where, after default, but before the beginning of the action, the default was removed by payment.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 704; Dec. Dig. § 249.*]

Department 2. Appeal from Superior Court, Spokane County; E. H. Sullivan, Judge.

Action by Louise Catherine Heckert against F. W. Hilscher. From a judgment for defendant, plaintiff appeals. Affirmed.

Merritt, Oswald & Merritt, for appellant. W. H. Plummer, for respondent.

PER CURIAM. The parties to this appeal were formerly husband and wife. In severing their matrimonial relations they had a property settlement. Respondent executed a promissory note for the sum of \$8,000, drawing a rate of interest equal to the sum of \$75 per month until March 1, 1911, and thereafter at the rate of 9 per cent. per annum. It was provided in the note that the interest should "be paid on the 1st day of each and every month, and if not paid on or before the expiration of 90 days from said 1st day, the whole sum of both principal and interest to become due and collectible at the option of the holder of this note," etc. At the same time the parties made the Union Trust Company, of Spokane, a depository to hold the note and the collateral which was deposited to secure its payment, under a contract in writing which provided: "Should, however, the said second party fail in behalf of his obligations in respect to said note, and should the said party of the first part

under the terms of this agreement become entitled to receive said stock, or to enforce payment of said note in any way, then and thereupon the trust company shall hold said stock and said note subject to such legal action, if any, as the first party may elect to take." Respondent did not make the November, 1909, payment, as provided in the note, and had not done so on the 1st day of February, 1910. On the 2d day of February this action was begun, and on the same day the respondent paid the \$75 into the trust company.

The case turned below, and must turn here, on a question of fact, Was the payment made before the action was begun by the service of the complaint and summons? The testimony is conflicting, and a review of it would serve no useful purpose. We are content to follow the trial judge, who found that the burden of proof had not been sustained by appellant. It is earnestly contended by the appellant that in law a payment after the expiration of the 90-day period would not relieve respondent of the consequences of his default, and that a forfeiture would result, because under the terms of the escrow agreement the trust company could not accept the payment and bind appellant. Reliance is put upon that part of the contract quoted above; but it seems to us that appellant could not declare a forfeiture of the contract without some affirmative act or declaration manifesting her intention or option to do so in some way provided in the contract or recognized by the law. Weinberg v. Naher, 51 Wash. 591, 99 Pac. 736, 22 L. R. A. (N. S.) 936. Mindful of this rule, she attempted to meet it by beginning her action. But the court found respondent had purged himself of his default at the time the action was begun. Time is not made the essence of the contract. The option to defer payments, granted upon sufficient consideration, is a valuable right, and cannot be taken away, unless it clearly appears that the intention of the moving party to declare the default or invoke the penalty has been exercised within time.

Judgment affirmed.

(61 Wash. 294)

BEEBE v. NORTHWESTERN DAIRY CO.

(Supreme Court of Washington. Dec. 21, 1910.)

APPEAL AND ERROR (§ 430*)—PARTIES—NOTICE OF APPEAL.

Where the complaint alleged that defendant was a domestic corporation, and the answer alleged that it was a foreign corporation, and the sheriff's return of service of process failed to indicate whether a domestic or foreign corporation was served, and plaintiff did not show affirmatively that there was a domestic and a foreign corporation of the same name, an appeal from a judgment against the foreign corporation, rendered after separate defaults against the domestic and foreign corporations,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

will not be dismissed because of the failure to serve notice of appeal on the domestic corporation.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2173; Dec. Dig. § 430.*]

Department 2. Appeal from Superior Court, King County; J. Stanley Webster, Judge.

Action by Margaret Beebe against the Northwestern Dairy Company. From a judgment for plaintiff, defendant appeals. Motion to dismiss appeal denied.

Byers & Byers, for appellant.

PER CURIAM. Action by Margaret Beebe against Northwestern Dairy Company, a corporation, to quiet title. In paragraph 1 of her complaint plaintiff alleged "that defendant is a corporation incorporated and existing under and by virtue of the laws of the state of Washington." Northwestern Dairy Company, by its attorneys, moved to strike portions of the complaint. This motion was denied. Thereafter Northwestern Dairy Company, appearing by the same attorneys, filed an answer, in which, after denying paragraph 1 of the complaint, it affirmatively alleged "that this defendant is a corporation duly organized, created, and existing under and by virtue of the laws of the state of Oregon, and has filed its articles of incorporation in the office of the Secretary of State of the state of Washington, and has paid its license fee last due." Plaintiff's demurrer and motion to strike this answer were both sustained. Thereafter separate defaults were granted against Northwestern Dairy Company of Washington and Northwestern Dairy Company of Oregon, and judgment for costs was entered against Northwestern Dairy Company of Oregon, which corporation has appealed.

The respondent has moved to dismiss, for the reason that no notice of appeal has been served upon the Northwestern Dairy Company of Washington. In presenting her motion to dismiss, respondent insists that the record discloses the existence of two corporations of the same name, one organized in Washington and the other in Oregon; that they made separate appearances, but that the Oregon corporation only has appealed. The appellant insists that one corporation only exists, it being the appellant incorporated in Oregon. The sheriff's return fails to indicate whether a domestic or foreign corporation was served. The motion to strike did not state that the defendant then appearing was either a domestic or foreign corporation. When the answer was filed, it appeared therefrom that the defendant claimed itself to be an Oregon corporation. The record thus indicates the existence of one corporation only, and appellant could not serve the notice of appeal on any other defendant. If there is a Washington corporation, as alleged in the complaint, but denied by the an-

swer, respondent should affirmatively show that fact in support of her motion to dismiss. We do not find that appellant failed to serve its notice of appeal upon any other corporation that had appeared.

The motion to dismiss is denied.

(61 Wash. 301)

HORTON v. CITY OF SEATTLE.

(Supreme Court of Washington. Dec. 21, 1910.)

MUNICIPAL CORPORATIONS (§ 741*)—PERSONAL INJURIES—NOTICE OF CLAIM—EVIDENCE.

Plaintiff, in her notice of claim for injuries sustained by the alleged negligence of a city, charged that she was greatly bruised and injured and her whole right side was paralyzed. She also stated that she suffered great pain under her kidney and hip joint and in the right leg. *Held*, that such statement of her injury was sufficient to sustain evidence of pain in the back and shoulder, of paralysis in the right arm, and injury to her hand and right side of the back.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1562; Dec. Dig. § 741.*]

Department 1. Appeal from Superior Court, King County; Wilson R. Gay, Judge.

Action by Minnie Horton against the City of Seattle. Judgment for plaintiff, and defendant appeals. Affirmed.

Scott Calhoun and James E. Bradford, for appellant. Blaine, Tucker & Hyland and Robert C. Saunders, for respondent.

PARKER, J. This is the second appeal in an action to recover damages for personal injuries. The first appeal was disposed of in our decision reported in 53 Wash. 316, 101 Pac. 1091, when the cause was remanded for a new trial because of errors occurring in the first trial. A new trial resulted in a verdict and judgment in favor of the plaintiff, and the city has again appealed.

It is first contended that the trial court erred in admitting evidence over appellant's objections tending to show injury to the shoulder and back of the respondent, upon the ground that no statement of such injury was made in the notice of her claim filed with the city as required by its charter. The statement in her claim involved in this contention is as follows: "She was greatly bruised and injured, and her whole right side was paralyzed, and she suffered great pain under her kidney and right hip joint, and she also suffered severe pains in her right leg."

Respondent was permitted to testify, among other things, as follows: "A. Well, my back hurt me so bad that I could not hardly lift anything. * * * A. * * * My back hurts me all the time. I can't lift buckets of water, nor nothing of that kind. * * * Q. Was your shoulder affected by that fall? A. Yes; I think the doctor said my right shoulder was about an inch lower than my left

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

one. * * * Q. Now, you say that at the time of the accident this right leg and right arm were paralyzed; is that right? A. Yes, sir; pretty nearly so, I think. Q. I wish you would state to the jury what the condition has been since that with reference to your right limbs? A. Well, my right hand is cold all the time, and my right foot is cold, and I don't—I can't feel much with that one, and I froze my foot not very long ago, and I didn't know it was froze until I got home. * * * A. Well, I just thought my whole back was hurt. I could not specify that my shoulder was hurt apart from anything else. It was my whole back from my shoulder to my hips."

Her physician was permitted to testify, among other things, as follows: " * * * The muscles under the shoulder blade, attached to the shoulder blade on the right side, were in a state of tensity. * * * A. What I mean by the back is the right, side of the back, understand, and around as far as the muscle that I have described has a function; that is, it is attached all the way along the shoulder blade, and will extend pretty well forward, or at least almost to the median line on the side. There is tenderness about both this muscle and over the muscle of the attachment to the wings of the vertebræ on that side. And this tenseness and spastic condition of the muscles attached to the shoulder blade has a tendency to pull the right shoulder down, keeping it in a state of contraction. * * * "

It seems clear to us that, under the liberal rule heretofore adopted by this court relating to the sufficiency of a notice of claim such as is here involved, this evidence was all admissible. We have not quoted all of the evidence of this nature objected to; but that above quoted will show its general nature, and we think comes the nearest to being objectionable of any of it. We think it is easy to see that it all has some relation to her claim that her "whole right side was paralyzed." And her reference in her claim to her "great pain under her kidney," of course, relates to pain in the region of the back. We think there was no error in admitting this evidence.

It is next contended that the court was in error in admitting evidence relating to respondent's loss of time and earning capacity, upon the ground that the pleadings did not put that matter in issue. A critical examination of this evidence might disclose a possible technical error; but the evidence is little more than an incidental reference to her earning capacity, and it was not followed up by any attempted showing as to the amount of time she had lost because of the injury. If there was any error in this regard, it was too insignificant to warrant reversal of the cause.

It was further contended that the question of the city's negligence and of respondent's

contributory negligence should have been taken from the jury and decided in the city's favor as a matter of law. We deem it sufficient to say in answer to this contention that a careful review of all of the evidence convinces us that it was clearly sufficient to require the submission of these questions to the jury.

The other assigned errors are clearly without merit, and we do not think they require discussion. We find no prejudicial error in the record.

The judgment is affirmed.

RUDKIN, C. J., and MOUNT, GOSE, and FULLERTON, JJ., concur.

(61 Wash. 381)

JAGGY et ux. v. ROONEY et ux.

(Supreme Court of Washington. Dec. 30, 1910.)

1. APPEAL AND ERROR (§ 1011*)—REVIEW—FINDINGS.

Findings of fact of the trial court on conflicting evidence will not be disturbed on appeal. [Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.*]

2. BOUNDARIES (§ 52*)—PROCEEDINGS TO ESTABLISH—APPOINTMENT OF COMMISSIONERS—DISCRETION OF COURT.

Rem. & Bal. Code, § 948, provides that the court, in proceedings to establish a lost boundary, may in its discretion appoint commissioners, not exceeding three, who shall, before entering upon the discharge of their duties, take an oath to faithfully discharge them, and shall make a report to the court, which shall be advisory. *Held* that, the appointment of the commissioners being discretionary, the court may appoint one or more as in his discretion, from the facts before him, seems best.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 253-263; Dec. Dig. § 52.*]

3. APPEAL AND ERROR (§ 1044*)—HARMLESS ERROR—PROCEEDINGS TO ESTABLISH BOUNDARY.

The report of such a commissioner being merely advisory, a mere irregularity, such as his failure to be sworn before entering upon his duties, is not ground for reversing the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4122, 4123; Dec. Dig. § 1044.*]

4. APPEAL AND ERROR (§ 945*)—REVIEW—DISCRETION OF COURT.

The trial court's action upon discretionary and advisory matters is not reviewable by the Supreme Court, since it cannot be determined what the effect of such matters was upon the court's mind, or to what extent, if any, his judgment was influenced or based upon such matters.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3811; Dec. Dig. § 945.*]

Department 2. Appeal from Superior Court, Clarke County; Donald McMaster, Judge.

Action by John Jaggy and wife against Patrick Rooney and wife. Judgment for plaintiffs, and defendants appeal. Affirmed.

Jos. P. Stapleton, for appellants. H. W. Arnold and A. L. Miller, for respondents.

MORRIS, J. Action to establish a lost boundary. Findings and decree for plaintiffs, and defendants appeal.

The defense was a denial of all the allegations of the complaint, save ownership of the lands in controversy, and an affirmative defense pleading the establishment of a true boundary fence for a period of 30 years. The evidence was very conflicting, and so far as the findings represent the facts submitted to the court, and his determination thereof, we are not disposed to disturb them, under the long-established rule of this court. Some legal questions are presented in the errors suggested, which we will pass upon.

The court appointed three commissioners to establish the boundary in question. They were unable to agree, and were discharged. The court thereupon appointed one commissioner, who was one of the three previously appointed. It appears from the record that this commissioner failed to take the required oath. He nevertheless proceeded with his duties, made his report, and the same was accepted by the court. Appellants contend that the statute does not contemplate the appointment of one commissioner, and any report made by such single commissioner is valueless. Further, this commissioner, not having been sworn as directed by the statute, was not in fact a commissioner, and his report is valueless for such reason. The statute (Rem. & Bal. Code, § 948) provides that the court may in its discretion appoint commissioners, not exceeding three, who shall, before entering upon the discharge of their duties, take an oath to faithfully discharge the same. They shall make a report to the court, which said report shall be advisory. Under the statute the appointment of commissioners is purely a discretionary matter with the court, and any report made and filed by such commissioners is of no value, except as advisory to the court, should he deem it best to accept it as such. *Stangair v. Roads*, 41 Wash. 583, 84 Pac. 405. And since such appointment is discretionary with the court, he may appoint one or more commissioners, as in his discretion, from the facts before him, seems best. *Strunz v. Hood*, 44 Wash. 99, 87 Pac. 45.

No error can therefore be predicated on the court's failure or refusal to appoint more than one commissioner; and since the report of such commissioner is of no final probative value, but only advisory, a mere irregularity such as the failure to be sworn before entering upon the discharge of his duties, cannot be regarded as reversible error here. Such report being merely advisory, the court may reject it as a whole, or receive it in part. He may accept it in so far as it agrees with his conclusions upon other facts presented to him, or refuse to give it any weight. The court's action upon discretionary and advisory matters is not subject to review in this court, since we have no way of determining the effect of such matters upon the mind of

the court, or to what extent, if any, his judgment has been influenced or based upon such matters.

Much evidence was before the court upon all the disputed issues. Many witnesses testified as to the fence claimed as the true boundary, and as to witness trees, earth mounds, and other indicia of the original government survey. Slashings, clearings, cultivation of crops, and other improvements upon and in the disputed line were by the testimony called to the court's attention, from all of which the court reached his conclusion. To what extent, if any, he made use of the report of the commissioner in its advisory nature, we have no means of ascertaining. He may have given great credence to it. He may have rejected it altogether.

Finding no error, the judgment is affirmed.

RUDKIN, C. J., and CHADWICK, DUNBAR, and CROW, JJ., concur.

(61 Wash. 365)

COLE v. HUNTER TRACT IMPROVEMENT CO.

(Supreme Court of Washington. Dec. 29, 1910.)

VENDOR AND PURCHASER (§ 31*)—RESCISSION OF CONTRACT—MISTAKE—IGNORANCE OF RACE OF PURCHASER.

In the absence of fraud, mistake of a vendor of a lot as to the race of the purchaser, he being a negro, is no ground for rescission; the fact not being of the essence of the contract.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 35-37; Dec. Dig. § 31.*]

Department 1. Appeal from Superior Court, King County; A. W. Frater, Judge.

Action by David Cole against the Hunter Tract Improvement Company. Decree for plaintiff, and defendant appeals. Affirmed.

Hughes, McMicken, Dovell & Ramsey, for appellant. Andrew R. Black, for respondent.

PARKER, J. This is a suit to enforce specific performance of a contract for the purchase of real property. A trial resulted in a decree of specific performance in the plaintiff's favor, and the defendant has appealed therefrom.

The facts affecting the rights of the parties may be summarized as follows: The appellant is the owner of a large addition to the city of Seattle, which is generally regarded as high-class residence property. The respondent is of the negro race. The appellant claims, and introduced evidence tending to show, that if sales of lots in this addition were made to people of that race, it would depreciate the value of the addition as residence property, and result in material loss to appellant, and that for that reason appellant has refrained from selling to negroes. In 1907 appellant entered into

a contract for the sale of one of the lots to respondent. The contract was executed by appellant by its president and secretary, and was executed by respondent, by A. R. Black, his agent and attorney. Appellant did not know that respondent was a negro until after all payments had been made upon the purchase price, and he was entitled to a deed under the terms of the contract, a year or more after its execution. There is no evidence that respondent purposely concealed from appellant that he was a negro, nor that he knew that the fact of his being a negro would have induced the appellant to refrain from selling him the lot. The consummation of the sale in respondent's behalf by others was evidently because of the fact that his business rendered it more convenient to have the matter attended to in that way. We may also add that the evidence does not show that any of the persons dealing with appellant for respondent knew that the fact of his being a negro would have induced appellant to refrain from selling him the lot. Upon discovering that respondent was a negro, appellant offered to refund to him the purchase money, with interest, and refused to give him a deed, upon the sole ground that he was a negro, and that appellant did not know that fact at the time the contract was made, nor until after the purchase price was paid.

The substance of appellant's contention is that these facts show such a mistake on its part as will entitle it in equity to rescind this contract and avoid specific performance thereof. We cannot agree with this contention. It seems to us that this mistake is not of the essence of the contract. It may have to do with the motive of appellant in making sales of lots in the addition; but we are unable to see how, in principle, this mistake differs from a mistake in value of a thing which may be the subject of a sale. It is not claimed that there was any fraud in this transaction. Of course, there could not be, because both parties were ignorant of facts which would have induced appellant not to make the sale. Both parties were not ignorant of the same facts, it is true; but appellant not knowing that respondent was a negro, and respondent not knowing that such fact would influence appellant not to make the sale, it is the same in effect as if they were both ignorant of some single fact affecting appellant's motive—such, for instance, as both being ignorant of and mistaken as to the real market value of the lot. If there is any difference here as to the obligation resting upon the respective parties to inform themselves as to the facts which would induce appellant not to make the sale, it would seem more just to require appellant to inform itself as to the race of respondent than to require respondent to inform himself as to appellant's

desire not to sell to negroes. Appellant certainly had more reason to pay attention to facts affecting its own motives than respondent had to suppose that such motives would be affected by the mere fact that he was a negro.

It may well be argued that there was no mistake on the part of appellant as to the person of respondent. There was no mistake as to his ability to perform his contract, but only as to his color, which in no way affected the rights of either party, as expressed by the terms of this written contract. While respondent's color would have induced appellant not to make the sale, had it known that fact, that was not of the essence of the contract, but related to a supposed influence that such a contract would have upon other interests of appellant. It seems to us that this mistake does not come as near being related to the rights of the parties under the contract as a mistake in the value of the thing sold would, and it seems clear that a mistake of that nature, in the absence of fraud, with the parties standing at arm's length, would not entitle either party to rescind. *Sankey's Executors v. First National Bank*, 78 Pa. 48; *Dambmann v. Schulting*, 75 N. Y. 55; *Stettelmer v. Killip*, 75 N. Y. 282; *Comer v. Granniss*, 75 Ga. 277.

We have not had any decisions of the courts called to our attention involving a mistake of this exact nature; but we think the cases above cited are applicable to the principle here involved. We are of the opinion that the decree of the learned trial court should be affirmed.

It is so ordered.

RUDKIN, C. J., and MOUNT, GOSE, and FULLERTON, JJ., concur.

(61 Wash. 351)

HALL v. NORTHWEST LUMBER CO.

(Supreme Court of Washington. Dec. 27, 1910.)

1. MASTER AND SERVANT (§ 280*)—INJURIES—ACTIONS—JURY QUESTION—NEGLIGENCE.

In bringing logs from the woods and loading them on cars defendant lumber company used a wire cable running from the woods to the loading place, to which was attached a "skidder," which held the logs while they were drawn to the loading place, and the apparatus used for loading the logs consisted of a pulley through which a wire cable ran to which was attached a pair of hooks which were fastened into the log, which was lifted onto the cars by a pull on the cable by a steam winch. Plaintiff was directed by his foreman to attach the hooks to a log some 40 feet in length, which lay somewhat back from the pulley, and in line with the skidder, and was going to do so when he noticed the skidder coming from the woods, when he hurriedly fastened the hooks to the log, and was attempting to escape when the foreman signaled to have the log pulled, which was done somewhat quickly, and the log instead of pulling straight out as was expected, caught

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

on a stump, causing the other end to swing around and strike plaintiff. *Held* that, whether the foreman was negligent in not foreseeing that the log might swing around and strike plaintiff, so as to make it his duty to have waited until plaintiff was out of the way before signaling for the log to be hoisted, was for the jury in an action for plaintiff's injuries.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1032, 1033; Dec. Dig. § 288.*]

2. MASTER AND SERVANT (§ 190*)—MASTER'S LIABILITY—NEGLIGENCE OF SUPERINTENDENT.

The work of loading the logs with the apparatus used was such as to require supervision, so that the employer was liable for injuries caused by the negligence of the foreman selected by it to supervise the loading.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 449-474; Dec. Dig. § 190.*]

3. MASTER AND SERVANT (§ 185*)—MASTER'S LIABILITY FOR NEGLIGENCE OF SUPERINTENDENT.

Where an employer reserves the right to superintend and direct the work of employes, he is liable for the negligent performance of the duty of superintendence, whether it is undertaken by himself personally or one employed by him for that purpose.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 385-421; Dec. Dig. § 185.*]

4. TRIAL (§ 143*)—JURY QUESTIONS—CONFLICTING EVIDENCE.

A disputed question of fact is for the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 342, 343; Dec. Dig. § 143.*]

5. APPEAL AND ERROR (§ 204*)—OBJECTIONS—ADMISSION OF EVIDENCE.

Error cannot be predicated in the Supreme Court on objections to the admission of evidence not made in the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1258-1280; Dec. Dig. § 204.*]

6. TRIAL (§ 267*)—INSTRUCTIONS—REQUESTS.

It is sufficient if requests for instructions be given in substance; it not being necessary that the very language of the instructions be used.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 663-672; Dec. Dig. § 267.*]

7. TRIAL (§ 29*)—CONDUCT OF JUDGE.

A question of the trial court, in a servant's injury action against a corporation, whether certain counsel, whose names appeared on the pleadings, were not the general attorneys for an officer of defendant, was not objectionable as tending to inform the jury that others of defendant's counsel were regularly employed counsel of a surety company; such an inference not being justified from the question.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 29.*]

8. APPEAL AND ERROR (§ 1070*)—HARMLESS ERROR—RECEPTION OF VERDICT.

Though it was only necessary for the trial court to ask the jurors whether the verdict returned was their verdict, any error in asking each of the jurors how they found on certain questions, which were necessary to be decided in order to arrive at the verdict returned, was not so prejudicial to defendant as to require a reversal of a judgment for plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1070.*]

9. DAMAGES (§ 132*)—EXCESSIVE DAMAGES—PERSONAL INJURIES.

The femur of plaintiff's left leg was broken and the broken bone has not united, though two operations have been performed thereon, in one of which the broken ends of the bone were wired together and the medical experts differed as to the probability of the bone ever being in better condition. Plaintiff was 23 years of age when injured and was rendered incapable of pursuing any calling requiring a standing position. *Held*, that a verdict for plaintiff for \$10,000 was not excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 372-385; Dec. Dig. § 132.*]

10. COSTS (§ 185*)—MILEAGE.

Mileage may be properly claimed by the successful party for the first time in the cost bill, though the witnesses did not make claim therefor to the clerk when reporting their daily attendance.

[Ed. Note.—For other cases, see Costs, Dec. Dig. § 185.*]

11. COSTS (§ 188*)—DISBURSEMENTS—WITNESSES—INTERPRETER'S FEES.

The reasonable fees which plaintiff was compelled to pay for interpreters to procure the testimony of his witnesses are taxable as a part of his disbursements upon recovery by him.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 659; Dec. Dig. § 188.*]

Department 1. Appeal from Superior Court, King County; Wilson R. Gay, Judge.

Action by John Hall against the Northwest Lumber Company. From a judgment for plaintiff, defendant appeals. Affirmed.

John P. Hartman and Byers & Byers, for appellant. Brady & Rummens, for respondent.

FULLERTON, J. The respondent was injured while employed in the logging camp of the appellant, and brought the present action to recover therefor. There is no substantial dispute in the record as to the cause of the accident. The appellant was engaged in bringing logs in from the woods and loading them on cars. In the operation it made use of two distinct apparatuses, the first of which was known as a Lidgerwood skidder. This consisted of a wire cable stretched from the loading place into the woods over which was operated the skidder proper; the skidder being a couple of sheave wheels fastened in a frame in such a manner as to roll on the wire cable while carrying a weight swinging below. The method of drawing logs in from the woods was to fasten one end onto the skidder, hoist it up sufficiently high to clear obstructions, and then draw it in to the loading place by means of a cable operated by a steam winch. The second apparatus was used for loading the logs. It consisted of a pulley fastened to supports directly over the railway track, through which was run a wire cable leading from the drum of another steam winch. The end of the cable passing through the pulley was fastened to a pair of hooks locally known as tongs. These tongs would be fastened into a log which would be lifted from the ground onto the railway cars

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

by means of a pull on the cable by the steam winch. The loading crew consisted of the winchman, the loader, and the tong tender; it being the duty of the last named to fasten the tongs into the logs preparatory to lifting them onto the cars. The work of the logging camp was under the direction of one Dan Williams, and on the day of the injury he was superintending the loading of the cars. After two cars had been loaded and the third one almost finished, Williams directed the respondent to hitch on to a log some 40 feet in length, that lay some little distance back from the overhead pulley in the line of the path of the skidder that brought the logs in from the woods. The respondent gathered up the tongs and proceeded towards the log pointed out, and had nearly reached it, when he noticed the skidder coming in from the woods dragging a log. It was almost upon him and he hurriedly fastened the tongs and sought to escape by running in the direction of the railroad track, at right angles to the track of the approaching log. Just as he started Williams gave the signal to pull away on the log to which the tongs were hooked. The winchman obeyed the signal, starting the log somewhat quickly. Instead of the log pulling straight out as was expected, the front end caught on a stump, which caused the other end to swing around in the direction the respondent was endeavoring to make his escape. The log struck him before he could get beyond its reach; the blow breaking the femur of his left leg and otherwise injuring him. At the trial the jury returned a verdict in his favor for \$10,000, and judgment was entered for this sum. This appeal was taken therefrom.

The assignments of error first to be noticed relate to the sufficiency of the evidence; it being contended that the evidence fails to show any negligence on the part of the appellant which was the proximate cause of the injury. But we think negligence was clearly shown. It lies in the foreman's act of starting the haul on the log before the respondent was out of the zone of danger. No doubt, it was the foreman's desire to get the log out of the way of the incoming log brought by the skidder, but from its position he ought to have foreseen that it was liable to catch upon some one of the intervening stumps, and swing around to one side or the other. Common prudence dictated that he should have waited until the respondent was clear of the swinging end. At least, these were questions for the jury, and were properly submitted to them by the court.

But it is said that it was no duty of the master to superintend the work in which the respondent was engaged, and hence when the foreman undertook to direct the work his acts were but those of a fellow servant, for which the master is not liable. But the work was of such a character as to require concert of action on the part of the several workmen engaged in its performance, and

could not proceed with any degree of efficiency without the immediate and direct supervision of some one. When the master therefore took the burden upon itself of selecting such a supervisor, it became responsible for the acts of the person so selected, and if he performed his duties negligently, it became responsible to any one injured by such negligent performance. *Anderson v. Globe Navigation Co.*, 57 Wash. 502, 107 Pac. 376; *Engelking v. Spokane*, 110 Pac. 25; *Olson v. Erickson*, 53 Wash. 461, 102 Pac. 400.

What might have been the rule had the master employed the men and directed them to do the work required in any manner they saw fit, and they had chosen their own supervisor, we need not inquire. But where the master employs the men as laborers merely, reserving to himself the right to superintend and direct their work and the manner in which they shall perform the work, he becomes liable for a negligent performance of the duty of superintendence, no matter whether he undertakes to perform the duty individually or intrusts it to another. In such a case the person so selected is the master's representative, not the representative of the servants.

It is next insisted that the respondent was guilty of contributory negligence. It is assumed that the tongs were not placed in a proper position upon the log it was intended to haul, and that the accident was the result of their improper placement. But this was a disputed question, and as such, for the jury.

The appellant next objects that certain X-ray photographs of the respondent's injured leg were admitted in evidence without sufficient identification. But an examination of the objection made by counsel to their introduction, made at the time they were offered, does not include this specific objection. They were clearly admissible as against the objections made to their introduction, and error cannot be predicated in this court on objections not suggested to the trial court.

It is further objected that the court erred in refusing to give certain instructions requested by the appellant. On the trial of the cause it was sought to show in defense of the respondent's action that one Dan Williams, and not the appellant, was operating the logging camp in which the respondent was injured, and that he, if any one, was responsible for any injury received by the appellant. Certain instructions were asked presenting this question to the jury, which the court gave in a modified form. The modification consisted in stating more fully to the jury the matters to be considered by them in arriving at their verdict, than were contained in the requested instructions. But we find nothing in the modification made that is improper. The appellant's contention was fully and fairly presented. This satisfied the rule. As we have often said, it is not necessary that the court give to the jury a re-

quested instruction in the language in which it is presented; it is sufficient if the instruction is given in substance.

The appellant complains that it was prevented from having a fair trial because of certain remarks made by the judge during the course of the trial. But an examination of the record leading up to them convinces us that they could not have been prejudicial. They were, with the exception of one or two instances, pertinent to the matter under consideration; the only fault that can be found with them being that they were couched in language somewhat redundant and not at all times very well chosen. Those that seem to have no pertinency to the particular matter in hand seem to us also to be without prejudice. The one thought to be most flagrant being a question, asking if certain counsel, whose names appeared on the pleadings, were not the general attorneys for an officer of the appellant. This is thought to be prejudicial, because certain other attorneys who appeared for the appellant were regularly employed counsel of a surety company, and that the inquiry tended to make that fact known to the jury; but, clearly, there is no justification for this inference.

On polling the jury after they had returned their verdict, the trial judge inquired of each juror not only concerning the verdict returned, but how he found on certain questions presented necessary to be passed upon in order to arrive at the verdict returned. It is complained that this was error, but we think otherwise. It was perhaps, unnecessary to ask the several jurors anything more than the single question, "Is this your verdict?" but it could not be so far prejudicial to the appellant as to require a reversal to make additional inquiries. *Norman v. Hopper*, 38 Wash. 415, 80 Pac. 551.

It is objected that the verdict is excessive. It is large, but the respondent's injuries are great. There has been no union of the broken bone, although he has submitted to two operations, one of which consisted in wiring the ends of the bone together in an effort to make them unite, and the experts differed as to the probability of its ever being in any better condition than it now is. Moreover, the respondent was only 23 years of age when the injury occurred, and is incapacitated from pursuing any pursuit in life that requires a standing position. Under these circumstances we cannot think the verdict excessive.

The court allowed as disbursements certain mileage for witnesses who did not make a claim for the same to the clerk when reporting their daily attendance, and certain fees paid an interpreter. The statute relating to the necessity for claiming mileage in order to enable a party to recover the same is somewhat obscure, but we think it may properly be claimed for the first time in the

cost bill. The fees of the interpreter, in so far as they were reasonable, were clearly taxable as part of the respondent's disbursements. He was compelled to pay them in order to obtain the testimony of his witnesses, and has a right to their return.

The judgment is affirmed.

RUDKIN, C. J., and GOSE, PARKER, and MOUNT, JJ., concur.

(61 Wash. 289)

INGALLS et ux. v. EASTMAN.

(Supreme Court of Washington. Dec. 21, 1910.)

HIGHWAYS (§ 155*)—OBSTRUCTIONS—SPECIAL INJURY.

Plaintiff used a highway twice a day to reach a tract farmed by him from the tract on which he resided. In consequence of an obstruction of the highway, he was required to travel about twice the distance each trip, and the closed highway had the better grade. *Held*, that he sustained special damage, and could sue under Rem. & Bal. Code, §§ 943, 944, 8318, declaring that the obstruction of a highway is a nuisance for which a person specially injured thereby may sue.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 432-436; Dec. Dig. § 155.*]

Department 1. Appeal from Superior Court, Yakima County; E. B. Preble, Judge.

Action by W. D. Ingalls and wife against George W. Eastman. From a judgment for defendant, plaintiffs appeal. Reversed.

Frank A. Luse, for appellants.

GOSE, J. The plaintiffs are the owners of a part of the N. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 28, and of the N. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 34, township 13 N., range 18 E., in Yakima county. They reside upon the former tract, and farm both pieces of land. There is a public highway leading directly from their residence to their land in section 34. About six months before the commencement of the action, the defendant obstructed the highway by building a wire fence across it. In addition to the facts stated, the complaint alleges that the defendant will continue to maintain the obstruction unless required to abate it by a judicial order, that the plaintiffs go from their home to the land in section 34 at least twice each day, that they have made more than 300 round trips since the creation of the obstruction, that owing to the obstruction they have been compelled to travel about twice the distance upon each trip, and that the closed highway has the better grade. A demurrer was interposed to the complaint, raising two questions: (1) That the complaint does not state facts sufficient to constitute a cause of action; and (2) that the court has no jurisdiction of the subject-matter or the parties. From a judgment sustaining the demurrer, and dismissing the action, the plaintiffs have appealed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

It is apparent that the appellants suffer a special damage beyond that suffered by the general public, and that their property is injuriously affected and their personal enjoyment lessened, within the meaning of the statute. See Rem. & Bal. Code, §§ 943, 944, and 8316. The question presented by the demurrer has recently received careful consideration by this court. *Sholin v. Skamania Boom Co.*, 56 Wash. 303, 105 Pac. 632. Under the view there announced, the complaint states a cause of action. No brief has been filed on behalf of the respondent. The court had jurisdiction of the subject-matter and the parties, and erred in sustaining the demurrer. The order sustaining the demurrer was entered before the opinion in the *Sholin* Case was filed.

The judgment is reversed for further proceedings.

RUDKIN, C. J., and FULLERTON, MOUNT, and PARKER, JJ., concur.

(61 Wash. 304)

LEWIS v. HILL et al.

(Supreme Court of Washington. Dec. 21, 1910.)

1. TRUSTS (§ 198*)—PURCHASE BY TRUSTEE OF TRUST PROPERTY.

While a trustee cannot purchase or deal in the trust property for his own benefit or on his own behalf, such a purchase is not absolutely void, and may be confirmed directly by the parties interested or by long acquiescence or the absence of an election to avoid the conveyance after the facts are known by the cestui que trust.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 258-265; Dec. Dig. § 198.*]

2. EXECUTORS AND ADMINISTRATORS (§ 380*)—PURCHASE BY ADMINISTRATOR—ACQUIESCENCE BY DEVISEE—SETTING ASIDE SALE.

A devisee who acquiesced in a plan for the purchase by creditors of a sufficient portion of the estate to satisfy their claims, and who with knowledge of all the facts failed to object to the acquisition by the administrator and his wife of certain claims at a discount, and their subsequent purchase of part of the property pursuant to the plan, which was beneficial to the estate, could not, after for four years failing to object, complain of the administrator's purchase.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1545; Dec. Dig. § 380.*]

Department 1. Appeal from Superior Court, King County; Mitchell Gilliam, Judge.

Suit by William H. Lewis, as executor and trustee, under the last will and testament of Alice S. Hill, deceased, against William Curtis Hill and another. From a decree dismissing their cross-complaint, defendants appeal. Affirmed.

Phillip Tindall and Thomas C. Bradley, for appellants. Harold Preston and Leander T. Turner, for respondent.

PARKER, J. This suit was instituted by the plaintiff for the purpose of obtaining a decree of the superior court for King coun-

ty, settling his account as executor and trustee under the last will and testament of Alice S. Hill, deceased, and discharging him from the obligations of that trust. The issues here involved arise upon the cross-complaint of William Curtis Hill and James Marshall Hill, sons of Alice S. Hill, deceased, wherein they allege certain acts of the plaintiff to have been unlawful and fraudulent, resulting in loss to Alice S. Hill and her estate. These acts, which we will notice later, all occurred during the lifetime of Alice S. Hill, while the plaintiff was administrator of the estate of William C. Hill, the deceased husband of Alice S. Hill. Most of the acts complained of occurred in the administration of that estate, while others occurred in personal dealings between the plaintiff and Alice S. Hill. The substance of the complaint is that the plaintiff has withheld from the estate of Alice S. Hill certain property, or, rather, the proceeds thereof, acquired by him and his wife during the lifetime of Alice S. Hill, which she and her estate became equitably entitled to. It is this property that the cross-complainants seek to have the plaintiff account for, as a part of his trust under the will of Alice S. Hill, deceased. At the conclusion of the evidence in behalf of the cross-complainants the trial court, upon motion of counsel for the plaintiff, dismissed the cross-complaint and denied the relief prayed for, upon the ground that the evidence was not sufficient to support the claims made against the plaintiff by the cross-complainants. From this disposition of their claims, William Curtis Hill and James Marshall Hill have appealed to this court.

William Curtis Hill, the husband of Alice S. Hill, died in the year 1890, leaving property in the state of Washington. He left a will, making his widow, Alice S. Hill, his sole devisee, but failed to mention any of his children therein, and for that reason the will was declared void by this court as to the children. *Hill v. Hill*, 7 Wash. 409, 35 Pac. 360. Mrs. Hill continued to administer her deceased husband's estate until June, 1895, when she resigned and the respondent, William H. Lewis, was appointed administrator in her place, by the superior court for King county. The administration of that estate was brought to a close on February 1, 1904, when, by the usual court proceedings, final settlement and distribution was decreed, and an order entered discharging respondent as administrator. Thereafter, on August 9, 1904, Alice S. Hill died at Washington, D. C., where she had been living for some years previous, leaving property in the state of Washington. She left a will, giving certain specific property to each of her children; and giving the residue, being by far the larger part of her property, to the respondent William H. Lewis, in trust for her children, and naming him as executor of her will. We are

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

not here concerned with the detailed provisions of this trust nor with the execution of those provisions, since no question is raised relative thereto. The controversy here involved has to do with matters occurring before the death of Alice S. Hill, and presents the question of whether or not respondent has brought into this trust estate all of the property which in equity belongs there. Learned counsel for appellants, in their brief, state the theory upon which they are proceeding as follows: "The estate of Alice S. Hill may, for the purposes of this suit, be regarded as the successor of the estate of her husband, William C. Hill, deceased. The theory upon which the cross-plaintiff William Curtis Hill and the intervenor James Marshall Hill have raised the issues involved in this appeal is that plaintiff, while administrator of the estate of William C. Hill, deceased, wrongfully appropriated to his wife property and funds belonging to that estate and that he defrauded their mother of property and of the proceeds of other property which belonged to her as the beneficiary of that estate. The relief sought is the restoration to Mrs. Hill's estate of that property and of the proceeds of such as has been sold."

At the time of the death of William C. Hill in 1890, he and Alice S. Hill had eight children: The two sons, who are these appellants; a daughter, Elizabeth, who afterwards became the wife of respondent; and five other daughters. As these children became of age, all except the youngest daughter deeded to their mother, Alice S. Hill, their interest in their father's estate; and the youngest daughter becoming of age after the mother's death deeded to respondent her interest in her father's estate, in compliance with a provision in the will of the mother, as a condition to that daughter receiving certain benefits under that will. Therefore, since these appellants are claiming rights against respondent only as residuary legatees under their mother's will, we are to deal with this controversy as if it was being waged between their mother, Alice S. Hill, and respondent, and as if no one but Alice S. Hill and the creditors of the estate of her husband, William C. Hill, had any interest whatever in that estate at the time of the doing of the things by respondent, which are complained of by appellants. This brings us to a consideration of those acts and the question of the alleged violation of Mrs. Hill's rights thereby.

In the course of the administration of the estate of William C. Hill by respondent as administrator, the title to a considerable portion of the property thereof passed to Elizabeth Hill Lewis, the wife of respondent. The greater portion of the property so passing to Mrs. Lewis was taken in trust for her mother, Alice S. Hill, and the remainder of it was taken in her own right. The latter is

the source of this controversy, and the story of its bringing about is in substance as follows: From the time of the appointment of respondent as administrator of the estate of William C. Hill in 1895 until the fall of 1899 that estate was embarrassed by the importunities of creditors, and was in a condition bordering upon insolvency. The total of the estate's obligations was near the amount of the appraised value of its property. In 1899 the estate was indebted upon claims of creditors and for taxes as follows:

Alice S. Hill (preferred claim).....	\$18,487 29
Alice S. Hill.....	25,332 55
Schwabacher Brothers	8,450 00
John Thomas	5,920 00
William Knight	5,472 00
John Leasure	5,472 00
J. H. Parsons.....	1,720 00
Taxes: The larger part of which were delinquent for several years past, and to which statutory penalties and interest had attached; but if paid before November 1, 1899, thereby saving the remitted penalties and reduced interest under the special act of 1899 (Laws 1899, p. 339), amounted to.....	27,923 22
	<hr/> \$98,777 06

There was also due upon attorney's and administrator's fees sufficient to make the total indebtedness of the estate approximately \$100,000. The administrator had made repeated efforts since his appointment in 1895 to sell property of the estate to raise funds to pay its indebtedness, but had been unable to do so. The time had arrived when something must be done towards the liquidation of the indebtedness to prevent insolvency overtaking the estate. The special act of the Legislature of 1899 remitting penalties and reducing interest upon delinquent taxes if paid before November 1, 1899, furnished an additional incentive to act in the matter before that time, for it was estimated that over \$11,000 could be saved in the item of taxes if paid before that time; and the estate could not pay them except through a sale of its property. This, of course, could be effected by payment direct by the estate from the proceeds of a sale, or by the purchasers at such sale paying them, making the amount of their bids accordingly. In either event the reduction would work to the benefit of the estate if a sale could be consummated in time to pay the taxes before November 1, 1899. Prompted by these considerations, in the summer of 1899 tentative arrangements were made with all the creditors, including Alice S. Hill, to sell to them property of the estate at its appraised value sufficient in amount to satisfy each of their claims. To accomplish the payment of the claims in this manner it was of course absolutely necessary that all of the creditors should agree to such an arrangement; otherwise, such a sale would not have the effect of a cash sale, and the possibility of some of the creditors being unlawfully preferred would not be avoided. It

was accordingly planned, Mrs. Hill and all of the creditors joining therein, no one else having any interest whatever in the estate so far as concerns this inquiry, as we have already noticed, that an order of sale of the property of the estate for the payment of the debts of the estate should be obtained from the court by the usual proceedings, and at the sale to be made in pursuance thereof there should be bid in by or in behalf of each creditor a sufficient amount of the property, at its appraised value, to satisfy their respective claims; thus giving the sale the effect of a cash sale. Up to a very short time before the consummation of the sale, with the 1st day of November close at hand, it was supposed that all of the creditors would abide by this arrangement and bid for property to the amount of their respective claims; but Thomas, Knight, and Leasure finally declined to bid and satisfy their claims in this manner. Thereupon, in order to proceed with the arrangement, respondent purchased for his wife, Elizabeth Hill Lewis, these claims, and she bid in at the sale sufficient property at its appraised value in her own right to satisfy these claims, as there was bid in by or in behalf of all other creditors sufficient property to satisfy their respective claims. There was paid to Thomas Knight, and Leasure for their claims approximately only 40 per cent. of their face value. This and the use of the claims at face value to purchase the property constitute the principal acts of alleged wrong on the part of respondent. It is quite evident from this record that if Thomas, Knight, and Leasure had proceeded with the original arrangement and bid in property in satisfaction of their claims, as was done by or in behalf of the other creditors, instead of selling their claims to Mrs. Lewis, and she taking their place, this controversy would never have been heard of. It appears that Knight, Thomas and Leasure were finally unwilling to take property for their claims in view of its uncertain value, its then lack of marketableness, and the burden of raising sufficient cash to pay the taxes prior to November 1st. These were the risks and burdens assumed by Mrs. Lewis, and for which she was compensated by the discount in the purchase of the claims. In after years she profited considerably by the increase of the value of this property, and this is the principal thing that appellants seek to compel respondent, her husband, to account for; basing their contention upon the theory that the purchase of the claims of Knight, Thomas, and Leasure in this manner was in law a fraudulent speculation, by the respondent as administrator, in claims against the estate, and that all profits flowing from such dealing became in equity the property of the estate. We do not propose to discuss the technical legal duties, devolving upon an administrator relative to the purchase of claims against the estate he

is administering, or relative to his purchasing property of the estate; neither do we propose to discuss the somewhat uncertain question in the light of this record, of whether or not the purchase of these claims rendered them in law the property of the community, consisting of respondent and his wife, or her separate property. If the latter resulted, it would seem that the decision of this court in *Hipkins v. Estes*, 51 Wash. 1, 97 Pac. 1089, would put an end to appellants' contentions.

The evidence in this case warrants the conclusion that Alice S. Hill, whom we have seen was the only person interested in the estate, besides the creditors, at the time of the doing of the acts complained of, with full knowledge of all the material facts relating to those acts, acquiesced in and sanctioned them, and profited materially by the liquidation of the debts of the estate brought about in the manner we have narrated. The learned trial court viewing the evidence in this light reached the conclusion that Alice S. Hill was not in a position to complain of the acts of respondent, and that these appellants of course had no higher right. It was upon this theory that appellants' cross-complaint was dismissed. The question of the knowledge and acquiescence of Alice S. Hill is only one of fact. Upon this question we deem it sufficient to say that the evidence convinces us, as it evidently did the learned trial court, of the truth of the following: Alice S. Hill knew, before the sale of the Thomas, Knight, and Leasure claims to Mrs. Lewis, that those claims could be purchased at a discount. She had an opportunity to buy them herself if she desired. She learned by correspondence from respondent very soon after the sale, if she did not know of it before, that Mrs. Lewis had purchased these claims, and bid in property as other creditors did in satisfaction thereof. She may not have then known the exact amount Mrs. Lewis paid for the claims, but must have known that they were bought at considerable less than their face value. She knew of the urgent necessity of some one buying these claims who would participate in the consummation of the proposed plan of the sale. She learned early in January, 1900, within three months after the sale, by correspondence from respondent, if she did not already know it, that it was expected that Mrs. Lewis would profit by the purchase of these claims, and the taking of property of the estate in settlement of them. Alice S. Hill appears to have been quite well informed of, and had rather decided notions, as to the value of the various tracts of land belonging to the estate. Her claims had been all assigned to Mrs. Lewis prior to the sale, which accounts for Mrs. Lewis bidding in and taking a large amount of the property in trust for her mother. Alice S. Hill was informed by letter from respondent very soon after the sale as to what particular

tracts of the property had been bid in for her, and what had been bid in by the other creditors; and later, when the details had been more fully worked out, she was informed by letter with greater particularity. Although learned counsel for appellants strenuously argue to the contrary, we are convinced from the evidence that respondent took great pains to keep Alice S. Hill fully and fairly informed as to all facts she was entitled to know touching the purchase of these claims for Mrs. Lewis, and the liquidation of the same with all other claims by the sale of the estate's property. She lived for more than four years after these things occurred, continuing friendly business relations with respondent, during which period she repeatedly evidenced her satisfaction with his conduct in bringing about the liquidation of the debts of her deceased husband's estate, and in his administration of that estate. During this period the increase of value in real property in the state of Washington resulted in large profits to all creditors who had taken property of the estate in settlement of their claims. She shared in this profit, and of course knew that her daughter Mrs. Lewis shared in it in the same proportion upon the property she had acquired. During all this time there does not appear the slightest intimation from Alice S. Hill that she or her husband's estate was entitled to any of the property thus acquired by Mrs. Lewis. In the meantime the estate of William C. Hill was brought to a final settlement in the spring of 1904 some months before the death of Alice S. Hill. We will pass, however, the question of the binding force of that settlement upon her, since but little is made of it by counsel for either party. Upon the matter of Mrs. Hill's capabilities, we adopt the language of the learned trial judge in disposing of appellants' claims, which we think the evidence fully warrants, as follows: "It appears * * * that during the time of those transactions which are the basis of this controversy that Mrs. Hill was an exceedingly bright, intelligent, and capable woman."

With these facts before us, the law of the case seems a simple matter. We have seen that for the purpose of this inquiry Alice S. Hill will be regarded as the only person with any right whatever to object to the acquisition by her daughter Elizabeth Hill Lewis of the property of the estate in the settlement of the Thomas, Knight, and Leasure claims. Alice S. Hill is in effect the sole cestui que trust; and, when her rights are not invaded, no one can complain. Such, reduced to its simplest terms, are the limits of this inquiry. Assuming, now, that Mrs. Lewis' acquisition of this property was for the community, and not as her separate property, and that therefore the matter must be dealt with as if respondent was acquiring an interest in it, we think the principle of law controlling the

rights of the parties may be stated in the language of Chief Justice Fuller speaking for the Supreme Court of the United States in *Hammond v. Hopkins*, 143 U. S. 224, 251, 12 Sup. Ct. 418, 427 (36 L. Ed. 134), as follows: "Undoubtedly the doctrine is established that a trustee cannot purchase or deal in the trust property for his own benefit or on his own behalf, directly or indirectly. But such a purchase is not absolutely void. It is only voidable, and as it may be confirmed by the parties interested, directly, so it may be by long acquiescence or the absence of an election to avoid the conveyance within a reasonable time after the facts come to the knowledge of the cestui que trust." *Brown v. Cowell*, 116 Mass. 461, 465; *Miggett's Appeal*, 109 Pa. 520; *Butterfield v. Cowing*, 112 N. Y. 486, 20 N. E. 369; *Ungrich v. Ungrich*, 131 App. Div. 24, 115 N. Y. Supp. 413, 417.

We are of the opinion that Alice S. Hill acquiesced in the acts of respondent, and that whatever might be said as to those acts being technically unlawful, as against those who had a right to complain, they are not such acts as she had the right to complain of at the time of her death, and hence these appellants, who claim only as her devisees, have no better right.

The other things complained of by appellants occurred in connection with personal dealings between respondent and Alice S. Hill. They consist of alleged inducements made by respondent, resulting in the transfer of certain of her property to him for inadequate consideration. These contentions we regard wholly without merit. A review of them in detail would disclose a condition of affairs somewhat like that which we have reviewed above, so far as her knowledge of conditions surrounding them is concerned. The evidence we think clearly shows that in these transactions she knew what she was doing, got all the consideration she agreed for, and that to a considerable extent they were transactions of her own suggestion.

Some question is made upon the admissibility of certain testimony brought out upon cross-examination of respondent by his attorney while upon the stand as a witness for appellants. This testimony related to conversations between respondent and Mrs. Hill during her lifetime, and for that reason was objected to by appellants' counsel. We will not attempt to solve this question, since we are of the opinion that the other evidence, consisting among other things of a vast amount of correspondence passing between respondent and Mrs. Hill, concerning the matters involved, fully warrants the conclusion reached by the learned trial court.

We are of the opinion that the dismissal of appellants' cross-complaint should be affirmed. It is so ordered.

RUDKIN, C. J., and MOUNT, FULLERTON, and GOSE, JJ., concur.

(61 Wash. 296)

SHRYOCK v. HANNENEN et al.

(Supreme Court of Washington. Dec. 21, 1910.)

1. MUNICIPAL CORPORATIONS (§ 293*)—PUBLIC IMPROVEMENTS—ASSESSMENTS FOR BENEFITS—RESOLUTION OF COUNCIL—STATUTES.

Laws 1903, c. 124, relating to local improvements, do not require the city council in its resolution of intention to improve a street to give any description of the district proposed to be assessed.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 773-775; Dec. Dig. § 293.*]

2. MUNICIPAL CORPORATIONS (§ 450*)—PUBLIC IMPROVEMENTS—ASSESSMENTS—ASSESSMENTS FOR BENEFITS—STATUTES—RESOLUTION AND ORDINANCE—DESCRIPTION.

Laws 1903, c. 124, relating to local improvements, requires that the ordinance establishing the improvement district shall describe and define it, so that it shall include "all the property fronting on the street to be improved, between the points named in such resolution, to the distance back from such street, if platted into blocks and lots, 120 feet, provided the block is 240 feet or more in length, and if less than 240 feet in length, then to the center of the block, and if not platted, to the distance of 120 feet." The resolution of intention and the ordinance creating a local improvement district, after fixing the termination of the proposed improvement both on Front and Marion streets, provided for assessment of "all the lots, lands, and parcels of land fronting and abutting upon said Front and Marion streets, between the points herein mentioned as the terminals of said improvement, and upon each side thereof to a distance back from said street of one hundred and twenty feet." *Held*, that the description was sufficient to meet the requirements of the statute.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1073, 1074; Dec. Dig. § 450.*]

3. MUNICIPAL CORPORATIONS (§ 450*)—PUBLIC IMPROVEMENTS—ASSESSMENTS FOR BENEFITS—STATUTES—OMISSION TO ASSESS PROPERTY.

An ordinance of the city council establishing a local improvement district, as required by Laws 1903, c. 124, to include all the property fronting on the street to be improved between the points named in such resolution, to a distance back from the street, if platted in blocks and lots, of 120 feet, provided the block was 240 feet or more in length, and if less than that length, then to the center of the block, and if not platted, to a distance of 120 feet. A block within an improvement district was irregular in shape, its average width was 200 feet, and it was used chiefly for railroad purposes. *Held*, that its assessment to 120 feet back from the street, as unplatted lands, was proper.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1073, 1074; Dec. Dig. § 450.*]

4. MUNICIPAL CORPORATIONS (§ 450*)—PUBLIC IMPROVEMENTS—RESOLUTIONS AND ORDINANCES—DESCRIPTION—SUFFICIENCY.

A resolution and ordinance of the city council of Aberdeen, providing for an improvement district and for an assessment for improvements made, without describing the streets to be improved as being located within the state of Washington, is sufficient.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1073, 1074; Dec. Dig. § 450.*]

5. MUNICIPAL CORPORATIONS (§ 304*)—PUBLIC IMPROVEMENTS—RESOLUTIONS AND ORDINANCES—DESCRIPTION—SUFFICIENCY.

A description of a local improvement to be made, contained in a resolution and ordinance of a city council which does not name the city, is a sufficient description, for it is presumed that its council acted within its powers.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 811-816; Dec. Dig. § 304.*]

6. MUNICIPAL CORPORATIONS (§ 487*)—PUBLIC IMPROVEMENTS—ASSESSMENT OF BENEFITS—PERSONS WHO MAY QUESTION—VALIDITY.

Where property is within an improvement district, the owners, in an action by a contractor who has completed the improvement and who is the holder of certificates of delinquency, cannot avoid the assessments on their property by showing that the assessment also included property of others not subject to assessment.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1146; Dec. Dig. § 487.*]

7. MUNICIPAL CORPORATIONS (§ 484*)—PUBLIC IMPROVEMENTS—ASSESSMENT FOR BENEFITS—EVIDENCE—PRESUMPTIONS.

All presumptions are in favor of the regularity of assessment proceedings, and errors or mistakes therein to avail the objector must be shown affirmatively, and where the record of an assessment for a local improvement does not show that the difference in rates of assessment was made arbitrarily or that the property assessed at the higher valuation did not receive a greater benefit from the improvement than did the property with a lesser burden, the burden of proof is not sustained.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1137-1139; Dec. Dig. § 484.*]

8. MUNICIPAL CORPORATIONS (§ 460*)—PUBLIC IMPROVEMENTS—ASSESSMENT FOR BENEFITS—EXPENSE OF SURVEYS.

The expenses of preliminary surveys and estimates, costs of advertising, when reasonable, may fairly be charged as part of the costs of a local improvement.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1102-1104; Dec. Dig. § 460.*]

Department 1. Appeal from Superior Court, Chehalis County; Mason Irwin, Judge.

Action by S. Shryock against John Hannen and others. Judgment for the defendants, and the plaintiff appealed. Reversed and remanded, with instructions.

John C. Hogan, for appellant. J. C. Cross and A. Emerson Cross, for respondents.

FULLERTON, J. On May 16, 1906, certain persons owning real property abutting upon Front and Marion streets in the city of Aberdeen petitioned the city council of that city to improve the same at the expense of the abutting property owners by laying a 16-foot plank roadway in the center thereof between certain designated points. Acting on the request of the petition, the city council passed a resolution of intention to improve the street between the points named, and in the manner designated, fixed a day

for hearing protests against the same, and caused notice to be given thereof, as required by statute. On the day of the hearing, no protests being filed, the city council passed an ordinance directing the work to be done. The work was thereupon let to appellant, he being the lowest bidder therefor, who completed it to the satisfaction of the city, whereupon the property benefited was duly assessed to pay the costs thereof. The respondents failed to pay their assessments, and certificates of delinquency against the several parcels of land owned by them were issued to the appellant. This action was brought to foreclose the certificates. The action resulted in a judgment denying the appellant's right to foreclose the certificates, and this appeal was taken therefrom.

In its findings of fact, the court recited a number of objections to the proceedings which were seemingly thought fatal to the appellant's right to recover, but many of these were mere irregularities not affecting the merits of the assessment, and we shall notice only these objections which the respondents rely upon in this court as being fatal to the right of recovery.

The first of these is that the resolution of intention to improve the street, and the ordinance creating the improvement district, do not sufficiently describe the property it is proposed to assess to pay the costs of the improvement. The statute under which the city council proceeded (Laws 1903, pp. 231, 232) seems not to require any description of the property proposed to be assessed in the resolution of intention to improve the street, and the requirement for the ordinance establishing the improvement district is that it shall include "all property fronting on the street to be improved between the points named in the resolution, to a distance back from such street, if platted into blocks and lots, 120 feet, provided the block is 240 feet or more in length, and if less than 240 feet in length, then to the center of the block, if platted only in blocks, to the center of each block, and if not platted, to the distance of 120 feet." The resolution of intention and the ordinance creating the local improvement district, after fixing the termination of the proposed improvement both on Front and Marion streets, provided for assessment of "all of the lots, lands, and parcels of land fronting and abutting upon said Front and Marion streets, between the points herein mentioned as the terminals of said improvement, and upon each side thereof to a distance back from said street of one hundred and twenty (120) feet." This, we think, is a sufficient description to comply with the statute. It clearly marks the boundaries of the land proposed to be assessed, and nothing would be added to its definiteness by describing the land included within such boundaries by the numbers of the lots and blocks as they appear on the recorded plats. The purpose

of the description is notice, and certainly any property holder owning property abutting upon or adjacent to the streets described could know definitely from the description given whether any of his property was to be assessed for the proposed improvement.

It is contended also that the ordinance establishing the assessment district is void, because it omits property required by the statute to be included therein. Lying westerly of Front street is an irregular shaped tract, which one of the witnesses testified was platted into a block known as block C. This tract was not platted into lots, and the respondents contend that under the statute above cited it should have been assessed to its center, regardless of its length or width, and that in fact it was not so assessed. The block is not shown on any of the plats introduced in evidence, and consequently it is impossible to tell what its actual dimensions are. A witness testified, however, that its average width was 200 feet. If this be true, and the city assessed it for a width of 120 feet, then clearly no property was omitted from the roll that ought to have been included therein. But we think the tract was properly assessed as unplatted land. It formed a part of a railway company's right of way, and has upon it not only the track of the main line, but numerous spur tracks, and its platting seems to have been rather for the purpose of designation than for commercial purposes. It was proper therefore to assess it back from the streets for a distance of 120 feet.

It is contended further that both the resolution and ordinance are void, for the reason that the streets described are nowhere stated to be within the state of Washington. But they show that the streets are within the city of Aberdeen, and this is a sufficient description in that respect. Moreover, the description would be sufficient without even naming the city, on the principle that it is presumed that the city council acted within its powers. *Stanton v. City of Chicago*, 154 Ill. 23, 39 N. E. 987.

A further objection is that the assessment roll includes property not subject to assessment under the statute. This objection would perhaps be valid were the property so included the property of these objectors, but such was not the fact. Property of other persons not subject to assessment was perhaps included in the assessment roll, but the owners paid the assessment without objection. Surely the respondents cannot avail themselves of that fact to avoid the assessment upon their own property, which is concededly within the assessment district.

The respondents object further that the assessment was not equal or uniform, that certain property was assessed at a higher rate than was other property of like value receiving the same benefits, and that certain expense charges were added to the cost of the

improvement and included in the assessment roll which ought not to have been so included. But we find no merit in these objections. While it is true that certain property was assessed at a higher rate than was certain other property somewhat similarly situated, the record does not show that the differences were made arbitrarily, or that the property assessed at the higher valuation did not receive a greater benefit from the improvement than did the property charged with the lesser burden. All presumptions are in favor of the regularity of the assessment proceedings. Errors or mistakes therein in order to avail an objector must be shown affirmatively. The expenses objected to were the costs of making the preliminary surveys and estimates, and the costs of advertising. These, when reasonable, may be properly charged as part of the costs of the improvement, and there is no evidence here that they were not reasonable charges.

The judgment is reversed and the cause remanded, with instructions to enter judgment foreclosing the several certificates of delinquency.

RUDKIN, C. J., and PARKER, MOUNT, and GOSE, JJ., concur.

(61 Wash. 390)

STATE v. HAMSHAW.

(Supreme Court of Washington. Dec. 30, 1910.)

1. CRIMINAL LAW (§ 252*)—AMENDMENT OF COMPLAINT.

In general, a criminal complaint cannot be amended; for it is a verified pleading.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 526-536; Dec. Dig. § 252.*]

2. CRIMINAL LAW (§ 260*)—APPEAL FROM JUSTICE—AMENDMENT OF COMPLAINT.

Although the statute provides that on appeal from a justice of the peace cases are to be tried *de novo*, that law has no bearing on criminal complaints, and they cannot be amended on appeal from a conviction before a justice of the peace.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 260.*]

3. CRIMINAL LAW (§ 261*)—ARRAIGNMENT AND PLEA—SUFFICIENT CHARGE.

Accused is entitled to an arraignment and plea upon a sufficient charge, and that formality cannot be dispensed with over his objection.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 612; Dec. Dig. § 261.*]

Department 2. Appeal from Superior Court, Snohomish County; H. W. Canfield, Judge.

C. W. Hamshaw was convicted of practicing dentistry without a license, and appeals. Reversed and remanded.

Parker & Brown, for appellant.

CHADWICK, J. Defendant was brought to trial before a justice of the peace upon the following complaint: "George W. Went-

worth, being first duly sworn, according to law, says: That at Marysville, in the county of Snohomish, state of Washington, on or about the 15th day of November, 1909, C. W. Hamshaw did practice dentistry without having obtained and filed a license as required by law in the county of Snohomish, state of Washington; the said county at all times mentioned being the place of residence of the said C. W. Hamshaw." After moving to the jurisdiction of the court and the sufficiency of the complaint, he entered a plea of not guilty, and after a trial and conviction appealed to the superior court. On January 22, 1910, an order was made by the superior judge, allowing the state to file an amended complaint, and that "the amended complaint should stand for and in place of the original complaint on file herein." The prosecuting attorney filed what purported to be an amended complaint, signed by the same complainant, and sworn to before the justice, charging a violation of the dental law; in other words, stating a cause of action. The amended complaint was never filed in the justice court, but was entitled: "In the Justice Court before Noah Shakespeare, Justice of the Peace in and for Everett Precinct, County of Snohomish, State of Washington." The amended complaint was filed as a substitute, or, to use the words of the trial judge, "to stand for and in place of the original complaint." The case came on for trial February 10, 1910, resulting in the conviction of the defendant. A motion for a new trial setting up the several grounds of the statute was interposed, and, being overruled, the defendant was sentenced to pay a fine of \$50 and the costs of the prosecution. From this judgment, defendant has appealed.

We think appellant's objection to the right of the court to proceed in the way it did should have been sustained. There is no provision of the law for amending a criminal complaint. In *State v. Van Cleve*, 5 Wash. 642, 32 Pac. 461, it was held that a criminal pleading could not be amended as to substance. "The vice of this sort of an amendment is made clear when reference is made to the statute which requires informations to be sworn to, that the defendant shall be arraigned, and that a certain time shall be allowed him to plead. Code Proc. §§ 1231, 1269, and 1271. This information was verified February 27, 1892. At the time it was amended no reverification was made, no arraignment was had, and no plea was entered."

Our attention has been called to the case of *State v. Bringgold*, 40 Wash. 12, 82 Pac. 132. In that case, however, the case just referred to, as well as the general rule, was not discussed by counsel in the briefs, or by the court in its opinion. In so far as it

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

holds that the superior court has jurisdiction to "allow the complaint to be amended by the filing of a new complaint," it may be considered as overruled. The appeal in such cases is taken, and the case proceeds de novo, upon the transcript from the justice court. The statute does not allow, as in civil cases, any amendment to the pleadings. It can be no embarrassment to the superior court, or in any way interrupt its procedure, if it is of opinion that the complaint does not charge a crime, or that the defendant should be held for trial, to enter an order of dismissal, or order an information filed, and, after arraignment and plea, proceed to the trial in an orderly way, thus acquiring jurisdiction in the manner sanctioned by the Constitution and the statutes. No man should be held to answer in any court upon a complaint that does not charge a crime, or in a court that has not acquired jurisdiction in a lawful and legal way. The right to arraignment and plea upon a sufficient charge, while perhaps not within the letter of the Constitution, is within its spirit, and, although the conduct of a defendant may be such that a court will hold the right to be waived (*State v. Quinn*, 56 Wash. 295, 105 Pac. 818; *State v. Straub*, 16 Wash. 111, 47 Pac. 227), it has never been held that the formality could be dispensed with over the protest of the party charged.

The judgment of the lower court is reversed, and the cause remanded, with instructions to dismiss the case.

RUDKIN, C. J., and CROW, MORRIS, and DUNBAR, JJ., concur.

(61 Wash. 361)

CITY OF SPOKANE v. GILBERT et al.

(Supreme Court of Washington. Dec. 29, 1910.)

MUNICIPAL CORPORATIONS (§ 506*)—ASSESSMENTS FOR BENEFITS—CONFIRMATION OR REVISION OF ASSESSMENT BY COURT—POWER.

Rem. & Bal. Code, § 7790, provides that it shall be the duty of eminent domain commissioners to apportion the benefit from the taking of property for a street between the property owners and the city. Section 7795 provides that on the hearing of an objection the trial shall be by the court, and if it shall appear that the objector is not properly assessed a proper judgment shall be entered. Section 7796 provides that the court before whom such proceedings are pending shall at any time have power to modify, etc., any assessment returned. *Held*, that the assessment by the commissioners is not conclusive, and the court has power to modify the apportionment of the assessment as between the city and the property owners, and to that end may hear evidence.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1177; Dec. Dig. § 506.*]

Department 1. Appeal from Superior Court, Spokane County; Wm. A. Huneke, Judge.

Action by the City of Spokane against L. F. Gilbert and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Fred B. Morrill and Bruce Blake, for appellant. Cullen & Dudley and Joseph Ross-low, for respondents.

MOUNT, J. In this case the city of Spokane, in the year 1906, instituted condemnation proceedings for a strip of land for a street; the purpose being to make Division street a continuous street between certain points. Theretofore, for a distance of two blocks, this street had not been dedicated, so that the street consisted of two parts, disconnected by land which was owned by private parties. The city desired to lay three large water mains along this street, and it therefore became necessary to condemn the land for use as a street. The land was adjudged necessary as a public use, and damages for the taking were found in the sum of \$8,075, in favor of the owners of the land. This amount was paid by the city, and a judgment of appropriation entered, to the effect that the city have and hold the land taken "for use as a public street of the said city." Subsequently a petition was filed, and an order made thereon appointing commissioners to make an assessment upon property specially benefited by the improvement, to pay the costs thereof. These commissioners, known as the board of eminent domain commissioners, made an assessment upon the property benefited, and returned the assessment roll to the court. No benefit was assessed to the city, but the whole cost was assessed against property in the vicinity of the improvement. Thereafter objections to the roll were filed by a large number of property owners, whose land had been assessed. These objections came on to be heard, and the court found that the public was benefited to the extent of \$3,000, which should be paid by the city, and that the balance should be paid by the property assessed by the eminent domain commission, and an order was made modifying the assessment roll accordingly.

The city appeals from that order, and makes two contentions, as follows: "(1) That at the hearing upon the confirmation of the assessment roll, the court is bound by the judgment of necessity (and the ordinance upon which the action is based) in the original cause, as to the question of necessity and public use; (2) that the court is limited in its inquiry to the provisions of the statute relating to the manner in which such hearings shall be conducted." Respondent concedes the first position, which does not affect the result, because there was no attempt to dispute the adjudication of public use or necessity for the street. Appellant's position upon the second contention is that, if the property of the objectors was assessed pro-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

portionately in accordance to benefits from the improvement, and was not assessed more than it was benefited thereby, then the assessment must stand as returned by the commissioners, and that the court is without jurisdiction to modify the assessment.

The statute seems clear upon this question. It provides, at section 7790, Rem. & Bal. Code, as follows: "It shall be the duty of such commissioners to examine the locality where the improvement is proposed to be made and the property which will be especially benefited thereby, and to estimate what proportion, if any, of the total cost of such improvement will be of benefit to the public, and what proportion thereof will be a benefit to the property to be benefited, and apportion the same between the city and such property, so that each shall bear its relative equitable proportion, and having found said amounts, to apportion and assess the amount so found to be a benefit to the property upon the several lots, blocks, tracts, and parcels of land, or other property in the proportion in which they will be severally benefited by such improvement." This section makes it the duty of the board of eminent domain commissioners to estimate what proportion of the cost of the improvement will be of benefit to the public and what proportion thereof will be of benefit to the property, and apportion the cost between the city and such property. Section 7795, same volume, provides: "The hearing shall be conducted as in other cases at law, tried by the court without a jury, and if it shall appear that the property of the objector is assessed more or less than it will be benefited, or more or less than its proportionate share of the costs of the improvement, the court shall so find, and also find the amount in which said property ought to be assessed, and a judgment shall be entered accordingly." Section 7796 provides: "The court before which any such proceedings may be pending shall have authority at any time before final judgment to modify, alter, change, annul or confirm any assessment returned as aforesaid, or cause any such assessment to be recast by the same commissioners, whenever it shall be necessary for the obtainment of justice, or may appoint other commissioners in the place of all or any of the commissioners first appointed for the purpose of making such assessment or modifying altering, changing or recasting the same, and may take all such proceedings and make all such orders as may be necessary to make a true and just assessment of the cost of such improvement according to the principles of this act, and may from time to time, as may be necessary, continue the application for that purpose as to the whole or any part of the premises."

These statutes clearly give the court power to adjust the assessment between the city

and the property owner, so that each one may pay the proportionate share of the cost of the improvement. The court is not bound by the assessment made by the commissioners. In *Re Pike Street*, 42 Wash. 551, 85 Pac. 45, we said: "The statute gives the court power to modify, change, alter, or annul the assessment, and we think it may lawfully find that an improvement is of sufficient general benefit to make an appropriation of the cost a general charge against the municipality." In order to do this, the court must necessarily hear and consider evidence bearing upon such question.

We find no error in the record, and the judgment is therefore affirmed.

RUDKIN, C. J., and PARKER, GOSE, and FULLERTON, JJ., concur.

(61 Wash. 332)

SCHOENING et al. v. MAPLE VALLEY LUMBER CO.

(Supreme Court of Washington. Dec. 21, 1910.)

1. CONTRACTS (§ 74*)—CONSIDERATION.

A promise by a third person obtaining logs from a logger indebted for supplies to pay the creditor a specified sum per M. on scale bill on each raft delivered by the logger to him is supported by a consideration, where, in reliance thereon, the creditor forbore taking any steps to collect the account as it then existed, and continued to furnish supplies to the logger, who thereby secured an extension of credit and who was thereby enabled to continue his logging operations and supply the third person with logs.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 331-343; Dec. Dig. § 74.*]

2. FRAUDS, STATUTE OF (§ 23*)—PROMISE TO PAY DEBT OF ANOTHER.

A promise by one obtaining logs from a logger, made to a creditor of the logger for supplies furnished that he would pay the creditor a specified sum per M. on scale bill on each raft furnished by the logger to apply on the account and that the promise should hold as long as the logger's account was kept satisfactorily and that notice would be given to the creditor, was an absolute promise to pay the specified sum on the scale on each raft and was an original undertaking to pay such amount until notice was given.

[Ed. Note.—For other cases, see *Frauds*, Statute of, Cent. Dig. §§ 18, 19; Dec. Dig. § 23.*]

3. PLEADING (§ 245*)—COMPLAINT—AMENDMENTS—ALLOWANCE.

Where the original complaint in an action on a written instrument, whereby defendant promised to pay plaintiff a specified sum per M. on scale bill on each raft furnished by a third person to apply on his account with plaintiff, alleged that the third person had delivered to plaintiff 748,205 feet of logs, whereupon there became due plaintiff \$374.10, the court at the commencement of the trial properly permitted an amendment alleging the delivery of a larger number of logs and thereby increasing the indebtedness.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 653-675; Dec. Dig. § 245.*]

4. APPEAL AND ERROR (§ 1039*)—HARMLESS ERROR—VARIANCE.

The variance between the complaint, in an action on a written instrument, whereby defend-

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ant agreed to pay a specified sum per M. on scale bill on each raft furnished by a third person to apply on the third person's account with plaintiff, which alleged the number of logs delivered and the evidence showing the delivery of a greater number, was not prejudicial to defendant having knowledge of the number furnished by the third person.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4086; Dec. Dig. § 1039.*]

Department 2. Appeal from Superior Court, King County; Wilson R. Gay, Judge.

Action by Charles Schoening and another, copartners, doing business under the firm name and style of the Palace Market against the Maple Valley Lumber Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

William Hickman Moore, for appellant. Faben & Kelleran, for respondents.

MORRIS, J. On September 9, 1908, George Kelly, a logger, was indebted to the respondents upon an account for butcher's supplies furnished him in his logging operations, in a sum exceeding \$374.10. Kelly was then, and for some time previous had been, a logger delivering his logs to the appellant. Not paying his account with respondents, they became unwilling to further supply him, and notified him they would discontinue his account unless they could have some money, and asked him if there was any way in which he could secure the account. Kelly answered he knew of no way, unless the appellant would give security. Respondents thereupon suggested to him that he see the appellant and have it guarantee the account; and if it did not do so, they would not carry the account longer and would take steps to collect it. Thereupon Kelly went to appellant, and the same day, on his return, handed respondents the following writing: "Bryn Mawr, Wash., Sept. 9, 1908. Palace Market Co.—Gentlemen: Commencing with the next raft of logs that comes in from George Kelly, we will pay you 50c. per M. on scale bill on each raft to apply on his account with you. This will hold as long as his account is kept satisfactorily with us, but be left entirely with us as to when we may cease to pay as above or not. We will notify you in any case. Yours, Maple Valley Lbr. Co., per W. F. Brown, Sec'y." In February, 1909, respondents brought suit against appellant on this agreement, alleging its execution in consideration of respondents' waiver of any action against Kelly, and for the purpose of enabling Kelly to continue his logging operations and delivery of logs to appellant, and the release of the logs from any charge or lien of respondents. Thereafter Kelly delivered to appellant 748,205 feet of logs, whereupon there became due respondents upon the agreement the sum of \$374.10, for which judgment was asked. Answering, appellant admitted the making and delivery of the

writing, denying the other allegations of the complaint. Upon the trial, the court permitted respondents to amend by alleging the delivery of 971,213 feet of logs and an indebtedness of \$485.60. This ruling was made at the commencement of the trial, before entering upon the taking of testimony, and over the objection of appellant. No suggestion of surprise was made by appellant upon the offer of the amendment, nor was any continuance or other relief asked for. Findings were made in favor of respondents, awarding them judgment in the sum of \$485.59, and the lumber company appeals.

The errors claimed are, that there was no consideration for the writing, the allowance of the amendment, and variance. Upon the first contention, appellant contends that, inasmuch as respondents had no right of attachment or lien upon the logs, there was no consideration. It is not necessary for us to decide whether there was any right of attachment or lien, as the consideration of the writing does not depend upon the existence of any such right. There was ample consideration irrespective of any such right. Respondents forbore taking steps to collect the account, as it then existed, either by suit or otherwise. They continue furnishing supplies to Kelly, which they would not otherwise have done. Kelly secured an extension of credit, and was thereby enabled to continue his logging operations, which otherwise he could not have done. Continuing his logging operations, he was able to supply the appellant with logs, a beneficial inducement moving directly to appellant, as well as to Kelly. Thus, all three of the interested parties received a benefit because of the agreement. These considerations, and others that might be suggested from the nature of the transaction, furnished ample consideration to support the writing. 9 Cyc. 342 et seq.; *Staver & Walker v. Missimer*, 6 Wash. 173, 32 Pac. 995, 36 Am. St. Rep. 142; *Kelly & Brodock v. Greenough*, 9 Wash. 659, 38 Pac. 158; *Hutchinson v. Mt. Vernon Co.*, 49 Wash. 469, 95 Pac. 1023; *Malone v. Crescent City M. & T. Co.*, 77 Cal. 38, 18 Pac. 858.

In this connection, appellant contends there was no absolute agreement to pay, and that the writing is too uncertain and wanting in mutuality. The agreement contained an absolute promise to pay 50 cents per M. on the scale on each raft of logs. It was an original undertaking on the part of appellant to pay this amount until such time as it notified respondents it would cease such payment. The court finds no such notice was ever given. Until the notice was given, respondents had a right to assume that appellant held itself liable. There was no error in the allowance of the amendment. Our

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

statute providing for amendment of pleadings is very liberal, and the court was clearly within its provisions in permitting respondents to amend. There was no variance. The cause of action alleged was the cause proved. There was no difference between the pleading and proof, except as to the increase in the number of logs furnished appellant and the consequent liability at 50 cents per M. In order to establish a variance, there must be an essential difference to the prejudice of a party in making his defense. There could be none under such circumstances. It would not prejudice appellant to inform it of the number of logs furnished it by Kelly. Such was undoubtedly, then, within its knowledge and we fail to see how it could have been misled. There is no uncertainty about the writing. Appellant plainly confesses a liability to the extent of 50 cents per M. on all logs furnished by Kelly, until notice to the contrary should be given. There was no lack of mutuality. The writing induced all parties to the transaction to do something in reliance upon its terms. Appellant furnished supplies. Kelly continued logging and supplying logs to appellant. Appellant received its benefit in the receipt of the logs from Kelly. The writing itself does not purport to indicate anything other than appellant's undertaking, but, under the circumstances of its execution, its purpose and its effect, it could not be subject to a charge of lack of mutuality. Judgment is affirmed.

RUDKIN, C. J., and CHADWICK, CROW, and DUNBAR, JJ., concur.

(61 Wash. 357)

SPOKANE CANAL CO. v. COFFMAN et ux.
(Supreme Court of Washington. Dec. 29, 1910.)

1. FRAUDS, STATUTE OF (§ 45*)—AGREEMENT NOT TO BE PERFORMED WITHIN ONE YEAR—SPECIFICATIONS AS TO TIME.

A parol contract to plant and cultivate fruit for five years from the time of the contract is within the statute of frauds, because it is one not to be performed within a year.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 67-71; Dec. Dig. § 45.*]

2. EVIDENCE (§ 397*)—PAROL EVIDENCE CONTRADICTING WRITING.

The terms of a written contract may not be varied or contradicted by parol evidence.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1756-1765; Dec. Dig. § 397.*]

3. EVIDENCE (§ 419*)—PAROL EVIDENCE—CONSIDERATION.

The terms of a written contract for the sale of land, fixing the consideration, cannot be varied by parol evidence, for such terms are within the statute of frauds as much as any other part of the contract.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1912-1928; Dec. Dig. § 419.*]

4. CONTRACTS (§ 10*)—REQUISITES—CONSIDERATION—MUTUALITY.

A contract for the sale of land providing that there would be no forfeiture for nonpay-

ment of the price for five years, if the purchaser remained on the premises and cultivated it, and set out an apple orchard, and if at the end of this time he had not paid for the land, there would be an abundance of fruit growing thereupon to pay for the same, is void for lack of mutuality.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 21-40; Dec. Dig. § 10.*]

5. CONTRACTS (§ 9*)—REQUISITES—CERTAINTY.

Such contract is void for uncertainty as it does not show any certain time of payment.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 10-20; Dec. Dig. § 9.*]

Department 1. Appeal from Superior Court, Spokane County; E. H. Sullivan, Judge.

Action by the Spokane Canal Company against Henry M. Coffman and wife. From a judgment for plaintiff, defendants appeal. Affirmed.

John M. Gleason and Joseph F. Morton, for appellants. Happy, Winfree & Hindman, for respondent.

MOUNT, J. This is the second appeal in this action. When the case was here before upon the appeal of the plaintiff in the action, the judgment was reversed and the cause remanded for further proceedings. *Spokane Canal Company v. Coffman*, 54 Wash. 645, 103 Pac. 1106. In the opinion, we said: "The record shows that they [respondents at that time] are in default under the contract, and unless a new contract has been entered into, extending the time of payment or waiving all payments past due, appellant is clearly entitled to a judgment for rescission and for possession of the land." When the case was remanded, the defendant filed an amended answer by which the contracts were admitted, as alleged in the complaint, and an attempt was made to allege a new contract and waiver of payments past due and to become due. The amended answer alleged the new agreement as follows: "Plaintiff company then and there informed these defendants * * * that if said defendants would remain on said premises, and cultivate the same and set out an orchard on said premises, that no forfeiture would be demanded or claimed under said contract, or either of them, by reason of the failure of defendants to pay said monthly payments, or the taxes on said lands for a period of five years, if such there was, to wit, the time necessary to grow an orchard on said lands, and that at the end of said five years, if the said defendants had not previously paid for their lands, that there would be a superabundance of fruit growing on said lands by reason of the cultivation of said orchard by said defendants to pay for same." It is not alleged that this waiver or new contract was made in writing. At the trial the defendants offered to prove that the contract was made orally, and that in pursuance thereof de-

endants remained on the land, and planted the same to trees and shrubbery and improved the same to the value of \$3,000. The trial court was of the opinion that this alleged modification was, in effect, an attempt by parol evidence to vary and modify the terms of a written contract, and also that the contract was one which is required to be in writing, and was within the statute of frauds, and for these reasons sustained objections to the offered evidence.

We think the court was right upon both grounds. The contract was one which was not to be performed within a year, and under the statute was void unless in writing. The original contracts were in writing. There is no contention about that fact. But it is now claimed that the time and manner of payment were subsequently changed by oral agreement. The rule is elementary that the terms of a written contract may not be varied or contradicted by parol. The rule is stated in *Bradley v. Harter*, 156 Ind. 499, 60 N. E. 141, as follows: "It is true that the consideration for the sale of real estate, even as between the parties to the written contract, may be shown by parol, when such consideration is not of itself contractual, within the terms or provisions of the written instrument; but when a written contract affected by the statute, stipulates, fixes, and provides for the payment of the consideration, as was done under the written agreement in this case, the consideration, and the mode or manner of its payment, as therein fixed and provided, become a part of the contract, and the latter, as to these, is no more open to change or modification by parol than it is in respect to any other of its parts." Under this rule, the trial court was right in rejecting oral evidence to thus modify and vary the terms of the admitted written contract.

Furthermore, if we assume that the contract alleged was an entirely new contract, and was taken out of the statute because there had been a part performance, still the contract was so indefinite and uncertain as to be void. The allegation is that, if the appellants would remain on the premises and cultivate the land and set out an orchard thereon, no forfeiture would be claimed for a period of five years; and at the end of this period, if the appellants had not paid for the land, then there would be an abundance of fruit growing thereon to pay for the same. In other words, there was no obligation on the part of the appellants to pay for the land within five years, and no definite time thereafter when payment should be made with fruit, and appellants were not required to remain upon the land or to cultivate it. The contract is entirely wanting both in definiteness and in mutuality. In the case of *Dorsey v. Packwood*, 53 U. S. 126, 13 L. Ed. 921,

where the purchaser of a plantation "bound himself to transfer to his son-in-law one-half of the plantation, slaves, cattle, and stock as soon as the son-in-law should pay for one-half of the cost of said property either with his own private means or with one-half the profits of the plantation, it was held that such a contract was deficient in mutuality. The court, in reference to the contract, there said: "But there is one characteristic necessary to give it validity as a binding contract, in which it is entirely deficient. It wants mutuality. It imposes no obligation on Dorsey whatever. He is not bound either to render services or pay money as a consideration for one-half the land. Packwood could not support a suit upon it to compel Dorsey to do anything. He has not an alternative obligation, because Dorsey is not bound to perform either alternative."

The same is true in this case. If the contract was made as the appellants alleged and attempted to prove, there was nothing in it to bind them. They were neither required to remain upon the land nor to pay for it at any time. We are of the opinion, therefore, that the new contract alleged was within the statute of frauds, could not be proved by oral evidence, and was also void for uncertainty.

The judgment is therefore affirmed.

RUDKIN, C. J., and GOSE, FULLERTON, and PARKER, JJ., concur.

(61 Wash. 271)

NORTH COAST R. CO. v. AUMILLER et al.
(Supreme Court of Washington. Dec. 20, 1910.)

1. EMINENT DOMAIN (§ 247*)—NATURE—DELEGATION OF POWERS—INSTRUCTION.

The power of eminent domain is to be strictly construed and parties seeking it may not encroach on individual rights, so that in an action where the issue was whether a railroad company was liable for interest upon an award, that question must be considered with reference to Const. art. 1, § 16, which provides that full compensation must be paid into court before the land may be taken, etc.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 638-643; Dec. Dig. § 247.*]

2. EMINENT DOMAIN (§ 241*)—COMPENSATION—JUDGMENT ENTRY—ABANDONMENT.

Judgment need not be entered immediately upon the verdict awarding damages in condemnation, but the condemning party may elect whether it will abandon the proceeding or appropriate the property, for there is no requirement under Const. art. 1, § 16, that the judgment be immediately entered.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 621-625; Dec. Dig. § 241.*]

3. EMINENT DOMAIN (§ 243*)—COMPENSATION—JUDGMENT FOR DAMAGES—ACTUAL JUDGMENT.

Although in a condemnation proceeding, it may be said that there are three separate judgments, the adjudication of necessity, the award of damages, and the decree of appropriation, the first is a condition precedent, and the last merely formal, so that the award of damages is the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

real judgment which decides the controversy between the parties.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 627-629; Dec. Dig. § 243.*]

4. EMINENT DOMAIN (§ 247*)—PROCEEDINGS TO AWARD COMPENSATION—INTEREST ON AWARD—POSSESSION.

After an award of damages in condemnation, judgment of appropriation was not entered for some time. During that interim, the owner remained in possession. When it was entered, he claimed interest upon the award. *Held*, that as possession is only one of the elements in the value of land, and as the right to rent, sell, etc., having been practically cut off by the judgment, under Const. art. 1, § 16, requiring full compensation to be paid into court before land is taken, interest should be allowed upon the award.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 638-643; Dec. Dig. § 247.*]

5. EMINENT DOMAIN (§ 247*)—PROCEEDINGS TO AWARD COMPENSATION—INTEREST ON AWARD—POSSESSION—SET-OFF.

In condemnation, if it be sought to set off the value of the possession as against the interest on the award, the burden of establishing the value of the possession is upon the condemning party; the landowner having nothing to do but receive full compensation before his land is taken.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 638-643; Dec. Dig. § 247.*]

Department 2. Appeal from Superior Court, Yakima County; E. B. Preble, Judge.

Action by the North Coast Railroad Company against W. J. Aumiller and wife. From a judgment for plaintiff, defendants appeal. Reversed, with directions.

James O. Cull, for appellants. Danson & Williams and H. J. Snively, for respondent.

DUNBAR, J. This action was brought by the respondent, a railroad company, under the eminent domain statutes, to appropriate certain property of the appellants for a right of way. An order of necessity was adjudged, and the case was tried to a jury on the question of damages sustained by the appellants, which resulted in a verdict in their favor in the sum of \$15,000. This verdict was entered on the 13th day of May, 1910. On the 17th day of June, 1910, respondent applied to the court for the entry of judgment and final decree of condemnation, which was obtained and entered. This judgment did not provide for the payment to appellants of interest on the amount of the award from the date of entry of verdict to the date of payment of judgment, and it is upon this refusal of the court to enter judgment for that amount that this appeal is taken, and the only question involved is whether a landowner, in case of appropriation of his property by a railway corporation under the power of eminent domain, is entitled to interest on the amount of damages awarded by the jury from the date of the award or entry of verdict until the final judgment of appropriation.

Section 16, art. 1, of the Constitution of the state of Washington, provides among other things that no right of way shall be appropriated to the use of any corporation other than municipal until full compensation therefor be first made in money, or ascertained and paid into court for the owner. It is well established that the powers of eminent domain are to be strictly construed, and that parties seeking it must not be allowed to encroach upon the individual rights beyond the scope of their authority, so that this question will be considered with reference to constitutional guaranty that full compensation must be paid into court for the owner. There is no requirement that the appropriator of the property shall cause judgment to be entered immediately upon the verdict assessing the damages, and under the rule announced by this court in *Port Angeles Pacific R. Co. v. Cooke*, 38 Wash. 184, 80 Pac. 305, the condemning party has a right to a reasonable time in which to make the election whether it will abandon the proceedings or appropriate the property. In *Port Angeles Southern Railroad Co. v. Barbare*, 46 Wash. 275, 89 Pac. 710, it was held that a corporation had a reasonable time to make its decision in this regard. Conceding this right, the least that it can do in good conscience is to give the owner the benefit of the value of the award while it is taking time to determine whether or not it will abide by the award. It having the advantage of an opportunity to retrace its steps while the other party is irrevocably bound by the award, we think that this is, at least, all the advantage which should be accorded it, and that the property owner should not be forced to bear a loss by reason of the transaction.

In this particular case the amount in controversy is small, but the principle to be established might become important in other cases. In this case it is conceded that the owners remained in possession of the property, but it is also a fact that they offered to prove that they had received no rents, issues, and profits from said property subsequent to the award, and that they had been unable to rent the same because of the claim thereto of the petitioner in virtue of these proceedings. If this be true, and it must be taken to be true, then it would seem that, not having the real benefit of the land and not having the right to the use of the award, there could be no question that full compensation was not obtained by them. The award of damages is somewhat in the nature of a judgment. In fact, it was held to be an interest-bearing judgment by this court, in *State ex rel. Donofrio v. Humes*, 34 Wash. 347, 75 Pac. 348. It is true, as urged by the respondent, that there might be said to be three separate and distinct judgments recognized in our eminent domain

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

proceedings, adjudication of the necessity of the appropriation, judgment on the verdict or award of damages, and judgment or decree of appropriation. The first, of course, simply establishes an antecedent right to commence the proceedings. The last is only the formal announcement which necessarily follows, and gives legal effect to the real judgment, which embodies and decides the real controversy between the parties, viz., the amount which is to be paid.

But, whatever may be said of these more or less technical questions, the vital question is, What constitutes full compensation? Conceding that the possession remains in the landowner, it cannot be said with any degree of reason that the value of his possession is not impaired by the judgment of damages. Possession is only one of the elements of value in land. The right to rent, the right to sell, the right to improve, are all valuable rights which must in the nature of things be affected by this relation. If so, it conclusively follows that he has not received full compensation. As said by the court in *Lake Koen Navigation, Res. & Irr. Co. v. McLain Land & Inv. Co.*, 69 Kan. 334, 76 Pac. 853: "In condemnation appeals the issue is, what shall be full compensation? Interest is allowed merely as a means of securing such compensation. If, upon the condemnation of land, complete deprivation do not follow at once, still, further tenure is rendered precarious. Possession may be disturbed at any time, and all property rights are exercisable only under doubt and uncertainty as to their duration. As a recompense for the loss attending this embarrassed use of the land, and this qualification of dominion over it pending the payment of the condemnation money, interest may be allowed." *Lewis on Eminent Domain*, § 743, is as follows: "Where damages are assessed for property to be afterwards taken, the award or verdict should include interest from the time with reference to which the damages are estimated, to be reduced by the value of the use of the property to the owner while he continues to have such use. As we have before observed, the estimating and payment of the compensation should be concurrent with the taking. As this is impossible in practice, a time must be selected with reference to which the compensation shall be assessed and to which the title will relate when the compensation is paid. This point of time must necessarily be before the compensation can be paid. Between that time and the payment the owner has only a qualified use of his property. He may use it as it is, but he cannot improve or sell it, except subject to rights acquired by the condemnation. As his just compensation is withheld from him, though necessarily, he should have an equivalent for such withholding, and that, in law,

is legal interest." In further discussing the question, it is said: "It is true that, until the company actually takes possession, at the end of the proceedings, the owner has the legal right to possess and use the land. It cannot be assumed that the value of this legal right is equivalent to the interest on the assessed value of the land. From the time of the award, he is practically deprived of his right to dispose of the land. His possession is precarious, liable to be terminated at any time; he cannot safely rent; he cannot safely improve; if he sows, he cannot be sure that he will reap. As he is not placed in this position by any act of his own, is not in as a wrongdoer, nor under any contract, there would be no justice in charging him with any assumed value of the use. Where the owner has actually derived benefit and value from his possession and use between the filing of the award and the assessment by the jury, the value of such possession and use may be ascertained by the jury and the amount of it deducted from the interest allowed." This is also the rule laid down by *Randolph on Eminent Domain*, § 280, where it is said: "Where the landowner is left in possession for a time after the date of valuation, the possession has been deemed equivalent to interest. In other decisions possession is not deemed equivalent to interest, as it is permissive only, and does not carry the right to improve the property save at the possessor's risk. The best rule is that which does not arbitrarily make possession equivalent to interest, but allows interest from the date of valuation, and reduces the amount by the estimated value of the possession." And without further citation, the overwhelming weight of authority is to this effect. It is also to the effect that, inasmuch as the landowner has nothing to do but to receive full compensation before his land shall be taken, the question of whether the possession has been equal to interest on the award is a fact to be established affirmatively by the condemning party.

Under this rule, the judgment in this case will be reversed, and the court instructed to enter judgment for the additional interest demanded.

RUDKIN, C. J., and OROW, MORRIS, and CHADWICK, JJ., concur.

(61 Wash. 386)

WILTON v. PIERCE COUNTY et al.

(Supreme Court of Washington. Dec. 30, 1910.)

1. MUNICIPAL CORPORATIONS (§ 34*)—ANNEXATION OF TERRITORY—PROCEEDINGS—ELECTION—"QUALIFIED ELECTORS."

Laws 1907, c. 245, provides that upon petition of one-fifth of the qualified electors residing within territory sought to be annexed, the board of county commissioners, after due hearing, shall call an election on the question of the annexation in the territory to be an-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

nexed, which shall be conducted according to the general election laws and at which only qualified electors shall vote. The general election law (Rem. & Bal. Code, § 4798) provides that the board of county commissioners in each county shall divide their respective counties into election precincts, establish the boundaries thereof, and designate one voting place in each precinct. Held, that since under the general election law a voter would only be a qualified elector within the precinct in which he resided, there was no valid election for the annexation of territory to a city, where no polling places were established by the notice calling for the election in eight of the precincts of the county which were included within the territory to be annexed; the voters in such precincts not being qualified electors.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 98-101; Dec. Dig. § 34.*]

For other definitions, see Words and Phrases, vol. 7, pp. 5875-5876.]

2. INJUNCTION (§ 80*)—JURISDICTION—POLITICAL QUESTIONS.

While equity has no jurisdiction over a purely political question, the validity of an election for the annexation of territory to a city involves the property rights of the citizens of the annexed territory, so as to give equity jurisdiction to enjoin the canvassing of the returns of such election on the ground of its invalidity.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 151; Dec. Dig. § 80.*]

3. MUNICIPAL CORPORATIONS (§ 34*)—ANNEXATION OF TERRITORY—PROCEEDINGS—REMEDIES TO PREVENT ANNEXATION—PERSONS ENTITLED TO SUE.

Rem. & Bal. Code, § 4945, providing that no one may contest an election except a qualified elector of the district, county, etc., in which the office is to be exercised, would not apply so as to require one, suing as a property owner in territory proposed to be annexed to a city by an election for that purpose, to enjoin the canvassing of the returns on the ground of the invalidity of the election, to allege that he was an elector; the suit not being to contest the right to hold office.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 98-101; Dec. Dig. § 34.*]

Department 2. Appeal from Superior Court, Pierce County; M. L. Clifford, Judge.

Suit by William H. Wilton against Pierce County and others. From a decree for plaintiff, defendants appeal. Affirmed.

J. L. McMurray and Frank D. Oakley, for appellants. F. Campbell and Burdick & McQuesten, for respondent.

MORRIS, J. Appeal from a decree granting an injunction, enjoining appellants from canvassing the returns of an election held January 8, 1910, the purpose of which was the annexation of territory to the city of Tacoma. The complaint alleged respondent to be a resident and freeholder within the territory sought to be annexed, and then followed a number of alleged illegal features in the holding of the election, only a few of which we will notice, as the decree was entered upon motion for judgment upon the pleadings. We will therefore only refer to those charges which are admitted in the an-

swer and upon which the judgment must rest, if at all.

The complaint charged, and the answer admitted, the places fixed in the notice where the election would be held, which places in some instances were not within the regularly established voting precinct of the county within the district sought to be annexed. It is also admitted that, in eight of the precincts of the county, portions of the territory of which were included within the district sought to be annexed, no polling places were established by the notice calling for the election. The election was held under chapter 245, Laws of 1907, providing that, upon the presentation of a petition signed by 20 per centum of the qualified electors resident within the territory sought to be annexed, the board of county commissioners, after due hearing and determination of regularity, shall call "an election to be held in such proposed territory to be annexed," notice of which shall be given in form not material to be here inquired into. "Such election shall be conducted in accordance with the general election laws of the state, and no person shall be entitled to vote thereat, unless he shall be a qualified elector." The general election laws, under which an election of this character is by the terms of the act to be held, provide that the board of county commissioners in each county shall divide their respective counties into election precincts, establish the boundaries thereof, and designate one voting place in each precinct. Rem. & Bal. Code, § 4798. This annexation act also provides that the question of annexation of the proposed territory shall be submitted to the qualified electors of the territory. Among the necessary qualifications of an elector is residence within the precinct for 30 days preceding an election. Manifestly, then, a resident of the proposed territory would not be a qualified elector therein, except as he was a qualified elector of some already established precinct. Residence within the precinct being a necessary qualification, one could not be a qualified elector except within the precinct in which he resided; and any attempt to exercise the right of franchise under the general law must be made within the precinct in which the elector resides. Outside of the boundaries of that precinct he is not a qualified elector for the purpose of voting. When, therefore, an elector in "White" precinct was compelled to go to a designated place in "Black" precinct to cast his vote, he lost his right thereto. When he left the boundaries of "White" precinct in which he resided and attempted to cast a vote in "Black" precinct, such a vote was not the vote of a qualified elector, and any election affected by such votes would not be an election by qualified electors. The question of convenience of the voters is not to be con-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

sidered. It is rather one of qualification, and each elector must cast his vote within that precinct residence in which clothes him with the qualifications of an elector. The residents of these eight precincts, who were compelled to go outside of their resident precincts in order to vote, lost the right to vote by doing so, and the question was not, as provided for in the act, submitted to the qualified electors of the territory. Counsel for appellants argues such is not a correct construction of the statute, because in school elections voters may vote in places outside of the election precincts in which they reside. True; but in school elections, residence within election precincts is not a qualification of the voter. The qualification is special, not at all according to the general election laws as provided for in this statute; the qualification as to residence being residence within the school district. Manifestly, upon the same reasoning one could not vote at a school election in a district within which he did not reside. There is nothing contrary to these views in *Mayor v. Shattuck*, 19 Colo. 104, 34 Pac. 947, 41 Am. St. Rep. 208, and *State v. State Board of Canvassers*, 78 S. C. 461, 59 S. E. 145, 14 L. R. A. (N. S.) 850, cited by appellants. It follows that the election was not legal in that it was not an election by qualified electors.

Appellants contend that the court below had no jurisdiction; that the question is purely a political one. We concede that a court of equity has no jurisdiction over a purely political question, such as is involved in many questions growing out of some matters pertaining to or involving elections. But the question here submitted involves more than a political right; it reaches farther and touches the property right of the citizen. Such, we think, is established by previous holdings of this court upon a like question. *State ex rel. West Seattle v. Superior Court*, 36 Wash. 566, 79 Pac. 29; *State v. Nicoll*, 40 Wash. 517, 82 Pac. 895; *Estate of Brown v. West Seattle*, 43 Wash. 26, 85 Pac. 854. The freeholder in the rural, and the freeholder in the urban, district hold their property subject to different rights of taxation, special assessments and different regulations as to sanitary and other regulations affecting the public health, safety, and general welfare. It is too clear for argument that property in a city is subject to many restrictions which create a burden not borne by property outside of the municipal boundaries. When, therefore, the property of a citizen is brought within the municipal boundaries of a city, his property rights have been affected. He must now hold that property subject to many regulations, restrictions, and burdens not previously attaching to it. And in seeking to prevent such a transfer, he presents more than a political question; it is one which

affects him in his property as well as his political right.

Appellants further contend that respondent, in describing himself as "a resident and freeholder within the territory," pleads himself out of court, in that he fails to describe himself as an elector, and the general election laws provide that "no person shall be competent to contest an election, unless he is a qualified elector of the district, county, or precinct, as the case may be, in which the office is to be exercised." Rem. & Bal. Code, § 4945. This is not an election contest. Respondent is not here contesting the right of any person to hold office. Rather he is seeking to protect an infringement of his property rights, attempted to be made without compliance with the law giving the right of such infringement.

Believing, therefore, that the failure to follow the mandate of the law as to the manner of holding this election rendered the same illegal, the respondent was entitled to the decree appealed from, and the same is affirmed.

RUDKIN, C. J., and CROW and DUNBAR, JJ., concur. CHADWICK, J., took no part.

(42 Mont. 290)

CITY OF BOZEMAN v. BOHART.

(Supreme Court of Montana. Dec. 6, 1910.)

1. INJUNCTION (§ 38*)—TEMPORARY INJUNCTION—WHEN AUTHORIZED.

A plaintiff in an action for unlawful detainer may in a proper case obtain a temporary injunction in aid of it to restrain defendant from interfering with the occupation, use, and enjoyment by plaintiff of the premises, though the action is summary and is usually speedy and adequate to oust defendant from his unlawful possession.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. §§ 86-90; Dec. Dig. § 38.*]

2. EQUITY (§ 43*)—REMEDY AT LAW.

Where a court is competent to take cognizance of a legal right and has power to proceed to judgment which affords adequate relief, plaintiff must proceed at law because defendant has a constitutional right to a trial by jury.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. §§ 121-140, 164-166; Dec. Dig. § 43.*]

3. INJUNCTION (§ 38*)—TEMPORARY INJUNCTION—WHEN AUTHORIZED.

That the main relief sought in an action is legal, so that defendant is entitled to a jury trial on legal issues, does not prevent the court in its equitable jurisdiction to issue an injunction to preserve the subject of the action until the legal issues can be determined.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. §§ 86-90; Dec. Dig. § 38.*]

4. MUNICIPAL CORPORATIONS (§ 722*)—LEASES—RIGHTS RESERVED.

A city executing a lease of its lands reserving the use thereof for the burial of dead animals and for a dumping ground for garbage, and binding the lessee to superintend the burying of dead animals and the deposit of garbage, retains the right to make use of the land so far as it is necessary to serve the convenience and preserve the health of its inhabitants, and the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep. r Indexes

right is a substantial and continuing one not inconsistent with the right of occupancy by the lessee for his own purposes, and the city may protect and enforce the right, though it is not seeking to terminate the lease and recover possession.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 722.*]

5. MUNICIPAL CORPORATIONS (§ 722*) — INJUNCTION (§ 46*)—LEASES—CONSTRUCTION—OBLIGATIONS OF LESSEE.

A lease by a city of its lands, reserving the use thereof for the burial of dead animals and for a dumping ground for garbage, and requiring the lessee to superintend the burying of dead animals and the deposit of garbage for a specified compensation, and requiring him to keep clear and easy of access a sufficient tract for the burial of dead animals and for the dumping of garbage, makes the lessee an employé of the city to the extent to which his services are required to superintend the disposition of garbage and the burying of dead animals and he must allow the city authorities free access to the premises and render substantial services to it, and his interference with the right of entry by the city makes him a trespasser, and by continuing his conduct the court has jurisdiction to grant relief by injunction.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 722;* Injunction, Cent. Dig. §§ 98, 99; Dec. Dig. § 46.*]

6. INJUNCTION (§ 38*)—LEASES—RIGHTS RESERVED—REMEDY.

A city leased its land, reserving the use thereof for the burial of dead animals and for a dumping ground for garbage, and required the lessee to superintend the disposition of garbage and the burying of dead animals. The lessee failed to bury dead animals, and permitted many of them to remain unburied for many days. In other instances dead animals were buried with only light covering, and, though the city demanded compliance with the contract, he refused to do so. The city could not acquire any other place to make proper disposition of the garbage and dead animals. *Held*, that under Rev. Codes, §§ 6643, 6865, authorizing an injunction when during the litigation the continuance of some act will produce irreparable injury, and authorizing an injunction to enjoin a nuisance, the city suing for unlawful detainer was entitled to a temporary injunction restraining the lessee from interfering with the city's use of the property, since there was no proper measure of damages by which the city could be compensated for the unlawful interference with its rights by the lessee, and since his act created a nuisance.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 86-90; Dec. Dig. § 38.*]

7. INJUNCTION (§ 18*)—SOLVENCY OF DEFENDANT.

Where the damages resulting to one from the wrongful interference of his rights by another cannot be measured in money, the fact that the latter is solvent does not affect the right of the former to a temporary injunction.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 17; Dec. Dig. § 18.*]

Appeal from District Court, Gallatin County; W. R. C. Stewart, Judge.

Action by the City of Bozeman against Seth E. Bohart. From an order denying a motion to dissolve a temporary injunction, defendant appeals. Affirmed.

John A. Luce, for appellant. George Y. Patten, for respondent.

BRANTLY, C. J. This is an action for unlawful detainer, and, incidentally, for equitable relief by way of injunction pending the litigation. On May 26, 1909, the plaintiff city and the defendant entered into the following contract, which is attached to and made a part of the complaint: "This agreement, made and entered into this 26th day of May, 1909, by and between the city of Bozeman, a municipal corporation of the state of Montana, the party of the first part, and Seth E. Bohart, of the county of Gallatin, state of Montana, the party of the second part, witnesseth: That the party of the first part, for and in consideration of the rents, issues, covenants, and agreements hereinafter mentioned, has demised, leased, and let, and by these presents does hereby demise, lease, and let unto the party of the second part, the following described premises situate in the county of Gallatin, state of Montana, to wit: That certain piece and parcel of land lying about a mile north of the city of Bozeman, known as the city dump ground, excepting however therefrom one-half acre in the southwest corner to be used by the city as a pesthouse site. To have and to hold the above-rented premises to the party of the second part during the full term of two years from the twenty-sixth day of May, 1909, unless terminated as hereinafter provided before said date. Said premises are leased to said party of the second part by the party of the first part on the expressed conditions, covenants and agreements as follows: The party of the first part reserves the use of said ground for the burial of all dead animals from within the limits of the said city of Bozeman, for the dumping of all manure, rubbish, garbage and other refuse matter, and for any other dumping which it may desire. The party of the second part agrees to bury all dead animals brought there by the city free of charge, and to be there every day and superintend the burying of all dead, and the deposit of all manure, rubbish, garbage and other refuse matter that may be brought there, charging others than the city for burying large dead animals not to exceed \$1.00 per head, and small animals not to exceed twenty-five cents per head, and in case such parties bury their own dead animals on bringing them there, then to make no charge. The party of the second part further agrees to keep sufficiently clear and easy of access a sufficient tract of said ground for the burying of dead animals and for the dumping of said manure, rubbish, garbage and other refuse matter as may be designated by the Public Buildings and Grounds Committee of the party of the first part; and further agrees to designate the place of the burial of all dead animals, and the dumping of all refuse matter, and to see that all animals are buried within twenty-four hours from the time of being deposited on said grounds; and further agrees not to

remove, or permit to be removed, from said grounds any sand or other deposits, without the written permission of said committee, above named. It is further agreed that the party of the first part shall be at no expense whatever for repairs or improvements on said grounds during the term of this lease, and the party of the second part has the right to remove all improvements in the way of buildings and fences placed by him on said grounds at the expiration of this lease, provided that the party of the second part shall put the fences now on said premises in good repair, and maintain them in good repair during the term of this lease, and shall not be permitted to remove any new fencing or repairs thereon. It is agreed by the party of the first part that the party of the second part shall have all crops produced by him on the cultivated land of said premises for each of the crop seasons of 1909 and 1910, which shall be the full consideration for the proper care and superintendence of said grounds as herein provided, and shall have no other compensation therefor. It is further agreed between the parties hereto that should the party of the second part fail to comply with any of the conditions, covenants or agreements herein contained, then and in that event this lease shall at once terminate, and the party of the first part shall have the right to re-enter and take full and absolute possession of said premises, and all thereof; and it is expressly made a condition of this lease that the party of the second part shall not assign this lease, nor sublet said premises, or any part thereof, and that he shall at the expiration of said term or sooner termination of this lease, quietly yield and surrender possession of the said premises, and all thereof, to the party of the first part. In witness whereof, the party of the first part, by resolution of its council duly passed, has caused this agreement to be executed by its mayor and city clerk, and the seal of said city to be hereto affixed, and the party of the second part has hereunto set his hand."

In pursuance thereof, the defendant entered into possession of the premises, and continued therein until the commencement of this action. As ground for equitable relief, the complaint alleges, in substance, that since May 26th the defendant has failed to be upon the premises every day during business and working hours to superintend the burial of animals, the dumping of manure, garbage, etc.; that he has failed to bury all dead animals as by the contract he was required to do; that he has in some instances permitted dead animals conveyed upon the premises by the city to remain unburied for as many as 10 days and to be eaten by hogs; that in other instances numbers of dead animals have been allowed to remain exposed for more than 24 hours awaiting burial; that he has buried with a light covering of manure only some which afterwards had to be burned; that in other instances the bodies have been

burned; and that all of these had been deposited upon the premises after the defendant went into possession and prior to August 5, 1909. It is further alleged that frequent demands have been made upon the defendant to comply with his contract, but that he has refused to do so, and that at a meeting held on August 5, 1909, it was determined by the city council by resolution, on recommendation of its committee on buildings and grounds, to terminate the contract, and that the defendant has, in pursuance of this determination, been duly notified in writing by the mayor and required to quit the premises within three days, exclusive of the date of service of notice, but that he has failed to do so. The complaint then continues: "(9) That the said lands and premises herein mentioned and described are held, occupied, and used by the plaintiff and its inhabitants as a dump ground for the burial of dead animals, and the deposit of manure, rubbish, garbage, and other refuse matter from the streets, alleys, and private premises within the said city of Bozeman, and is the only place conveniently accessible from the said city of Bozeman where the said city of Bozeman and its inhabitants may take such dead animals, manure, rubbish, garbage, and other refuse matter, and that the same is situated within less than a mile of the limits of the said city of Bozeman, and near a public and main traveled highway; that the use and occupation of said lands and premises as such dump ground and for the purposes aforesaid, and the control thereof, by the plaintiff, is necessary that it may discharge its public duties in the protection and preservation of the health of its inhabitants, and the maintenance of sanitary conditions in said city; that the defendant is now in the occupation of said lands and premises, and has excluded the plaintiff and its officers, agents, and employes therefrom, and threatens to and will, unless restrained by this honorable court, continue to so occupy the same and exclude the plaintiff and its officers, agents, and employes therefrom; and that, if the plaintiff is deprived of the use, occupation, and enjoyment and control of the said lands and premises, great and irreparable injury will be suffered by the said city of Bozeman and its inhabitants for which pecuniary compensation would not afford adequate relief, and that the plaintiff has not any plain, speedy, or adequate remedy in the ordinary course of law."

The prayer is for a judgment for restitution of the premises, with damages, and for an injunction pendente lite restraining the defendant from interfering with plaintiff's occupancy and use and enjoyment of them. Upon the filing of the complaint the district judge issued an injunction requiring the defendant, his agents, servants, and employes, and all others acting in his aid or assistance, to "refrain from in any wise interfering with the occupation, use, and enjoyment of the plaintiff and its officers,

agents, and employes, of those certain lands, premises situated," etc., describing them. Thereafter the defendant moved for a dissolution of this order. The motion was denied. Hence this appeal.

The several contentions made by counsel for defendant are all involved in the general inquiry: Does the complaint state a case which authorizes the issuance of an injunction? It is said that an action for unlawful detainer is plain, speedy, and adequate, and hence that an injunction will not lie in aid of it. This form of action is summary in its nature, and usually is speedy and adequate to oust the defendant from his unlawful possession. But the character of the particular action is not determinative of the question whether the court should grant provisional relief pending settlement of the main controversy. Even though in a given case the trial can be speedily had and the plaintiff be successful, yet the defendant has the right of appeal, and his conduct may in the meantime be such that provisional relief is imperatively necessary to preserve the subject of the litigation or the mutual rights of the parties until final judgment. For illustration: The defendant, being in a position to do so, may so use the property as to injure the inheritance or destroy it in the character in which it is intended to be enjoyed, or the rights obstructed by him may be of such a character that damages for obstructing them cannot be computed in money. In such a case the damages awarded in the final judgment would not compensate the owner for the accruing loss, and to deny him provisional relief to preserve the status quo would be equivalent to a declaration that there are wrongs for which the law furnishes no remedy. The general rule is that, when the court is competent to take cognizance of a legal right and has power to proceed to judgment which affords adequate relief without the aid of a court of equity, the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by jury. *Hipp v. Babin*, 19 How. 271, 15 L. Ed. 633; *Whitehead v. Shattuck*, 138 U. S. 146, 11 Sup. Ct. 276, 34 L. Ed. 873; *Black v. Jackson*, 177 U. S. 349, 20 Sup. Ct. 648, 44 L. Ed. 801; *Heyward v. Andrews*, 106 U. S. 672, 1 Sup. Ct. 544, 27 L. Ed. 271; *Cope v. Braden*, 11 Okl. 291, 67 Pac. 475; *Laughlin v. Fariss*, 7 Okl. 1, 50 Pac. 254; *Tomlinson v. Rubio*, 16 Cal. 203; 22 Cyc. 828. But it does not follow that, because the main relief sought is legal and that the defendant is entitled to a jury trial upon the legal issues in the case, the equitable jurisdiction of the court may not be invoked to preserve the subject of the action until the legal issue can be determined.

Under the contract between the parties, the plaintiff reserved the right of entry upon, and occupancy of, a portion of the land leased, for the purpose of dumping garbage and manure, and also for the deposit of dead an-

imals for burial by the defendant. In making the reservation, it retained the right to make use of the property as theretofore, so far as it deemed it necessary to serve the convenience and preserve the health of its inhabitants. The defendant, to the extent to which his services are required to superintend the deposition of the garbage and to bury the dead animals, became the employe of the city. He was bound under his contract, not only to allow the city authorities free access to the premises, but also to render substantial service to the city. The right reserved is a substantial and continuing one, not inconsistent at all with the right of occupancy by the defendant for his own purposes, and the plaintiff has the right to protect and enforce it even though it were not seeking to terminate the lease, and recover the exclusive possession of the premises. It may be conceded that performance of the services stipulated for cannot be enforced by injunction. But, by interfering with this right of entry for the purpose for which the reservation was made, the defendant became a wanton trespasser, and, by continuing his conduct, brought himself clearly within the rule recognized and applied by this court in the case of *Lee v. Watson*, 15 Mont. 228, 38 Pac. 1077, that relief will be granted by injunction to protect the owner of land against a repetition of wanton trespasses for which adequate compensation cannot be given by way of damages. The fact that the circumstances of the case are novel and unusual is no reason why relief should be denied.

The case of *Trustees of German Evangelical Congregation of New Elm v. Hoessli*, 13 Wis. 348, involved a controversy between rival trustees over the right to control the property and temporalities of a religious society. In disposing of a contention that a court of equity will not interfere by injunction to prevent a private trespass, the court said: "The general rule undoubtedly is that in cases of private trespass an injunction would not be granted, for the reason that the aggrieved party had an adequate common-law remedy by action, where proper damages could be assessed by a jury. In ordinary cases this was found to be sufficient for the protection of property. 'But in cases of a peculiar nature, where the mischief was irremediable, which damages could not compensate, or where the injury reached to the very substance and value of the estate, and went to the destruction of it in the character in which it was enjoyed,' then courts of equity would grant an injunction to prevent the injury complained of. [Citing cases]. Now, it must be admitted that the circumstances of this case are so special, the nature and use of the property itself are so peculiar, that an ordinary action of trespass would furnish no adequate compensation for an injury to the possession; for would any mere pecuniary damages furnish any compensation to a religious society for repeated

and constant acts of trespass upon its property and temporalities? Most clearly not. The entire value of such property consists in its free and undisturbed use and enjoyment for religious worship. Considering, therefore, the nature of this property, the use and purpose to which it is dedicated, the mischief arising from acts of trespass upon it, and the insufficiency of the ordinary legal remedies, we must say that in our opinion the complaint states a proper case for an injunction." So here, considering the peculiar character of this property and the rights reserved under the contract, the fact that the city has not and cannot acquire any other place to make proper disposition of its garbage and dead animals found within its limits during the heat of the summer, and thus minister to and preserve the health and comfort of its inhabitants, can it be said that there is any proper measure of damages by which the city can be compensated for the unlawful interference with its right by the defendant? In our opinion this question must be answered in the negative. These facts bring the case within the statute. Rev. Codes, § 6643. Furthermore it is within the knowledge of every one that dead bodies left exposed during the summer season contaminate the air with offensive odors, and become hatching places for communicable diseases. It is also well known that accumulations of garbage produce like results and are a fruitful source of contamination and sickness. It is therefore imperatively necessary that prompt and effective disposition be made of both by those upon whom is cast the duty to do so by law or the ordinances of a city to preserve the health and comfort of the inhabitants. The course pursued by the defendant resulted in the maintenance of a public nuisance which the plaintiff had a right to have abated by injunction. Rev. Codes, § 6865. But it is said that it does not appear from the complaint that the injury will be irreparable, because it is not alleged that the defendant is insolvent. In the final judgment, damages may be awarded for the rental value of the property, but, as we have said, there is no standard by which can be measured the damages which the plaintiff will suffer by having its necessary sanitary work interrupted, and being deprived, pending the litigation, of its means of protecting the health and comfort of its inhabitants. In such cases the ability of the defendant to respond in damages is not material. Manifestly, if the damage resulting from the interference with plaintiff's right cannot be measured in money, in the very nature of the case, it is unimportant what the financial condition of the defendant is. High on Injunction, § 697.

It will be observed that the order does not oust the defendant from possession of the premises. It merely requires him to refrain

from interfering with the occupation, use, and enjoyment of the plaintiff and its employes, thus preserving the right of entry and occupancy to the extent to which it was reserved in the contract.

The order is affirmed.

Affirmed.

SMITH and HOLLOWAY, JJ., concur.

(42 Mont. 232)

KIFT et al. v. MASON et al.

(Supreme Court of Montana. Nov. 29, 1910.)

1. APPEAL AND ERROR (§ 1009*)—EQUITY—FINDINGS OF FACT—EVIDENCE.

On appeal in an equity case findings of the trial court will be sustained, unless it appears that the evidence preponderates against them.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3970-3978; Dec. Dig. § 1009.*]

2. EVIDENCE (§ 215*)—ADMISSIONS—WRITINGS.

Where a lease of a placer claim is made, with an option to purchase within a stated time, the lease amounts to a statement by all parties to the contract that the lessor owned the claim and that the lessee did not.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 754-759; Dec. Dig. § 215.*]

3. MINES AND MINERALS (§ 58*)—LEASE—ACTION TO RESCIND—EVIDENCE.

In an action to set aside the lease of a placer claim, with an option to the lessee to purchase, evidence held not to preponderate against the findings that the lessee did not represent that the location was his and that the lessors had jumped his claim.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 168, 169; Dec. Dig. § 58.*]

4. MINES AND MINERALS (§ 16*)—PUBLIC MINERAL LANDS—PLACER CLAIMS—VALIDITY.

A quartz claim on a patented placer depends, for its ultimate validity and value, upon the ability of the locators to prove that when the application for patent was made, the placer claim contained a known vein upon which the discovery of the quartz was based.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 21-23; Dec. Dig. § 16.*]

Appeal from District Court, Silver Bow County; J. M. Clements, Judge.

Action by Samuel Kift and Isaac Knoyle, an infant, by James Knoyle, guardian ad litem, against Louis Mason and another. Judgment for defendants, and plaintiffs appeal. Judgment affirmed.

McBride & McBride and Kremer, Sanders & Kremer, for appellants. L. P. Forestell and I. A. Cohen, for respondents.

HOLLOWAY, J. In March, 1900, the plaintiffs made discovery of mineral-bearing rock in place within the exterior boundaries of a patented placer claim, and posted notice of location of the Hornet quartz lode mining claim. In May following, and before completing the Hornet location, plaintiffs exe-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

cuted and delivered to defendant Mason a contract of lease and bond upon their interests. The contract admitted Mason to the possession of the premises, defined his duties, and gave him an option to purchase at any time within two years upon payment of \$500. In November, 1901, this suit was brought to cancel the contract upon the ground of fraud. The complaint alleges that after plaintiffs made their location of the Hornet lode claim, Mason came to them and stated that the property was his, and that plaintiffs had "jumped" his claim; that plaintiffs believed these representations to be true and relied upon them; that Mason then asked for a lease and bond upon the property, and because of the representations made by him and the reliance thereon by the plaintiffs, they executed the contract referred to above; that in truth and in fact Mason's statement that he owned the ground was wholly false, and fraudulently made for the purpose of procuring the lease and bond; that at the time the plaintiffs' interests were reasonably worth \$5,000; that as soon as plaintiffs discovered that Mason did not own the premises and that his representations to them were untrue, they elected to rescind the contract and notified the defendants. It is alleged that the defendant Merriman claims some interest in the contract as a co-owner with Mason. The answer admits the ownership of plaintiffs in the Hornet lode claim; admits the making of the contract; denies all the allegations of fraud; pleads the transfer of the interest of Mason in the contract to the defendant Merriman; pleads compliance on the part of the defendants with all the terms of the contract by them to be performed, including a tender of the amount of the purchase price within the time limited, and its refusal by the plaintiffs, and concludes with a prayer for a decree for specific performance of the contract by the plaintiffs. The cause was tried to the court without a jury. Findings of fact and conclusions of law, all in favor of defendants' contention, were made and a decree in conformity with the prayer of their answer was rendered and entered. From that judgment or decree and an order denying their motion for a new trial, plaintiffs appealed.

Appellants contend that the evidence does not justify findings 2, 4, 5, 6, 7, 8, 9, 10, 11, and 12, or any of them; but if findings 2, 4, and the first part of 5 are to be sustained, the others are entirely immaterial. Findings 2, 4, and the portion of 5 referred to above, are as follows: "(2) That after plaintiffs had located the Hornet lode claim, the defendant Mason did not represent to or tell plaintiffs or either of them that the ground covered by the Hornet location was the property of said Mason." (4) That the Hornet lode claim was not of the value of \$5,000, nor of any greater value than \$500 at the time of the execution of the said lease and bond on May 2, 1900. (5) That the defendant

Mason did not represent to plaintiffs or either of them that he, Mason, owned the ground covered by the Hornet location, nor did he represent that it was his property.
* * *

It will be observed that findings 2 and 5 are to the same effect and determine the principal issue made by the pleadings adversely to the plaintiffs. It is the rule in this state, now too well established to be open to further controversy, that on appeal in an equity case the findings of the trial court will be sustained, unless it appears that the evidence preponderates against such findings. *Bordeaux v. Bordeaux*, 32 Mont. 159, 80 Pac. 6; *Finlen v. Heinze*, 32 Mont. 354, 80 Pac. 918; *Pope v. Alexander*, 36 Mont. 82, 92 Pac. 203; *Watkins v. Watkins*, 39 Mont. 367, 102 Pac. 860. Does the evidence disclosed by this record preponderate against the findings that Mason never represented to plaintiffs that he owned the ground covered by the Hornet location? There is a sharp conflict in the evidence upon this question. No useful purpose would be subserved in setting forth the testimony of the several witnesses at length. Plaintiff Kift and the witness James Knoyle testified that Mason did make the representation pleaded in the complaint; Mason denied it. There were facts and circumstances which doubtless weighed against the plaintiffs' contention in the mind of the judge who presided at the trial of the case. The very fact that an option to purchase the property within two years was given to Mason, of itself amounts to a declaration of all the parties to the contract that plaintiffs owned the Hornet claim, and that Mason did not. It appears, too, that at the time the contract was made, plaintiffs had not discovered any ore of commercial value; that they had not done any work of consequence upon the claim, and that from the very nature of the case, the claim did not have any considerable market value, if any market value at all; but that after Mason went into possession and expended time and money developing the claim valuable mineral deposits were discovered; that plaintiffs then had an opportunity to sell for a much larger sum than \$500, and then for the first time sought cancellation of the contract. The testimony given by plaintiffs and the witness James Knoyle respecting statements made by them concerning the value of the Hornet claim is contradicted by the testimony of witnesses apparently disinterested, who were called by the defendants. These facts all doubtless tended to discredit the plaintiffs and their witness in the mind of the trial judge, and we cannot say that such a result was not justified. Furthermore, the trial court had the advantage over the members of this court in seeing the witnesses on the stand, hearing them give their testimony orally and observing their demeanor, and was therefore in a much more advantageous position in

weighing the evidence and in giving credit where credit was apparently due. Under these circumstances we do not think it can be said that the evidence preponderates against findings 2 and 5 as made.

Finding No. 4 appears to us to be fully justified by the evidence. As said above, at the time the contract was made the Hor-net claim was not anything more than a prospect, without any ore of commercial value in sight, and with the location not completed. In addition, it was a quartz claim upon a patented placer and depended for its ultimate validity and value upon the ability of plaintiffs to prove that at the time application for patent to the placer was made, the placer claim contained this known vein upon which discovery of the Hor-net claim was based. Rev. St. U. S. § 2333; *Noyes v. Clifford*, 37 Mont. 138, 94 Pac. 842. Under these circumstances, it seems to us that the trial court was fully warranted in saying that the Hor-net claim did not have a value greater than \$500; and this, too, notwithstanding subsequent development demonstrated that the property was worth a much greater sum, for the trial court in finding upon the question of value was properly considering the claim from the standpoint of its condition at the time the contract was executed.

Justification for the findings above completely disposes of every question raised upon this appeal. If there was not any fraud practiced upon plaintiffs by Mason to secure the contract, then they cannot complain, even though they may have discovered that their bargain was a very poor one. In determining this appeal, we have confined ourselves to the theory upon which the cause was tried. We do not mean to imply that plaintiffs could have recovered had they proven that Mason did make the representations which they claim he made, and that such representations were false. Whether under such circumstances recovery could be had, is a serious question, but one not necessary to be determined on this appeal.

The judgment and order are affirmed.

Affirmed.

BRANTLY, C. J., and SMITH, J., concur.

(42 Mont. 238)

GLEASON v. MISSOURI RIVER POWER CO. et al.

(Supreme Court of Montana. Oct. 29, 1910.)

1. APPEAL AND ERROR (§ 194*)—OBJECTIONS—PLEADING—NECESSITY.

An objection to the sufficiency of defendant's plea of contributory negligence need not be considered on appeal, where it was not raised in the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1241-1246; Dec. Dig. § 194; * Pleading, Cent. Dig. §§ 1375-1407.]

2. NEGLIGENCE (§ 117*)—CONTRIBUTORY NEGLIGENCE—PLEADING.

Contributory negligence should be pleaded with the same degree of particularity required in pleading negligence.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 195-197; Dec. Dig. § 117.*]

3. MASTER AND SERVANT (§ 262*)—INJURIES—ACTION—PLEADING—ASSUMPTION OF RISK.

The principles relating to the particularity and sufficiency of pleas of negligence and contributory negligence apply to the plea of assumption of risk.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 858; Dec. Dig. § 262.*]

4. MASTER AND SERVANT (§ 289*)—INJURIES—ACTION—JURY QUESTION—CONTRIBUTORY NEGLIGENCE.

In an employé's action for injuries by contact with an electric wire, claimed to have been caused by defendant's negligence in not informing plaintiff as to the amount of current carried by the wire, etc., evidence held not to warrant a finding of contributory negligence as a matter of law.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089-1132; Dec. Dig. § 289.*]

5. MASTER AND SERVANT (§ 278*)—INJURIES—ACTIONS—SUFFICIENCY OF EVIDENCE.

In a servant's action for injuries by contact with an electric wire, claimed to have been caused by his employer's negligence in failing to inform him of the strength of the current in the wires, evidence held not to sustain a verdict for plaintiff.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954-972; Dec. Dig. § 278.*]

Appeal from District Court, Silver Bow County; Jeremiah J. Lynch, Judge.

Action by Edwin C. Gleason against the Missouri River Power Company and another. From a judgment for plaintiff and an order denying a motion for a new trial, defendants appeal. Reversed and remanded for new trial.

Wm. Wallace, Jr., John G. Brown, and R. F. Gaines, for appellants. Maury & Templeman and J. O. Davies, for respondent.

SMITH, J. The complaint in this action, after alleging the corporate character of the Missouri River Power Company, reads as follows: "That on the 5th day of August, 1907, and for some weeks previous thereto and for some weeks thereafter, the company had placed in complete and absolute control of its power station, near the High Ore mine in Silver Bow county, the defendant S. L. Case. At the times in this paragraph mentioned he was the superintendent over all the men working for the company in and about the said power station and in and over and about the lines carrying electric current for the company to its patrons in the city of Butte from the said power station; that on August 5, 1907, this plaintiff by the mutual agreement of himself with the company was the servant of the company, employed by the company, and engaged by the company to do line work. On the said 5th day of August,

1907, the said S. L. Case negligently gave to this plaintiff a negligent order, and negligently ordered the plaintiff to do certain work of great danger to the plaintiff, and the plaintiff obeyed said order, and was greatly injured in consequence thereof, partly, but also greatly injured in consequence of the negligence of the company hereinafter set out. The two negligent acts, to wit, that of the defendant Case, and also that of the defendant company, concurred to produce the injury hereinafter set out, and each was a direct and a proximate cause thereof. The negligence of defendant Case was as follows: He ordered this plaintiff to work on one of the wires of the defendant company at a point about two blocks east of the Western Iron Works in Silver Bow county. The said wire was represented by the said Case to the said plaintiff to be carrying a current of electricity not in excess of twenty-six hundred and fifty (2,650) volts, and not in excess of sixty (60) amperes, and if this representation had been true the plaintiff would not have been injured, for that the plaintiff would have worked in safety with the methods which he did use to insulate himself on a wire which carried only 60 or less amperes and 2,650 or less volts; but in truth and in fact the said wire was carrying a much larger amperage than 60, to wit, it was carrying an amperage of about 200 amperes. This fact was unknown to the plaintiff, nor could the plaintiff, with due diligence, have ascertained that fact; but this fact was known to the defendant, S. L. Case, or he, by the exercise of reasonable care, could have and would have discovered and known the same. The negligence of the company consisted in that the said wire was designed to carry, and was supposed by plaintiff and the other linemen to carry, and there was being used off of the said wire, a current not in excess of 60 amperes and 2,650 volts, but for a considerable period of time before the 5th day of August, 1907, and on the said day the company had negligently allowed to escape into the said wire, and there was escaping and going through the said wire at the said time, a current equal to 2,650 volts and about 200 amperes. That when the plaintiff went to work at the said point induced by the company and by S. L. Case to believe that there was only a current of 2,650 volts and 60 amperes, he sufficiently and properly and carefully insulated himself for protection against the current which the company and S. L. Case had led him to believe was there; but he was in no wise insulated nor protected from the current which was actually in the said wire as aforesaid, and by reason of the said excessive current, and the said negligent order and plaintiff's careful obedience thereto, the plaintiff was grievously burned by the said current, sufficient in all respects to do great bodily injury to life and limb of men. That by the said burnings, the said defendants did injure the plaintiff's right ear so

that he is disfigured for the remainder of his natural life; did burn the plaintiff on his left arm whereby he suffered great pain and injury; did burn the plaintiff for a space of about three inches wide all the way and extending from the wrist almost to the elbow on the right arm; did so burn the plaintiff's right hand that he can never straighten any of the fingers in the right hand save only when the wrist is at one certain angle with the radius and the ulna; and thereby did permanently and for all times render almost worthless the right hand of the plaintiff, and seriously impair his earning capacity in his trade as an electrical appliance worker for the remainder of his natural life. That the plaintiff on the said 5th day of August, 1907, was without negligence on his part and using all care and precaution for his own safety."

A general demurrer to the complaint was interposed and overruled. Thereupon the defendants answered jointly, admitting that Case "was the company's superintendent at its power station near the High Ore mine"; that the plaintiff was in the employ of the defendant corporation, for hire; denying that Case at any time "negligently gave him a negligent order, or negligently or otherwise ordered him to do work of great danger"; admitting that plaintiff "while at work at a point near the Western Iron Works received certain injuries," but denying "that the injuries were due to or occasioned by any negligence or negligent omission on the part of the defendants or either of them." Defendants also alleged affirmatively, as follows: "That the injuries, if any, sustained by the plaintiff were due to and proximately caused by his own contributing fault and carelessness;" and were "due to and caused by dangers, the risk of injury from which plaintiff had theretofore assumed." There was a reply putting in issue the affirmative allegations of the answer. The cause was tried to a jury, which returned a verdict in favor of the plaintiff, and against both defendants, for the sum of \$8,000. Judgment was entered for this sum, whereupon the defendants moved for a new trial. The court entered an order denying the motion, on condition that the plaintiff remit \$2,000 from the judgment. This he did. The appeals are from the judgment and the order denying a new trial.

Plaintiff testified at the trial: "My position with the company was that of lineman and wireman. On August 4, 1907, I replaced a fuse at a point about two blocks east of the Western Iron Works. I replaced a wire in the place of a fuse at Mr. Case's request. The day before I took a fuse off of there and gave them to him. They had been blown. I presume that excessive current had blown them. I examined one of these fuses about 32 days afterwards, after I was able to go to the place. As to the amperage of the fuse taken out on Sunday, August 4, 1907, I found that the fuse had been reloaded with a wire sufficient to carry 200 amperes. I was suffi-

ciently acquainted with electrical work to know that this fuse carried 200 amperes without breaking down; that much or more. This time, 32 days after I was injured, was the first time I knew they were 200-ampere fuses. On August 5th, between 8 and 9:30 o'clock in the morning, I went to Mr. Case's office, and he said that I should take Mr. Collins over the line and show him our customers. He then told me to go to the place that I had removed the fuses the day before, and put in the wires and take out the wires, and to put fuses back in place of them, to solder a No. 6 wire over the fuse that had been blown, and to put in the same fuse that I had given to him the day before. He told me that the wire was perfectly safe to work on, and that the current did not exceed 60 amperes at any time, and that a 60-ampere fuse would be able to carry it. I went to the place, climbed the pole, took out the wires and replaced fuse No. 1 on the right-hand side, and took my pliers and took out of No. 2 and shoved it in No. 2 fuse box, and then went and took hold of No. 3, and there was an explosion. It blew the fuse. A piece blew out; it burned out in the form of an arc which was caused from exploding the fuse. The arc was so severe it burned my arm and face. At that time the voltage on that line was 2,650. There was no fault to be found with the voltage. At that time a No. 8 wire was carrying that current into the fuse box. A No. 8 wire would carry safely and continuously 60 amperes. It would not carry any more without fusing, not if it was carrying a continuous load. It would not carry 200 amperage. The size of wire which is proper and useful to carry 200 amperage is a No. 00. A No. 8 wire is a great many times smaller than a No. 00. These wires you show me are the three wires that I had put in the fuse block that Mr. Case ordered me to. These wires will carry about 75 amperes without breaking down—without being burned up. They will not carry any more of a continuous current. The pressure on the line was in fact 2,650 volts and 200 amperes. I know that from the fact that it had blown a 200-ampere fuse on the morning previous. My opinion as to the safety or danger of a man working on that pole replacing those fuses on a voltage of 2,650 and an amperage of 200 is that it would be very dangerous and could not be done. Before I saw the explosion and the sheet of flame, I had no knowledge that the wire carried 200 amperes. An arc is an instantaneous movement of current from one conductor to another. It jumps the intermediate space. There could have been no arc there, or formed there, if the amperage had been 60 amperes or less. Sixty amperes or less could not have caused any explosion to blow the fuse as this did. Two hundred amperes were present to cause that explosion. By voltage, I mean the pressure on the wire. Amperage is the measurement of the

current. Voltage is the pressure, and amperage is the amount of the current used. If we take it in the form of water, voltage is the pressure on the main, and the amperage is the number of gallons that comes through the main; that would be a good comparison. When I placed the wires in the fuse block I did not get any flash. I took the three that had been blown out and soldered across them a piece of No. 6 wire, which is a little larger than a No. 8. When the explosion occurred I had not got the third fuse up to the block; the second had simply been placed in. The third fuse at no time touched either terminal of the fuse block—it never got anywhere near the block; it was not within a foot of the block. I arrive at the amperes in that wire from the very fact that it had blown the fuse that would carry 200 amperes the day before, and from the intensity of the arc I know 60 amperes of current could not possibly cause that. I did not put jumpers across in place of the fuse or around the fuse blocks."

James Collins, who was present at the time of the accident, testified for the plaintiff: "When the arc started, Gleason was putting on the second fuse; I do not know what became of the third fuse. We always try to avoid shutting down a customer. The only way in case of removing a fuse block is to jumper across—that is, to bridge across the fuse block so that when you remove the fuse the current would have some means of passing through, so that there would be a continuous current. If you put a jumper across and remove the plug I don't think there is any probability of getting an arc. If you don't jumper across and remove the block while the current is going through, sometimes you will get an arc. I have removed lots of these blocks and never got an arc to speak of. I went back in the afternoon and removed all of the old fuses that were burned out and put in new ones. I did not get an arc when I made the connection, and I did not jumper it across. Linemen know from personal experience that jumpering is the safer method. I know how Gleason was making this change. That is the way I myself would have done it. The question of placing a jumper on before making the change depends on the current as to whether it is safe or not. Two hundred amperes would make an arc sufficient to burn a man; 60 amperes would not hurt a man at all."

E. M. De Mars testified for the plaintiff that he was an electrical worker of 22 years' experience and was foreman of an electrical company. Being shown the fuse which plaintiff claimed to be the third one in question, he testified: "Three hundred amperes would not explode this; it would carry 300 continuously. I would say that it would take 1,000 amperes to explode this fuse, and a voltage of 2,650. There is a difference between blowing a fuse and exploding it. It

would take 100 amperes to blow the copper wire on the back. The soldering would melt and the fuse, but the copper wire carries great heat. High amperage has the effect of burning the wire. Bridging or jumping across is considered the safe way by workmen for a number of years. From my experience and from my work for the last ten years I would say that it was safer to furnish a way for current to flow, rather than to have the opportunity to form an arc. The safety or danger of putting in those fuse blocks with or without jumpers depends entirely on the current in the wire. There is always danger in high-tension pressure."

For the defendant, James C. Dow testified that continuity of service is the main aim of an electrical service plant. "It is impressed on all the employes. Taking out a fuse would break the continuity of service. You can preserve continuity of service by jumpering around a fuse; you always try to preserve continuity of service when a lineman is working."

W. S. Guthrie, an electrical engineer, testified: "As I remember it, there were four customers on the line that day. The customers were the Red Metal Company, which was behind the place where Gleason was working, the Western Iron Works was on the same line, the Crescent Creamery, the Western Lumber Company. I do not know whether the Butte Reduction Works was on the far end of it at that time or not. From my experience, you would get a fearful arc by breaking the contacts on a line which is carrying 2,650 volts and 60 amperes. An arc which would be formed at the same voltage and 200 amperes would be just that much worse. The amperage has nothing to do with an arc. One way to preserve continuity of service is to jumper with a copper wire. You cannot pull a fuse out without getting an arc, but if you jumper you get no flash or arc. The safer way is to jumper. It is not customary when you send a man to change a fuse to tell him whether to jumper it or not. He is supposed to use his own judgment whether he should jumper it or not, and to do everything he can for his own safety."

S. L. Case testified: "I am one of the defendants. There were probably half a dozen customers on that line altogether. I think there were six. The Leonard and Rarus were on that line. The Rarus load was about 1,350 to 1,400 horse power. The amperage of the Rarus would be approximately 270 and some odd. The Leonard was in addition to that, as was also the Western Lumber Company, the Western Iron Works, the Crescent Creamery, and the Home Baking Company. At 1 o'clock p. m. of that day the amperage on that line would be approximately 480. Gleason did not bring the fuses that had been burned back to me, and I did not tell him as to whether or not there was an additional 140 amperes of cur-

rent flowing over the line from 11 o'clock Sunday morning up to the time of the accident. I will say there was no additional current flowing on that line during that time. If there had been I would have known it."

E. M. De Mars, recalled for the defendant, testified that in his judgment an amperage of 60, under the circumstances shown, would not cause an arc.

James Keefe, city electrician of Butte, testified: "Of course, every man does his work a little different, but I would put a jumper around in order to be safe, if I were sent out on a wire with a current which I knew contained 2,650 volts and 60 amperes and the line had three fuses which I was to take out and replace. By jumpering you will prevent an arc."

L. L. Quigley testified: "On August 5th feeders 4 and 5 were cabled in together going into the station at that time. On No. 4 there would be about 220 amperes and on No. 5 would be close to 500—480 to 500. No. 4 and 5 were headed together at the bridge. The Rarus and Leonard were working at 11 that morning. The load that was going over No. 4 feeder was the same load that was going out over there for two or three days previous."

W. L. Miller testified: "In August, 1907, I was employed by the Missouri River Power Company and had charge of the Butte station which is here in question in this case. I was very well informed at that time with the customers, with their leads and loads that were fed from the Butte steam plant. I was familiar with the load which was used by the Western Lumber Works on and before August 5, 1907. It was taking practically nothing at that time. I am familiar with the current which was going to the Crescent Creamery; it was in the neighborhood of 1 ampere; the Home Baking Company was taking about 1 ampere; the current which was being fed to the Western Iron Works was about 5 to 10 amperes. About 10 amperes I will say from my knowledge and experience would be down at the junction pole at the Western Iron Works. The amperes which went to the Rarus mine at that time was 140 amperes. There were 10 amperes going down over this line to the Western Iron Works in that direction, feeding the customers. It divided itself equally between the two feeders; therefore there would be 5 amperes on it. The total current for the Rarus mine and which it was taking, was 340 amperes. A smaller wire will fuse quicker for an equal current. If the same current passed through a No. 6 wire and a No. 8 wire, the No. 8 would fuse first. The Rarus was running on the day in question. The Leonard mine on the morning of August 5th was using 410 amperes, and the Rarus 340 amperes. The precipitating plants with the other small customers were using about 10 amperes.

The entire amperage of the three wires on which Gleason was working would be the sum of the continuous current going to the Iron Works and the Crescent Creamery."

The foregoing is by no means all the evidence, but it is sufficient to illustrate the situation as presented to this court.

1. Appellants contend that the evidence shows, as a matter of law, that plaintiff was guilty of contributory negligence. On the part of the respondent it is urged that there is no sufficient plea of such a defense. The latter question might be disposed of by saying that it was not raised in the court below. However, as there must be a new trial, we think this court should express its views on the subject. It has long been settled law in this state that the presence of contributory negligence is a matter of affirmative defense. *Schroder v. Montana Iron Works*, 38 Mont. 474, 100 Pac. 619. This being so, it follows that contributory negligence should be pleaded with the same degree of particularity as is required of the plaintiff in pleading negligence on the part of the defendant. The manner of doing so was discussed at length by this court in the case of *Pullen v. City of Butte*, 38 Mont. 194, 99 Pac. 290, 21 L. R. A. (N. S.) 42. See Phillips on Code Pleading, § 503. The same reasoning applies to the plea of assumption of risk. We are of opinion that the facts in the case would not warrant the court in deciding, as a matter of law, that plaintiff was guilty of contributory negligence.

2. It is said that the evidence is insufficient to justify a verdict for the plaintiff. The question presented was found so difficult of solution that a second argument was ordered and has been had. The cause is *sui generis*. We are unable to determine the effect of the testimony. No question of the credibility of witnesses has been, or could be regarded. We have considered only the uncontradicted testimony, principally that of plaintiff himself; and yet we are unable to determine its meaning. No importance can be attached to the fact that the plaintiff had a verdict below or that the district court denied a new trial. The members of this court are in as favorable a situation to analyze the testimony as were the district judge and the jury. Indeed, we have had the benefit of two exhaustive and interesting arguments by learned counsel, the second after they had been fully advised of the particular difficulties confronting the court and had confessedly subjected the evidence to the closest scrutiny, in the light of technical knowledge of the mysterious and intricate workings of electrical currents, acquired after the cause was first argued. We regret that the expert testimony given by counsel at the second argument is not in the record. To illustrate the situation presented: The plaintiff displayed considerable knowledge of electricity. He testified as an expert to a certain degree. He declared positively that the pressure on the

line upon which he was working was 200 amperes, and gave the reason for his conclusion. He also said that an amperage of 60 would not form an arc such as was caused by this current. Let us assume that this testimony was sufficient *prima facie* to establish the fact. Again he declared that a No. 8 wire was carrying the current into the fuse box, and that a wire of that size would carry "safely and continuously" 60 amperes and no more, without fusing. He used the expression "not if it was carrying a continuous load." And again he said: "It would not carry 200 amperes." If, as he said, the No. 8 wire leading into the fuse box would not carry 200 amperes of current, but only 60, how can it be possible that 200 amperes got into the fuse box? How did that amount of current get across the No. 8 wire? That the load was a continuous one is shown by the allegations of his complaint wherein he avers that for a considerable period of time before the 5th day of August the company "negligently allowed to escape into the wire, and there was escaping into and going through said wire at the said time, a current equal to about 200 amperes." Does not the testimony last quoted nullify the effect of his previous declaration?

Again it is said that the defendants' witnesses supplied testimony showing that the entire load of electricity leaving the steam plant to supply the Rarus and Leonard mines and other works, could, under certain conditions, escape into the wire leading to the fuse box. Counsel for the respondent emphatically declare this to be the fact, while appellants' counsel, with equal emphasis and certainty of expression, has informed the court that it is not true. Both claim to base their conclusions upon the evidence. We are unable to determine which is correct. The evidence is too meager to enable us to form a conclusion.

Counsel also disagree as to whether the evidence shows that the pole upon which plaintiff was engaged was at the junction of the "main feeder" supplying the Rarus and Leonard mines and the line running directly to the Western Iron Works, or whether it was at a point beyond that at which the current left the "main feeder" to go to the mines. And there are many minor differences of opinion, all of which are important. In an ordinary case we could probably determine, with more or less certainty, what the testimony disclosed. But in this case we are unable to do so, and are therefore forced to the opinion that the verdict of the jury was a mere guess. If we cannot understand the evidence, with the able assistance afforded by counsel, it seems fair to say that the jury could not have done so. We do not intend to reflect on our own intelligence or that of the jury. The evidence is simply insufficient to warrant the drawing of logical conclusions. We have no doubt that upon a retrial experts can explain away the difficulties now sur-

rounding the case. Special questions should be submitted to the jury, to the end that the facts may be definitely settled before judgment is entered.

The judgment and order appealed from are reversed, and the cause is remanded for a new trial.

Reversed and remanded.

BRANTLY, C. J., and HOLLOWAY, J., concur.

(38 Utah, 258)

CONNORS v. PRATT, Warden of State Prison.

(Supreme Court of Utah. Nov. 26, 1910.)

1. HABEAS CORPUS (§ 95*)—QUESTIONS REVIEWABLE — VALIDITY OF COMMITMENT TO PRISON.

Where petitioner for habeas corpus admitted the legality of his commitment to the state prison under a ten years' sentence for burglary, but asserted that his commitment under a life sentence for murder was invalid, the court would determine the legality of the life sentence and dispose of the petitioner as justice might require, as required by Comp. Laws 1907, § 1088, and thereby enable petitioner on the court adjudging the life sentence invalid to apply for a reduction of the ten years' sentence, as authorized by section 1686x13, and thereby enable the state to prosecute petitioner on the charge of murder.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 82; Dec. Dig. § 95.*]

2. STATUTES (§ 138*)—AMENDMENT—VALIDITY.

Laws 1899, c. 56, is void in so far as it authorizes the district attorneys to sign and file informations in criminal prosecutions instead of the county attorneys, because of an attempt to amend statutes contrary to Const. art. 6, § 22, providing that no law shall be amended by reference to its title only.¹

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 205, 206; Dec. Dig. § 138.*]

3. INDICTMENT AND INFORMATION (§§ 39, 51*)—INVALID INFORMATION—CONVICTION—EFFECT.

A conviction based on an information signed and filed by the district attorney, pursuant to Laws 1899, c. 56, invalid in so far as it authorizes district attorneys to sign and file informations instead of the county attorneys, is of no force.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 150, 161; Dec. Dig. §§ 39, 51.*]

4. HABEAS CORPUS (§ 111*) — CONDITIONAL DISCHARGE.

Where petitioner in habeas corpus admitted the legality of his commitment to the state prison under a ten years' sentence for burglary, but insisted that his commitment under a life sentence for murder was illegal, and there was probable cause to believe that a murder was committed and that petitioner probably was connected with the offense, the court on adjudging the invalidity of the life sentence would remand petitioner to the custody of the warden under the sentence for burglary to be held on that sentence until released by law, and the discharge from the life sentence must be conditional only so that at the expiration of the

burglary sentence, or, at any time when legally required to do so, petitioner must be delivered into the custody of the sheriff to be dealt with according to law under the charge of murder.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 100; Dec. Dig. § 111.*]

Original petition of habeas corpus by Frank Connors against Arthur Pratt, Warden of the State Prison, for the discharge of petitioner. Petitioner remanded to custody.

Dale H. Parke, for plaintiff. A. R. Barnes, Atty. Gen., for defendant.

FRICK, J. Frank Connors filed his petition in this court praying for a writ of habeas corpus upon the ground that he is illegally restrained of his liberty by Hon. Arthur Pratt, warden of the state prison of Utah. The writ was duly issued and the warden made return thereto, from which it is made to appear that said Connors is held by said warden under two commitments one issued out of the district court of Utah county, dated the 9th day of October, 1899, and the other issued out of the district court of Carbon county, dated the 14th day of October, 1902. The first commitment was issued upon a judgment whereby said Connors was convicted of murder in the first degree for which he was sentenced to life imprisonment in the state prison of Utah. The second commitment was based upon a conviction for burglary upon which he received a sentence of 10 years in said prison.

At the hearing the plaintiff, through his counsel, conceded that he was legally held under the judgment convicting him of burglary, but contended that he was illegally held under the judgment convicting him of murder for the reason that the information upon which that judgment is based was signed and filed by the district attorney of the Fourth judicial district pursuant to chapter 56, p. 77, Laws Utah 1899, which chapter, he contends, is of no force or effect for the reason that it was adopted contrary to certain provisions of the Constitution of this state. In view that the plaintiff concedes that he is not illegally restrained of his liberty by the warden upon one of the commitments aforesaid, the Attorney General suggested at the hearing that all that this court can do at this time is to remand the prisoner back into the custody of the warden. Upon the other hand, plaintiff contends that, notwithstanding the fact that he is rightfully held upon one commitment, he nevertheless has the right to have the legality of his first sentence determined by this court.

We are of the opinion that inasmuch, as the plaintiff concedes that the warden is not illegally restraining him of his liberty upon one of the commitments, we might well refuse at this time to examine into the legality of the other. Under our statute (section

¹ State v. Beddo, 22 Utah, 432, 63 Pac. 96; State v. Morrey, 23 Utah, 273, 64 Pac. 764; State v. Buker, 23 Utah, 276, 64 Pac. 1118; State v. McNally, 23 Utah, 277, 64 Pac. 765.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

1088, Comp. Laws 1907), we are, however, to "dispose of the prisoner as justice may require." In this connection we remark that in section 1686x13 it is, in substance, provided that the board of pardons is authorized to extend to all convicts who are "sentenced for a period less than life, and who shall not have been guilty of a breach of the rules of discipline of the prison, a reduction of the period of sentence." By the section following the one just quoted from the maximum amount of reduction that the board of pardons may make is specified. Pursuant to the foregoing provisions, the warden of the state prison is required to furnish to the board of pardons a certificate in which the reduction of time to which any convict may be entitled shall be stated, and, if there are no objections to the reduction being granted, the board of pardons orders the convict released from further imprisonment under the sentence. It seems that, while the statute fixes the maximum amount of time that a sentence may be reduced for good conduct, the board nevertheless must determine whether in a particular case such or some other deduction of time less than the maximum shall be allowed or not. As the plaintiff's sentences now stand, both of which are prima facie valid, he is under a life sentence as well as under one for a shorter period. If the sentence for life is valid, then plaintiff cannot insist upon a reduction of time, because upon a sentence of that character no reduction is legally permissible. If, however, the life sentence is invalid, as hereinafter pointed out, he may be entitled to a reduction upon the 10-year sentence. So long, however, as the life sentence, which is prima facie valid, is not declared to be invalid by some court of competent jurisdiction, that sentence always stands in plaintiff's way in attempting to have the board of pardons allow him the statutory reduction on the 10-year sentence. This is so because it may be assumed that the board of pardons will not pass upon the legality of the life sentence since it has no power to do so, and, so long as that sentence is in effect, an application for a reduction of time by plaintiff upon the 10-year sentence would be useless.

In view of this anomalous situation, in so far as plaintiff is concerned, and in view of the fact that, although the life sentence may be void, the state may nevertheless prosecute the plaintiff for the crime of murder in case it be determined that he was tried for that crime in a court having no jurisdiction, it seems to us that justice requires that we at this time pass upon the legality of the first commitment, so that in the event that it should be declared void the plaintiff may timely and in a proper manner present the question of the reduction of the 10-year sentence under which he is now held and which would be terminated if the board of pardons

reduced that sentence for the maximum period of time fixed by the statute, and, further, that the state may proceed to try the plaintiff upon the charge of murder of which he is now presumed to be innocent until legally tried and convicted by a court having jurisdiction to do so. That a judge or court in passing upon an application for a discharge from imprisonment upon a writ of habeas corpus where it is made to appear that a person is held under two commitments may pass upon the legality of both, notwithstanding that the prisoner concedes that he is legally held under one, is supported by the authorities. The question a long time ago was presented to the Supreme Court of New York in *Ex parte Badgley*, 7 Cow. 472, where it was held that "where there are two causes of imprisonment, one good and the other invalid, the court may, on habeas corpus, discharge as to the invalid cause, remanding the prisoner as to the other." This doctrine is followed in *Ex parte Gibson*, 31 Cal. 620, 91 Am. Dec. 546. See, also, 23 Cyc. 335; *Church on Habeas Corpus*, § 293, and notes.

Passing, therefore, to the question of whether the sentence for life is valid or not, we are constrained to hold that that question is no longer an open one in this state. In *State v. Beddo*, 22 Utah, 432, 63 Pac. 96, the constitutionality of that portion of chapter 56, supra, by which it was attempted to amend section 4692, Rev. St. 1898, was squarely presented, and this court there held that said chapter was void in so far as it authorized the district attorneys to sign and file informations in criminal prosecutions, instead of the county attorneys, because the amendment was attempted to be made contrary to the provisions of section 22 of article 6 of the Constitution of this state. The *Beddo* Case has been followed in at least three other cases, namely, *State v. Morrey*, 23 Utah, 273, 64 Pac. 764, *State v. Buker*, 23 Utah, 276, 64 Pac. 1118, and *State v. McNally*, 23 Utah, 277, 64 Pac. 765. In view of those cases, it has become the settled law of this jurisdiction that all judgments of conviction based upon informations signed and filed by the district attorneys, which were filed pursuant to chapter 56, are of no force or effect.

In this case the warden made return that he held the plaintiff under the commitment based upon the judgment for life imprisonment as well as upon the one for burglary. This being so, the prisoner is being illegally held by the warden under the first, but not so under the second commitment. The order, therefore, should be that the prisoner be conditionally discharged from imprisonment under the sentence for life imprisonment, but that he be remanded to the custody of the warden upon the sentence for burglary to be held by the warden upon that sentence until the board of pardons shall release the prisoner pursuant to the provisions of section

1686x13, *supra*; or until he is otherwise legally discharged from imprisonment. The discharge from the life sentence should, however, not be absolute, but should be conditional only, for the reason that there is probable cause to believe that a crime, to wit, murder, was committed, and that the plaintiff probably was connected with the offense or has committed the same. *Ex parte Jones*, 27 Ark. 349; *Ex parte Stow*, 27 Ark. 354; 15 A. & E. Ency. L. (2d Ed.) 209. At the expiration of the second sentence, therefore, or at any time when legally required to do so, the prisoner should by the warden be delivered into the custody of the sheriff of Utah county to be dealt with according to law. It is so ordered.

MCCARTY, J., concurs.

STRAUP, C. J. I concur in the result in which it is determined that the petitioner is not unjustly imprisoned nor illegally restrained of his liberty. It was made to appear, and it is conceded by the petitioner, that the warden justly and legally held the petitioner in custody, and restrained him of his liberty, by virtue of a commitment issued upon a proper judgment resulting from the petitioner's trial and conviction of the crime of burglary. A determination that the petitioner was not at the time of his application nor of the hearing unjustly imprisoned or illegally restrained of his liberty, and that he was not entitled to a discharge from the warden's custody, was all that was necessary to a decision of the case. Whether at some time in the future he may be legally or illegally restrained of his liberty by the warden is not now involved.

(38 Utah, 277)

STATE ex rel. BOARD OF EDUCATION OF
SALT LAKE CITY v. MCGONAGLE.

(Supreme Court of Utah. Nov. 28, 1910.)

MUNICIPAL CORPORATIONS (§ 434*)—SPECIAL
ASSESSMENTS — PROPERTY EXEMPT — STAT-
UTES.

Under Comp. Laws 1907, § 1933, providing that all property held by the board of education shall be exempt from general and special taxation, and from all local assessments for any purpose, etc., lands owned by the board are exempt from local assessment or special taxation for the construction of a public sewer, and the city could not impose the payment of a reasonable charge before it was required to permit the board to connect with or use the sewer.†

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1045-1050; Dec. Dig. § 434.*]

Application by the State of Utah on the relation of the Board of Education of Salt Lake City for writ of mandate against George F. McGonagle. Writ granted.

C. S. Varian, for plaintiff. H. J. Dinlenny, for defendant.

STRAUP, C. J. An application is made by the board of education of Salt Lake City for a writ of mandate against the city engineer of that city requiring him to issue a permit to enable the board to connect a school building with the public sewer of the city. The substance of the petition is, that the city engineer is *ex officio* the supervisor of the sewer system of the city and has supervision and control of it; that it is provided by ordinance of the city that before a sewer connection can be made an application in writing must be filed with the engineer, accompanied by plans showing the cause of the connection sought to be made, the size and location of all branches located therewith, and payment of a fee as prescribed by the ordinance; that such an application was filed, a tender made of the fee, and a demand for a permit, and that the engineer refused to issue it upon the ground that the board had refused to pay a special assessment levied against the school property of the board for the construction of the public sewer. To this petition the engineer interposed a demurrer for want of facts, and filed an answer. The relator moved for judgment on the pleadings. The questions of law raised by the demurrer and the motion may be considered together.

It is urged by the engineer that mandamus does not lie, because the performance of the act sought to be directed by the court is not one which, under the statute (Section 3641 Comp. Laws 1907), the law specially enjoins as a duty resulting from an office, trust, or station or to compel the admission of the relator to the use or enjoyment of a right to which it is entitled, and from which it is unlawfully precluded by the engineer. The performance of such acts—the issuing of permits—is by law specially enjoined on the engineer as a duty resulting from his office. By ordinance it is his duty to issue permits when applications therefor are made, accompanied by plans, and upon the payment of the fee. No one else is authorized to issue them. When a written application is made in compliance with the ordinance, the performance of the act—the issuance of the permit—is one which the engineer is required to perform in obedience to the mandate of legal authority, without regard to his own judgment or opinion concerning the propriety or impropriety of the act to be performed. True, the engineer, in a sense, was required to exercise some judgment with respect to the plans accompanying the application, and to ascertain whether the application, in such respect, was in compliance with the ordinance, yet the duty to perform the act was none the less ministerial. The fact that a person who is required to perform an act may be required to satisfy himself of the existence of a state of facts under which he is given the right or warrant to perform

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

† *Wey v. Salt Lake City*, 35 Utah, 504, 101 Pac. 381.

the required duty, does not render the performance of the act discretionary and not ministerial.

The alleged and admitted facts show that upon a published notice of intention Salt Lake City extended and constructed a public sewer laterally along a public street of the city, and to defray the abutters' portion of the costs and expenses thereof it levied a local or special assessment or tax on the lands abutting the street along which the sewer was constructed. The board of education owned land abutting the street which was used for school purposes, and upon which a school building is maintained by it for public school purposes. The tax or assessment levied against such land of the board amounted to \$98, payable in annual installments of \$16.34. It is further provided by an ordinance of the city that whenever property had been previously assessed for a sewer or a sewer extension, and any portion of such assessment remained due and delinquent at the time of an application for a permit for a connection, no permit should be issued until such delinquent assessment was paid. The board refused to pay the assessment on the ground of an exemption. The engineer contended that he had no authority or power to issue the permit until the delinquent assessment was paid, and on that ground refused the permit.

We have a statute (section 1933, Comp. Laws 1907) which provides that "all property, real and personal, held by the board of education, shall be exempt from general and special taxation, and from all local assessments for any purpose, and shall not be taken in any manner for debt." In the case of *Wey v. Salt Lake City*, 35 Utah, 504, 101 Pac. 381, this statute was held constitutional. It was there decided that lands owned by the board of education were exempt from local assessment or taxation to pay the expenses of improving streets. We think it equally clear that the lands owned by the board are exempt from local assessment or special taxation for the construction of a public sewer, and that the assessment levied against it by the city was invalid. The ordinance pointed to by the engineer forbidding him to issue a permit until the alleged delinquent assessment was paid does, therefore, not aid him. Of necessity, such ordinance refers only to a valid assessment levied against lands subject to the assessment.

It, however, is urged, that though the property was exempt and the assessment invalid, still, the city being the owner of the sewer, could lawfully impose the payment of a reasonable charge before it was required to permit the board to connect with or use the sewer, and that the payment of \$98, the amount of the assessment, by the board for the use of the sewer was a reasonable charge. The Legislature has seen fit to exempt all

property of the board, both real and personal, from special taxation and all local assessments, for any purpose. Since the property was not subject to the assessment, and the levy for that reason invalid and the assessment unenforceable, to then permit the municipality to impose as a condition of tapping and making a connection with the public sewer the payment of a charge for the use of the sewer, is to allow the municipality, to do indirectly what it cannot do directly. *State ex rel. Dunner v. Graydon*, 6 Ohio Cir. Ct. R. 634; *Meyler v. Meadville*, 23 Pa. Co. Ct. R. 119.

We think the duty to issue the permit in the premises is plain, and that no good reason has been shown why it was refused. We are of the opinion that the relator is entitled to the writ requiring the engineer to issue the permit. Such is the order. Costs to the relator.

FRICK and McCARTY, JJ., concur.

(57 Or. 454)

KIERNAN v. CITY OF PORTLAND et al.
(Supreme Court of Oregon. Dec. 31, 1910.)

1. MUNICIPAL CORPORATIONS (§ 64*)—INITIATIVE AND REFERENDUM PROVISIONS.

Const. art. 11, § 2, as amended June 4, 1906, provides that corporations may be formed only under general laws, but shall not be created by the legislative assembly by special laws, and, further, that "the legislative assembly shall not enact, amend, or repeal any charter, or act of incorporation for any municipality, city or town," and that "the legal voters of every city and town are hereby granted power to enact and amend their municipal charter, subject to the Constitution and criminal laws of Oregon." *Held*, that the first sentence of section 2 places no restriction on the Legislature as to the enactment of general laws, except that no special laws creating or affecting municipalities shall be enacted by the Legislature, the exception reserving to the legislative department the right, whether by the people directly through the initiative, or indirectly through the Legislature, to enact general laws on the subject, indicating that the inhibition in the next sentence has reference only to special laws.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 64.*]

2. STATES (§ 4*)—"REPUBLICAN FORM OF GOVERNMENT."

The term "republican," as used in the federal constitutional provision (article 4, § 4) guaranteeing to every state a republican form of government, means a government by the citizens en masse acting directly, though not personally, according to rules established by the majority.

[Ed. Note.—For other cases, see *States*, Dec. Dig. § 4.*]

For other definitions, see *Words and Phrases*, vol. 8, p. 7785.]

3. STATUTES (§ 35½*)—INITIATIVE AND REFERENDUM PROVISIONS—MUNICIPAL CORPORATIONS—REPUBLICAN FORM OF GOVERNMENT.

Const. art. 2, as amended June 4, 1906 (section 1a), provides that initiative and referendum powers reserved in the people are also reserved to the legal voters of any municipality

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

and district, as to all local, special, and municipal legislation. Article 11, § 2 provides that the legal voters of every city and town are granted power to enact and amend their municipal charter, subject to the Constitution and criminal laws of Oregon. *Held*, that such provisions did not deprive the state of a republican form of government, in violation of Const. U. S. art. 4, § 4, in that they were a deprivation of legislative power to enact, amend, or repeal a city charter, or act of incorporation, since the sovereign power to legislate residing in the people may be exercised either directly by the initiative, or referendum, or indirectly by the Legislature, without in any way endangering the republican form of government.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 35½.*]

4. COURTS (§ 92*)—OPINION—DICTA.

Where certain propositions were presented in the briefs of the parties to an appeal and at the oral argument and were considered and decided, the decision would not be rejected as mere dictum, and unnecessary to a determination of the case.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 335; Dec. Dig. § 92.*]

On petition for rehearing. Rehearing denied. For former opinion, see 111 Pac. 379.

KING, J. The principal point suggested by the petition for rehearing is the contention that the people of Oregon have no power, by constitutional provision or otherwise, to deprive the Legislature of the sovereign power to enact, amend, or repeal any charter or act of incorporation for any city or town, and any attempt so to do is void. The constitutional provisions, amending articles 4 (section 1a) and 11 (section 2), adopted in June, 1906, known as the "Charter Amendments," are as follows:

"Section 1a. The referendum may be demanded by the people against one or more items, sections, or parts of any act of the legislative assembly in the same manner in which such power may be exercised against a complete act. The filing of a referendum petition against one or more items, sections, or parts of an act shall not delay the remainder of that act from becoming operative. The initiative and referendum powers reserved to the people by this Constitution are hereby further reserved to the legal voters of every municipality and district as to all local, special, and municipal legislation, of every character, in or for their respective municipalities and districts. The manner of exercising said powers shall be prescribed by general laws, except that cities and towns may provide for the manner of exercising the initiative and referendum powers as to their municipal legislation. Not more than ten per cent. of the legal voters may be required to order the referendum, nor more than fifteen per cent. to propose any measure, by the initiative, in any city or town.

"Sec. 2. Corporations may be formed under general laws, but shall not be created by the legislative assembly by special laws. The

legislative assembly shall not enact, amend, or repeal any charter or act of incorporation for any municipality, city, or town. The legal voters of every city and town are hereby granted power to enact and amend their municipal charter, subject to the Constitution and criminal laws of Oregon."

It will be observed from the first sentence in section 2 that no restriction is placed upon the Legislature with respect to the enactment of general laws; the exception being that no special laws creating or affecting the municipalities shall be enacted by the Legislature. Under all the rules of construction, this exception reserves to the legislative department the right, whether by the people directly through the initiative, or indirectly through the Legislature, to enact general laws upon the subject, making it clear that the inhibition in the next sentence has reference to special laws.

In *Farrell v. Port of Portland*, 52 Or. 582, 586, 98 Pac. 145, it is held that the initiative amendments to the Constitution, bearing upon the creation and government of municipalities, including section 1 of article 11, must be construed together. In considering the effect of section 2, art. 11, it is there said: "But this section and the language used in it should not be construed alone. It is a part of the initiative and referendum scheme first inaugurated by the amendment of 1902, and subsequently enlarged and extended by the amendments of 1906. All these amendments, so far as they refer to the same subject-matter, should be read together, and be so interpreted as to carry out the purpose of the people in adopting them, regardless of the technical construction of some of the language used." Since the above is the rule regarding the various amendments taken as a whole, much stronger must be the reason for reading and construing together all the sentences in the one section, from which it is obvious that the only restriction placed upon the Legislature by section 2 pertains to the passage of special laws affecting municipalities. These agencies of the state are thereby enabled to enact such local measures, to revise existing local laws, and to exercise their powers affecting them, and thus carry out their general scope and purpose, so long as they are not inconsistent with the Constitution of the state, or of the United States, and are in harmony with all the special laws and general laws of the state constitutionally enacted. *Straw v. Harris*, 54 Or. 424, 443, 103 Pac. 777. The language following the above excerpt from page 587 of 52 Or., 98 Pac. 145, of the opinion in *Farrell v. Port of Portland*, concerning the limitations placed by the amendment upon the Legislature, must be interpreted in the light of the questions there under consideration, from which it is manifest reference was

had only to special laws affecting municipalities. The so-termed "general initiative and referendum scheme," there alluded to, and whether it is in violation of this provision of the federal Constitution, is fully considered and determined adversely to petitioner's contention in *Kadderly v. Portland*, 44 Or. 118, 74 Pac. 710, 75 Pac. 222, and *State v. Pacific States Tel. & Tel. Co.*, 53 Or. 163, 99 Pac. 427, and there held to be not in conflict or inconsistent therewith. Other cases impliedly if not expressly sustaining this position are: *Farrell v. Port of Portland*, 52 Or. 582, 98 Pac. 145; *Straw v. Harris*, 54 Or. 424, 103 Pac. 777; *Haines v. City of Forest Grove*, 54 Or. 443, 103 Pac. 775; *State v. Langworthy*, 104 Pac. 424.

The question, however, as to whether the people may, by constitutional amendment, reserve to themselves the right to enact any law to the exclusion of the Legislature, and, by such method, delegate to municipalities powers not subject to abridgment, change, limitation, or recall by special acts of the legislative assembly, was not directly involved in any of the cases above cited. It would seem, however, that the views and conclusions reached in the decisions named necessarily dispose of this feature, but since counsel for petitioner insists that such disposal has not been made, and presents his contention in good faith, we will, at the possible expense of repetition of views announced in the above cases, consider the points thus presented. To begin, article 4, § 4, Const. U. S., reads: "The United States shall guarantee to every state in this Union a republican form of government, and shall protect each of them against invasion; and on application of the Legislature, or of the executive (when the Legislature cannot be convened), against domestic violence." In *Luther v. Borden*, 7 How. 1, 48, 12 L. Ed. 581, the court observes: "Moreover, the Constitution of the United States, as far as it has provided for an emergency of this kind, and authorized the general government to interfere in the domestic concerns of a state, has treated the subject as political in its nature, and placed the power in the hands of that department. The fourth section of the fourth article of the Constitution of the United States provides that the United States shall guarantee to every state in the Union a republican form of government, and shall protect each of them against invasion; and on the application of the Legislature or of the executive (when the Legislature cannot be convened) against domestic violence. Under this article of the Constitution, it rests with Congress to decide what government is the established one in a state. For as the United States guarantee to each state a republican government, Congress must necessarily decide what government is established in the state before it can determine whether it is republican or not. And when the sen-

ators and representatives of a state are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal." See, also, *Cooley*, Const. Lim. (6th Ed.) pp. 42, 45; *Texas v. White*, 7 Wall. 700, 730, 19 L. Ed. 227; *Taylor v. Beckham*, 178 U. S. 548, 20 Sup. Ct. 800, 1009, 44 L. Ed. 1187, and 6 Mich. Law Review, 304, where authorities sustaining the above view are collated. We have an illustration of the principles announced in *Luther v. Borden* in the admission of Oklahoma as a state. Before its statehood was recognized, Oklahoma had adopted, as a part of its Constitution, the initiative and referendum lawmaking system, patterned after the Oregon plan, regardless of which its senators and representatives were "admitted into the councils of the Union," and "the authority of the government under which they were appointed, as well as its republican character, is recognized by the proper constitutional authority," thus determining that state, with its comparatively new legislative system, to be republican in form. This recent historical precedent should in itself be adequate to set at rest the temporarily mooted question in hand.

This court, however, has heretofore taken jurisdiction of cases of this character (*Kadderly v. Portland*, 44 Or. 118, 74 Pac. 710, 75 Pac. 222; *State v. Cochrane*, 105 Pac. 884), and, owing to the importance of the points presented, we will proceed to a consideration thereof. To ascertain whether taking from the Legislature and delegating to the municipalities, or to the localities affected, local self-government, or a right to enact, maintain, and alter their charters as the Legislature formerly did, and whether the taking from the Legislature the right to make special laws upon the subject violates this provision of the national Constitution, makes it important that we first ascertain what is meant by a republican form of government. It is an expression which all assume to understand, yet, judging from the many unsuccessful attempts of eminent statesmen and writers to give it a clear meaning, it would seem the phrase is not susceptible to being given a precise definition. Especially is this true when sought to be applied to the Constitution of different states, concerning which Mr. James Madison, a member of the Constitutional Convention, said: " * * * If we resort for a criterion to the different principles on which different forms of government are established, we may define a republic to be, or may at least bestow that name on, a government which derives all its powers directly or indirectly from the great body of the people, and is

administered by persons holding their offices during pleasure for a limited period or during good behavior. It is essential to such government that it be derived from the great body of society, and not from any inconsiderable portion or a favored class of it. * * *

"The Federalist (Hamilton Ed.) paper 39, p. 301. Another and more pointed definition appears in *Chisholm v. Georgia*, 2 Dall. 419, 457, 1 L. Ed. 440, by Mr. Justice Wilson, a member of the Constitutional Convention, who, but a short time after the adoption of the federal Constitution, in advertising to what is meant by a republican form of government, remarked: "As a citizen, I know the government of that state (Georgia) to be republican, and my short definition of such a government—one constructed on this principle, that the supreme power resides in the body of the people." From which it follows that the converse must be true; that is to say, any government in which the supreme power does not reside with the people is not republican in form. See, also, Mr. Justice Wilson's remarks to the same effect, reported in 5 Elliott's Debates, 160.

Measured in the light of the above, it is difficult to conceive of any system of law-making coming nearer to the great body of the people of the entire state, or by those comprising the various municipalities, than that now in use here, and, being so, we are at a loss to understand how the adoption and use of this system can be held a departure from a republican form of government. It was to escape the oppression resulting from governments controlled by the select few, so often ruling under the assumption that "might makes right," that gave birth to republics. Monarchical rulers refuse to recognize their accountability to the people governed by them. In a republic the converse is the rule. The tenure of office may be for a short or a long period, or even for life, yet those in office are at all times answerable, either directly or indirectly, to the people, and in proportion to their responsibility to those for whom they may be the public agents, and the nearer the power to enact laws and control public servants lies with the great body of the people, the more nearly does a government take unto itself the form of a republic—not in name alone, but in fact. From this it follows that each republic may differ in its political system or in the political machinery by which it moves, but, so long as the ultimate control of its officials and affairs of state remain in its citizens, it will in the eye of all republics be recognized as a government of that class. Of this we have many examples in Central and South America. It becomes then a matter of degree, and the fear manifested by the briefs filed in this case would seem to indicate, not that we are drifting from the secure moorings of a republic, but that our state, by the direct system of legislation com-

plained of, is becoming too democratic—advancing too rapidly towards a republic pure in form. This, it is true, counsel for petitioner does not concede, but under any interpretation of which the term is capable, or from any view thus far found expressed in the writings of the prominent statesmen who were members of the Constitutional Convention, or who figured in the early upbuilding of the nation, it follows that the system here assailed brings us nearer to a state republican in form than before its adoption. Mr. Thomas Jefferson, in 1816, when discussing the term republic, defined and illustrated his view thereof as follows: "Indeed, it must be acknowledged that the term 'republic' is of very vague application in every language. Witness the self-styled republics of Holland, Switzerland, Genoa, Venice, Poland. Were I to assign to this term a precise and definite idea, I would say, purely and simply, it means a government by its citizens in mass, acting directly and not personally, according to rules established by the majority, and that every other government is more or less republican, in proportion as it has in its composition more or less of this ingredient of the direct action of the citizens." Writings of Thomas Jefferson, vol. 15, p. 19. It is well known that at the time of the adoption of the federal Constitution there existed in some of the Atlantic states a system of local government, known as "New England towns," in which the people had the right to legislate upon various matters, the masses assembling at stated periods for that purpose, all of which was within the knowledge of those composing the Constitutional Convention. After observing that a true republic, under his definition, would necessarily be restrained to narrow limits, such as in a New England township, and that the next step in use at that time was through the representative system, Mr. Jefferson pointed out that the further the officials of state or nation are separated from the masses proportionately less does such state or government retain the elements of a republic, and on page 23 concludes: "On this view of the import of the term 'republic,' instead of saying, as has been said, that it may mean anything or nothing, we may say with truth and meaning that governments are more or less republican, as they have more or less of the element of popular election and control in their composition; and believing, as I do, that the mass of citizens is the safest depository of their own rights and especially, that the evils flowing from the duperies of the people, are less injurious than those from the egoism of their agents, I am a friend to that composition of government which has in it the most of this ingredient." The observations quoted are in full accord with the recorded views of all the writers and statesmen of that time, when the intention of the framers of our national Constitution was

fully understood, in the light of which it seems inconceivable that a state, merely because it may evolve a system by which its citizens become a branch of its legislative department, co-ordinate with their representatives in the Legislature, loses caste as a republic. The extent to which a Legislature of any state may enact laws is, and always has been, one of degree, depending upon the limitations prescribed by its Constitution; some Constitutions having few and others many limitations. But in all states, whatever may be the restriction placed upon their representatives, the people, either by constitutional amendment or by convention called for that purpose, have had, and have, the power to directly legislate, and to change all or any laws so far as deemed proper—limited only by clear inhibitions of the national Constitution. Cooley, *Const. Lim.* (6th Ed.) 44.

An examination of our state Constitution, as first adopted, discloses many restrictions upon the lawmaking department, among which is a provision to the effect that no amendment thereto should be submitted to the people for ratification until after it passed two successive sessions of the Legislature. In course of time, an amendment under this provision was legally submitted and adopted by a majority vote of the people, by which the people reserved the right to change the Constitution or any part thereof without awaiting this legislative formality, the validity of which is not open to doubt. Is it not possible, indeed, is it not practicable, then, for the people further to restrict the power of their representatives to legislate upon matters of public interest, and in so doing are they not, and even under the old system were they not, directly legislating? This system of direct legislation has been in common use throughout the various state governments since their inception, but until the adoption of the initiative and referendum amendments no one was heard to assert that an amendment to the Constitution of a state merely because of depriving the Legislature of some lawmaking power or powers held by it at the adoption of the national Constitution was void on the grounds of being inconsistent with a republican form of government. The absurdity of such a contention, if made, would at once be obvious. But, viewed from any standpoint, such is the logical sequence of appellant's contention to the effect, that because the people have, by constitutional amendment, reserved the exclusive right to enact special laws concerning municipalities, and by constitutional amendment have delegated to municipal corporations the right to exercise such powers as before were only within the province of their representatives, through the Legislature, to delegate, violates the provision of the federal Constitution, guaranteeing to our state a republican form of government. In other words, it is argued that the right of the city

of Portland to legislate upon matters of municipal concern, to provide for the exercise of its right of eminent domain, to build bridges, etc., would be in harmony with the above provision of the federal Constitution, if delegated by the people through their representatives, but not so if done directly by them through the initiative. In brief, the effect of this argument is that the people may legally do indirectly by the mere enactment of a law what they cannot do directly by constitutional amendment. The statement of this contention should be sufficient for its answer.

We held in *Straw v. Harris*, 54 Or. 424, 103 Pac. 777, that a state could not by amendment of its fundamental laws or otherwise, except in the manner provided in section 3, art. 4, Const. U. S., delegate to any municipality or subdivision of the state prerogatives not subject to recall, that so to do would, in effect, be the creation of a state within a state, and that, so long as the Legislature is not precluded by the Constitution from enacting general laws affecting them, it may by that method amend, modify, or even abolish municipal corporations, and that even should this power be removed from the Legislature there must remain with the people a right to do so, if not by enacting a law to that effect, then by the former system of direct legislation, consisting in the adoption of amendments to the Constitution, known as the fundamental laws of the state, and that this right of state government to retain control of these agencies and departments of state cannot be surrendered, but must always remain somewhere within the reach of that source of all power—the people. We held, and still hold, to this view, not on the ground that to hold otherwise would be destructive of a republican form of government, but because to do so would in effect permit a state within a state and accordingly violate section 3, art. 4, of the federal Constitution, the first paragraph of which reads: "New states may be admitted by the Congress into this Union; but no new state shall be formed or erected within the jurisdiction of any other state; nor any state be formed by the junction of two or more states, or parts of states, without the consent of the Legislatures of the states concerned, as well as of the Congress." Suppose our lawmaking department should pass an ex post facto act, or a bill of attainder, such purported laws would be void, not because of being subversive of a republican form of government, but by reason of some express inhibition against legislation of that character contained in another section of the federal Constitution. If the national Constitution permitted or provided for the creation of a state within a state, could it be said that by reason thereof the state thus created would be unrepresentative in form? Under section 3 of article 4, above quoted, states may be divided and new ones created,

the limitation being that no state shall be created within a state, but the creation of new states under that section has never been considered an unrepugnant step. Should our state attempt to surrender its powers to an executive for life, with the provision that upon his death his authority should pass by entailed inheritance to his son or other relative, and at the same time, by constitutional change or otherwise, further surrender any right to alter the system, except with the consent of such executive, it would lose its republican form, and in effect become a local monarchy within the Union, thereby furnishing an example of a violation of section 4, art. 4, of the federal Constitution. But, so long as the people retain the power within themselves to conduct and manage the affairs of state—either directly or indirectly—a republican form of government is maintained, and comes within the provision of the federal Constitution guaranteeing the same, being circumscribed in its powers only by the provisions of such Constitution. The effect of petitioner's contention is that any attempt on the part of the state to enact and enforce a law which may be in conflict with any provision of the national Constitution is not void because in conflict or inconsistent with the special provision violated, but because it deprives the state of its republican form of government, and this seems to be the character of reasoning adopted by the majority in *People v. Johnson*, 34 Colo. 143, to which we are cited as sustaining petitioner's view. In that case the question was whether the consolidation of the city and county of Denver, the boundaries of which were made coterminous, abolished the city government, as distinguished from county government, thereby giving to such organization home rule to the extent of permitting it to do as the constitutional amendment of 1902 provided might be done—enact all local laws, and elect such officers at such times as deemed advisable, concerning which it was held by the majority that the city and county governments, although covering the same territory, remained separate and distinct, requiring different officers to be selected for each, and in a different manner, as before the change. The reason for the conclusion appears to be on account of other provisions in the Constitution of Colorado, the majority not recognizing the rule invoked without exception in all other jurisdictions, including ours, that Constitutions with amendments must be construed as a whole, and that when two constructions are possible, one of which takes away the meaning of a section, and another giving effect to all the provisions, the latter must prevail. *State v. Cochrane*, 105 Pac. 884; *Farrell v. Port of Portland*, 52 Or. 582, 98 Pac. 145. In an able and exhaustive dissenting opinion in that case by Mr. Justice Steele, concurred in by Mr. Justice Gunter, it is made clear that a federal question (such

as here presented) was not involved; that the 1902 amendment of Colorado's Constitution was not inconsistent with section 4, art. 4, of the federal Constitution. After demonstrating that the conclusion announced by the majority "overlooks the fundamental rule in the construction of Constitutions and statutes that a special provision controls the general one and that both may stand * * *" (*People ex rel. Atty. Gen. v. Johnson*, 34 Colo. 189, 193, 86 Pac. 233, 249), at the close of his opinion (page 193) it is observed: "Wherever the question has been presented, the courts have given effect to the wishes of the people and sustained the power to establish the form of government here provided as not being in violation of the federal Constitution, and not in excess of the powers of the people to so provide in their organic law. And it is to be regretted that this court felt in duty bound to undo the work of the charter convention and to deny the people of this city and county the right to provide for a simple and economical plan of government as directed by the Constitution." Our holding is that the state may, by constitutional provisions, directly delegate to municipalities any powers which it, through the Legislature, could formerly have granted indirectly. All the prerogatives attempted to be exercised by Portland in the construction of the Broadway bridge formerly could have been granted by the Legislature, and the power to provide therefor, having been delegated to the city by amendment to our organic laws, is valid, and the right to exercise such powers will continue until such time as changed by general enactments of the lawmaking department of our state, provision for which may be made by the Legislature by general laws, applying alike to all municipalities of that class, or by the people through the initiative, by the enactment of either general or special laws on the subject. *Cooley, Const. Lim.* (6th Ed.) 41, 45; *Hopkins v. Duluth*, 81 Minn. 189, 83 N. W. 536; *In re Pfahler*, 150 Cal. 71, 88 Pac. 270, 11 L. R. A. (N. S.) 1092; *Ex parte Wagner*, 21 Okl. 33, 95 Pac. 435; *State v. Field*, 99 Mo. 352, 12 S. W. 802; *Kansas v. Marsh*, 140 Mo. 458, 41 S. W. 943; *Kaddery v. Portland*, 44 Or. 118, 74 Pac. 710, 75 Pac. 222; *State v. Pacific States Tel. & Tel. Co.*, 53 Or. 163, 99 Pac. 427; *Straw v. Harris*, 54 Or. 424, 103 Pac. 777; *City of McMinnville v. Hownestine*, 109 Pac. 81.

In a public address prepared by Hon. Frederick V. Holman, attached to and filed as an appendix to petitioner's brief, it is argued that our previous holding in *Hall v. Dunn*, 52 Or. 475, 97 Pac. 811, 25 L. R. A. (N. S.) 193, and *Straw v. Harris*, 54 Or. 424, 103 Pac. 777, to the effect that we have but one lawmaking department, composed of two separate and distinct lawmaking bodies—(1) The people, acting directly through the initiative,* and (2) the people acting indirectly through the Legislature—either of which in

a manner provided by law may undo the work of the other, and necessarily must lead to disastrous results, etc., in that an act passed by the first may immediately on the convening of the Legislature be repealed, and one enacted by the legislative assembly may also be rescinded through either the initiative or the referendum. But that objection applies only to the question of expediency, with regard to which the lawmakers, and not the courts, are concerned. It might not be inappropriate, however, to observe that the same objection may with equal force apply to all legislative bodies. Our Legislature to convene next week can, if it so chooses, repeal all the laws (not included in constitutional amendments) enacted at the recent November election, and also undo the work of the last legislative assembly. Again, two years later or earlier a special session of the Legislature might be called, and enact many laws, and the day following its adjournment the newly elected Legislature could be convened and repeal all the laws going into effect the preceding day. The same may also be said of Congress, but this is seldom, if ever, urged as an argument against a representative system, or alluded to as indicating that our government is becoming un-republican in form. In the appendix mentioned, it is observed that under our system, as interpreted by this court, we have four legislative bodies in place of two: (1) The Legislature; (2) the people of the whole state; (3) the people of a municipality; (4) the common council or commissioners. This suggestion, however, overlooks the fact that in the above-cited cases advertence was made only to legal departments of the state, and not to municipal or other minor and quasi legislative bodies. The fallacy of this illustration (like many others to which our attention is directed, and which will not be specifically discussed) is obvious. The observation to the effect that under the interpretation given by this court to the charter amendments cities may invade the domain of state legislation to the extent, if desired, of condemning state property (such as capitol buildings, etc.), has no justification, either in the language of the charter amendments, or in anything said in any opinion of this court in interpreting such amendments. Many of the statements in our former opinions bearing upon points here presented are adverted to as dictum, and like contention is also made respecting our holding in the case at hand, to the effect that it is unnecessary to obtain the consent of the Port of Portland before the bridge in question may be constructed. The points decided, determining the status of the Port of Portland in the matter, were all forcibly presented in the briefs and at the oral argument, and the effect of the conclusion reached by this court was that, taking either horn of the dilemma, appellant's position is unten-

able. It cannot, therefore, be said that our views upon either point are dicta, and the same may be remarked of much, if not all, of the numerous like references to previous adjudications by this court (as in *Straw v. Harris* and other cases) in which the views alluded to as dicta hold adversely to the wishes and contention of the writers of petitioner's brief, and the appendix thereto. On what is dicta and the effect thereof see *Kirby v. Boyette*, 118 N. C. 244, 254, 24 S. E. 18; *Buchner v. C. & N. W. Ry. Co.*, 60 Wis. 264, 19 N. W. 56; *Kane v. McCown*, 55 Mo. 181; *Ocean Beach Ass'n v. Brinley*, 34 N. J. Eq. 438; 26 Am. & Eng. Ency. L., 165, 171; *Florida Cent. Ry. Co. v. Schutte*, 103 U. S. 118, 143, 26 L. Ed. 327. The terms "obiter dicta," "dictum," etc., like the phrase "technicalities of the law," are too often invoked by counsel to express disapprobation of some proposition of law militating against their contention.

Numerous other points are presented upon which the views of this court are requested. Some of them, however, were disposed of in our former opinions herein, to which we still adhere, and those remaining, even though not specifically adverted to, are included in the above considerations.

The petition for rehearing is denied.

(57 Or. 432)

WHITTIER v. WOODS, Justice of the Peace, et al.

(Supreme Court of Oregon. Dec. 27, 1910.)

1. JUSTICES OF THE PEACE (§ 84*)—APPEARANCE—GENERAL OR SPECIAL.

Though, in an action before a justice of the peace, defendant's motion to quash service of the summons, alleged, among other grounds, that the original complaint was not signed, and that it did not state facts sufficient to constitute a cause of action, the motion did not constitute a general appearance, where the only relief asked in the motion was to quash the service of summons.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. § 266; Dec. Dig. § 84.*]

2. PROCESS (§ 158*)—MOTION—MOTION TO QUASH—SCOPE.

In a motion to quash service of process, the defendant cannot question the sufficiency of the complaint.

[Ed. Note.—For other cases, see *Process*, Dec. Dig. § 158.*]

3. JUSTICES OF THE PEACE (§ 71*)—PROCEDURE IN CIVIL CASES—PROCEEDINGS PRELIMINARY TO TRIAL.

Prior to judgment, the plaintiff in a justice's court must take notice of all pleadings filed; but, if the case is called during the absence of counsel, counsel are entitled to notice, for they are not expected to continuously sit in a court which is always open.

[Ed. Note.—For other cases, see *Justices of the Peace*, Dec. Dig. § 71.*]

4. JUSTICES OF THE PEACE (§ 84*)—OBJECTIONS TO JURISDICTION—MOTION TO QUASH—MOTION TO AMEND.

Where a plaintiff asks leave of the justice for the constable to amend his return of serv-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ice, it is a confession of a motion to quash such return, and therefore a defendant is not subject to the jurisdiction of the court by an appearance in such motion.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 266-278; Dec. Dig. § 84.*]

5. JUSTICES OF THE PEACE (§ 82*)—SERVICE—DELIVERY AT RESIDENCE—RETURN—SUFFICIENCY—STATUTE.

B. & C. Comp. § 55, providing that summons and complaint shall be delivered to the defendant personally or, if he be not found, to some person of the family, being in derogation of the common law, is to be strictly construed and only resorted to when the defendant cannot be found. And hence a constable's return of process issued by a justice of the peace, reciting: "I could not find said defendant on the day said summons was delivered to me"—was insufficient, as it does not appear that defendant was without the county or could not be found by proper diligence.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 262, 263; Dec. Dig. § 82.*]

Appeal from Circuit Court, Baker County; William Smith, Judge.

Petition to review judgment of a justice's court brought by A. N. Whittier against W. J. Woods, Justice of the Peace, and another. From a judgment for defendants, plaintiff appeals. Reversed, with directions.

This is a proceeding to review a judgment of the justice's court. From the record it appears that an action was commenced in the justice's court for Huntington precinct, by defendant Thomason, against the petitioner, Whittier, to recover \$94.50 upon a debt. Summons was issued thereon March 7, 1910, requiring defendant to appear within seven days from the date of service, and was delivered to the constable for service. A return of service was made thereon and filed the same day, which is conceded to have been insufficient to give the court jurisdiction of the defendant. Judgment was rendered against the defendant, based on the return, on March 15th. On March 25th defendant, by special appearance, for the purpose of the motion and no other, moved the court "to quash and set aside the service of summons herein for the following reasons, to wit: (1) The original complaint in said cause was not signed by the plaintiff or by his attorneys. (2) The copies left at defendant's residence were not true copies of the complaint and summons. (3) The service of said complaint and summons was not in accordance with the provisions of the statute. (4) No legal service of the complaint or summons was made upon the defendant. (5) The complaint does not state facts sufficient to constitute a cause of action." On May 3d plaintiff moved the court to vacate the judgment theretofore entered and for leave to the constable to amend his return on the summons to conform to the facts, which was allowed. Thereupon the constable filed a new return, in which he states that he served the summons on March

7, 1910, on the defendant by delivering the certified copies of the summons and complaint to Maranda Whittier, wife of defendant, a member of his family over the age of 14 years, "such delivery and service being by me so made because of the fact that I could not find said defendant on the day said summons was delivered to me and by me served as aforesaid"; and that the delivery was made at the dwelling house of defendant in said county and state. Application was made by plaintiff for judgment thereon May 3, 1910, which the court refused, pending the motion to quash. Plaintiff then moved to strike out the motion to quash for the reason that the same was not served upon him, and therefore not entitled to be filed. This motion was allowed and judgment was rendered against defendant for the amount of the debt. Upon this state of the record, as shown by the petition, a writ was issued by the circuit court, and at the hearing upon the record the writ was dismissed, and petitioner appeals.

Hart & Nichols, for appellant. C. T. Godwin (Saxton & Godwin, on the brief), for respondents.

EAKIN, J. (after stating the facts as above). Two questions going to the jurisdiction of the court arise: (1) Was the motion to quash a general appearance of the defendant? (2) If not, was the amended return upon the summons sufficient to give the court jurisdiction of the defendant? It is contended that the first and fifth grounds of the motion are attacks upon the complaint, and amount to a general appearance, but this cannot be conceded. The only relief sought is to quash the service of the summons, and the five reasons assigned are only so designated for the purpose of showing the defect in the service. The first and fifth assignments can have no bearing upon the sufficiency of the complaint in deciding this motion. If the mover asks for some relief, which necessarily assumes that the court has jurisdiction of him, it will amount to a general appearance. But, so long as he keeps out of court for every purpose except to question its jurisdiction of him, the appearance is not general. This question is settled by the opinion of Mr. Justice Bean in *Belknap v. Charlton*, 25 Or. 41, 34 Pac. 758: "Where the defendant appears and asks some relief which can be granted only on the hypothesis that the court has jurisdiction of the cause and the person, it is a submission to the jurisdiction of the court * * * whether such an appearance by its terms be limited to a special purpose or not. * * * If he asks the court to adjudicate upon some question affecting the merits of the controversy, or for some relief, which presupposes jurisdiction of the person, and which can be granted only after jurisdiction is acquired, he will

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

be deemed to have made a general appearance, and to have submitted himself to the jurisdiction of the court, and cannot, by any act of his, limit his appearance to a special purpose. But, if granting the relief asked would be consistent with a want of jurisdiction over the person, he may appear for a special purpose without submitting himself to the jurisdiction of the court for any other purpose." To the same effect are *Meyer v. Brooks*, 29 Or. 203, 44 Pac. 281, 54 Am. St. Rep. 790, and *Winter v. Union Packing Co.*, 51 Or. 99, 93 Pac. 930.

In this motion the defendant asks for no other relief than to quash the service of the summons, which can only be granted for some defect in its substance or in the return of service, whereby it is insufficient to give the court jurisdiction of the defendant. The defendant cannot question the insufficiency of the complaint by such a motion, nor the court consider or grant to defendant any relief by reason thereof. Neither can the court strike out the motion for want of service, as there is no law requiring the service of pleadings in the justice's court.

Prior to judgment the plaintiff is in court and must take notice of pleadings filed. If the case is called up in the absence of counsel, the court should give them notice of the hearing, as counsel are not presumed to sit continuously in the court which is always open. B. & C. Comp. § 924. We must treat the judgment as void, as the justice did in setting it aside (*White v. Brown*, 54 Or. 7, 12, 101 Pac. 900); the record not showing that the court had jurisdiction of the defendant. However, the motion of plaintiff thereafter, asking leave of the court for the constable to amend his return of service, was a confession that the first return was not sufficient to sustain the judgment; and the defendant was not, therefore, subject to the jurisdiction of the court by reason of such appearance. As to the effect of the amended return, section 55, B. & C. Comp., provides that the copies of the summons and complaint shall be delivered "to the defendant personally or, if he be not found, to some person of the family," etc. Therefore service upon a member of the family is a substituted service, in which the defendant is presumed to be within the jurisdiction of the court, and receives the notice so served, and it is deemed an actual service upon him. But such service is a statutory deviation from the common law, which required personal service. The statute must be fully complied with and can be resorted to only when the defendant cannot be found. 32 Cyc. 461; 19 A. & E. E. 620. This is the holding in *Trullinger v. Todd*, 5 Or. 39, in which Mr. Justice Prim says: "The statute, in providing how service shall be made, evidently implies that when a summons is placed in the hands of an officer for service that he will use ordinary dili-

gence, at least, to find the party against whom the summons is issued, in order that he may make personal service upon him, but after using ordinary diligence, if he should fail to find such party, constructive (substituted) service may be made—and, when such service is made, the certificate should contain the fact that the party could not be found." And, in the absence of such statement in the certificate, the service was held void. This decision was approved in *Hass v. Sedlak*, 9 Or. 462, 464, holding that the certificate was a nullity. It is also approved in *Settlemyer v. Sullivan*, 97 U. S. 444, 447, 24 L. Ed. 1110. The statement in the certificate before us that "I could not find said defendant on the day said summons was delivered to me" does not show a compliance with this requirement. It is no indication that the officer did not then know where defendant was within the county, but only that he did not have time that day to search for him. The law contemplates that if defendant is within the county and not in hiding—that is, if he can, by the exercise of diligence, be found within the county—the officer must serve him personally. The return was insufficient to give the court jurisdiction of the defendant, and the motion to quash the service should have been allowed; it being insufficient to give the court jurisdiction of the defendant.

The judgment of the circuit court will be reversed; the writ of review sustained; and the cause remanded to the lower court, with directions to vacate and set aside the judgment of the justice court, and for such further proceedings as may be proper, not inconsistent with this opinion; petitioner to recover his costs and disbursements.

(53 Or. 109)

BAXTER v. DAVIS, et al., Board of School Directors.

(Supreme Court of Oregon. Dec. 20, 1910.)

1. SCHOOLS AND SCHOOL DISTRICTS (§ 55*)—OFFICERS—POWERS.

A board of school directors can exercise only powers expressly granted by statute, and such as may be necessary to carry the granted powers into effect.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. §§ 137, 138; Dec. Dig. § 55.*]

2. SCHOOLS AND SCHOOL DISTRICTS (§ 97*)—PURCHASE OF SCHOOL SITE—ISSUANCE OF BONDS—ELECTIONS.

Under B. & C. Comp. § 3389, subd. 5, authorizing the board of school directors, if authorized by the voters of the district, to purchase or build schoolhouses, buy land for school purposes, and issue bonds, the power to build schoolhouses, purchase sites therefor, and to issue bonds may be conferred by one and the same vote at an election called as authorized by subdivision 31 to vote on the question of contracting a bonded indebtedness to build a school and purchase a site.

[Ed. Note.—For other cases, see *Schools and School Districts*, Dec. Dig. § 97.*]

3. SCHOOLS AND SCHOOL DISTRICTS (§ 68*)—SELECTION OF SCHOOL SITES—STATUTES.

Under B. & C. Comp. § 3389, subd. 14, authorizing the school directors to call a meeting to vote on the question of the selection or purchase of a schoolhouse site, construed in connection with subdivision 5, authorizing the board, if authorized by the voters of a district, to purchase land for school purposes, the right to select a schoolhouse site is vested in the electors, and not in the board.

[Ed. Note.—For other cases, see Schools and School Districts, Dec. Dig. § 68.*]

4. STATUTES (§ 224*)—CONSTRUCTION—REPEALED STATUTES.

The court is construing a statute may consider repealed statutes.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 300, 302; Dec. Dig. § 224.*]

Appeal from Circuit Court, Union County; J. W. Knowles, Judge.

Suit by J. W. Baxter against M. F. Davis and others, constituting the Board of School Directors of School District No. 5, Union County. From a decree for plaintiff, defendants appeal. Modified and affirmed.

Plaintiff, as a resident taxpayer of school district No. 5 of Union county, brought this suit to enjoin defendants, as the board of directors of that district, from purchasing a block of land for a schoolhouse site, and from building a schoolhouse thereon for the district. The gist of the suit is the averment that defendants were acting in the premises without authority of law. The facts were stipulated, and the court entered a decree, awarding the injunction. From this the defendants have appealed.

T. H. Crawford, for appellants. B. F. Wilson, for respondent.

SLATER, J. From admissions in the pleadings and facts stipulated, it appears that, pursuant to an order of the board of directors, a district meeting was called, to be held at a fixed time and place in the district, for the stated purpose of submitting to the legal voters thereof "the question of contracting a bonded debt of fifty thousand dollars, for the purpose of building a school building, furnishing the same and purchasing land for school purposes, as a site for said building," etc., that such meeting was duly held, and that by the votes of those attending the meeting the board was authorized to issue and sell the bonds of the district to the amount of \$50,000 for the purposes stated in the notice, that, acting upon the authority thus conferred, the board issued and sold bonds to the amount authorized, and thereafter contracted to purchase from the county of Union a block of land, known as the "Old Courthouse Block," situate in the town of Union, in the district, with the avowed purpose of selecting it as the site for the new school building, and intending to pay therefor the sum of \$1,500 out of the proceeds of the bond sale. At the time this suit was

brought, the defendants had caused laborers to commence tearing down and removing a brick building standing upon the block, with the purpose in view of erecting a new building thereon, without further authority from resident taxpayers than their action taken at the said meeting. It is charged in the complaint that the board failed, neglected, and refused to submit to the vote of the taxpayers the selection of a site, or the question of the necessity for the purchase of additional lands for schoolhouse purposes, or the question of the erection of a schoolhouse. To this it was answered that the directors did not deem it necessary in their judgment to call a district meeting for that purpose, and that they were not at any time petitioned so to do by one-third or any number of the voters of the district.

Ballots, upon which were printed the words, "Bonds—Yes," and "Bonds—No," on separate lines, with space reserved upon the left thereof for the marking of the ballot by a cross, to indicate the voter's choice, were prepared in advance for the occasion, and were used by the voters at the meeting.

Defendants contend that by the vote cast at such meeting they were authorized, not only to bond the district to the amount named, but also to purchase land for a schoolhouse site, and to build and furnish a school building, without further order or direction from the taxpayers; that the authority thus conferred carried with it, by implication, power to do everything necessary to accomplish the object intended; that is, to select the site to be purchased for building purposes. A board of school directors can exercise no other powers than those expressly granted by the statute, and such as may be necessary to carry into effect a granted power. 35 Cyc. 899; School Directors v. Wright, 43 Ill. App. 271. The power that may be exercised under the statutes by the board of directors in respect to the premises is not absolute and unqualified, but limited to occasions when authorized by a majority vote of the legal voters present at any legally called meeting. The statute reads: "If authorized by a majority vote of the legal voters present at any legally called meeting, they shall purchase, lease, or build schoolhouses, buy or lease land for school purposes, furnish schoolhouses with furniture, lights and apparatus, and for such purposes, may, when so authorized, levy and collect * * * a tax, * * * or issue or sell negotiable bonds as hereinafter in this act provided." B. & C. Code, § 3389, subd. 5. The board must be authorized by a vote of the legal voters before it has power to act, and this authorization may be in terms as broad as the language of the statute permits; that is, to buy land generally for school purposes, if the right to select a site is not elsewhere

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

reserved, or to lease or build such a building as in the judgment of the board may be desired, and to furnish it with such equipment as the board may deem necessary, or its authority to act may be limited by the voters to the purchase of a particular piece of land at a stated price, or to build a building of a particular design or cost, etc. In the same sentence, and in the same connection, the statute confers upon the board another limited power to levy a tax or issue or sell bonds for such purposes, when so authorized, that is by a majority vote of the legal voters present at a legally called meeting, as thereafter provided. It is apparent that the financial circumstances of the district might be such as to permit an authority to be given for the purpose of land or the erection of a building without the necessity of levying a tax or issuing or selling bonds, and in that event the first power might be exercised without the second, but the first could not be exercised except in conjunction with the second, and we can see no reason why the authority to do both, when circumstances so demand that both must be exercised, may not be conferred by one and the same vote. This has been sanctioned by the Supreme Court of California, in construing the statutes of that state, which are of the same general import as our own. *People v. Caruthers School District*, 102 Cal. 184, 36 Pac. 396.

The occasion and manner of calling and conducting an election, where the purpose is to authorize the issuance and sale of bonds of the district, are specified in subdivision 31 of the same section referred to above. The authority to initiate a call for such an election is conferred upon 10 legal voters of the district, who may petition the board therefor. In response to the petition the board must issue the notice, stating therein the amount of the proposed bonded debt, the purpose for which the debt is to be created, that the vote is to be by ballot, upon which shall be the words, "Bonds—Yes" and "Bonds—No." An election so called and held, at which a majority of the electors vote "Bonds—Yes," confers authority, not only to issue and sell the bonds of the district in the amount voted, but to disburse the funds received for the particular purposes named. It was under this section that the meeting in district No. 5 was held. The funds derived from the sale of the bonds authorized and sold by the vote at that meeting have been appropriated to the particular purposes stated, and cannot be used for any other. If there is no other provision of the statute, reserving to the voters the right to select the site for a school building, then the board in this case has acted within its authority. But subdivision 14 of section 3389 provides that: "Whenever, in the judgment of the board, it is desirable or necessary to the welfare of the schools in the district, or to provide for the children

therein proper school privileges, or whenever petitioned so to do by one third of the voters in the district, the district board shall call a meeting * * * to vote upon the question of the selection, purchase, exchange, or sale of a schoolhouse site," etc. This subdivision must be construed along with subdivision 5 of the same section hereinbefore noted. On behalf of the defendants, it is contended that the language of the statute above quoted is intended only to provide when the board shall call a meeting, and that is limited to the occasion when in its judgment it is desirable or necessary, or when petitioned so to do by one-third of the voters of the district, that, in the absence of such petition, the question of calling an election to vote upon the selection of a site for a building is left to the judgment of the board, and that it may perform that duty without the authority of such a meeting. But it will be observed that none of the other things mentioned in that subdivision, for which an election is to be held, may be done by the board without authorization of the voters assembled in a district meeting, and we conclude that it must have been the legislative intent to withhold from the board and vest in the electorate the right to select a schoolhouse site. We are confirmed in this construction of that clause by an examination of the state of the law prior to the date of the enactment of this statute, for repealed statutes may be taken into consideration in construing statutes. *Sutherland on Statutory Construction*, § 452. This act was approved February 20, 1901 (Sess. Laws 1901, pp. 23, 65), and repeals title 4, c. 10, Hill's Code. Subdivision 3 of section 2002 thereof contains, so far as material to this case, the identical language of subdivision 5, § 3389, B. & C. Code, and subdivision 21 of section 2602 of the repealed statute expressly vested in the board of directors the power to locate sites for schoolhouses. A re-enactment of the former and a repeal of the latter, accompanied by a substitution of the language found in subdivision 14, § 3389, B. & C. Code, for the section repealed is conclusive that the legislative intent was to take from the board the power to make the selection of a schoolhouse site, which it formerly possessed, and to vest that power solely in the legal voters, to be ascertained at a district meeting, which must be called by the board either when acting upon its own judgment, or when petitioned therefor by one-third of the legal voters of the district.

The decree, however, will be so modified as to limit the continuance of the injunction order made by the trial court until such time as a majority of the legal voters of the district, present at a legally called school meeting, shall select such "Old Courthouse Block" as a site for a schoolhouse. In all other respects the decree is affirmed. No costs will be allowed to either party.

(58 Or. 228)

OREGON R. & NAVIGATION CO. v. McDONALD et al.†

(Supreme Court of Oregon. Dec. 20, 1910.)

1. RAILROADS (§ 72*)—DEED TO RIGHT OF WAY—CONDITION SUBSEQUENT.

A conveyance to a railroad reciting that it was made on the condition that the road would construct its line over the premises within two years created a condition subsequent.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 176; Dec. Dig. § 72.*]

2. RAILROADS (§ 72*)—RIGHT OF WAY—PURCHASE.

While a railroad may acquire a fee in land by condemnation, yet, where it goes into the market to buy as an ordinary purchaser, it may make its own terms, and may bind itself by conditions subsequent.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 168-178; Dec. Dig. § 72.*]

3. RAILROADS (§ 82*)—CONVEYANCE OF RIGHT OF WAY—FORFEITURE.

Grantors of land to a railroad on condition that the line be constructed over the premises within two years were not estopped from claiming a forfeiture by voluntarily permitting the grantee to enter on the land and construct its grade.

[Ed. Note.—For other cases, see *Railroads*, Dec. Dig. § 82.*]

4. RAILROADS (§ 82*)—RIGHT OF WAY—FORFEITURE.

Where, though, under a grant to a railroad conditioned on the building of the road within a specified time, the grantor was entitled to a forfeiture, it appeared that the road was constructed and in operation, the court would decree the road to be entitled to the land on payment of the damages occasioned by the taking thereof.

[Ed. Note.—For other cases, see *Railroads*, Dec. Dig. § 82.*]

Appeal from Circuit Court, Wallowa County; J. W. Knowles, Judge.

Suit by the Oregon Railroad & Navigation Company, a private corporation, against Hector McDonald and another. Decree for defendants, and plaintiff appeals. Decree modified as directed.

This is a suit in equity brought by plaintiff to enjoin defendants from interfering with plaintiff in the construction of its branch line of railway from Elgin to Joseph, where the same crosses defendants' land in Wallowa county. On September 18, 1905, plaintiff purchased of defendants the right of way for the railroad over their land; the amount so purchased comprising in all about 20 acres and the price paid being \$600. Defendants, however, declined to sell this land until the following clause was inserted in the deed: "This conveyance is made on the condition that the Oregon Railroad & Navigation Company will construct its line of road over the above described premises within two years from the date hereof." Plaintiff took possession of the land, and had completed its grade along the whole of it by October, 1907, and thereafter ceased work upon the road. Thereupon defendants fenced the land at each end, inclosing it with their other

er fields, and in August, 1908, when work had been resumed on other portions of the road, they posted notices, warning all persons, particularly plaintiff, its agents, and employes, to keep off the premises, and declaring themselves to be the owners and in possession thereof. Plaintiff brought this suit and secured a preliminary injunction under the protection of which it proceeded to complete the construction of its line. On the trial the court rendered a decree for defendants. Plaintiff appeals.

T. H. Crawford (W. W. Cotton and Arthur C. Spencer, on the brief), for appellant. Turner Oliver, for respondents.

McBRIDE, J. (after stating the facts as above). Plaintiff's principal contention is that the limitation in the right of way deed from defendants is in legal effect a covenant, and not a condition. Forfeitures are not favored in law, and the decisions abound in many subtle distinctions indulged in by the courts to avoid their frequently harsh consequences.

Before discussing the various and frequently unreconcilable decisions on this subject, it may be well to recur to elementary definitions: Littleton defines a condition as follows: "Also, divers words (amongst others) there be, which by virtue of themselves make estates upon condition; one is the word 'sub conditione.'" And Coke, commenting upon this, says: "This is the most expresse and proper condition in deed, and therefore our author beginneth with it." Coke upon Littleton, § 328. Sheppard says: "Amongst these words there are three words that are most proper, which in and of their own nature and efficacy, without any addition of other words of re-entry in the conclusion of the condition, do make the estate conditional, as 'proviso,' 'ita quod,' and 'sub conditione.' Touch. *122. Tested by these definitions, the language employed in the deed at bar would clearly seem to indicate an intent to create a conditional estate defeasible on the failure of the grantee to perform the condition. It is true that the courts in the cases cited by counsel have held that similar language constitutes a covenant, and not a condition, but in most, if not all, of these cases the words of condition were held to be modified or qualified by other language used in the same connection. Thus in *Post v. Well*, 115 N. Y. 361, 22 N. E. 145, 5 L. R. A. 422, 12 Am. St. Rep. 809, where the restriction read, "Provided always, and these presents are upon this express condition, that no part of the granted premises shall ever be used or occupied as a tavern," the court held that the language used should be construed as a covenant running with the land, placing this construction upon the ground that the original grantor owned adjoining property which might be depreciated in value by the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

† Rehearing denied March 14, 1911.

erection of a tavern in the vicinity. But in that case the grantor had an adequate remedy in equity to protect his estate from the erection of the obnoxious building, while in the case at bar defendants would have no such remedy to compel plaintiff to build its road. *Hawley v. Kaffitz*, 148 Cal. 393, 83 Pac. 248, 3 L. R. A. (N. S.) 741, 113 Am. St. Rep. 282, was a case where plaintiff executed to defendant a conveyance which contained the following clause: "This deed is given by the parties of the first part, and accepted by the second party, upon the express agreement of the second party to build, or cause to be built, upon the said premises within six (6) months from the date hereof a dwelling house to cost not less than fifteen hundred (\$1,500) dollars. Said agreement being considered by the parties hereto as part consideration for this conveyance." This was held by the court as a mere covenant, and not a condition subsequent; the court saying: "There is not only an entire omission on the part of the grantor to use any technical language, such as is ordinarily employed to create an estate on condition subsequent, but there is also an entire absence of any language indicating that, for noncompliance with the stipulation to build, it was the intention of the grantor that the estate granted should be defeated and forfeited. Not only is there no language that would create a condition subsequent, but the language actually employed, 'this deed is upon the express agreement,' implies a personal covenant, and not a condition." The distinction between the case cited and the one at bar is obvious. In *Ashuelot Nat. Bank v. City of Keene*, 74 N. H. 148, 65 Atl. 826, 9 L. R. A. (N. S.) 758, the restriction clause in the deed was as follows: "Provided, however, and this deed is made upon the express condition, that said premises shall be forever held and used for the purpose of erecting and maintaining a public library building thereon, and for utilizing so much thereof as is not used for library purposes for a public park, and for no other purpose whatever; said grantee to take and enjoy the rents and income therefrom until such reasonable time as the same shall be devoted to the purposes aforesaid." There had been some prior negotiations between the parties, which were in writing, and the court, taking into consideration these negotiations and the fact that the city was to have the use of the property and the rents and profits therefrom for a reasonable time, held that the language used was intended to create and define a trust rather than to impose a condition subsequent. The fact that the land was conveyed to the city to be used for a public purpose, and therefore as a public trust, was dwelt upon by the court as a circumstance, indicating that a forfeiture was not intended.

It is impossible to discuss within the limits of this opinion all the cases cited by counsel, but, as before observed, it will be

found in all that either in the conveyance itself or in some other instrument leading to it there is language qualifying, modifying, or tending to alter the significance of the alleged words of condition. There is no case cited, and it is believed that none can be found, where a bald single condition, standing alone as this, has been perverted into a covenant. The case of *Blanchard v. Detroit, Lansing & Lake Michigan R. Co.*, 31 Mich. 43, 18 Am. Rep. 142, is an instructive one. In that case a deed was made in consideration of \$500, and the covenant to build a depot "hereafter mentioned." Thereafter it was set forth that the conveyance "is made upon the express condition" that the company shall erect and maintain on the land conveyed a station house "suitable for the convenience of the public," and that one train "each way shall stop at such depot or station each day, and that freight and passengers shall be regularly taken at such depot." The company failed to build such depot and the grantor attempted to compel a specific performance, claiming, as plaintiff does here, that the clause quoted constituted a covenant. The court say: "The question whether there is a limitation or a condition, or whether there is a condition precedent or subsequent, or whether what is to be expounded, is a condition or covenant or something capable of operating both ways, very frequently becomes very perplexing in consequence of the uncertain, ambiguous, or conflicting terms and circumstances involved; and the books contain a great many cases of the kind and not a few of which are marked by refinements and distinctions which the sense of the present day would hardly tolerate. Where, however, the terms are distinctly and plainly terms of condition, where the whole provision precisely satisfies the requirements of the definition, and where the transaction has nothing in its nature to create any incongruity, there is no room for refinement and no ground for refusing to assign to the subject its predetermined legal character. In such a case the law attaches to the act and ascribes to it a definite significance, and the parties cannot be heard to say, where there is no imposition, no fraud, no mistake, that, although they deliberately made a condition, and nothing but a condition, they yet meant that it should be exactly as a covenant." So in the case at bar. We have an instrument in which the clause in controversy is couched in the exact language of a condition subsequent, plain, unambiguous, and unqualified, and we would pervert both law and language to hold that these apt. words mean something different from their ordinary import.

The case of *Gray v. Blanchard*, 8 Pick. (Mass.) 284, is in point. Gray conveyed a parcel of land adjoining his dwelling house by a deed, containing this restriction: "Provided, however, this conveyance is upon the condition, that no windows shall be placed

in the north wall of the house aforesaid, or of any house to be erected on the premises within thirty years from the date hereof." It will be noticed that the contingency provided against was of trivial character; the only possible effect of placing a window on the north wall being that such window might overlook the grantor's premises and invade his privacy. But the court held the condition good, and declared a forfeiture, saying: "The words are apt to create a condition. There is no ambiguity, no room for construction, and they cannot be distorted so as to convey a different sense from that which was palpably the intent of the parties. The word 'provided' alone may constitute a condition, but here the very term is used which is often implied from the use of other terms. 'This conveyance is upon the condition,' can mean nothing more nor less than their natural import; and we cannot help the folly of parties who consent to take estates upon onerous conditions by converting conditions into covenants."

Nor do we see any ground either in law or reason for holding that a railway company cannot bind itself by conditions subsequent. It is true that it may acquire a fee in the land by condemnation, but, when it goes into the market to buy as an ordinary purchaser, it would seem that it ought to be permitted to make its own terms. *Mills v. Seattle & M. Ry. Co.*, 10 Wash. 520, 39 Pac. 246, *Nicoll v. New York & Erie R. Co.*, 12 N. Y. 121, and *Blanchard v. Detroit, etc., R. Co.*, 31 Mich. 43, 18 Am. Rep. 142, are railroad cases, and in each of them a contract containing conditions subsequent is held valid. In the case at bar the plaintiff, having induced defendants to execute the conveyance, which they otherwise declined to execute, by writing in the provision in question, is not in a position to urge that such provision was one which it had no right to accept.

It is urged that defendants are estopped from urging a forfeiture by reason of the fact that they voluntarily permitted plaintiff to enter upon the land and construct its grade, and the case of *Roberts v. Northern Pacific R. R. Co.*, 158 U. S. 1, 15 Sup. Ct. 756, 39 L. Ed. 873, is cited, among others, in support of this contention. It is true that where one stands idly by and permits a railway corporation to enter upon his land and make valuable improvements thereon he will be held to have acquiesced in their act, but this only applies to cases where the entry was not under a specific agreement. Here the entry was made under a contract, which by its terms practically authorized a re-entry by the grantors at the expiration of two years if a road was not constructed within that period. There was no misleading plaintiff to its prejudice. Both parties knew from the beginning the possible consequences of delay. Defendants were unwilling to sell a strip of land across their farm and allow

the railroad company to hold it indefinitely, to the detriment of the balance of their holdings and to the possible exclusion of some other line of road. They wanted the road built within two years or they wanted their land back. Plaintiff, feeling confident that it could complete the road within that time, took the deed with the condition annexed to it. Owing primarily to the money panic and secondarily to weather conditions, they failed to comply with the conditions which no doubt seemed reasonable enough when the deed was made. Financial stringency has caused many people in this country to forfeit profitable contracts, but the courts cannot compel the beneficiaries of such contracts to be generous and extend the time for performance. We find no reason for holding that defendants have in any way waived this condition. After plaintiff had ceased work, defendants built a fence across that part of the field which had been opened for the purpose of constructing the grade, and, before plaintiff ever attempted to begin work at this point again, they warned the company and its agents that they had taken possession. In this we think that they were within the legal rights and waived nothing.

So far, then, we have found that defendants were entitled to a forfeiture and that the land has reverted, but we now recur to the remedy. The situation is anomalous. Plaintiff has constructed its road and has it in operation, thereby performing an important public function for a large and increasing population. It is reasonable to suppose that it is transporting freight and passengers, and, as is the custom of the country, the United States mail. It is to the interest of the public that it should continue to do so, and that the defendants should not be allowed to acquire a portion of its roadbed to the detriment of public travel. The condemnation of land for railway purposes is usually the function of a court of law, but there are in this case such special circumstances as to authorize this court to end the whole litigation at once and forever. The pleadings show that this land is needed for the purposes of a railway, and the evidence shows that the railway is actually there on the ground. Defendants come into court, submit themselves to the jurisdiction of equity, and ask affirmative relief. Much of the testimony was devoted to showing the value of the land taken, the effect of the taking on the remainder of the tract, and all those things which are usually shown in an action to condemn for a railroad right of way.

Having jurisdiction of this case, we have concluded to assume it for all purposes and to so modify the decree that plaintiff shall take title to the land described in this strip upon the paying to defendants the damage occasioned by such taking, which we assess at \$700, and the costs and disbursements of this suit; and that, upon payment of such

sum and costs to the clerk of this court, plaintiff be decreed to be the owner in fee for railway purposes of such strip of land.

(57 Or. 446)

WATSON v. McLENCHE.

(Supreme Court of Oregon. Dec. 31, 1910.)

On petition for rehearing. Denied.

For former opinion, see 110 Pac. 482.

MCBRIDE, J. Both plaintiff and defendant have filed petitions for a rehearing herein, but after carefully considering the same we are still satisfied with our former conclusions. We do not wish to be understood, in our former opinion, as deciding absolutely that an equitable defense exists, or in any way attempting to control or direct the circuit court in its further disposition of this cause. We only suggest that there may be, in the questions raised by appellant, such facts and defenses as might be appropriately set up in a cross-bill, and leave the case in such a position that the circuit judge may, in his discretion, after an examination of the testimony, permit one to be filed. Such discretion to permit or refuse the filing of a cross-bill should be, and no doubt will be, exercised by the lower court without reference to anything said by this court upon that subject.

Petition denied.

(57 Or. 428)

DIBBLEE v. ASTORIA & C. R. R. CO.

(Supreme Court of Oregon. Dec. 27, 1910.)

RAILROADS (§ 440*)—INJURY TO STOCK—NATURE OF ACTION—VARIANCE.

Plaintiff sued defendant railroad company for the killing of stock on its right of way, and the evidence showed that plaintiff's deed to the railroad company reserved a right to crossings, and that it agreed to put in cattle guards and open crossings, but did not do so, but that plaintiff had no arrangement with the railroad company to put in gates, and that it decided to inclose its right of way by a continuous fence and gates at the crossings. *Held*, that there was no variance, on the ground that the action was in tort, while the evidence tended to show liability arising on breach of contract; plaintiff not seeking to recover because defendant did not construct open crossings, but on the ground that the fence and gates were not kept in repair.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1570-1574; Dec. Dig. § 440.*]

On petition for rehearing. Petition denied.

For former opinion, see 111 Pac. 242.

EAKIN, J. The petition urges again that the action is upon a tort, and that the evidence tended to show that the liability arose upon breach of contract. The testimony of plaintiff, quoted in the petition, is to the effect that, by his deed to the railway company, he reserved his right to crossings; that orally the company agreed to put in cattle

guards, meaning open crossings, but did not do so; and that he had no arrangement with the company for gates. The defendant elected to inclose its tract by a continuous fence and gates at the crossings, and plaintiff is not seeking to recover because the company did not construct open crossings. He is not complaining that gates were constructed, but that the fence and gates were not kept in repair, and remedy is sought upon the statutory liability.

The other questions are answered in the opinion. The petition is denied.

(57 Or. 387)

Ex parte JERMAN.

(Supreme Court of Oregon. Dec. 20, 1910.)

1. HABEAS CORPUS (§ 46*)—JURISDICTION OF CIRCUIT AND COUNTY COURTS.

Const. art. 8, § 2, as amended in 1910, provides that the courts, jurisdiction and judicial system, except so far as expressly changed by the amendment, shall remain as at present constituted, until otherwise provided by law, but that the Supreme Court may in its own discretion take original jurisdiction in habeas corpus proceedings. Section 5 provides that no person shall be charged in any circuit court with the commission of any crime or misdemeanor defined or made punishable by any of the laws, except upon indictment. *Held*, that while original jurisdiction is given to the Supreme Court in habeas corpus proceedings, to be exercised in its discretion, the authority of the circuit and county courts in that respect is not taken away or abridged.

[Ed. Note.—For other cases, see *Habeas Corpus*, Dec. Dig. § 46.*]

2. HABEAS CORPUS (§ 44*)—ORIGINAL JURISDICTION OF SUPREME COURT—NATURE—"DISCRETION."

Const. art. 8, § 2, as amended in 1910, provides that the Supreme Court may in its own discretion take original jurisdiction in habeas corpus proceedings. *Held*, that it was the intent to allow to the court the widest latitude consistent with law and justice in determining whether it will act in any given case, "discretion" not meaning absolute or arbitrary power when vested in an officer and meaning when vested in a court the exercising of the best of the court's judgment upon the occasion that calls for it, and the section does not thrust upon the Supreme Court the burden of hearing and deciding in the first instance every application for habeas corpus which might be presented to it, but before taking jurisdiction the court should consider the condition of its business, the hardships of petitioner incident to a denial of the writ, and whether he has any plain, speedy, and adequate remedy in the circuit court, and a remedy by appeal, and where the court's docket is greatly congested, so that if jurisdiction were taken other criminal cases equally meritorious, some involving the question of life and death, and nearly all involving the present imprisonment of the parties concerned, would have to be postponed, the court will refuse to take jurisdiction of a petition for habeas corpus by persons who have appeared in court and pleaded guilty to an offense, craving immediate sentence, on the ground that the clerk in entering the judgment failed to recite therein the crime for which they were sentenced, as expressly required by B. & C. Comp. § 1444; they having adequate remedy by application to the court to require the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

clerk to correct the judgment entry, by appeal to the Supreme Court, and by application for habeas corpus in the circuit court.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 35; Dec. Dig. § 44.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2095-2099.]

3. HABEAS CORPUS (§ 44*)—ORIGINAL JURISDICTION.

Regardless of the rights of a petitioner to apply to the lower court for a writ of habeas corpus, appellate courts refuse original jurisdiction in such proceedings only where it appears that civil rights are concerned. Per King, J., dissenting.

[Ed. Note.—For other cases, see Habeas Corpus, Dec. Dig. § 44.*]

4. WORDS AND PHRASES—"DISCRETION."

"Discretion" of the court is freedom to act according to the judgment of the court or according to the rules of equity and the nature of circumstances; sound discretion guided by fixed legal principles, to be exercised in conformity with the spirit of the law, and in accordance with the rules established in reference thereto. Per King, J., dissenting.

5. HABEAS CORPUS (§ 92*)—RECORD.

The question as to whether a writ of habeas corpus should issue must be determined from the record presented. Per King, J., dissenting.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 81, 83, 87-96; Dec. Dig. § 92.*]

6. HABEAS CORPUS (§ 85*)—RECORD.

In habeas corpus proceedings in the Supreme Court it cannot be presumed that proceedings in the lower court, upon which a judgment void upon its face was entered, were regular, and that an error occurred through the inadvertence or misprision of the clerk in entering the judgment. Per King, J., dissenting.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 78; Dec. Dig. § 85.*]

7. HABEAS CORPUS (§ 44*)—ORIGINAL JURISDICTION OF SUPREME COURT—CONSTRUCTION OF CONSTITUTION.

Const. art. 8, § 2, as amended in 1910, provides that the Supreme Court may, in its own discretion, take original jurisdiction, in habeas corpus proceedings. *Held*, that the amendment was intended to reach the cases of persons unlawfully held in custody, so as to avoid the delays incident to an appeal from the county and circuit courts to the Supreme Court, and the provision making it discretionary with the Supreme Court whether they should take jurisdiction was intended to be exercised in cases more civil than criminal in nature, such as controversies between divorced parents over the custody of children, and instances requiring possibly an examination of witnesses, and not to cases where the record shows a restraint of petitioner under a void judgment. Per King, J., dissenting.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 35; Dec. Dig. § 44.*]

King, J., dissenting.

Petition for a writ of habeas corpus by Archie M. Jerman on behalf of Francesco Roberto and Lorus Martinez. Petition denied.

This is a petition for a writ of habeas corpus. The petition was made at the instance of Archie M. Jerman, whose connection or relationship to the prisoners and the subject-matter does not appear. After the

usual formal allegations, it is alleged that the pretended cause of imprisonment is under color of a void judgment of the circuit court of which the following is a copy, omitting the formal portions of the document: "State of Oregon v. Francesco Roberto and Lorus Martinez. On this day the state of Oregon appearing by W. C. Winslow, deputy district attorney, and the defendants appearing in person and by their attorney, Wm. P. Lord, Jr., the plea of not guilty heretofore entered by the said defendants is by them changed to a plea of guilty and the said defendants both waiving further time for sentence and requesting the court to at once pass sentence upon them. It is therefore ordered and adjudged that said Francesco Roberto and Lorus Martinez be confined in the penitentiary of the state of Oregon without limitation of time." Session laws of 1905, p. 318, provide that whenever any person is convicted of any crime, the maximum punishment of which does not exceed 20 years' imprisonment in the penitentiary, the court may, in its discretion, sentence such person to imprisonment without limitation of time; provided, that such imprisonment shall not exceed the maximum penalty prescribed for such offense. There are further provisions permitting the Governor to parole such person after he has served the minimum penalty for such offense. Section 1444, B. & C. Comp., is as follows: "When judgment upon a conviction is given, the clerk must enter the same in the journal, stating briefly the crime for which conviction has been had; such entry may be made at any time during the term as of the day's proceedings upon which the judgment was given." Section 6, art. 7, of the Constitution provides: "The Supreme Court shall have jurisdiction only to revise the final decisions of the circuit courts." Section 9, art. 7, provides: "All judicial power, authority, and jurisdiction not vested by this Constitution, or by laws consistent therewith, exclusively in some other court, shall belong to the circuit courts."

On November 8, 1910, article 8 of the Constitution was amended so as to read as follows:

"Section 1. The judicial power of the state shall be vested in one Supreme Court and in such other courts as may from time to time be created by law. The judges of the Supreme and other courts shall be elected by the legal voters of the state or of their respective districts for a term of six years, and shall receive such compensation as may be provided by law, which compensation shall not be diminished during the term for which they are elected.

"Sec. 2. The courts, jurisdiction, and judicial system of Oregon, except so far as expressly changed by this amendment, shall

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

remain as at present constituted until otherwise provided by law. But the Supreme Court may, in its own discretion, take original jurisdiction in mandamus, quo warranto and habeas corpus proceedings."

In section 5 of such amendment appears the following: "No person shall be charged in any circuit court with the commission of any crime or misdemeanor defined or made punishable by any of the laws of this state, except upon indictment found by a grand jury."

Wm. P. Lord, Jr., for petitioners. A. M. Crawford, Atty. Gen., and Walter C. Winslow, Deputy Dist. Atty., for the State.

McBRIDE, J. (after stating the facts as above). This is the first application for the exercise of the original jurisdiction of this court conferred by the constitutional amendment, adopted at the last general election. Counsel for petitioners in the able brief filed by him has, with a fairness as commendable as it is rare, cited the leading authorities both for and against the position contended for by him.

Under the provisions of the original Constitution cited in the statement of the case, we think there can be little question that this court had no power to issue the writ; that power being vested exclusively in the circuit and county courts. It is also apparent that, since the amendment, while such power may be exercised by this court in its discretion, the authority of the circuit and county courts in that respect is in no manner taken away or abridged. Until future legislation shall change them, the circuit and county courts continue to exist and to exercise the same powers and jurisdiction in respect to writs of this character which they exercised before the adoption of the amendment. Section 2, above quoted, is clear and distinct on this point, while section 5 distinctly recognizes the continued existence and authority of the circuit court by providing that "no person shall be charged in any circuit court with the commission of any crime, except by indictment."

Such being the condition, we are now called upon to determine whether the discretion given us by the late amendment should be exercised in this case. It is evident from the nature of the language used, "the supreme court may, in its own discretion, take jurisdiction," that it was the intention of the framers of this amendment to allow to this court the widest latitude consistent with law and justice in determining whether it would act in any given case. It does not, in terms, invest the court with positive jurisdiction. It permits them to take it, and invests the court with a peculiar discretion to do so or refrain from so doing. It does not stop with the usual formula, "in their discretion," but goes further and is more emphatic, using the term "in their own discretion."

"Discretion" is defined as the discernment

of what is right and proper, "as deliberate judgment." *Citizens' St. R. Co. v. Heath*, 29 Ind. App. 395, 62 N. E. 107. "Discretion does mean and can mean nothing else but exercising the best of the court's judgment upon the occasion that calls for it." *Tompkins v. Sands*, 8 Wend. (N. Y.) 462, 24 Am. Dec. 46. "Discretion, when vested in an officer, does not mean absolute or arbitrary power. The discretion must be exercised in a reasonable manner, and not maliciously, wantonly, and arbitrarily, to the wrong or injury of another." *Nicklaus v. Goodspeed*, 108 Pac. 135. See, also, "Adjudged Words and Phrases," title, "Discretion."

We are of the opinion that it was not the intention of the framers of the late amendment to thrust upon this court the burden of hearing, considering, and deciding in the first instance every application for quo warranto, mandamus, and habeas corpus which should be presented to it. Such a construction would overwhelm us with a mass of original business, including the examination of witnesses, hearing arguments of counsel, and considering the merits of the causes presented, which would interfere seriously with those duties for which this court was primarily constituted, namely, the hearing and decision of cases coming here in the usual manner upon appeal. And we are also of the opinion that, before taking jurisdiction in any of the cases enumerated, we should carefully consider, first, the condition of the business of this court; second, the hardships to the petitioner incident to a denial of the writ; third, whether the petitioner has any plain, speedy, adequate remedy in the circuit court; and, fourth, whether he has a remedy by appeal.

As to the first, it is well known that, at the present time, the docket of this court is greatly congested, and it follows that, if we take jurisdiction of this matter and proceed with a hearing, other criminal cases equally meritorious, some involving the question of life and death, and nearly all involving the present imprisonment of the parties concerned, will have to be postponed to the consideration of the case of these petitioners who are confessedly guilty of some crime, the particulars of which do not appear.

It does appear from the imperfect record that they appeared in court, pleaded guilty to an offense against the laws of this state, and craved the immediate sentence of the court therefor, and that thereupon the court sentenced them to an indeterminate term in the penitentiary. So far the proceedings seem to have been regular, but the law makes it the duty of the clerk to enter in the judgment the crime for which the defendant was sentenced, and this he has failed to do, so that Roberto and Martinez are in danger of remaining indefinitely in the bastille, unless this inadvertence is corrected. But these gentlemen have several plain, speedy, and adequate remedies. An obvious

one is to apply to the court to require the clerk to correct the judgment entry to correspond with the facts. Another is to appeal to this court in the regular way and have the judgment of the circuit court reversed or amended. And a third is to apply for a writ of habeas corpus before a judge of the circuit court, and find their redress. With all these remedies in other courts open to them, we do not think this is a case wherein this court should exercise the extraordinary jurisdiction conferred by the recent amendment to the detriment of other and more meritorious business.

The petition is denied.

EAKIN, J. (concurring). It is urged by the petitioners that the writ of habeas corpus is appellate in its operation, and therefore should be issued as a matter of right. They rely largely upon the cases of *Ex parte Clarke*, 100 U. S. 399, 25 L. Ed. 715, and *Ware v. Sanders* (Iowa) 124 N. W. 1081. In both of these cases it is recognized as a proceeding, when issued by the Supreme Court, by which the judgment of the lower court may be reviewed, in so far as to ascertain whether the court had jurisdiction or its judgment was void for any other reason. But, by the Constitution of the United States, the Supreme Court can only exercise original jurisdiction in cases affecting ambassadors, public ministers, and consuls, and those in which a state is a party. Otherwise its jurisdiction is appellate and it disclaims any original jurisdiction to issue writs of habeas corpus. It recognizes the writ as a means by which it may exercise its appellate jurisdiction to review the judgments of the inferior federal courts, to determine whether they were rendered without jurisdiction, or are otherwise void; and usually, in connection therewith, it will issue a writ of certiorari to bring up the record, that it may examine it upon these questions, holding that the Constitution does not prescribe the manner in which its appellate jurisdiction may be exercised. *Ex parte Virginia*, 100 U. S. 339, 25 L. Ed. 676; *Ex parte Siebold*, 100 U. S. 371, 25 L. Ed. 717. In *Ex parte Yerger*, 8 Wall. 85, 19 L. Ed. 332, the court say: "We regard as established upon principal and authority, that the appellate jurisdiction by habeas corpus extends to all cases of commitment by the judicial authority of the United States, not within any exception made by Congress." In *Ex parte Siebold*, supra, it is held that it cannot issue the writ as an exercise of its original jurisdiction. In *Ware v. Sanders*, supra, the decision follows these cases because the Iowa Constitution gives the Supreme Court supervisory control of inferior judicial tribunals throughout the state, and jurisdiction to issue the writ of habeas corpus, its issuance, being also provided for by statute, may doubtless be properly used as a means of exercising such supervision. The Oregon Constitution contains no such

provision, but extends to the Supreme Court only original jurisdiction to issue the writ of habeas corpus in its own discretion. An appeal is in the nature of a writ of error which, in most cases, is a matter of right at common law, but with us it depends wholly upon statute granting the right and not upon any principle of the common law. The right is not guaranteed by the Constitution. It provides that this court shall have jurisdiction to revise the final decisions of circuit courts. But this provision is not self-executing and does not give the right, in the absence of legislative enactment, and therefore appeals can only be prosecuted in the manner provided by law. *Portland v. Gaston*, 38 Or. 533, 63 Pac. 1051. This writ is not one by which the judgment of the lower court may be reviewed in the Supreme Court.

The language of this provision of the Constitution clearly indicates that it was not the purpose to place upon the Supreme Court the duty to issue and hear as an original proceeding every writ of mandamus, quo warranto, and habeas corpus, when applied for throughout the state. It "may, in its own discretion," issue the writ; that is, when, in the opinion of the Supreme Court, there is some necessity for an application to it, and only when there is some reason why adequate and prompt relief may not be obtained in the circuit or county court. To hold otherwise, this court might be burdened with these applications of which, until now, the circuit and county courts have had exclusive jurisdiction, and where under all ordinary circumstances the remedy is complete and prompt. There may often be cases in which it will be necessary or proper that this court shall take original jurisdiction of these writs, but the Constitution contemplates that they shall issue only in cases in which the court deems it proper in the exercise of a legal discretion.

In the case of *Ex parte Ryan*, 124 La. 286, 50 South. 161, upon an application to the Supreme Court for a writ of habeas corpus, it is held that the application would not be entertained if the hearing could be had before a court of first instance. In *State ex rel. v. Sheriff*, 44 La. Ann. 1014, 11 South. 541, it is said: "Whilst the writ of habeas corpus is one of right, it is not one of course. A party seeking to avail himself of it is not at liberty to select for himself, absolutely, either the time or place for relief or the tribunals through which it is to be obtained. So far from conceding it to be the duty of this court to entertain and act under each and every application for the writ on which we might legally do so, we are of the opinion that we should abstain from action where this may as well be done in competent lower courts, unless there should be special circumstances in the case making immediate direct action or intervention necessary or expedient." *State ex rel. v. Sheriff*, 36 La. Ann. 855; *State v. McColey*, 115 La. 406, 39

South. 81. In *Commonwealth v. Baroux*, 36 Pa. 262, an application for a writ of mandamus (included with habeas corpus in the grant of jurisdiction), it is held that although the Supreme Court has jurisdiction to issue the writ of mandamus, "It is in our discretion to refuse it as an original case, if there be an adequate remedy in another form or before another court." And the writ was denied because no necessity for making the application to the Supreme Court was shown. In *State ex rel. v. Barret*, 25 Mont. 112, 117, 63 Pac. 1030, upon a similar application, it is held that there must be some good reason why the application is made to the Supreme Court for such a writ. "District courts are ordinarily the primary forums, and in them should be commenced special proceedings, unless sufficient reasons exist why resort to the Supreme Court is necessary in the first instance." To the same effect are *State ex rel. v. Lawrence*, 38 Mo. 535, and *State ex rel. McIlhany v. Stewart*, 32 Mo. 379.

The conclusion is irresistible, that the new jurisdictional provision contemplates that the application to the Supreme Court for any of these writs should only be entertained in case there is some good reason why it cannot be issued and heard by the circuit or county court, which does not appear in this case.

KING, J. (dissenting). As to whether under our Constitution a habeas corpus proceeding is appellate in its nature, entitling petitioner to a writ, regardless of the amendment under consideration, and as to the effect of the judicial amendment upon other courts of the state, I express no opinion. But I must dissent from the conclusion announced by my associates concerning our duty, under the amendment, to take jurisdiction of the case before us. It is rarely, if at all, that an argument is heard before issuing the writ, and, as I understand it, because of the far-reaching and possibly disastrous effect of a misstep, or of the establishment of a wrong precedent at this time, counsel for both sides of the controversy were permitted to be heard, and I think properly, for it is certainly of vast importance that no error in this respect should be made. As observed by Mr. Justice Lyons of the Supreme Court of Wisconsin, in *Re Ida Louise Pierce*, 44 Wis. 418: "The interest of the state in the personal liberty of its citizens is primary and proximate, and to secure such liberty to each citizen entitled thereto is one of the most important purposes of government." And in *Re Semler*, 41 Wis. 522, Mr. Justice Cole remarked: "No rule should be adopted restricting the jurisdiction of this court over the writ of habeas corpus, which has ever been regarded as the safeguard of personal liberty, except for the most weighty considerations." So, too, in *Simmons v. Georgia I. & C. Co.*, 117 Ga. 306, 308, 43 S. E. 780, 781 (61 L. R. A. 739), Mr. Justice Cobb, speaking for the court, ob-

serves: "The writ is as much a palladium of liberty today as it was during the abuses existing in the days of the ancient English sovereigns. It is to the credit of an advanced civilization that the necessity for the issuance of the writ rarely ever arises, but the Constitution of this state declares that the privilege of the writ shall never be suspended, and it stands today, as it did in the days of King Charles, to protect and safeguard the liberty of the citizen."

There is perhaps no other state with a Constitution containing a provision similar in language to the one presented. Most, if not all, of the states have provisions in their fundamental laws substantially as appears in our Bill of Rights, § 23, viz.: "The privilege of the writ of habeas corpus shall not be suspended, unless in case of rebellion or invasion the public safety require it." Under this and like provisions all the states containing such requirements take original jurisdiction of habeas corpus proceedings, and recognize the right to exercise sound discretion in allowing or denying the writ. On page 311 of 117 Ga., page 782 of 43 S. E. (61 L. R. A. 739), in the case of *Simmons v. Georgia I. & C. Co.*, the court observes that: "While the writ of habeas corpus is a 'writ of right,' it did not, either under the common law or the statute of Charles II. issue as a matter of course, but only on probable cause shown." To the same effect is the language quoted in the concurring opinion from *State ex rel. v. Sheriff*, 44 La. Ann. 1014, 11 South. 541, where under the facts there shown jurisdiction was properly denied. Thus writs have often been denied by the exercise of the sound "discretion" by courts in states without such language in their fundamental laws as may appear in the amendment under consideration, disclosing that the provision, "in their own discretion," adds nothing new to the practice. But I have yet to find the first case where the issuance of the writ has been denied by an appellate court to one imprisoned in the penitentiary under a void judgment. I do not question the possibility of there being an occasional decision to that effect, but, if so, it is a rare exception, and on investigation it probably will be found that the refusal was because of some unusual circumstance or showing made, disclosing special and exceptional reasons therefor. I understand the rule supported by the great weight of authority to be that, regardless of the rights of a petitioner to apply to the lower courts for the writ, appellate courts refuse original jurisdiction in habeas corpus proceedings only in cases where it appears that civil rights are concerned.

Judicial discretion, it is true, cannot be governed by any fixed rule or rules, for so to do would leave no discretion, yet it has in legal parlance a well-understood meaning, which meaning, it is to be presumed, was intended when placed in our Constitution. The use of the word "own," to which some weight

appears to be attached, is tautological, and adds nothing to the strength of the expression. Volume 14 of the Cyc. 383, 384, defines 'discretion of the court as the "ability to discern by the right line of law, and not by the crooked cord of private opinion, which the vulgar call discretion; freedom to act according to the judgment of the court, or according to the rules of equity and the nature of circumstances; judicial discretion regulated according to known rules of law; legal discretion, and not a personal discretion; sound discretion guided by fixed legal principles; sound discretion guided by law; sound judgment, to be exercised according to the rules of law; sound judicial discretion." This court, in referring to the use of the word "discretion," as used in *Coos Bay Nav. Co. v. Endicott*, 34 Or. 573, 576, 57 Pac. 61, 62, and so often used in our statute, has said that it "must be exercised in conformity with the spirit of the law and in accordance with the rules established in reference thereto. * * *". Also in *Linn Co. v. Morris*, 40 Or. 415, 420, 67 Pac. 295, 297, Mr. Justice Moore observes: "The judicial discretion that is not subject to review on appeal is such an exercise of authority in the mode of proceeding for the enforcement of rights or the redress of wrongs as is reasonably designed, according to fixed legal principles, to promote substantial justice." Numerous cases have been reversed by this court on account of an exercise, under some provision of our statutes, of what the trial courts deemed their discretion, among which is *Nicklaus v. Goodspeed*, 108 Pac. 135.

The question, then, with which we are confronted, and the only question, is whether, under the well-known rules of law, the facts presented by the petition for the writ are adequate to justify the exercise of our discretion in favor of granting the same. The only provision upon the subject reads: "Whenever any person is convicted of a felony for which the maximum punishment does not exceed twenty years imprisonment, the court may, in its discretion, sentence such person to imprisonment in the penitentiary without limitation of time, and such person so convicted and sentenced may be paroled for good conduct by the Governor upon such terms and conditions as may seem to him wise, at any time after such person shall have served the minimum period of imprisonment provided for by law for such offense, but such imprisonment shall not in any event exceed the maximum term provided by law for the crime of which the prisoner was convicted and sentenced." Laws 1905, p. 318. It will thus be seen that, under the statute an indeterminate sentence, or sentence "without limitation of time," can be imposed only where it appears that the accused has been convicted of a felony, the penalty for which does not exceed 20 years' incarceration in the penitentiary. *State v. Smith*, 107 Pac. 980. There is nothing in the record before us from which the

offense to which defendants pleaded guilty may be ascertained. It may have been for a mere misdemeanor, the penalty for which was a light fine or jail sentence. This question can only be determined upon the return to the writ, which is not before us. The journal entry quoted in the petition, showing the sentence imposed, states no fact or facts from which it may be inferred that a plea of guilty was entered to a felony, and certainly if not to a felony the sentence imposed is absolutely void; no law being provided for such sentence under any other circumstances. The question as to whether the writ should issue should be determined from the record presented. This is too well settled to need citation of authority for its support, and no rule of law is better established or more fully settled than that when proceedings of the character under discussion are presented to this court for consideration, it cannot be presumed that the proceedings in the court below (upon which a judgment, void upon its face, was entered) were regular, and that an error occurred through the inadvertence or misprision of the clerk in entering the judgment. Such is the holding in practically all of the federal and state courts, including the adjudications of this court, as observed in *State v. Gilbert* (decided May 14, 1883) 112 Pac. 436, in referring to the transcript there presented for consideration: "To it alone can we look to ascertain what the action of the court below was, and upon it determine whether any error was committed. The duty of the clerk in such matters is ministerial undoubtedly, and subject to the supervision and control of the court. But his record is the highest record of the judicial action of the court. It imports verity, and, until impeached by the court itself, is conclusive of the matters to which it relates" —citing *Schlirmer v. People*, 33 Ill. 276. To the same effect, *State v. Cartwright*, 10 Or. 193; *State v. Smith*, 107 Pac. 980; *State v. McCaffrey*, 26 Or. 570, 38 Pac. 932. This rule, after careful consideration by this court, was followed in *State v. Walton*, 50 Or. 142, 91 Pac. 490, 13 L. R. A. (N. S.) 811. The same principle is announced and upheld in *Crahn v. United States*, 162 U. S. 625, 16 Sup. Ct. 952, 40 L. Ed. 1097, since the promulgation of which the rule thus declared has been recognized in every state in the Union, having no statutes to the contrary, where the question has arisen, except in Colorado.

Taking the record then as presented, it is obvious that Francesco Roberto and Lorus Martinez, whom the petitioner represents, are sentenced to the Oregon state prison until the end of time without authority of law, and the proceedings by which they are held are void. It may be that the prisoners pleaded guilty to a crime coming within the indeterminate sentence act, but unless we adopt the policy of relying upon mere rumors or hearsay evidence, and step outside the record presented to ascertain the facts, we have no means of knowing upon what charge they

are imprisoned. Unless, therefore, we are to turn a deaf ear to the well-established principles of law applicable to writs of habeas corpus, we should, under the showing by the petition, allow the writ, on the return to which the real status of the prisoners could be determined.

The object of this amendment, in my judgment, was to reach such cases as the one presented, and thereby avoid the delays incident to an appeal from the county and circuit courts to this court. These delays often work to the prejudice of the state, and at other times occasion great injustice to those unlawfully held in custody. For example, in the case of *Isakson v. Stevens*, 110 Pac. 393, recently decided, the petitioner, on a charge of felony, was on February 13, 1909, held before a committing magistrate to await the action of the grand jury. A petition for writ of habeas corpus was applied for in the circuit court and denied, but, pending an appeal, the accused was admitted to bail. Owing to the congested condition of our calendar the case was not reached and finally was not determined until August 3, 1910. In that case, under the facts disclosed by the records, the accused deserved to be imprisoned in the penitentiary for a term of years, but after more than 17 months had elapsed the matter was through this court, and although decided against the petitioner, he had not even been tried in the court below. Whether he appeared for trial or, through forfeiture of his bail, escaped punishment, is immaterial for the purpose of this illustration, which discloses the facility with which a criminal through delay may escape justice. No more of the court's time would have been consumed had the application for the writ been made here in the first instance than was finally required on appeal. Had the amendment under consideration then been in force, and the application brought here in the first instance, the petition, not showing sufficient grounds for the discharge of the accused, would have been denied without delay, and the prisoner, after a few days' delay, would, if guilty, have been sentenced, or, if innocent, have secured his liberty. Assume, on the other hand, that a man is suspected of a bailable offense, yet has committed no crime, but through a misapprehension of the law the judge below denies him bail. Should he then be required to ask the same judge, by habeas corpus, to discharge him, and on a second denial of justice be compelled to appeal and wait many months for a final determination in the appellate court, and during that time be restrained of his liberty? To ask this is to answer it. As before noted, the prisoners, so far as we know, may have committed the smallest misdemeanor, entitling them only to a few days in jail, yet, by the conclusion reached, they are required to apply for the writ to the court where the error occurred, on refusal of which they must remain in the state prison for a year

or more, until the case may here be reached and determined.

Manifestly the amendment had some purpose in view when it gave to the people affected the right to apply to this court for a writ of habeas corpus, and this cause, it appears to me, clearly comes within the class of cases thereby contemplated. The argument that it may impose additional burdens upon a long-suffering and overworked court should have no weight. It is not for the courts to say what work should be thrust upon them by the law-making department; that is a legislative and not a judicial matter. Like objections were made to the granting of this guaranty of personal liberty before its first royal recognition in the Magna Charta, and especially when, in 1679, the first fully recognized habeas corpus act (31 Car. II, c. 2) was adopted. No doubt it was then anticipated that such courts as were then existent would be overworked by applications of those claiming to be unlawfully restrained of liberty, and possibly they were, but, so far as I can ascertain, this inconvenience has seldom been recognized as an argument against the exercise and recognition of this right. It was on account of delays of courts and the officers thereof (of which appeals in this country furnish frequent illustrations) that birth was given to what the *Cyclopedia* (Vol. 21, p. 283) refers to as the first effective habeas corpus act, the reasons therefor being stated in the preamble of the act thus: "Whereas great delays have been used by sheriff, gaolers, and other officers, to whose custody any of the king's subjects have been committed for criminal or supposed criminal matters, in making returns of writs of habeas corpus to them directed, by standing out an alias and pluries habeas corpus, and sometimes more, and by other shifts to avoid their yielding obedience to such writs, contrary to their duty and the known laws of the land, whereby many of the king's subjects have been, and hereafter may be long detained in prison, in such cases where by law they are bailable, to their great charges and vexations, for the prevention whereof, and the more speedy relief of all persons imprisoned for any such criminal or supposed criminal matters; be it enacted. * * *

This act, when read in full, will be found very complete as compared to those preceding it, and was enacted to cure the abuse of discretion then so common. The conditions leading up to its enactment, and until the final solution of the problem in England by the adoption of the law on the subject, enacted in the reign of George III, are given (15 Am. Eng. Ency. 129), as follows: "The judges delayed for two terms to deliver an opinion as to how far such a charge was bailable, and when at length they agreed that it was bailable they annexed a condition of finding sureties for good behaviour, which still protracted the imprisonment, the chief justice,

Sir Nicholas Hyde, at the same time declaring that 'if they were again remanded for that cause, perhaps the court would not afterwards grant an habeas corpus, being already made acquainted with the cause of the imprisonment.' There were other abuses which came into frequent practice which in some measure defeated the benefit of the remedy. Thus the party imprisoning was at liberty to delay his obedience to the first writ, and wait until a second and third, called an alias and pluries, were issued, before he produced the prisoner."

In the light of history, is it not to be presumed that inconveniences and delays analogous to those above, so frequent even under our advanced system of procedure, moved the people of the state in the adoption of a constitutional provision on the subject, and should we not pause long before establishing a precedent, the effect of which is to recognize a continuance of those conditions? From their inception the circuit courts, as well as county courts of this state, have had jurisdiction of these matters, yet it is a well-known fact that such applications have constituted but a very small percentage of their cases, due principally to the fact that one is rarely held in custody under a void judgment. The writ is used only to correct jurisdictional errors, resulting in a wrongful restraint of liberty, from which it must necessarily follow, that, should we take jurisdiction of this class of cases, applications therefor would rarely be made. In nearly every state in the Union its use is invoked by appellate courts, and jurisdiction thereof taken in cases analogous to the one under consideration, yet applications therefor have been comparatively few. Then why anticipate a rush of petitions to this court and an overcrowding of our docket from that source of litigation, if recognized? It is reasonable to assume that our people, knowing our state to be unlike others in this respect, in that unusually long delays must be encountered before a writ of habeas corpus may be heard in the Supreme Court, deemed it an important step forward, and accordingly intended by amendment to grant to our citizens the same rights and privileges in this respect as are enjoyed in other states.

The holding to the effect that these prisoners may apply to the trial court for a correction of the record to conform to the facts, is novel as well as new in its application. As before shown, it is not within our province to assume any state of facts not disclosed by the record. Nor can facts be determined without first granting the writ and procuring a return thereto. To invoke this rule is to condemn without a hearing; it is *petitio principii*, an assumption of the very thing to be established, and which the petitioner seeks to have investigated. It also occurs to me that it is an anomalous precedent to hold it to be the duty of one alleging himself to be imprisoned illegally, or without authority of law, first to move to have the record

corrected in such manner as will change an unlawful detention into a lawful imprisonment, but such I take to be the effect of the holding, that an "obvious" remedy would be for the prisoners "to apply to the court to require the clerk to correct the judgment entry to correspond with the facts."

Again, there is a broad distinction between conditions justifying the granting of the writ of habeas corpus cases and cases appealed from a judgment in the usual trial of one accused of a crime, where only questions of procedure are invoked, and where, as a rule, jurisdictional matters are seldom presented, while in habeas corpus proceedings only the jurisdiction of the court is determined, such as, the right to retain the prisoner in custody under a void law or a void judgment. The distinction between these two classes of cases, and the reason why the same rule should not be invoked in one as in the other, I think manifest. As observed by the court in *Simmons v. Georgia I. & C. Co.*, 117 Ga. 308, 43 S. E. 780, 781 (61 L. R. A. 739): "Questions growing out of an alleged illegal restraint of a person's liberty are always questions of much delicacy and importance. They impose upon the judiciary the duty of instituting a careful and painstaking investigation into the cause of the detention, and, if it be shown to be illegal, the courts should not be too astute in finding technical objections to the manner in which the legality of the restraint is called in question."

Furthermore, no unusual inconvenience could result from the granting of the writ. The court where the sentence was imposed and the prison where the parties are confined are in this city. This, in addition to the showing presented, disclosing a restraint of the prisoners under a void judgment, affords an additional argument in support of the prayer of the petition, the denial of which, in my judgment, is an abuse of discretion. I can conceive of many cases where the discretion of the court would properly be exercised in denying the petition; for example, cases more civil than criminal in character, illustrations of which are controversies between divorced parents over the custody of children, and instances requiring possibly an examination of witnesses, alluded to in the concurring opinion, which class the appellate courts in some states, in the exercise of their discretion, have either remanded to the courts below or dismissed the writ, on account of the insufficiency of the showing made, or of the lack of importance of the cause presented. As a rule these cases are treated as being on the same plane as many of the injunction, mandamus, and quo warranto proceedings; but the distinction between them and those of the character here under consideration, with but few exceptions, is fully recognized by the courts and the confusion respecting the points here involved, I believe to be due to a failure to recognize this distinction; accordingly personal liberty is reduced to the same level as property and official rights. I do not ques-

tion that, in each of the cases relied upon in the opinion of Mr. Justice EAKIN, the court was justified in declining to take jurisdiction, and it was cases of that class in which it was intended by the amendment that this court should exercise its sound discretion (or "its own discretion," if preferred) and refuse to entertain. Such, for example, was the case of *Ex parte Ryan*, 124 La. 286, 50 South. 161, where the custody of a child was involved, and where it was apparent there was no emergency for prompt action. Also in *Commonwealth v. Baroux*, 36 Pa. 262, in which members of a city council were held for contempt of court in not obeying a peremptory writ of mandamus, in reference to which the court held that the facts did not justify a direct application to the Supreme Court. *State ex rel. v. Barret*, 25 Mont. 112, 63 Pac. 1030, was another ordinary case of mandamus, while the case of *State ex rel. v. Lawrence*, 38 Mo. 535, was a quo warranto proceeding. The distinction between cases of that character and the one under consideration should preclude them from becoming authority for the course adopted in the case at bar. The language quoted from them in the concurring opinion, standing alone, seems in point, but when read in connection with the record alluded to in each case, I think far from applicable to the points here presented.

In conclusion, I deem the result announced by my associates a long stride towards a suspension of the writ of habeas corpus; it is a step backward in the progress of the law, and, I think, clearly inconsistent with the reason and spirit of the habeas corpus provision of the judicial amendment to our constitution. The writ should issue and the final outcome be determined upon the showing made thereby.

(57 Or. 509)

STATE v. YEE GUENG.

(Supreme Court of Oregon. Dec. 31, 1910.)

1. CRIMINAL LAW (§ 404*)—EVIDENCE—REVOLVERS.

Where, in a prosecution for the murder of a Chinese person, the state claimed that defendant and certain others were engaged in a conspiracy to kill deceased, who was killed by a shot from a 38-caliber revolver, the court did not err in admitting in evidence a 41-caliber Colt's revolver found about two hours after the shooting in a toilet where accused and another of the alleged conspirators were found hiding at the time of their arrest; there being other evidence indicating that they attempted to escape or resist arrest.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 891; Dec. Dig. § 404.*]

2. HOMICIDE (§ 213*)—EVIDENCE—DYING DECLARATIONS—RELIGIOUS BELIEF.

While testimony as to dying declarations of deceased is admissible to show motive for false statements, a religious belief or the want thereof, or lack of confidence in future rewards or punishment, is not an element bearing on the credibility or weight of such declarations, and hence the court properly refused to charge that the jury could consider, as affecting the credi-

bility of the declarant, that he did not believe in future rewards or punishment at the time he made such declarations.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 445½; Dec. Dig. § 213.*]

3. WITNESSES (§§ 380, 383*)—IMPEACHMENT—PARTY PRODUCING WITNESS.

B. & C. Comp. § 850, provides that the party producing a witness may not impeach his credit by evidence of bad character, but may contradict it by other evidence, and show that he has made at other times statements inconsistent with his present testimony. *Held*, that such provision authorizes a party producing a witness who testifies adversely to him concerning some material matter to impeach such testimony in the manner described, but does not permit the party an inquiry as to matters, regarding which the witness has not given any testimony, or only given testimony of a weak and unsatisfactory character, and then to prove his statements at another time in reference to such matters.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1214, 1224; Dec. Dig. §§ 380, 383.*]

4. WITNESSES (§ 383*)—CONTRADICTION—INCONSISTENT STATEMENTS.

In a prosecution for killing a Chinese person, decedent in his dying statement said that accused belonged to a certain tong, but did not indicate the faction thereof. The state produced a witness who was claimed to have been one of the conspirators, and he, having testified that he was a member of such tong, was asked whether prior to the day he was arrested there was a split or division in the tong. Witness refused to answer except that he did not know. *Held*, that the court erred in permitting the state to produce the record of the previous trial of the witness, and show by that that the witness had there testified on oath that there were two factions in the tong before deceased's death and that witness and deceased belonged to different factions.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1224; Dec. Dig. § 383.*]

Appeal from Circuit Court, Multnomah County; Earl C. Bronaugh, Judge.

Yee Gueng was convicted of murder, and he appeals. Reversed and new trial ordered.

In April, 1908, defendant, Yee Gueng, with Lem Woon, was jointly charged with the murder of Lee Tai Hoy. The homicide occurred as the decedent was ascending a stairway on the outside of the building where he lived, at the corner of Fourth and Pine streets, in Portland. The accused and Lem Woon, together with nine others of their race, lived in an apartment on the third floor of a building at the corner of Second and Oak streets, about three blocks easterly from the scene of the crime. In April, 1909, defendant was separately tried, denying any participation in the affair and attempting to prove an alibi, found guilty of murder in the first degree, and from a judgment sentencing him to death appeals.

Ralph E. Moody and Henry E. McGinn (John F. Logan and Frank M. Freeman, on the brief), for appellant. Dan J. Malarkey (George J. Cameron, Dist. Atty., and Joseph J. Fitzgerald, Deputy Dist. Atty., on the brief), for the State.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

KING, J. (after stating the facts as above). The first assignment, requiring our attention, relates to the admission in evidence of the 41-caliber Colt's revolver, found about two hours after the shooting in a toilet where the accused and Joe Bong, at the time of their arrest, were found hiding. It is unquestioned that the only shots fired, and which caused the death of Lee Tai Hoy, were from a 38-caliber revolver. Testimony also tends to show that two Chinamen accompanied the one who did the killing, and that they were present when the assailant fired the fatal shots. The 41-caliber revolver objected to was practically found in the possession of the accused at the time he appeared to be eluding the officers, and was offered in evidence in connection with and as an incident thereto. Since the circumstances tend to show an effort to escape, or to resist arrest, less doubt exists as to the admissibility of this evidence than in the case against Lem Woon (107 Pac. 974), who, when arrested, was in a room adjoining that in which defendant was found, and who was not shown to have owned a weapon, or to have had one in his possession at or near the time of his arrest. We are of the opinion, therefore, that under the rule announced in *State v. Wintzingerode*, 9 Or. 153, the weapon found at the time of the arrest of the accused was properly admitted in evidence.

No error was committed in refusing the requested instruction, to the effect that the jury could take into consideration, as affecting his credibility, the fact, if established to its satisfaction, that the decedent did not believe in future rewards and punishments at the time of making his dying statement. Had declarant lived and taken the witness stand, this objection would not have been tenable, and, since dying declarations are admitted only on account of the exigencies of the occasion, so often discussed and so well understood, no reason exists in such a case for relying on any certain belief with reference to a future life, its rewards or punishments, any more than could be urged against a witness testifying in the presence of a jury. Every witness is presumed to speak the truth, and, under the law, the statements of a person made with full knowledge of impending death are entitled to the same presumption. The natural inclination of every sane person is to speak the truth on all occasions; exceptions thereto existing only by reason of some motive therefor. Testimony, relative to dying declarations, is admissible to show a motive for false statements; for example, such circumstances and incidents surrounding the last statements as may indicate a spirit of revenge or otherwise, a lack of ability to distinguish between persons or things, or incidents or statements tending to disclose doubts in the mind of the declarant, as to whether death is near at hand, etc., are admissible (*State v. Doris*, 51

Or. 136, 94 Pac. 44, 16 L. R. A. [N. S.] 680), but a religious belief or want thereof, or lack of confidence in future rewards or punishments, as the case may be, is not an adequate basis for that purpose.

Error is also predicated upon the attempt to impeach the testimony of Lem Woon, who, was called by the state, by the introduction in evidence of his statements made at his trial. The witness testified that on the night of March 7, 1908, he was arrested in the apartments where he, with Yee Gueng, was living; that he (Lem Woon) had been a member of the Bo On Tong for "7 or 8 years" in all; that 11 Chinamen made their headquarters in the same apartments where he had been stopping; and that he was acquainted with Lee Tai Hoy, who was a member of the Bo On Tong. The witness was then asked by counsel for the state: "Now, was there prior to the day you were arrested a split or division in the district Bo On Tong of which you and Lee Tai Hoy were members?" This question was objected to as incompetent, irrelevant, and immaterial, and after some discussion and a ruling of the court to the effect that the witness could not be required to incriminate himself, but could otherwise answer, the response was: "I don't know. Q. Was there not shortly before the time you were arrested trouble in the Bo On Tong, causing two factions of the Bo On Tong? A. I don't know. I was at the canneries. I don't know about that. I am a laborer. Q. Is it not a fact that shortly prior to this day when you were arrested there was trouble in the Bo On Tong, causing its division into two factions, and that you belonged to what was known as the old party or the old faction, and Lee Tai Hoy belonged to what was known as the new party or the new faction? A. I don't know anything about it." The witness was then asked whether he remembered the circumstances of his testifying in his own behalf "when he was tried in this court last June," to which he answered in the affirmative. For the purpose of refreshing the witness' memory, his attention was then directed to his testimony on that occasion, and the questions and answers given in the former trial, hereinafter quoted, were read to him, to which he responded: "When I was tried last year, I said I belonged to the Portland Bo On Tong, but I don't know which party Lee Tai Hoy belonged to." He was then asked if he did not in the former trial testify as follows: "Q. Was there any trouble between the different factions of the Bo On Tong just before the 6th of the second month of Kwong Sul—or, was there any trouble in the Bo On Tong before Lee Tai Hoy's death, between the different factions? And did you not answer that Lee Tai Hoy and Chong Young kept the Bo On Tong's money, no account, kept \$3,000? A. Yes. Q. And there were two factions of the Bo On Tong, were there not? A. I don't know. Q. What do you

mean by saying there was trouble between the factions because Lee Tai Hoy kept some money? A. Lee Sing Shue is the man that takes care of the accounts I suppose." Counsel for the state then offered in evidence the testimony taken at the former trial as follows: "Q. Which faction of the Bo On Tong do you belong to? A. I belong with the old party. Q. Which faction did Lee Tai Hoy belong to? A. New party." The counsel for the defense objected to the introduction in evidence of the record of Lem Woon's former testimony, as well as to each of the questions above set forth, on the ground that the same was incompetent, irrelevant, and immaterial.

Under section 850, B. & C. Comp., a party producing a witness may, under some circumstances, introduce evidence contradicting his statements, or show that he has at other times made statements inconsistent with his present testimony. In construing this section in *Langford v. Jones*, 18 Or. 307, 326, 22 Pac. 1064, 1071, Mr. Justice Thayer, speaking for the court, after making observations to the effect that it was intended thereby to permit the party producing the witness to contradict him by other evidence, etc., remarks: "But that section does not allow the party to inquire about matters regarding which the witness has not given any testimony or testimony of a weak and unsatisfactory character, and then prove his statements made at another time in reference to such matters. The intent of the provision was to allow a party producing a witness who testifies adversely to him regarding some matter which directly affects the merits of the case to impeach such testimony in the manner there pointed out. The object of the section was to prevent the party from being prejudiced by the evidence of his own witness." After citing this case with approval, Mr. Justice Moore, in *State v. Steeves*, 29 Or. 85, 104, 43 Pac. 947, 952, observes: "The rule appears to be well settled that a party cannot impeach his own witness by showing he has made statements inconsistent with the testimony given at the trial, unless the testimony so given be material and prejudicial to the interests of the party calling him." Applying the rule thus announced to the case in hand, it will be observed that the witness gave no testimony directly adverse, or prejudicial, to the state. He was asked whether certain conditions existed, and the tenor of his responses was to the effect that he did not know, or could not furnish the desired information, implying, not that he had not made the statements attributed to him at his own trial, but that the statements if made were untrue. It was merely "testimony of a weak and unsatisfactory character," such as adverted to in *Langford v. Jones*, and suggested in *State v. Steeves*.

Giving to the entire oral testimony of this witness its full effect, it falls to disclose that the accused belonged to a faction different

from that of which the decedent was a member, and the only information from which it may be inferred that he belonged to a different faction is the mere circumstance that the accused was living in the same apartments as Lem Woon, whom the excerpts from his former testimony indicated belonged to the old wing of the tong and Lee Tai Hoy to the new. The declarant in his dying statements said the accused belonged to the Bo On Tong, but did not indicate the faction thereof. Nor, except as above stated, was it sought to be proved that he affiliated with the old party, of which the declarant was not a member.

One of the manifest purposes for which this witness was called and for which this testimony was elicited was to establish the fact that the accused was a member of a faction of the Bo On Tong unfriendly to the faction of that society to which decedent belonged. Had the witness testified, not as anticipated by the state, that he belonged to the same faction as decedent, then such testimony would have been adverse to the state and a surprise to counsel, in which event any previous statements made by him contradictory of this testimony would have been admissible under B. & C. Comp. § 850, but only for the purpose of impeaching the witness, and not as direct evidence of the material fact sought to be shown in the first instance. As stated by Mr. Justice Moore in the *Steeves Case*: "This is as far as the rule can be legitimately carried, and courts should carefully guard against its abuse by the party producing the witness, for, if the (previous) statements made by him could be admitted in evidence in support of the cause of the party calling him, a witness in league with such party might make statements out of court, and not under oath, which he knew were false, and, being called as a witness, could truthfully testify concerning the facts in issue and against the party calling him; and, upon his denying that he made the statements attributed to him, or claiming that he failed to remember of having made them, evidence thereof could be introduced, not for the purpose of excusing the mistake made in calling the witness, or to correct the effect of the adverse testimony, but as substantive evidence in support of the cause of the party calling him, thus permitting a party to do by indirection what he could not do directly." The testimony complained of was received, not for the purpose of merely contradicting the statements of a witness testifying adversely, for that did not occur, but as direct and substantive evidence of a material fact in the case, which it was expected to be established by the witness himself.

Nor can the fact that the former statements were made under oath change the rule, for the accused in this case, although jointly indicted with Lem Woon, was not on his trial at that time, was not present when

the statements were made, and had he been present would have had no opportunity to cross-examine the witness or to dispute his assertions. *Patty v. Salem Flouring Mills Co.*, 53 Or. 350, 353, 96 Pac. 1108, 98 Pac. 521, 100 Pac. 298.

The admission of this testimony forcibly tended to impress the jury that what was proved in the case in which Lem Woon was convicted of murder in the first degree should apply with equal force against this defendant, the prejudicial effect of which is obvious.

The judgment must therefore be reversed, and a new trial ordered.

(57 Or. 482)

STATE v. LEM WOON.

(Supreme Court of Oregon. Dec. 31, 1910.)

1. HOMICIDE (§ 174*) — EVIDENCE — RELEVANCY.

Defendant was present at a shooting in company with G., when they with another Chinaman were engaged in a felonious assault with firearms on deceased. Defendant and G. fled together to the same building where they were arrested, and a pistol which apparently had been recently discharged and reloaded was discovered in the same closet where G. had been concealed under circumstances indicating that it was one of the pistols used by the conspirators in perpetrating the murder. *Held*, that such pistol was admissible, not only as an incident of the arrest, but also as one of the circumstances showing a criminal conspiracy to murder deceased.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 364; Dec. Dig. § 174.*]

2. CRIMINAL LAW (§ 424*) — CONSPIRACY — EVIDENCE.

Where it was claimed that defendant and two others were involved in a conspiracy to murder deceased, and a pistol was found in a closet where one of the alleged conspirators was concealed, and where he was found when he and defendant were arrested, the admission of such pistol in evidence against defendant was not objectionable as evidence of acts and declarations of a conspirator after the termination of the conspiracy.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1002-1010; Dec. Dig. § 424.*]

King and Slater, JJ., dissenting.

On rehearing. Denied.

For former opinion, see 107 Pac. 974.

McBRIDE, J. All the questions raised on this motion are fully discussed by Mr. Justice Eakin in the original opinion in this case, which is reported in 107 Pac. 974, and we shall adhere to the views therein expressed.

Upon this motion counsel, however, lay particular stress upon the action of the court in admitting in evidence the pistol found by Officer Tichenor in the toilet at the time he arrested Yee Gueng and Jo Bong. Independent of the fact adverted to in the original opinion that the finding of the pistol was an incident of the arrest, and, therefore, ad-

missible, we are of the opinion that upon well-known principles of law it was admissible on other grounds. The evidence of Lee Shu was direct and positive that he saw this defendant and Yee Gueng and another unknown Chinaman in the hall of the building of deceased, assaulting him, and that they each had pistols. Immediately after this, Gow Ying Yuen saw three Chinamen run out of the building, and recognized defendant and Yee Gueng as two of them. They were last seen by him going down Oak street in the direction of the building in which they were afterwards arrested, and only a short distance therefrom. In about half an hour the officers arrived at the room where defendants were arrested, and were refused admission. When they finally succeeded in breaking down the door, they found Yee Gueng and Jo Bong concealed in a dark closet, a loaded pistol, which gave evidence of having been recently discharged, lying on the floor of the closet, and Lem Woon in a bunk in the adjoining room.

Here is evidence tending to show three things: (1) That defendant was present at the scene of the shooting, in company with Yee Gueng, and that they and another Chinaman were engaged in a felonious assault, with firearms, on deceased. (2) That they fled together to the same building. (3) That a pistol which to all appearances had been recently discharged and reloaded was in the same closet where Yee Gueng had been concealed under circumstances which indicated to any reasonable mind that it was one of the pistols used by the conspirators in perpetrating the murder. Now it makes no difference which one of the three conspirators fired the fatal shot, if the evidence shows that all three were present, aiding and abetting therein. There is strong evidence tending to show that at least three or four bullets were shot from the pistol of Lem Woon, but several bullets are not accounted for, and not found, and the evidence of Tichenor is to the effect that the pistol found by him in the closet when he arrested Yee Gueng showed powder stains in the barrel, indicating its recent use. These circumstances show a criminal conspiracy between Yee Gueng, Lem Woon, and another Chinaman to murder the deceased. Nor does the admission of the pistol in evidence come within the rule that under most circumstances forbids the introduction of testimony as to acts or declarations of a conspirator after the termination of the conspiracy. The finding of the pistol and its condition was neither an act nor a declaration. It was a fact indicating that when Yee Gueng was seen with defendant, armed and assaulting the deceased, he was doing so with intent to murder, and assisted in its perpetration; and this intent and the consequences of it are imputable to the defendant, who, as other evidence

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

tends to show, was present, assisting in the commission of the crime. The pistol was no more an act or declaration of Yee Gueng than was the closet in which he was arrested. It was a mute, but forceful, witness, corroborating the testimony of Lee Shu that the defendant and Yee Gueng were armed at the scene of the shooting. It further tended to show that the purpose of their being there was homicidal, and, in some degree, that it had been used for the purposes of the murder.

It is significant that the defendant and Yee Gueng were never so far as the testimony discloses 20 feet apart from the time the homicide was committed until they were arrested. They were seen together armed at the scene of the shooting; they were seen running away together from the scene of the crime; and they were arrested in the same building, a very short time afterwards, in rooms in close proximity to each other.

In a somewhat extended experience in criminal trials the writer has never seen a case of murder in the first degree more clearly and conclusively proved, and to seek now some mere pretext to set aside a verdict obtained after a fair and impartial trial would be to encourage crime and make a mockery of the law.

The petition is denied.

KING, J. (dissenting). At the time of the filing of the former opinion, I acceded with some hesitation to the conclusion there announced, but after a careful re-examination into the errors assigned, and the law and evidence applicable thereto, I am unable to concur in the conclusion reached by the majority.

It will be remembered that Lem Woon at the time of his arrest, while in what is termed the same apartments as those occupied by his codefendant, was not one of the two Chinamen found hiding in the toilet where the pistol was discovered; the accused, when arrested, being in an adjacent room, and there is no testimony tending to show that the .41 Colt's revolver, offered in evidence, was at any time in his possession or under his control, nor does it appear that Lem Woon was in hiding or attempting to escape detention further than that he was in a room adjoining the one occupied by his codefendant, and that the entrance to the entire apartments was barred, these rooms being the regular abode of the defendant and nine or ten others of his race. The revolver was admitted in evidence against him over the timely and proper objections of his counsel. It is well settled that subsequent declarations and acts, unless shown to be intimately and closely connected with the transaction, are not admissible against one accused of a crime. *State v. Smith*, 43 Or. 109, 71 Pac. 973; *State v. Ching Ling*, 18 Or. 419, 18 Pac. 344. The weapon was found in the place where Yee Gueng and Jo Bong

were hiding, under such circumstances, and in such close proximity to them as to indicate its contemplated use by them in resisting arrest, if necessary, thus indicating to some extent at least that they were attempting to escape, from which guilt might be inferable, and so justify the revolver's admission in evidence against them, as held by us in *State v. Yee Gueng* (decided at this time) 112 Pac. 424. But, so far as serving to connect this defendant with the crime, the same rule does not apply. If admissible at all, it is only on the theory that it was a circumstance incident to the arrest, tending to show an effort to escape or in some manner to elude the officers. This assumption cannot be held, for the weapon was not in Lem Woon's possession, and the fact that it was found in an adjacent toilet, occupied by others, is too remote. In this connection it must be remembered there were nine other regular occupants of the apartments at the time; that is, the quarters occupied by them was a Chinese lodging house. The mere fact that the Chinese society had formerly met there at various times was insufficient to justify the admission in evidence of the pistol in question against any or all persons happening to be either a member of such society, or found to be rooming in the quarters, without in some manner connecting them also with the weapon offered in evidence. This revolver was in the same position, with reference to its admissibility, as was the box of firearms found, the admission in evidence of which the court refused. To admit the weapon, under the proof accompanying it, is to rely on an inference from an inference, and not a deduction from an established fact, and this character of evidence is expressly excluded by section 785, B. & C. Comp., which provides that the inference must be founded: "(1) On a fact legally proved; and (2) on such a deduction from that fact as is warranted by a consideration of the usual propensities or passions of men, the particular propensities or passions of the person whose act is in question, the course of business, or the course of nature." It will thus be seen that an inference could only be founded on a fact legally proved. No fact is here proved from which it may be inferred that this defendant owned the weapon in question, or in any manner possessed or intended to use it in resisting arrest. The circumstance of the door being locked indicating to some extent that he was evading the officers, and affording equal protection to all the occupants against arrest, might, if offered, have entitled the lock to admission in evidence; for, that fact once established, its purpose creates an inference as much against one occupant as another, the weight to be given thereto depending largely upon the conduct thereof after the door was forced open. This feature, however, was proved, and from it the jury might have inferred all were avoiding arrest, but

these inferences were from established facts, and not inconsistent with the usual propensities or passions of men, mentioned in the above section of the Code.

Not so, however, as to the pistol admitted. No proof whatever appears associating defendant with it. To connect him in any manner therewith it must be inferred that he either owned the weapon or placed it in the toilet in which others were hiding, and from that again infer that the motive for which it was placed in the toilet was for its use in resisting arrest by the occupants, of which he was not one. This is not only too remote a circumstance to entitle the weapon to admission, but is in violation of the above section of the statute. *State v. Hembree*, 54 Or. 463, 103 Pac. 1008. See, also, 8 Cyc. 680; 6 Ency. Ev. 699; 2 Wigmore, Ev. § 1157, p. 135; *McBride v. Commonwealth*, 95 Va. 818, 30 S. E. 454; *State v. Arthur*, 129 Iowa, 235, 105 N. W. 422; *State v. Kehr*, 133 Iowa, 35, 110 N. W. 149; *Riggins v. State*, 42 Tex. Cr. R. 472, 60 S. W. 877. Mr. Wigmore condemns the practice of admitting this class of testimony, and the *Encyclopedia of Evidence*, above cited, holds that: "As a circumstance tending to connect the accused with the act charged, it is competent to show his possession of a deadly weapon or instrumentality similar to that with which the homicide appears to have been committed, at the time thereof, or within a reasonable time previous or subsequent, or that he prepared such a weapon for use. But it is not proper to show the possession of a weapon with which the wound could not have been inflicted." The rule thus stated is fully sustained by the other authorities cited. Under the authority of *State v. Wintzingerode*, 9 Or. 153, we held this class of evidence in *Yee Gueng* to be admissible against those found in possession of the weapon, or in whose special hiding place it was discovered, but the same reasons cannot be invoked for its admission here.

That the admission of the weapon in evidence against this defendant must have prejudiced the jury against the accused seems clear—as much, if not more, than did the admission of the photographs admitted in evidence in *State v. Miller*, 43 Or. 325, 328, 74 Pac. 658, 659, on account of which a new trial was ordered. The observations in that case on this point apply with equal force here. After stating that photographs under some circumstances (concerning which the same may be here remarked with regard to firearms) are admissible, and after illustrating the class of cases in which they may properly be offered in evidence, Mr. Justice Wolverton remarks: "But unless they are necessary in some matter of substance, or instructive to establish material facts or conditions, they are not admissible, especially when they are of such a character as to arouse sympathy or indignation, or to divert

the minds of the jury to improper or irrelevant considerations"—citing *Baxter v. Chicago & N. W. R. Co.*, 104 Wis. 307, 80 N. W. 644; *Selleck v. City of Janesville*, 104 Wis. 570, 80 N. W. 944, 47 L. R. A. 691, 78 Am. St. Rep. 892; *Fore v. State*, 75 Miss. 727, 23 South. 710. So it may here be said that the admission of a weapon in evidence, not shown in any manner to be connected with this defendant, tended to divert the minds of the jury to improper and irrelevant considerations. Especially must this be true when it is remembered that the excluded box of weapons was during a large part of the trial permitted to remain in sight of the jury, to which was added the circumstance of the special counsel for the state requesting the witness by whom the revolver was identified to go to the box of weapons and take out this one, which the witness, in the presence of the jury, did. All of this tended to direct the attention of the jury to the wholesale collection of weapons excluded, which were clearly inadmissible—as much so as weapons found in a gunsmith's shop adjacent to a room occupied by one charged with murder.

Error is also predicated upon the remarks and interrogatories of the special counsel during the trial, much of which is set out in the former opinion in this case, the objection and consideration of which also excludes the alleged error of the court in admitting much of the cross-examination of Chin Ling, a witness for the state. The cross-examination of this witness in my opinion was permitted to be extended beyond reasonable limits. Much of it had no reference directly or indirectly to anything brought out on the direct examination. Regardless of this feature, however, the conduct of the special counsel, adverted to in the former opinion, in placing Jung Ah Poo upon the witness stand in the manner complained of, and in bringing matters before the jury by remarks and interrogatories held to be highly improper (even though objections to much of the course pursued were sustained), manifestly tended to prejudice the rights of the accused, and, while probably no one of the statements or remarks could be deemed sufficient to justify a reversal, yet taken as a whole they must, unless we disregard the legal rights of the accused, make a reversal necessary. The impropriety and the prejudicial effect of the interrogations and remarks of the character complained of are fully and ably considered in *People v. Wells*, 100 Cal. 459, 461, 34 Pac. 1078. In that case the defendant was charged with forgery. A Mr. Stanleys was put on the stand as a witness for the prosecution. Afterwards the captain of the police, as a witness for the state, was examined, and the prosecuting attorney asked him this question: "I want to ask one leading question, and do not answer it until counsel has an opportunity to object. Is it a fact that a short time after that Stanleys came to you and re-

ported about Wells wanting him to tell the woman to skip?" To this inquiry an objection was made and sustained. In referring to this interrogatory the appellate court observed: "There was not the slightest excuse for asking this question. . . . What, then, was its purpose? Clearly, to take an unfair advantage of appellant by intimating to the jury something that was either not true, or not capable of being proven in the manner attempted. And the wrong was not remedied because the court sustained an objection to the question." The court then proceeds to discuss other interrogatories of like character, which it will be noticed were analogous in effect and propriety to those here under consideration, and the observations concerning which apply with equal force to those here presented, upon which a reversal is asked. Mr. Justice McFarland remarks: "The inexcusable asking of the foregoing question would not be perhaps of itself sufficient ground for reversing the judgment, but it is of importance when taken in connection with questions asked the defendant when a witness, as showing the general manner and temper with which the prosecution was conducted. Upon cross-examination of appellant the prosecuting attorney asked him these questions: 'Where did you formerly reside? Do you know the Highland National Bank of Newburgh, N. Y.? Were you married to your present wife when you came here with her? Did you not admit in a letter to Mr. M. C. Belknap that in November, 1893, you forged your father-in-law's name to a note in New York?' To these questions counsel for appellant objected as incompetent, immaterial, irrelevant, and not in cross-examination, declared that they were unfair to appellant, and asked the court to instruct the district attorney not to ask any more such questions. The record merely shows that after discussion the objections were sustained. The first three of these questions are important mainly as leading up to the last one, the asking of which was utterly inexcusable and reprehensible. It would be an impeachment of the legal learning of the counsel for the people to intimate that he did not know the question to be improper and wholly unjustifiable. Its only purpose, therefore, was to get before the jury a statement, in the guise of a question, that would prejudice them against appellant. If counsel had no reason to believe the truth of the matter insinuated by the question, then the artifice was most flagrant; but, if he had any reason to believe in its truth, still he knew that it was a matter which the jury had no right to consider. The prosecuting attorney may well be assumed to be a man of fair standing before the jury, and they may well have thought that he would not have asked the question unless he could have

proved what it intimated if he had been allowed to do so. He said plainly to the jury what Hamlet did not want his friends to say 'As, well we know;' or, 'We could, an if we would;' or, 'If we list to speak;' or, 'There be, an if there might.' This was an entirely unfair way to try the case; and the mischief was not averted because the court properly sustained the objection, though we think it should have warned counsel against the course which he was taking, and instructed the jury specially on the subject. The wrong and the harm was in the asking of the question. Of course, in trials of criminal cases, questions as to the admissibility of evidence will frequently arise about which lawyers and judges may fairly differ in opinion; and in such cases defendants must be satisfied when courts sustain their objections. But where the prosecuting attorney asks a defendant questions which he knows, and every judge and lawyer knows, to be wholly inadmissible and wrong, and where the questions are asked without the expectation of answers, and where the clear purpose is to prejudice the jury against the defendant in a vital matter by the mere asking of the questions, then a judgment against the defendant will be reversed, although objections to the questions were sustained, unless it appears that the questions could not have influenced the verdict." The holding in the above case is fully sustained by the great weight of authority. In fact, but few cases may be found where a continued course or attempt to ask questions ruled out by the court, tending to convey to the jury matters not admissible in evidence, and which, by their nature, are damaging in effect to the accused, have not resulted in a reversal. *State v. Blodgett*, 50 Or. 329, 92 Pac. 820; *State v. Bartlett*, 50 Or. 440, 93 Pac. 243, 19 L. R. A. (N. S.) 802, 126 Am. St. Rep. 751; *State v. Reed*, 52 Or. 377, 97 Pac. 627.

As to other errors assigned, I express no opinion. I deem the errors above considered ample to disclose that defendant did not receive the fair and impartial trial guaranteed by law to all persons, regardless of race or station in life, the recognition of which by the courts is essential to the safety of our citizens and to the perpetuity of our form of government.

The judgment should accordingly be reversed and a new trial ordered.

SLATER, J., concurs in this dissent.

(57 Or. 410)

CRANE CO. v. ERIE HEATING CO. et al.
(Supreme Court of Oregon. Dec. 20, 1910.)
MECHANICS' LIENS (§ 183*)—MATERIALMAN'S LIEN—RIGHT TO LIEN.

Defendant heating company contracted by four separate contracts with defendant railroad company to furnish heating apparatus in a

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

roundhouse, storehouse, office, oilhouse, and power house, constituting four separate buildings, to be constructed by the railroad company; the contracts providing that the heating company should "furnish all of the labor and material required for the installation" of the various apparatus. Plaintiff furnished the heating company with material used in installing the improvements, including the power plant, which was installed to furnish power for machines in the roundhouse repair shop, hot water for the boiler washer and steam for the pipes in the roundhouse, and to transmit steam and water to the boiler washer, but the steam pipes connecting the boiler washer and those in the roundhouse and the boiler and hot-water tank in the power house, as well as the connecting shaft, were put in by the railroad company and were not included in the heating company's contract, nor furnished by plaintiff. Plaintiff claimed a lien on all of the buildings erected for material furnished the heating company and used in the construction of the roundhouse, office, storehouse, oilhouse and power plant, but did not identify the material as going into any particular building. B. & C. Comp. § 5640, gives every person furnishing materials for use in the construction of any building, a lien thereon for materials furnished at the instance of the owner of the building, or his agent, and provides that every contractor, or person having charge of the construction of any building, shall be deemed the agent of the owner. *Held*, that since the lien given by the statute was upon each building for the material entering into its construction, unless the owner has treated several structures as one, plaintiff was not entitled to a lien on all of the buildings for the materials furnished, not having contracted with the railroad company and not having connected itself with either of the original contracts between that company and the heating company.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 315-322; Dec. Dig. § 183.]

Appeal from Circuit Court, Union County; J. W. Knowles, Judge.

Suit by the Crane Company against the Erie Heating Company and others. From a decree for defendants, plaintiff appeals. Affirmed.

This is a suit to foreclose a materialman's lien. The defendant Oregon Railroad & Navigation Company is the owner of the real estate at La Grande, Or., described in the complaint, occupied by it in connection with the operation of its railroad for side tracks, roundhouse, shops, and other buildings, that being the end of a division, and has constructed thereon the roundhouse, storehouse, office, oilhouse, and power house mentioned in the complaint; and on August 23, 1906, entered into a contract with the defendant Erie Heating Company, by which the latter, for the consideration of \$2,197, contracted "to furnish all of the labor and material required for the installation of the steam, air, and water lines in the 22-stall roundhouse," the contract containing specifications and other terms. On the same day it entered into another contract with the Erie Heating Company by which the latter, for the consideration of \$9,332, agreed "to furnish all the material and all of the labor * * * for the installation of one of our complete systems of hot-water heating for the 22-stall roundhouse

* * *; also the master mechanic's office, storeroom and oilhouse"—the contract containing the specifications and other terms. On the same day it entered into another contract with the Erie Heating Company, by which the latter, for the consideration of \$10,623, agreed "to furnish all of the labor and material required in the installation complete of one of our automatic locomotive boiler washers to be installed in the 22-stall roundhouse"; the contract containing specifications and other terms. On the same day it entered into another contract with the Erie Heating Company by which the latter, for the consideration of \$8,480, agreed "to furnish you the following machinery and to furnish the foundations and erect the machinery on their respective foundations in a building furnished by you * * * (including) all of the pipes, valves, and fittings for the connecting up of the steam, air, and water lines in the power house"; the machinery being named in the contract with the specifications and other terms, and constituting the power plant placed in the power house.

The complaint, subdivision 6, alleges, that on August 23, 1906, the "defendant the Oregon Railroad & Navigation Company entered into a contract with the defendant Erie Heating Company for the construction of a 22-stall roundhouse, master mechanic's office, storehouse or storeroom, oilhouse and power plant, to be constructed and built on the property above described; that thereafter, to wit, on the 25th day of March, 1907, said Erie Heating Company entered into a contract with the plaintiff for certain material to be used in, and which was thereafter used in, the construction of said 22-stall roundhouse, master mechanic's office, storehouse or storeroom, oilhouse and power plant." And in the seventh subdivision of the complaint it is alleged, that plaintiff did furnish such material to the value of \$1,435.10. In the eighth subdivision of the complaint the filing of the notice of lien is set out in detail, a copy of which is attached to the complaint as an exhibit, in which it is alleged, that the material was furnished to the Erie Heating Company, by plaintiff, "to be used and which was used in the construction of the 22-stall roundhouse, master mechanic's office, storehouse, or storeroom, oilhouse, and power plant, built and constructed in the city of La Grande, Union county, state of Oregon, for the Oregon Railroad & Navigation Company * * *; that said Erie Heating Company was the original contractor and agent of the Oregon Railroad & Navigation Company," in the construction thereof, and sets forth other details not necessary to mention here.

The defendant Oregon Railroad & Navigation Company filed an answer in which it denies subdivisions 6, 7, and 8 of the complaint, except in that it admits that the notice of lien, set out as an exhibit, was pre-

pared and filed as alleged, and sets up three affirmative defenses. To the first and second defenses demurrers were sustained, and the matters pleaded in the third are adjusted by the stipulation of facts. The only issue before us on the appeal arises upon the denials of subdivisions 6, 7, and 8 of the complaint.

The principal facts are stipulated, to the effect that the erections made by the Erie Heating Company for the Oregon Railroad & Navigation Company were done under the four separate contracts, above mentioned, in the buildings of the Oregon Railroad & Navigation Company; that the buildings were separate and distinct from each other; that plaintiff furnished to the Erie Heating Company material used in the installation of the improvements, as alleged by it, to the value of \$1,357.47 and used by the Erie Heating Company in fulfilling the four contracts; that the power plant was installed for the purpose of furnishing power for the machines in the repair shop in the roundhouse; for furnishing the hot water for the boiler washer and the heat and steam for the pipes in the roundhouse, and to transmit steam and hot water to the boiler washer; but that these steam pipes connecting the boiler washer and the steam pipes in the roundhouse with the boilers and hot-water tank in the power house, and the connecting shaft, were put in by the Oregon Railroad & Navigation Company, and were not included in the contract of the Erie Heating Company, nor was any of the material furnished by plaintiffs used therein. The trial court made findings of fact in accordance with the stipulation, and as a conclusion of law found that plaintiff has no lien upon the property of the Oregon Railroad & Navigation Company, and dismissed the suit. Plaintiff appeals.

C. H. Finn (A. C. Emmons, on the brief), for appellant. C. E. Cochran and A. C. Spencer (W. W. Cotton, Cochran & Cochran, and Jas. G. Wilson, on the brief), for respondents.

EAKIN, J. (after stating the facts as above). The controversy is whether the facts created a materialman's lien upon the buildings and property of the Oregon Railroad & Navigation Company.

For the purpose of aiding mechanics and laborers and materialmen in collecting their compensation for labor and material furnished in the construction of a building or other structure, the statute (section 5640, B. & C. Comp.) has provided that every person performing labor or furnishing material to be used in the construction of any building or structure shall have a lien upon the same for labor or material furnished at the instance of the owner of the building or his agent. "And every contractor * * * or other person having charge of the construction * * * of any building * * * shall

be held to be the agent of the owner for the purposes of this act." Without such a statutory provision the building or the owner of it would not be liable for the debt except upon his contract, and to enable a lien claimant to establish his lien under this law he must connect himself by contract with the owner. This can only be done by showing that the work was performed for the owner, or for a contractor, whom the statute has made the agent of the owner; that is, he must bring himself within the original contract. If the contractor has one contract for the erection of several buildings for one price, even though the buildings are separate from each other, it has been held that he or his subcontractor may have one lien thereunder against all the buildings; but otherwise, where the construction of each building is the subject of a separate contract, neither he nor the subcontractor are entitled to include in one lien all the properties for labor or material furnished for their construction and used in the buildings indiscriminately, for the reason that the lien, by the terms of the statute, is upon each building for the labor or material only entering into its construction, except in cases where the owner has treated several structures as one. We deem it unnecessary to enter into any extended discussion of this question, as it is settled in an opinion by Mr. Justice Lord in *Willamette Mills Co. v. Shea*, 24 Or. 40, 32 Pac. 759, and one by Mr. Justice Wolverton in *Beach v. Stamper*, 44 Or. 4, 74 Pac. 208, 102 Am. St. Rep. 597, where it is held that the original contract must form the basis for the lien on the whole. "All authority to bind the owner on account of the building or buildings to be constructed must emanate from the original contract, which becomes the foundation law for the government of all subcontracts, as they must be let under it and by virtue of the contractor's authority obtained through it." *Flanagan Bros. v. O'Connell*, 88 Mo. App. 1, and *Livermore v. Wright*, 33 Mo. 31, cited by plaintiff, are to the same effect. The *Premier Steel Co. v. McElwaine Richards Co.*, 144 Ind. 614, 43 N. E. 876, *Lindsay v. Gunning*, 59 Conn. 296, 22 Atl. 310, 11 L. R. A. 553, and *Press Brick Co. v. Brick & Quarry Co.*, 151 Mo. 510, 52 S. W. 401, 74 Am. St. Rep. 557, also cited by plaintiff, are not in point, as they relate to liens based on contracts made directly with the owner, and not through an original contractor.

Plaintiff's claim of lien is an attempt to hold a lien against the property of the Oregon Railroad & Navigation Company, with whom it has no contract, and it does not connect itself with the owner by or through the original contract.

The decisions of this court in the two cases above cited are decisive of this. The decree is affirmed.

(57 Or. 525)

SLADE et al. v. UTAH CONST. CO.

(Supreme Court of Oregon. Dec. 31, 1910.)

1. APPEAL AND ERROR (§ 1010*)—REVIEW—VERDICTS.

A verdict of the trial court is conclusive on appeal, where there is any evidence reasonably tending to support it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3982; Dec. Dig. § 1010.*]

2. MASTER AND SERVANT (§ 6*)—EVIDENCE—SUFFICIENCY.

In an action against a railroad construction company for the price of grading on the right of way, evidence held to show that plaintiffs were employed by a subcontractor under the construction company, and not by the construction company.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 6; Dec. Dig. § 6.*]

Appeal from Circuit Court, Baker County; William H. Smith, Judge.

Action by C. W. Slade and another against the Utah Construction Company. From a judgment for the plaintiffs, defendant appeals. Reversed and remanded.

This is an action to recover money alleged to be due upon contract. The facts are as follows: In 1907 the Northwestern Railroad Company was engaged in constructing a railroad near Huntington, Or. The contract for grading the line was let as a whole to the defendant, Utah Construction Company, which sublet various portions to other contractors. For the purpose of the contract, the road was divided into "sections" of one mile each, and these were subdivided into "stations," each containing approximately 100 feet. The grading contracts were sublet by the construction company, either by miles or stations, and it was the custom of subcontractors of mile sections to again sublet to smaller contractors a separate section or more. When a "station man," as he was called, contracted directly with the construction company, he was paid upon the completion of his contract, and the same custom was observed with the mile section contractor. But in both cases supplies and wages for the men employed by the contractor were advanced by the construction company as the work progressed. The plaintiffs had been employed by the construction company on a certain piece of work, called "mile 13," and, after its completion, had some negotiation with defendant G. W. Straw, who was an independent contractor with the construction company, in regard to doing the grading work on mile 23 of the line, and Straw had agreed that, if they would undertake it, he would pay them 12 cents per cubic yard for earth work, 33 cents per cubic yard for loose rock, and 75 cents per cubic yard for gravel. Witness Davis, one of the plaintiffs, testified that he told Straw that he would let him know in two days whether he would take the con-

tract; that, before taking the same, he saw Mr. Bowman, an agent of the Utah Construction Company, when this conversation occurred: "Mr. Bowman * * * asked me if I found anything that suited me yet, and I tells him Straw had a piece of work that looked good, and he said, 'Yes,' that was pretty good work. I told him I didn't like to mix up with Straw, though; and he told me to do the work, and he said: 'You will not have to. You get your stuff charged to Straw, and, when you get through, your classification and yardage, and get your money the same as station men.'" The witness on redirect examination stated a conversation which he had with Bowman: "I went up to headquarters along about the 12th, and saw Mr. Bowman, and I says to Bowman: 'Now will the books be closed on this contract we are going to take against Slade & Davis?' And he says: 'No; we can't close those books.' Then I says: 'We will take this work in Davis' name, and I won't be known in this contract.' And he says to take this work the same as station work and buy our stuff through Straw, instead of Slade & Davis, and, 'when you get through with this work, you will not have to wait for Straw's final. We will pay you the money the same as we pay station men.'" On cross-examination the witness testified that Slade & Davis would not have taken the contract except for the assurances given by Bowman and that they were working with the understanding that their money was coming through the Utah Construction Company. The following question was asked witness: "Q. Who were you working for, the Utah Construction Company or Straw? A. After we had this conversation we had, it was with this understanding that they had to pay us, and, if they didn't we wouldn't take it." Witness further testified: "That they had a contract on mile 13, and, whenever he wanted to pay a bill contracted by them on mile 13, he made out a time check or an order and signed it Slade & Davis, and that the party in whose favor the order was drawn presented it to the Utah Construction Company, who paid them the amount of the order and charged the amount to Slade & Davis. Q. And, after you went to work on mile 26, you never issued a time check signed Slade & Davis, but you had it signed by G. W. Straw in every case? A. Yes, sir. Q. After you went to work for G. W. Straw you never made out a check to any one? A. No, sir; he signed them. Q. And there was never one made by Slade & Davis? A. Mr. Davis made them out. Q. Who signed them? A. Mr. Straw. Q. You knew when you were working and contracting on your own account that you had authority to make them out? A. Yes, sir. Q. And you knew that when you were working for Straw that

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Straw was the only one who had authority to make them out? A. Yes, sir. Q. And you knew that Straw was an independent contractor? A. Yes, sir. Q. And you were working for Straw? A. I knew that we were working under him and with the understanding that we were to be paid. Q. You knew that when Straw completed that work that Straw was to be paid for the work? A. Yes, sir. Q. And when Straw was paid for the work that you were to be paid for your work? A. Yes, sir. Q. You knew that then and you know that now? A. Yes, sir. Q. And it was two years after this work was done before you made any claim to the Utah Construction Company that they owed you a dollar? A. Right when we finished, and they told us to look to Straw. Q. They paid you for mile 13 after that? A. Yes, sir. Q. And you never made any claim for this work when they settled for mile 13? A. No, sir." The witness then testified that he never commenced any action to recover the amount from Straw, and was then asked: "And you never thought to collect it from the Utah Construction Company until two years afterwards? A. No, sir. Q. You admit that Slade & Davis were working for G. W. Straw, and not for the Utah Construction Company? A. We were working for the Utah Construction Company in a way. They told us to take this work. Q. What did they tell you? A. Said to take the work the same as station work, and as soon as we got through they would pay us our money without waiting for Straw's final, soon as we got through. Q. Who signed the orders to get the money to pay the men that were working for you? A. Mr. Straw. Q. In every case? A. Yes, sir." Witness then stated that he understood the way that Slade & Davis took their contract the Utah Construction Company was standing good for the contract.

It further appeared from the testimony that Slade & Davis attempted to give notice of lien against the railroad company for this work, and that in the notice it was stated that they had been employed by Straw as subcontractors under the Utah Construction Company to do work in question. But witness Slade explained that he supposed this proper because they took the work from Straw. The witness then testified: "Q. Who was present when you took the work from Straw? A. I think Mr. Davis and Mr. Straw talked that over, and Garland, a man who was working for us, was probably there at the time. Q. Was that the time you agreed how much you should be paid by Straw for the loose rock and dirt? Were the prices agreed on then? A. Yes, sir. Q. Between you and Straw and Davis? A. Yes, sir. Q. Between Slade & Davis on the one side and Straw on the other? A. Yes, sir. Q. But no one else was present except Garland? A. Yes, sir. Q. And you agreed on

the prices then? A. Yes, sir. Q. As to how much you were to do this for? A. Mr. Davis made this contract with Mr. Straw. Q. In your presence? A. Yes, sir; some of it in my presence. I was on the buckboard, and held the horses, and Straw and Davis went over the work. Q. Did you notify him what prices you were to get from Straw? A. He asked me. Q. How much did you tell him? A. Told him 12 cents for earth and 75 cents for solid rock. For loose gravel I didn't know the price. Q. When did you tell Bowman that? A. I never told him about the rock or gravel. I simply told him 12 cents for the earth. Q. What did Bowman tell you? A. Told me to take it the same as station work. Q. What do you mean? A. He told me to take it the same as station work, and, when we got through with this work, they would pay me the same as station work, and we would not have to wait on Straw for his final. Q. What did you understand by that? A. If we got through before Straw, we wouldn't have to wait until we finished. Q. Did you understand that Straw would pay you, or the Utah Construction Company? A. The Utah Construction Company. Q. And charge it to Straw? A. I supposed they would charge it to Straw. [Witness then testified.] Q. And you knew when Straw gave an order to you or one of your men it would be paid and charged to Straw? A. Yes, sir. Q. Do you mean that this station work was not to be paid by Straw? A. I don't know. I know, if we got finished before Straw, Mr. Bowman told us that we would not have to wait for Straw's final. Q. When you would get an order from Straw for the work you had done? A. I supposed we would have to get an order from Straw. He didn't say that. Q. If you were to be paid by the Utah Construction Company, why did you get an order from Straw, why not give it yourself? A. For this work? Q. For any work? A. Straw had this work, and we had to get it through him. Q. And you had to look to him for your money, and the Utah Construction would help you to see that Straw would pay you? A. No; I understand that the U. C. Co. would pay it. Q. Whenever your work was done, you were to get an order from Straw for your money, and the Utah Construction Company would pay it? A. Yes, sir."

John L. Rand and Andrew Howat, for appellant. Samuel White (P. E. Cavaney, on the brief), for respondents.

McBRIDE, J. (after stating the facts as above). The statement of facts preceding this opinion goes largely into the testimony introduced by plaintiffs, because, if any evidence was introduced by plaintiffs reasonably tending to support their theory of the case, it is conclusive on this court after verdict. But in our opinion there is an entire absence of

testimony tending to show an original contract with the Utah Construction Company. In its final analysis it amounts to this: G. W. Straw had a subcontract from the Utah Construction Company for constructing a certain portion of the grade of the Northwestern Railroad. Slade & Davis were negotiating with him for mile 26, embraced in his contract, and were told by the agent of the construction company to enter into a contract with Straw, and the railroad company would pay them as station men were paid; that is, that the work on mile 26, which they were to do, would be paid for just the same as the company had been in the habit of paying on small contracts or subcontracts for 100 feet of grade, and that they would not be obliged to wait until Straw's whole contract was finally finished and accepted before the money would be forthcoming. Slade & Davis knew at that time that Straw had the contract for this particular mile of work, and that the construction company was bound to pay Straw for it, and could not legally contract with any one else to do it without Straw's consent. With this knowledge they entered into a contract with Straw to do the work for him at prices fixed by him and themselves, the complete details of which were never known to the Utah Construction Company. The supplies were charged to Straw, every time check was signed by Straw, and there is not a single syllable of testimony indicating that Straw knew or suspected that Slade & Davis were working for the Utah Construction Company and not for him. Suppose Slade & Davis had refused absolutely to finish their contract and had quit without cause, leaving it half completed; would not Straw have had an action for damages against them, and could they have successfully defended by saying that the Utah Construction Company was their real employer? Certainly not. Or suppose that they had abandoned the contract without completing it, and the Utah Construction Company had attempted to bring an action against them for damages. They could lawfully have answered: "You let the contract for mile 26 to Straw and agreed in writing to pay him for it. You had no right to let it to anybody else. You told us to contract with Straw and we did so. If you are injured in any way, you must look to Straw, the man you told us to work for—the only man who had the right to say who should grade this particular mile of road. We looked to you for the pay, but you must look to Straw for the work. He is your original contractor." It is plain that in such a case the construction company would have no standing in court. There is nothing in the evidence to indicate that it was a matter of the slightest advantage to the construction company that Slade & Davis should do the work rather than Straw or any other subcontractor.

A fair test of the question as to who was

the real employer, the principal in the transaction, is afforded by the foregoing illustration. The Utah Construction Company would have no remedy in damages occasioned by a failure on the part of Slade & Davis to complete the grading on mile 26, while Straw would have had such remedy, and the conclusion is irresistible that the construction company was not the original contractor with Slade & Davis, and, in fact, not a contractor in any sense of the word unless an oral guaranty, void under the statute of frauds, may be termed a contract. The agreement, if any was made, was merely collateral; and that the plaintiffs so considered and treated it is shown by their attempt to create a lien on the road in the notice of which they set forth that the work was performed by them for Straw.

This case does not come within the reasoning of the case of *Baillet v. Scott*, 32 Wis. 174, cited by counsel. In that case, Scott, the defendant, entered into a contract with Doton & Bennet, by which it was agreed that Scott was to pay the laborers employed by Doton & Bennet and deduct the amount so paid from the contract price agreed to be paid them. In pursuance of such authority from Doton & Bennet, Scott promised the laborers, before they went to work, that he would pay them, and the court held that the written agreement before mentioned was equivalent to an order by Doton & Bennet on Scott to pay them their wages as they became due, and that, when the laborers assented to this, it became a valid and binding contract. This was not an action between the laborers and Scott, but was a proceeding by an outside garnisher to attach the money which had been earned by them before process was served. It will be seen that in the above case there was held to be an agreement between Scott and the contractors and the laborers, making a complete contract. Here there is not the slightest evidence that Straw even knew of, or agreed to, any arrangement between Slade & Davis and the construction company. Nor does it come within the rule announced in *Mackey v. Smith*, 21 Or. 598, 28 Pac. 974, where goods were delivered to one person upon the agreement of another to pay for them, no credit being actually given to the party who received the goods, although for convenience they were charged in his name, that case proceeding upon the principle that the person who received the goods was not liable to the vendor and that the person who ordered their delivery was the sole debtor. Under the facts in that case, the vendor could not have recovered from the person to whom the goods were delivered. Here Slade & Davis had and still have a complete cause of action against Straw, and, in fact, have joined him as a defendant in this action, though he has not been served with summons. The case last cited and *Miller v. Lynch*, 17 Or. 61, 19 Pac. 845, so completely define the difference

between original and collateral contracts that further citation of authorities seems superfluous.

We do not think there was any testimony in this case showing an original contract on the part of the Utah Construction Company, and for that reason the judgment of the lower court is reversed, and a new trial ordered.

(55 Or. 596)

STATE v. GILBERT.

(Supreme Court of Oregon. May 14, 1883.)¹

(Syllabus by the Court.)

1. COURTS (§ 117*)—RECORDS—CONCLUSIVE-NESS OF RECITALS.

The judgment roll in a criminal action is conclusive as to the facts transpiring at the trial. The power of the court where the trial is had to correct such roll, on proper application, and cause it to conform to the truth, is undoubted; but, until so corrected, it is the record of the court, importing absolute verity, and its accuracy cannot be called in question.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 117.*]

2. CRIMINAL LAW (§ 876½*)—JUDGMENT—VALIDITY—UNCERTAINTY.

The transcript of the judgment roll, on appeal, disclosing two separate indictments against the appellant for distinct crimes, although of the same grade, and only one verdict and judgment, and containing nothing to indicate that the trial and conviction were had on only one of the indictments, the judgment was held erroneous, and reversed, because (1) it appeared that the appellant had been tried on both indictments at the same time; (2) the record was entirely uncertain as to the crime on which the conviction was had.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2102; Dec. Dig. § 876½.*]

Appeal from Circuit Court, Polk County.

Tom Gilbert was convicted of murder, and he appeals. Reversed, and new trial awarded.

Daly & Butler, for appellant. W. H. Holmes, Dist. Atty., for the State.

WATSON, C. J. At the December term, 1882, of the circuit court for Polk county, the grand jury found two indictments for murder in the first degree against the appellant—one for killing an Indian named Dave Yatskawa on November 28, 1882, in said county, and the other for killing an Indian woman named Pononapa, at the same time and place. With the exception of the name of the person alleged to have been murdered, there is no difference in the two indictments. The appellant was tried at the same term, convicted, and sentenced to death. In the journal entry of the judgment, however, the clerk failed to state any crime for which the conviction was had, as required by section 210 of the Criminal Code, and, strange to say, there is not a word in the record of

the trial indicating upon which of the indictments the appellant was tried, while both of them appear in the transcript of the judgment roll. These facts give rise to the only important questions in the case. Only one of these need be considered, as the determination of it which seems proper to us renders a reversal of the judgment appealed from unavoidable.

The record before us does not show upon which of the indictments, if upon only one, the trial and conviction were had. As the record should only contain the indictment upon which the appellant was tried in the court below, the legal deduction from finding the two indictments, in the records of the case as made up and certified by the proper officer, is that he was tried on both. It has been suggested that this court should presume that the proceedings in the court below were regular, and that the duplicity in the record has occurred through the inadvertence or mistake of the clerk in making up the judgment roll, of which the record before us is simply a transcript. But this judgment roll, although prepared by the clerk, is the record of the court. To it alone can we look to ascertain what the action of the court below was, and upon it determine whether any error was committed. The duty of the clerk in such matters is ministerial undoubtedly, and subject to the supervision and control of the court. But his record is the highest evidence of the judicial action of the court. It imports verity, and until impeached by the court itself is conclusive of the matters to which it relates. *Schlirmer v. People*, 33 Ill. 276.

For every purpose connected with the appeal we must consider this record as being a faithful memorial of the proceedings in the court below, and cannot entertain the suggestion that there may be a mistake in it, which that court might, from its own knowledge of the actual proceedings before it, on the trial, correct on proper application. That it would be competent for that court to make such a correction at any time, where no adverse rights have intervened, cannot be doubted. But the answer to the suggestion is that it has not been done, and we cannot assume that it could or would be done, nor look beyond the record actually before us. We are compelled to assume that the duplicity and uncertainty, which are shown by the record to have existed in the proceedings on the trial in the court below, did exist in fact, and that no other record of such proceedings could be made, under the circumstances. Upon the state of facts thus disclosed there is manifest error.

Our law will not even permit a defendant to be tried for more than one crime, and that charged in one form only, on the same indictment. Cr. Code, § 74. Much less, it would seem, would it tolerate his being tried

¹ This case has never been reported, and is now published because cited in *State v. Walton*, 50 Or. 142, 91 Pac. 490, 13 L. R. A. (N. S.) 811, and *Re Jer-man*, 112 Pac. 416.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

at the same time upon two indictments, charging distinct crimes of a capital nature, as appears by the record to have been done in this case. But, assuming that the record is correct, as we are conclusively bound to do, then there is a fatal uncertainty as to the crime of which the appellant was convicted. Who could tell, upon the state of facts disclosed by this record, whether the jury intended to find the appellant guilty of murder in the first degree for the killing of Dave Yatskawa, or for the killing of Pono-napa? No conviction, under such circumstances, could be sustained. *Clinton v. State*, 65 Tenn. 507.

The judgment of the court below must be reversed, and a new trial had; and it is so ordered.

Judgment reversed.

(57 Or. 517)

CUNNINGHAM et al. v. SALING, County Clerk, et al.

(Supreme Court of Oregon. Dec. 31, 1910.)

1. COUNTIES (§ 124*)—EMPLOYMENT OF DETECTIVE—RATIFICATION.

The employment of a detective by a county, though irregular, was ratified by the action of the county court in allowing a bill for his services and directing payment thereof by the county.

[Ed. Note.—For other cases, see *Counties*, Cent. Dig. § 185; Dec. Dig. § 124.*]

2. COUNTIES (§ 150*)—DEBT LIMIT—CONSTITUTIONAL INHIBITION—APPLICATION.

A constitutional debt limit imposed on a county is applicable only to indebtedness voluntarily incurred, and not to such as cannot be avoided without danger to the peace and good order of the community, and hence the fact that the limit had been reached was no valid objection to the county's liability for the services of a detective employed to assist in enforcing the liquor law.

[Ed. Note.—For other cases, see *Counties*, Cent. Dig. § 216; Dec. Dig. § 150.*]

Slater, J., dissenting.

Appeal from Circuit Court, Umatilla County; H. J. Bean, Judge.

Suit by Charles Cunningham and another against Frank Saling, County Clerk of Umatilla County, Or., and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

This is a suit to enjoin the delivery and payment of a warrant drawn by order of the county court of Umatilla county in favor of the Thiel Detective Agency for \$356, for services rendered the county in procuring evidence to convict violators of the local option law in such county. The evidence tends to show that in the year 1908 violations of the local option law became so frequent and flagrant as to become a public scandal. The local officers were appealed to by the district attorney to assist in procuring evidence against the offenders, but either could not or would not afford him any assistance. The court not then being in session, he brought the matter

of procuring a detective before the county judge, who agreed that such was the proper course and assured him that it was probable that the county court would ratify such action. Thereupon, on request of the district attorney, the Thiel Detective Agency sent an operative, through whose efforts a large number of offenders were convicted and a large amount of money in fines was paid into the county treasury. The agency presented a bill for \$356 for this service to the county court, which approved the same and ordered it paid. The indebtedness of the county at the time exceeded the \$5,000 limit prescribed in the Constitution.

Charles H. Carter and H. J. Smythe, for appellants. G. W. Phelps, Dist. Atty., for respondents.

McBRIDE, J. (after stating the facts as above). While the original employment of the detective in this matter was irregular and legally unauthorized; the action of the county court in allowing the bill and directing the payment of it amounted to a ratification of the original employment, so in this respect the case stands in the same condition as if the county court had employed the detective in the first instance. *Steiner v. Polk County*, 40 Or. 124, 66 Pac. 707. While the testimony makes it clear that the indebtedness of the county exceeded the constitutional limit, yet it has been held that the constitutional inhibition only extends to voluntary indebtedness and not to such as is thrust upon it by operation of law, by which phrase is meant such expenses as cannot be avoided without danger to the peace and good order of the community. Thus, in *Municipal Security Company v. Baker County*, 33 Or. 339, 54 Pac. 174, it was held that the employment of an expert to check the county books to ascertain whether there had been any embezzlement of the county funds was a duty imposed upon the county by operation of law, and that a warrant issued in payment of such services was valid, although the county had already greatly exceeded the constitutional limit of indebtedness. It was no doubt true that the county authorities could have refrained from hiring an expert and have trusted to chance, and to the honesty of the official concerned, as to the outcome. They had the physical power to do so, but, as the court said: "It was such a service, so far as we are informed by the record, as the county could not well dispense with for the time being, even, and perform understandingly and intelligently the functions pertaining to its organization." In the same case the court say: "The most important function of the county is to maintain a local government subordinate to, but an arm of, the state. Now, the expense incident to and necessary under the laws prescribed by the state to organize and maintain such a

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

government may be said to be thrust upon it by law." This is good law and fits the case at bar. The principal function of every county government is the protection of society, the enforcement of law, and the punishment of crime. This is the highest and most pressing duty which the law imposes upon any county or upon the county authorities, and any expense necessary to punish crime and bring the guilty to justice is an expense imposed upon the county by law. It is a duty that admits of no volition. The authorities cannot avoid it if they would; they should not if they could. In all expenditures for the punishment of crime the real question is, Are they necessary in order to secure the enforcement of the criminal laws? If they are, then a duty exists to make the expenditure, and it may be said to be involuntary in the sense that it is not an expense sought and incurred as the result of deliberate bargain, but arises from the necessity of enforcing the law.

In this case it is evident that the law was being flagrantly violated, and that the local authorities either sympathized with its violation or were too inefficient to prevent it. Under such circumstances there rested upon the county court the duty to use such measures as were necessary to prevent and punish crime and they have done so effectually. To hold with the contention of plaintiffs would allow many crimes to go unpunished. If a murder should be committed in Umatilla county and it became necessary to offer a reward, some friend of the murderer, under the guise of a taxpayer, could come forward and enjoin the county from doing so, on the pretext that it was exceeding its indebtedness. The hands of the county authorities ought not to be so fettered, and they will not be. Judgment affirmed.

SLATER, J. (dissenting). I cannot give my assent to the conclusion reached in this case. The debt in question was incurred by the district attorney of Umatilla county with the consent of the county judge in employing special detectives to assist in discovering violators of the local option laws, and in procuring evidence of such violation. The excuse for obtaining such special assistance is that local officers would not render the necessary aid to the district attorney to ferret out violators of the law. This case should not be confounded with one where some person has been charged by complaint in a court with the commission of a crime, and the duty is thrust by law upon the prosecuting officer to secure evidence to convict; but it rests primarily upon a mere suspicion or assertion of an officer that the law in some respect is being violated, and upon an assertion that local officers, who were appealed to by the district attorney to assist in procuring evidence thereof, either could not or would not render him assistance. The constitutional limitation (section 10, art. 11), upon counties contracting debts, reads: "No county shall

create any debts or liabilities, which shall singly or in the aggregate exceed the sum of five thousand dollars, except to suppress insurrection or repel invasion. * * * " If the plain meaning of the words of this clause be followed, no doubt or confusion can arise, and no justification can be found for injecting constructive interpolations into it. It was early held by this court in the case of Grant County v. Lake County, 17 Or. 453, 21 Pac. 447, that where the debt in question was not created by the county, but the liability was imposed by the Legislature, it was not within the prohibition. There is no straining of the ordinary signification of the words in such construction; and undoubtedly, when the Legislature creates an office and requires the salaries and other expenses thereof to be paid out of the county funds, the debt is created not by the county, but by legislative power, and hence is not within the limitation. *Lewis v. Widber*, 99 Cal. 412, 33 Pac. 1128. From this the distinction arose between a class of debts said to be voluntarily created by the county and those imposed upon it by law. But when it is said, as it is in the majority opinion, as the rationale of the decision, that "the most important function of the county is to maintain a local government subordinate to, but as an arm of, the state," and that, "the expense incident to and necessary under the laws prescribed by the state to organize and maintain such a government may be said to be thrust upon it by law," all limitation upon debts created by the county has practically been taken away. The expression quoted is from the opinion of Mr. Justice Wolverton in *Security Company v. Baker Co.*, 33 Or. 338, 344, 54 Pac. 174. But in a later case (*Eaton v. Minnaugh*, 43 Or. 465, 73 Pac. 754) the whole question was reviewed at some length by Mr. Justice Bean. He expressly concedes that it is not safe to rest the distinction upon the unqualified statements above quoted, for he says: "It manifestly cannot be held that all liabilities arising from the mere discharge of some public duty by a county, or in the performance of some powers conferred upon it by law, are involuntary obligations, and therefore not an indebtedness within the meaning of the Constitution. A large part of the obligations incurred by every county may without any great impropriety be said to be involuntary, in the sense that the discharge of the duty in which they were incurred would not have been neglected or avoided without disregarding some provision of law; but if that test alone is to be the standard, a county is practically left free to contract unlimited obligations, notwithstanding the provisions of the Constitution. This would be violating the language of that instrument, and frittering away its meaning by construction."

Although it is admitted in that opinion that it is difficult, if not impossible, to lay down any general rule whereby so to classify

such obligations, a further definition of the interpolated phrase "a liability imposed upon a county by law" was deemed essential, and it was there held that a liability which the county is not at liberty to evade or postpone is not within the prohibition, and the converse was stated as "a liability arising from the performance of some public duty of a discretionary character, or which the county authorities may, in their discretion, postpone indefinitely or temporarily until means are provided for the payment of the expenses incident thereto, cannot be so held." This, it seems to me, is a very uncertain and unsatisfactory rule by which so important a constitutional limitation is to be judged and applied. Indeed, it was said in that case that each case must be determined largely from its own facts, and by the doctrine of exclusion and inclusion. The plain intent of this clause of the Constitution is to require counties to transact business upon practically a cash basis. The county has authority to levy taxes annually upon all the taxable property within its limits, with which to raise sufficient revenue to pay its expenses (B. & C. Comp. § 3085); and the law and the Constitution contemplate that it will exercise its powers in that respect.

So, also, certain offices have been created, and the duties thereof defined, to secure the enforcement of the criminal laws of the state. If the law contemplates that any expenditure, aside from the salaries of such officers, is to be made to assist them in the performance of their official duties, then it is also contemplated that such provision should be made by the county, under the taxing power, to provide in advance sufficient funds therefor.

The sheriff is the executive officer of the county, and his duties are specifically defined by section 1017, B. & C. Comp., and under certain circumstances he may command the power of the county (section 1015); but the law contemplates that the necessary and usual expense incurred by him in the performance of his official duties must be provided for in advance, for from the constitutional limitation debts or liabilities incurred to suppress insurrection or invasion only are expressly excepted. Again, the district attorney is the public prosecutor (section 991, B. & C. Comp.), and is required to institute proceedings before magistrates for the arrest of persons charged with or reasonably suspected of public offenses, when he has information that such an offense has been committed (section 993, B. & C. Comp.). And, again, a grand jury, having power to compel all persons to come before it and give testimony, is provided to inquire into suspected commission of crimes. Where the law has thus specifically provided methods and means to enforce the law and to ascertain who, if any, have violated the criminal law, and to secure

evidence against those charged, I do not think it can be consistently said, with sound reasoning, that the law has imposed upon the county an unavoidable duty to adopt other and different means at great expense to the county to reach a coveted end, simply upon the claim that some officer has failed to effectively discharge his duty, or even upon a claim that the usual and legal method has proved ineffective in the particular case.

Certain it is that the debt in question was created by the act of the county, and was not imposed upon it by law; but, measured by the rule heretofore adopted by this court, and by which it is now attempted to be sustained as not within the prohibition, it was not created by the county in the performance of a duty imposed upon it by law which could not be avoided or postponed because it was not incurred in the manner that the law contemplates such duty is to be performed. *Pacific Undertakers v. Wldber*, 113 Cal. 201, 45 Pac. 273.

(42 Mont. 272)

FORQUER v. NORTH et al.

(Supreme Court of Montana. Dec. 6, 1910.)

1. MASTER AND SERVANT (§ 258*)—INJURIES TO SERVANT—NEGLIGENCE—PROXIMATE CAUSE—COMPLAINT.

Plaintiff, a boy 13 years old, was injured while operating a pug mill in defendant's brick factory. The complaint alleged that plaintiff was directed to use a hose to turn water on the clay and feel of it as it emerged from the machine; that there was danger in such operation; that defendants knew of the need of instruction as to such danger, and that it was their duty to use reasonable care to give plaintiff such instructions in regard to the performance of his duties as would have enabled him to sense and avoid the danger; that this they negligently, and carelessly failed to do; that at the time of his injury, he was feeling the clay with his right hand and wetting it with the hose in his left hand, whereupon the left hand, while holding the hose, was carried forward against the knives of the machine and injured. *Held*, that the complaint was not defective for failure to allege that defendants' negligence in failing to instruct plaintiff was the cause of the injury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 823; Dec. Dig. § 253.*]

2. NEGLIGENCE (§ 108*)—PLEADING—CHARACTERIZATION OF ACTS.

Where the doing of certain acts under certain circumstances constitutes negligence, it is sufficient, after specifying the acts, to allege that they were negligently done, or if a failure to do certain acts constitutes negligence, then it is sufficient after specifying the acts to say that defendant negligently failed to do them.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. § 175; Dec. Dig. § 108.*]

3. MASTER AND SERVANT (§§ 101, 102*)—INJURIES TO SERVANT—SAFE PLACE—SAFE APPLIANCES.

A master is bound to use ordinary care to furnish a servant with a safe place to work, and reasonably safe appliances.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 171; Dec. Dig. §§ 101, 102.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

4. MASTER AND SERVANT (§ 258*)—INJURIES TO SERVANT—COMPLAINT—WARNING.

Where a complaint for injuries to a servant alleged negligence in failing to warn, it was not objectionable for failure to allege the particular warning required, or the particular danger to be apprehended, in the absence of a special demurrer for uncertainty.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 834; Dec. Dig. § 258.*]

5. MASTER AND SERVANT (§§ 276, 278*)—INJURIES TO SERVANT—NEGLIGENCE—FAILURE TO WARN—EVIDENCE.

In an action for injuries to a minor servant while operating a pug mill in a brick factory, evidence held to justify a finding that defendants were negligent in failing to warn plaintiff of the danger in doing his work in the manner he did, and that such negligence was the proximate cause of the accident.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 951, 972; Dec. Dig. §§ 276, 278.*]

6. MASTER AND SERVANT (§ 97*)—INJURIES TO SERVANT—METHOD OF WORK—IMPROBABLE INJURY.

Where plaintiff, a minor, operating a pug mill, was injured while doing the work according to directions, and such method was in itself dangerous and resulted in his injury, defendants were chargeable with actual knowledge of the dangers to be apprehended, and hence it was immaterial that the immediate cause of the injury was an accelerated flow of water through a hose, which was a wholly fortuitous occurrence, provided plaintiff did not contribute thereto.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 163; Dec. Dig. § 97.*]

7. MASTER AND SERVANT (§ 97*)—INJURIES TO SERVANT—DUTY OF MASTER—ANTICIPATION OF DANGERS.

Where defendant furnished plaintiff water in a hose with which to wet down clay as it emerged from a pug mill in a brick factory, defendant was chargeable with notice of how the water would flow in the hose, and that a sudden acceleration in the pressure of the water might cause the hands of a boy of plaintiff's age to be thrown against the knives of the machine and injured, and hence defendants were bound to take steps to guard against such an injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 163; Dec. Dig. § 97.*]

8. APPEAL AND ERROR (§ 203*)—OBJECTIONS NOT MADE AT TRIAL—REVIEW.

An objection to evidence not made at the trial cannot be reviewed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1064; Dec. Dig. § 203.*]

9. APPEAL AND ERROR (§ 205*)—CONCLUSION OF EVIDENCE—OFFER OF PROOF—NECESSITY.

The sustaining of an objection to a question is not reviewable, where no offer of proof is made, and the evidence expected is not disclosed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1281, 1282; Dec. Dig. § 205.*]

10. TRIAL (§ 89*)—EVIDENCE—MATERIALITY—MOTION TO STRIKE.

Where plaintiff, a boy 13 years old, was injured while operating a pug mill in a brick factory, proof that he occasionally threw mud balls and threw water at the men was properly stricken, where no causal connection was shown between such acts and the injury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 228-234; Dec. Dig. § 89.*]

11. APPEAL AND ERROR (§ 215*)—OBJECTION TO INSTRUCTION.

Where an objection made to an instruction on appeal was not presented to the trial court, it would not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1309-1314; Dec. Dig. § 215;* Trial, Cent. Dig. §§ 683-685.]

12. DAMAGES (§ 132*)—PERSONAL INJURY—AMOUNT RECOVERED—EXCESSIVENESS.

Plaintiff, a boy 13 years old, was employed to wet and watch clay coming from a pug mill in a brick factory, and as he was doing so his hand was carried against certain knives and injured. He was in a hospital over a week, and suffered pain in his hand and shoulder. It was six weeks before his hand healed, during which time he suffered pain and loss of sleep. When it healed, it was found that he had lost the use of one and perhaps two of his fingers, though it was problematical whether such condition was permanent. The hand was quite badly torn, and his physician testified that he treated it in the neighborhood of two months, and that after healing resultant tenderness to pressure in the palm of the hand might result, and that it would be susceptible to the influence of heat and cold. Held, that while a verdict for \$10,000 was excessive and should be reduced to \$4,000, it was not so excessive as to evince passion and prejudice on the part of the jury.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 373, 379; Dec. Dig. § 132.*]

Appeal from District Court, Yellowstone County; Sydney Fox, Judge.

Action by Claude Earl Forquer, a minor, by C. F. Forquer, his guardian ad litem, against Austin North and the Slater Brick Company. Judgment for plaintiff, and defendant brick company appeals. Affirmed on condition.

M. S. Gunn and Fred H. Hathhorn, for appellant. W. M. Johnston, Wm. Wallace, Jr., and R. F. Gaines, for respondent.

SMITH, J. This is the second appeal in this case. See *Forquer v. Slater Brick Co.*, 37 Mont. 426, 97 Pac. 843. The complaint has been amended and a retrial had, resulting in a verdict against both defendants in the sum of \$10,000. From a judgment entered on the verdict and an order denying a new trial, they have appealed.

The amended complaint, after alleging the plaintiff's age, 13 years, continues as follows:

"(4) That among the duties of plaintiff's said employment he was required to throw said pug mill in and out of gear and to oil the same, and he was likewise directed by his said employers, and it was then and there a part of his duty, to take a certain hose used in connection with said machine and to turn water upon the clay which was being fed through the same and to feel of said clay as it was emerging from said machine to ascertain the degree of moisture therein.

"(5) That said pug mill was a complicated piece of machinery and at its mouth, where said clay emerged, there were two cutting

knives revolving upon a cylinder or rod which in their revolution upward and at the top passed into a metal frame whose sides came very close to said knives, and because thereof there was danger of injury from said knives and frame in the operation aforesaid of watering and feeling of said clay as the same emerged from said mill.

"(6) That plaintiff was in fact wholly inexperienced in the use of said mill and was without experience in the use of any machinery and did not in fact know, and by reason of his youth and inexperience in the use of machinery could not have reasonably known, of the danger incident to feeling said clay with one hand and wetting the same with the water from the hose held in his other hand, and in the manner aforesaid, but that defendant either knew, or in the exercise of reasonable care ought to have known, of the said inexperience of plaintiff and his need of instruction as to said danger, and it then and there became and was the duty of defendants, and each of them, to use reasonable care to give this plaintiff such instruction in regard to the performance of said duties as would have enabled him to sense and avoid said dangers, but that this they negligently, carelessly, and wholly failed to do."

"(8) That on August 16, 1906, and while in the obedience of said direction of defendants, plaintiff was feeling of said clay as it emerged from said mill with his right hand and at the same time holding said hose in his left hand and therewith wetting the said clay, and while he was in ignorance of the danger connected with said operation, and so without instruction as to said danger by reason of the negligence of said defendants, and without any intention on the part of plaintiff so to do, his left hand then holding said hose was carried forward to and against one of said knives in its upward motion and carried upward and against said metal frame," in consequence whereof he was injured. There was no demurrer to the amended complaint, but at the commencement of the trial the objection was made that it did not state facts sufficient to constitute a cause of action.

1. This court held on the former appeal that the evidence was insufficient to warrant a finding that the defendant Slater Brick Company was negligent in failing to guard the knives or in furnishing a defective hose. We held, also, that in cases like this it is a question of fact for the jury to determine whether the plaintiff required warning instructions, and, if so, whether the defendant had reasonably fulfilled its duty in that regard. The amended complaint predicates negligence solely upon failure to warn of danger. Counsel for the appellants now urge: "The complaint does not state a cause of action, for the reason that it does not appear therefrom that the negligence charged was the cause of the injury. It is not alleged that the failure to instruct, which

is the only negligence alleged, caused or had anything to do with the injury." There is in the complaint, however, an allegation that the plaintiff was "without instruction as to said danger by reason of the negligence of the defendants." This court in *Pullen v. City of Butte*, 38 Mont. 194, 99 Pac. 290, 21 L. R. A. (N. S.) 42, said: "In *Smith v. Buttner*, 90 Cal. 95, 27 Pac. 29, the court, in considering the question now before us, said: 'It is well settled that negligence may be charged in general terms; that is, what was done being stated, it is sufficient to say it was negligently done, without stating the particular omission which rendered the act negligent.' In other words, if the doing of certain acts, under certain circumstances, constitutes negligence, it is sufficient after specifying the acts, to say that they were negligently done; or, if the failure to do certain acts constitutes negligence, then it is sufficient, after specifying the acts, to say that the defendant negligently failed to do them."

As was said by the court on the former appeal, and the remark may be applied to the allegations of the complaint as well as to the testimony: "The boy was obeying orders and it was for the jury to determine whether the defendant was chargeable with want of ordinary care in not apprehending that he would probably attempt to do both acts at the same time, and not instructing him accordingly." The complaint alleges that plaintiff was directed to use the hose; to turn water upon the clay and feel it as it emerged from the machine; that there was danger "in the operation aforesaid of watering and feeling said clay as the same emerged from the mill"; that the defendants knew of the need of instruction as to said danger, and it was their duty "to use reasonable care to give him such instructions in regard to the performance of said duties as would have enabled him to sense and avoid said dangers, but that this they negligently and carelessly wholly failed to do"; that at the time of his injury he was feeling the clay with his right hand and wetting it by means of the hose held in his left hand, whereupon "his left hand, then holding said hose," was carried forward against the knives. It will thus be seen that the case falls squarely within the rule laid down in *Pullen v. City of Butte*, supra. The complaint sets forth that the defendants were negligent in failing to do a certain act, viz.: to warn him of the danger connected with the performance of his duties in the manner in which he was directed to perform them. They were in duty bound to use ordinary care to furnish him a reasonably safe place in which to work and reasonably safe appliances. It is true that the complaint does not point out the particular warning required or the particular danger to be apprehended; but in the absence of a special demurrer for uncertainty, we think it sufficient to state a cause of

action in this regard. In the Pullen Case no negligent act or omission of any kind was pleaded. We think it fairly deducible from the complaint that plaintiff's left hand was carried forward by the appliance furnished him for watering the clay; to wit, a hose through which water was being forced under pressure, and that the instructions required were such as would have enabled him, if he heeded them, to avoid having his hand carried forward by the hose far enough to bring it in contact with the knives. The failure to give such instructions would furnish a proximate cause of the accident. We think it is also reasonably to be gathered from the allegations of the complaint that the defendants negligently failed to warn the plaintiff of the danger to be apprehended from the act of feeling the clay and watering it at the same time. An instruction as to the space to be maintained between the end of the nozzle and the clay might have assisted him in avoiding injury. It is constantly to be borne in mind that he was a boy with a boy's immature judgment, or lack of judgment. Perhaps the inquiry whether counsel, under the same circumstances, would have considered it necessary to warn his own boy in the manner we have suggested, will serve to illustrate the method of reasoning by which the jury may have arrived at the conclusion that ordinary care was not exercised in instructing this boy.

2. It is contended that the evidence is insufficient to sustain the verdict. The plaintiff testified as follows: "When I was hurt, I was throwing water on the clay and feeling whether it was moist enough or not. I was on my knees at the mouth of the machine, throwing water in. I was down about like this (indicating) with my hand up here with a piece of hose throwing water, and this hand catching the mud as it fell out, to see whether it was moist enough; down on my right knee here, with the left hand up on the machine, my right hand about a foot from the bottom of the tub, about center ways from the hole through which the clay came, about six inches from the opening at the end of the tub, I should judge. My left hand was about six inches from the knives, toward myself, as I was leaning. I had the nozzle in my hand. It was made of brass. I could not say how long it was exactly; I should judge it would be about six or eight inches long. I was holding at the back end of the nozzle; I could not say how long before I was hurt. There was water coming from the hose at the time, going just inside the mouth of the tub. The water was regulated by a stem on the valve at the back end of it and the end of the nozzle was fastened to the hose. I was throwing water inside the machine and the pressure of the water suddenly forced them ahead and jerked my hand in the knives, and got them crushed."

In the former decision, in considering whether the court erred in excluding the evidence of witnesses who were prepared to testify that in the course of their experience they never heard of an accident happening as this one is alleged to have happened, this court said that the happening of the accident as narrated by the plaintiff was a wholly fortuitous event, the occurring of which in the exact manner told by the boy could not be anticipated. It is now said that the court held that the testimony was insufficient to establish a liability against the brick company, and that the holding is the law of the case. Such, however, was not our understanding of the decision at the time, and is not now. We must not overlook the fact that the plaintiff testified that he was doing the work according to directions; that he was told to do it in the manner employed by him. If he was, and the jury evidently believed that he was, and if they further found, as they might, that the manner of doing the work was in itself dangerous and, resulted to his injury, then defendants were chargeable with actual knowledge of the danger to be apprehended, and, as was said in the former opinion it became immaterial to inquire the exact cause of the injury, provided plaintiff did not contribute thereto, and the fact that the accelerated flow of water was a wholly fortuitous occurrence was also immaterial. This court held in effect, in *Hollingsworth v. Davis-Daly Estates Copper Co.*, 38 Mont. 143, 99 Pac. 142, that where a defendant had created a dangerous way, it was chargeable with actual knowledge of its dangerous condition. The same principle applies here. If the defendants directed this boy to do the work in a particular manner, and that manner was dangerous, they were chargeable with knowledge of the fact. And if he did his work according to directions and was injured by doing it in that way, no burden rested upon him to point out the particular danger as to which he should have been warned.

Again, it is contended that the evidence fails to show that the injury was caused by the negligence charged. The following cases are cited to sustain the contention: *Buckley v. Gutta-Percha & Rubber Mfg. Co.*, 113 N. Y. 540, 21 N. E. 717; *Fronk v. Evans City Steam Laundry*, 70 Neb. 75, 96 N. W. 1053; *Siddall v. Pacific Mills*, 162 Mass. 378, 38 N. E. 969; *Hickey v. Taaffe*, 105 N. Y. 26, 12 N. E. 286. In each of these cases the court was unable to determine that any warning which might have been given would have prevented the accident; while in the case at bar, as we have pointed out in considering the complaint, the jury could properly find that certain warnings might have been effective for that purpose.

It is suggested that the sudden pressure of water in the hose was the direct cause of the accident and that this was an independ-

ent intervening cause, operating between the alleged failure to instruct and the result to the boy. Mr. White, in his work on *Personal Injuries on Railroads*, volume 1, § 23, says: "If the alleged act of negligence would not have produced the injury but for the interposition of an independent cause, which could not have been reasonably anticipated, but which turned aside the natural sequence of events and produced the result, such negligent act is not the proximate cause of the injury and is not actionable. The intervening cause in such case is the only proximate cause." The case at bar, however, is not at all like those to which the learned author refers. The plaintiff was furnished by the defendants with a hose through which water was running under pressure. They were charged with the duty of using ordinary care to furnish a flow of water that was reasonably safe for the boy to handle. It may have been, and probably was, reasonably safe for an adult to use. Having furnished the water and the hose, they were chargeable with notice of how the water would flow in the hose. And aside from this consideration, it is matter of common knowledge that the pressure of water flowing in a hose will move the hose about from place to place, unless it is held stationary; the amount of movement being regulated by the pressure of the water. We all know, also, that when for any cause the pressure is reduced, the flow is lessened, and vice versa. The jury may well have charged the defendants with notice of these facts. While it is true that no complaint is made of failure to use ordinary care in furnishing the hose or the water, we think it cannot be said that the jury had no justification for finding that the defendants, having furnished this particular apparatus, were chargeable with notice that it might become dangerous in the hands of a boy 13 years of age. In characterizing the accident, in the former opinion, as a wholly fortuitous event, a phrase adopted from appellants' brief, we meant no more than to say that its happening in the exact manner narrated was probably not to be anticipated. That the entire situation was dangerous to a boy of plaintiff's age is proven by the testimony of Mr. Bonnett, the superintendent of the plant, who stated at the trial that he gave instructions to the plaintiff, which, if observed, would have prevented his injury. He said: "I told him to turn the water on the brick machine proper after the clay had left the pug mill, when requested to do so. I simply told him to turn the hose in it. He could stand right there without getting down where the hose was. I gave him that instruction two or three times during the day. I instructed him when feeling the temper of the clay to feel of it on top. He was never told to go there and feel of the clay as it came out of the pug mill before it went into the brick machine, but to keep away from

there." This testimony was in direct contradiction of that of the plaintiff, but it serves to show that the company's superintendent realized the necessity of warning him, and the particular instructions thought to have been necessary. The jury must have found that the warning to keep away from that portion of the machine where the plaintiff was injured was not given. If it had been and the boy had followed the warning, he could not have been injured, despite the wholly fortuitous circumstance that the pressure of the water suddenly forced the hose and nozzle ahead and "jerked" his hand.

Again, it is claimed that plaintiff was properly instructed by the superintendent, Bonnett. It is said that Bonnett's testimony is uncontradicted, but we cannot assent to this conclusion. Plaintiff testified, as we understand the record, that Bonnett told him to "catch the clay as it left the machine, after it had fallen out of the machine; catch it and feel it and see if it was moist enough or not." Bonnett testified as hereinbefore set forth, and he also said: "I instructed him how to do that work, and where to stand when doing it. I told him to stand about two-thirds back from the end and throw on a good bit on the clay, and sometimes he could reach the valve and stop the water and do a great deal more than take care of the water. There was no danger connected with the operation of the machine in that way, in the way I told him, if he carried out the instructions I gave him. It was possible for him to throw water into the hopper without going to the front end of the machine, standing alongside of it. He would stand about four or five inches from the end of the machine and throw the water down. I don't know exactly how long it took me to instruct the young man. Off and on probably a day or two. He was doing very well. It was not necessary for the boy to go down on his hands and knees in doing this work at all. I was with him part of the time. I cannot say how much of the time, because some one would call me here and I go there, and see how he was getting along, and then go up there and stand and watch him. I could not complain of the way he performed his duties there. I saw him do the work assigned to him. He was doing very well for the time he had been there. I don't remember seeing him do the work in any other way than I had pointed it out to him." We think the testimony is in substantial conflict.

While the witness C. P. Slater was on the stand he was asked this question on direct examination: "State whether or not in your judgment as a brickmaker, based upon your experience with this particular machine, it would be dangerous or otherwise for an inexperienced boy, 13 years of age, of ordinary intelligence, who had never worked with a machine of this kind before, and had no experience whatever with machinery, to be em-

ployed in tempering clay in a pug mill of this character, watering the clay with a hose and feeling of it with his hands to determine the moisture?" The question was objected to, but not for the reason urged against it in this court. Under these circumstances, we cannot consider the specification of error. *Smith v. City of Butte*, 40 Mont. 445, 107 Pac. 409; *Butte Northern Copper Co. v. Radmilovich*, 39 Mont. 157, 101 Pac. 1078; *Thornton-Thomson Mer. Co. v. Bretherton*, 32 Mont. 80, 80 Pac. 10.

It is contended that the court erred in sustaining an objection to the following question propounded to the defendants' witness Bray, viz.: "Have you ever known or heard of an accident occurring in the manner testified to by the plaintiff in this case?" No offer of proof was made, and we have no means of knowing what answer the witness would have made to the question at the second trial. *State v. Byrd*, 41 Mont. 585, 111 Pac. 407; *Bean v. Missoula Lumber Co.*, 40 Mont. 31, 104 Pac. 869; *Tague v. John Caplice Co.*, 28 Mont. 51, 72 Pac. 297.

Defendants' witness Page testified that at times the plaintiff did not pay strict attention of his work. He then testified, over objection: "He was making and throwing mud balls occasionally and throwing water with the nozzle once in a while towards the men. He threw mud balls about three times that day, possibly an hour or two before the accident." This testimony was afterwards stricken out on the ground that no causal connection was shown between the act of throwing mud balls and the injury. We think the ruling was correct.

The court instructed the jury as follows: "Though the danger be obvious and such as an operator of ordinary intelligence and experience would perceive, yet when a child is put to work and his age and experience require it, the employer must see not only that he has notice of the danger, but also that he is sufficiently instructed as to the way in which he should do the work so as to avoid the danger. And the master cannot relieve himself of this duty by delegating it to either a foreman or to any one else; but must himself see to it that it is in fact done. Nor can he assume that a boy of tender years is experienced with machinery. His age is a notice and requires the master to inquire as to the child's capacity and experience." It is contended that by this instruction the court told the jury that the master must personally warn and instruct the inexperienced servant. When the trial judge proposed to give the instruction which was offered by the plaintiff, it was objected to in its entirety, "for the reason that it imposes too great a burden upon the employer or master in regard to duty resting upon him to instruct or warn the minor." The objection may apply as well to the whole instruction as to that particular portion which is now subjected to criticism. Indeed, the phraseology

seems to indicate that it was intended to apply to the portion relating to the master's general duty to instruct, and not to that part wherein the court appears to say that the warnings must be delivered by the master personally. And again, the specific criticism now offered does not appear to have been advanced in the court below. The trial court must be given an opportunity to rule on the exact point presented to this court, before it can be put in error. *Yergy v. Helena Light & Ry. Co.*, 39 Mont. 213, 102 Pac. 310.

It is claimed that the verdict is so excessive as to evince passion and prejudice on the part of the jury. We do not think so. We are of opinion, however, that the verdict is excessive. In *Lewis v. Northern Pacific Ry. Co.*, 36 Mont. 207, 92 Pac. 469, this court refused to disturb a judgment for a like amount. In that case the plaintiff lost his left hand. This plaintiff, however, is far from being injured to that extent.

He testified: "I went to the hospital and stayed there a little over a week. I suffered pain in my hand and to my shoulder. I went home from the hospital. It was about six weeks or maybe longer before my hand healed up. It pained me quite a bit. I could not sleep at all hardly. When it healed up, I found it was very weak. I could not stand much work. I didn't have the use of my fingers. The little finger and the next one to it were not available for use. I carry one finger bent, because it drew that way when it healed up; can't straighten it out. I have the use of the first and second fingers and the thumb on this hand. Sometimes pain runs through it on the motion of it. Heat and cold bothers the whole hand. Cold hurts it quite a bit, while it is getting warm; it hurts the fingers and through the hand; won't stand hardly any pressure at all. Haven't noticed any improvement in that respect in the lapse of time; bothers me sometimes. The pains extend up to the shoulder. My folks are farming now. About all I could do was to handle the hoe some; that bothered my hand quite a bit and made it sore. I have done some work with my father on the farm; hoeing is about the only thing I can do. I have done other work, small, light work."

Dr. Watkins testified: "The skin was torn back of the ring and little finger; the whole thing torn and laid backwards; tendons severed and pretty well scraped nearly to the bone. There was some flesh torn from the palm of the hand; the torn part commenced back of the hollow of the hand about an inch and a half from the wrist, forward into the palm of the hand. The flap that is torn back in the hand is about two inches long. The tissues had been severed in making that flap nearly to the bone. The fingers were in normal shape at that time. There was a split between the little finger and the one next to it. The third finger assumes the position it does now from the contraction caused by the

injury; it is of no use now. The fourth finger is impaired to a certain extent, not wholly. An injury of that kind would cause pain, cause severe pain, I should say. The length of time would depend on the individual. The condition of the hand is probably due to an injury to the tendons and sheath covering the joint. I treated the boy, I think, in the neighborhood of two months. He was told to come up whenever it was necessary. An injury of that kind after healing might leave resultant tenderness to pressure in the palm of the hand, and might render a peculiar susceptibility to the influence of heat and cold."

As every case must necessarily be decided in the light of its own facts, it would serve no useful purpose to incumber this opinion with a citation of authorities on the question of excessive verdicts. This plaintiff has suffered pain, and the usefulness of one—perhaps two—of his fingers is impaired. Whether the injury will permanently affect his ability to use the fingers, we do not know. We recall several cases in this court wherein medical men testified that time will minimize the effect of such an injury. The hurt received is apparently healed. No fingers are lost. We are of opinion that the sum of \$4,000 will amply compensate the plaintiff; and, indeed, this sum is a large one under the circumstances.

The cause is remanded to the district court of Yellowstone county, with directions to grant a new trial, unless within 30 days after the remittitur is filed with the clerk of that court, the respondent shall file his written consent that the judgment for damages may be reduced to \$4,000. If such consent is given, the judgment shall be modified accordingly as of the date of its original entry, and, together with the order denying a new trial, will stand affirmed. That part of the judgment relating to costs in the court below is not to be disturbed. Respondent to recover costs of appeal.

BRANTLY, C. J., and HOLLOWAY, J., concur.

(42 Mont. 257)

DONLAN v. THOMPSON FALLS COPPER & MILLING CO. et al.

(Supreme Court of Montana. Nov. 29, 1910.)

1. INJUNCTION (§ 132*)—PRELIMINARY INJUNCTION—EFFECT.

The office of a preliminary injunction is to preserve the status quo until on final hearing the court may grant full relief.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 302; Dec. Dig. § 132.*]

2. APPEARANCE (§ 8*)—PRELIMINARY INJUNCTION—MOTION TO DISSOLVE.

A motion to dissolve a temporary injunction is not an appearance in the action.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. § 31; Dec. Dig. § 8.*]

3. JUDGMENT (§ 106*)—DEFAULT—FAILURE TO ANSWER.

Under Rev. Codes, § 6719, permitting judgments by default on failure to answer or to challenge the jurisdiction of the court by answer, demurrer, motion, or special appearance, coupled with a motion, within the time specified in the summons, or such further time as may be granted, etc., a mere appearance by the defendant will not prevent the entering of his default.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 160, 162, 180-197; Dec. Dig. § 106.*]

4. JUDGMENT (§ 120*)—DEFAULT—PLEADING—MOTION TO VACATE PRELIMINARY INJUNCTION.

Rev. Codes, § 6719, provides for a default for want of answer, demurrer, motion, or special appearance, coupled with a motion, etc., filed within the time required for answer, and section 7149 declares that after appearance, a defendant, or his attorney, is entitled to notice of all subsequent proceedings for which notice is required to be given. *Held*, that where defendants filed no pleadings except a motion to dissolve a preliminary injunction, until after the time to answer had expired, their default was properly entered without notice, though such motion be regarded as an appearance.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 120.*]

5. APPEAL AND ERROR (§ 957*)—JUDGMENT (§ 139*)—DEFAULT—JUDGMENT—VACATION—DISCRETION.

Where defendant's default was properly entered, whether it should be set aside was within the sound discretion of the trial court, with the exercise of which the appellate court will not interfere except in case of abuse.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3823; Dec. Dig. § 957; Judgment, Cent. Dig. §§ 265-268; Dec. Dig. § 139.*]

6. JUDGMENT (§ 143*)—DEFAULT—VACATION—MISTAKE—INADVERTENCE—SURPRISE OR EXCUSABLE NEGLIGENCE.

Where defendants' attorney mistakenly determined that there was no necessity for appearing in the main action, until the day set for hearing a motion to dissolve a preliminary injunction, which was subsequent to the expiration of the time to answer fixed by the summons, and no attempt was made to file any pleading in accordance with the mandate of the summons, defendants were not entitled to the vacation of a judgment entered against them by default, on the ground of mistake, inadvertence, surprise, or excusable neglect.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 269-291; Dec. Dig. § 143.*]

7. JUDGMENT (§ 145*)—DEFAULT—VACATION—MERITS.

Defendants, in a suit to establish water rights, were not entitled to a vacation of a default judgment, where no answer stating a valid defense was presented, and the affidavit in support of the motion failed to show that defendants had a valid defense on the merits.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 271, 292, 295; Dec. Dig. § 145.*]

8. JUDGMENT (§ 161*)—DEFAULT—VACATION—ANSWER.

While a general denial will suffice in a proper case as an answer, if made within the time required, an answer making a prima facie showing of a good defense is essential to the opening of a default.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 317, 318; Dec. Dig. § 161.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Appeal from District Court, Sanders County; Henry L. Myers, Judge.

Suit by Edward Donlan against the Thompson Falls Copper & Milling Company and others. From an order denying defendants' motion to vacate and set aside a default judgment, they appeal. Affirmed.

H. O. Schultz and Walsh & Nolan, for appellants. Harry H. Parsons, A. S. Ainsworth, and James M. Self, for respondent.

SMITH, J. This is an appeal from an order of the district court of Sanders county, denying the defendants' motion to vacate and set aside a judgment by default.

The action was brought to establish plaintiff's alleged prior right to the use of certain waters of Thompson river; the complaint alleging that defendants have interfered therewith. Both temporary and permanent injunctive relief and general relief was prayed for. The summons was personally served on all of the defendants on August 17, 1909. On the same date a temporary restraining order was issued and served. On September 4, 1909, all of the defendants, by their attorney, served and filed a notice that on September 15, 1909, they would move the court for an order dissolving and vacating the injunction order theretofore granted. This notice was accompanied by the affidavits of the defendants Wenham and Hurlburt. The affidavit of Wenham concludes thus: "Wherefore, affiant prays for the vacation and dissolution of said restraining and injunctive order, or for a good and sufficient undertaking therefor, and for such other and further relief as to the court shall seem meet and proper." On September 8, 1909, the default of the defendants was entered by the clerk, and on September 30, 1909, they gave notice that on October 6, 1909, they would move the judge for an order vacating and setting aside their default and extending the time "for 20 days from the date of the hearing of said application and motion for the defendants, or any of them, to appear and further plead in the above-entitled action." Accompanying the notice was the motion referred to and an affidavit by the attorney. Afterwards, presumably on October 6th, the motion to set aside the default was denied; on October 11th plaintiff presented proof, and a judgment was entered substantially as prayed for. On October 30th, the defendants gave notice of a motion, to be made on November 5th, to set aside the default and judgment "and for an order extending the time for 20 days from the hearing of said application and motion for the defendants, or any of them, to appear and answer in the above action." This notice was accompanied by the affidavits of Wenham, Hurlburt, and the attorney. The affidavit of Wenham, who is the vice president and secretary of the defendant corporation, alleges that, when the

summons, complaint, and restraining order were served, they were turned over to the attorney, with the request that he take legal measures to dissolve the order; that he agreed to look after the rights of the defendant corporation, which promise defendant relied on, affiant believing that all necessary steps would be taken to obtain a dissolution of the order, and the defendants believing that they had until September 15, 1909, to appear and defend the action on its merits; that on September 15th defendants learned for the first time that default had been taken, and they believed that the motion to dissolve the injunction was such an appearance as would prevent the entry of default; that their failure to enter any other appearance arose entirely from that belief. The affidavit of the attorney is to the effect that he believed his notice of motion to dissolve the temporary restraining order was such an appearance as would prevent a default being taken, and that he so advised his clients. The affidavits show that the Thompson Falls Copper & Milling Company is the only defendant interested in the result of the litigation. On January 17, 1910, an order was made denying the second motion to set aside the default, and defendants have appealed from the order.

Did the court abuse its discretion in denying the application to set aside the default? It is contended by counsel for the appellants that the notice of motion to vacate the temporary restraining order, together with the affidavits accompanying the same, constituted such appearance as would prevent a default being taken. It certainly is not in accordance with the practice heretofore existing, to regard such an appearance, if it be an appearance at all, as having any effect upon the running of the time given the defendant to answer, demur, or make a motion in the main action. The office of a preliminary injunction is merely to preserve the status quo until, upon final hearing, the court may grant full relief. It is unnecessary in this case to distinguish between a temporary restraining order and an interlocutory injunction. Both are merely provisional in nature and do not conclude a right. They are simply incidental to the main issue to be tried. Mr. High, in his work on Injunctions (4th Ed.) p. 8, says: "It is to be constantly borne in mind that in granting temporary relief by interlocutory injunction, courts of equity in no manner anticipate the ultimate determination of the questions of right involved. They merely recognize that a sufficient case has been made out to warrant the preservation of the property or rights in issue in statu quo, until a hearing upon the merits, without expressing, and, indeed, without having the means of forming, a final opinion as to such rights." We are well satisfied that the main action, if we may employ the distinguishing term, and the provisional rem-

edy, are so far different in the respective ends sought to be accomplished, that an actual motion to dissolve the injunction could not be construed as an appearance in the action. As well might it be said that a motion to make the complaint more definite and certain would have the effect of staying the operation of the restraining order. But it is contended that no motion was ever made to dissolve the order. No formal motion was made. As we have seen, however, the affidavit of Wenham concludes with a prayer that the order be dissolved, or that an additional undertaking be exacted. The method of procedure adopted is, to say the least, novel. But we may treat the affidavit as a motion, and, as already indicated, such holding can avail the defendants nothing.

But let us suppose that the notice of motion, with the accompanying affidavit of Wenham, constituted an appearance in the main action. The result is the same. The summons was served on August 17th, and the notice on September 4th. On September 7th the defendants were all in default. What warrant was there for believing that they could extend the time to answer, demur, or make a motion, until September 15th, by giving notice that they would move to dissolve the restraining order on that date? If they could thus enlarge their time to answer, they could as well extend it until any other date. The mere appearance of a defendant will not prevent his default being entered.

Section 6719, Rev. Codes, provides that judgment by default may be had, if the defendant fail to answer the complaint or to challenge the jurisdiction of the court, as follows: "2. In actions [other than those arising upon contract for the recovery of money or damages only], if no answer, demurrer, motion, or special appearance, coupled with a motion, has been filed with the clerk of the court within the time specified in the summons or such further time as may have been granted, or within twenty days after a motion to quash or set aside the service of summons, or any motion challenging the jurisdiction of the court, has been denied, the clerk must enter the default of the defendant."

This court, in 1904, in the case of *Mantle v. Casey*, 31 Mont. 408, 78 Pac. 591, held that under section 1020 of the 1895 Code of Civil Procedure, then in force, a special appearance for the purpose of moving to quash the service of summons did not extend the time for answering to the merits. The Ninth Legislative Assembly (Laws 1905, c. 59) thereupon amended paragraph 2 of the section, by adding thereto the words, "demurrer, motion, or special appearance, coupled with a motion," after the word "answer," where it first appears, and the following after the word "granted," "or within twenty days after a motion to quash or set aside the service of summons, or any mo-

tion challenging the jurisdiction of the court." The amended law is now paragraph 2 of section 6719, Rev. Codes, supra. It will therefore be seen at once that whereas, under the old law, nothing but an answer (or possibly a demurrer) would arrest the running of the time, under the law as amended there are several means of accomplishing that end. The first is by filing an answer or demurrer to the complaint; the second is by a motion filed in the main action, such a motion as will constitute a general appearance; and the third is by special appearance, coupled with a motion. As the complaint and answer present issues of fact, and the demurrer raises an issue of law, so also must the general appearance motion, unless it be merely a request for additional time, in some way attack the complaint. In other words, it must be a motion the granting of which would be inconsistent with the idea that plaintiff was entitled to recover a judgment by default upon the complaint as filed.

It cannot be said that defendants were entitled to notice of application for a default, even though the notice of motion to dissolve the preliminary injunction could be construed as a general appearance in the main action. There was no answer, demurrer, or motion attacking the complaint. Both the summons and complaint remained unsalied and unaffected by the motion actually made. Section 7149, Rev. Codes, provides that after appearance a defendant or his attorney is entitled to notice of all subsequent proceedings of which notice is required to be given. The summons notified the defendants that their default would be taken, unless, within 20 days after service, they took steps to prevent it, and they having taken no action to arrest the running of the time, it was unnecessary to again notify them.

We conclude, therefore, that the default of the defendants was properly entered. Whether it should have been set aside was a matter within the sound legal discretion of the court below, and with its determination we may not interfere, unless there was a manifest abuse of such discretion. Every case must be decided upon its own facts. *Loeb v. Schmith*, 1 Mont. 87; *Donnelly v. Clark*, 6 Mont. 135, 9 Pac. 887; *Lowell v. Ames*, 6 Mont. 187, 9 Pac. 826; *Whiteside v. Logan*, 7 Mont. 373, 17 Pac. 34; *Briscoe v. McCaffery*, 8 Mont. 336, 20 Pac. 691; *Thomas v. Chambers*, 14 Mont. 423, 36 Pac. 814; *City of Helena v. Brule*, 15 Mont. 429, 39 Pac. 456, 852; *Chambers v. City of Butte*, 16 Mont. 90, 40 Pac. 71; *Herbst Importing Co. v. Hogan*, 16 Mont. 384, 41 Pac. 135; *Blaine v. Briscoe*, 16 Mont. 582, 41 Pac. 1002; *Morse v. Callantine*, 19 Mont. 87, 47 Pac. 635; *Butte Butchering Co. v. Clarke*, 19 Mont. 306, 48 Pac. 303; *Eakins v. Kemper*, 21 Mont. 160, 53 Pac. 810; *Collier v. Fitzpatrick*, 22 Mont. 553, 57 Pac. 181; *Greene v. Montana Brewing Co.*, 32 Mont. 102, 79

Pac. 693; Jones v. Jones, 37 Mont. 155, 94 Pac. 1056; Pengelly v. Peeler, 39 Mont. 26, 101 Pac. 147; Brown v. Weinstein, 40 Mont. 202, 105 Pac. 730.

The statute provides that the court may relieve a party from a judgment taken against him, through his mistake, inadvertence, surprise, or excusable neglect. There was no mistake, inadvertence, or surprise in the case at bar. The attorney, in the exercise of his professional judgment, determined that there was no necessity for appearing in the main action, until the day set for hearing a motion to dissolve the preliminary injunction, 29 days after service of the summons. We are not advised as to why it was thought his clients might then be in default, if they were not so before. No attempt was made to comply with the plain mandate of the summons, the direction therein was wholly disregarded, and the only appearance, if there were any, was in an ancillary proceeding and for the purpose of relieving the defendants of a burden which was immediately affecting them. Mr. Henry Campbell Black, in his article on Judgments, found in 23 Cyc., at page 939, says: "A party cannot be relieved from a judgment taken against him in consequence of the legal ignorance or mistake of his counsel, whether it concerns the rights or duties of the client, the legal effect of the facts in the case, or the rules of procedure." See, also, Scilley v. Babcock, 39 Mont. 536, 104 Pac. 677; Hancock v. Pico, 40 Cal. 153. We think the trial court cannot be put in error for refusing to set aside this default judgment.

There is another good and sufficient reason why it should not be interfered with. Nowhere does it appear that the defendants have a meritorious defense to the action. This court, in Donnelly v. Clark, supra, quoted with approval the language of the Supreme Court of California, in Parrott v. Den, 34 Cal. 81, as follows: "Every consideration of expediency and justice is opposed to the opening up of cases in which judgment by default has been entered, unless it be made to appear prima facie that the judgment, as it stands, is unjust." This court then continued: "How could it be made to so appear, unless the nature of the defense is disclosed? The defendants do not come with an answer showing a defense, and while this may not be necessary, it is the better practice." These defendants have never tendered an answer, although abundant opportunity to do so has been afforded. Instead, they have twice asked for additional time. The affidavits filed fall far short of disclosing a meritorious defense, or any defense. The plaintiff in his complaint sets forth his claims specifically. He alleges that he is the owner of certain described arid lands; that on June 28, 1909, he appropriated, for use thereon, 7,000 miners' inches of the waters of Thompson river, and

he exhibits a copy of his notice of appropriation; he also alleges that he "proceeded diligently to prosecute by excavation and construction the work of creating and building a reservoir, a dam and dam site, ditches, and other necessary aqueducts, by and through which the said amount of water so appropriated shall be stored, conveyed, and used for the irrigation of said lands"; that he has made application to the federal authorities "for the said reservoir, dam, and aqueduct rights, together with the right to cut, use, and destroy such timber as may be necessary to the completion of the work"; that he has had true surveys and maps made and filed with the proper authorities of the United States, and has made payment for said sites and rights of way, together with all timber and material necessary to be used or destroyed. He then alleges that his appropriation of water is prior in time and right to any claim of the defendants. We also find this allegation: "That the defendant Thompson Falls Copper & Milling Company, its servants and employes, and each and all of the other defendants herein, their servants and employes, without right or authority, have unlawfully and wrongfully, and against the will and in violation of the orders of plaintiff, gone into and are now in possession of the lands and premises last above described; that they are, and ever since the 11th day of August, A. D. 1909, have been in possession thereof; that they are digging, excavating, and tearing up the said lands and premises, and thereby rendering them unfit and useless to plaintiff in the said uses and purposes aforesaid, in that they are attempting to, threatening to, and unless restrained will, take out, use, and divert the waters of said stream or river above the said point of diversion and sites of this plaintiff, and thereby and by means thereof will despoil and ruin and render nugatory all the rights of this plaintiff hereinbefore mentioned and enumerated."

The affidavit of Wenham sets forth that the defendant corporation has a good and meritorious defense to plaintiff's cause of action; that it has property and property rights involved of enormous value; that it is hindered in the operation of its mines and mining properties, of great value, by reason of the judgment; that irreparable loss and injury is being inflicted upon it by virtue of the judgment; that it is the owner of two patented mining claims which are forced to be and remain idle by reason of the judgment; that the mines "are worth and valued, with machinery, appliances, mill, appurtenances, dam, flume, and water right accrued thereto," the sum of \$895,000, and all thereof are forced into continued idleness, disrepair, decay, and loss by reason of the judgment; "that the defendant through and by this affiant asserts, claims, maintains, owns, and operates all the legal rights and actual pos-

session of all water and water rights of and appertaining to the said patented mining claims, meaning and intending thereby to assert, in every way, that the rights of the said Thompson Falls Copper & Milling Company is superior to all and every other right, and that it includes all the water and water rights of and on the Thompson river at the point and place where said company diverts the waters of said river, and that said point and place is above and further up the stream than the point or place where plaintiff in this action claims water and the right to divert water, and that in this respect this affiant is and will be maintained by the original documents of record in Missoula and Sanders counties." In another part of the affidavit we find the statement: "That at the time of the commencement of this action and the issuance of the injunctive order, the said company was then engaged, and had been for almost 30 days prior thereto, in the work of rebuilding and repairing its dam, flume, and other structures for carrying and conveying water to its mines, concentrator, and mine works on the Thompson river," and was in no wise interfering with any rights or alleged rights of the plaintiff.

In his affidavit the attorney alleges that "he verily believes defendants have a good and meritorious defense to each and every cause of action alleged in plaintiff's complaint"; that "the defendant Thompson Falls Copper & Milling Company is deprived by said default and judgment from making needed and necessary repairs on its dam, flume, aqueduct, and water appliances for the purpose of beneficial uses of a water right accrued and vested in it; that plaintiff claims a water right to and in the same stream in and to which defendant Thompson Falls Copper & Milling Company has an accrued and vested water right, paramount and superior to plaintiff."

Included in the judgment are certain findings of fact, one of which is as follows: "(3) That if the defendants or any of them, or the grantors or predecessors in interest of any of them, ever had a valid and existing water right on said river and the right to the use of any of the waters of said river for any purpose or uses whatsoever, said right has been abandoned and forfeited by nonuse, failure to do any work upon said water right, and by a course of conduct which shows a clear intent and purpose to abandon said right to any such water as they or any of them might or may have had."

An analysis of the affidavits filed in behalf of the company discloses that the affiants have industriously refrained from asserting any facts having a tendency to show that the judgment entered is not a just one. The company owns two mining claims "with machinery, appliances, mill, appurtenances, dam, flume, and water right accrued thereto," of enormous value. It asserts, claims, and

operates "all the legal rights and actual possession of all water and water rights of and appertaining to the mining claims," meaning thereby to "assert in every way" that its rights are superior to all others and include all of the water and water rights on Thompson river, "at the point where it diverts the water," which is above the place where plaintiff claims the right of diversion. It does not appear, except by inference, that any of the property of the defendant company had ever been used or operated, except that it is shown by the affidavit of defendant Hurlburt that repairs on the dam, flume, and aqueduct were in active operation at the time of service of the summons, and had been for some weeks prior thereto. Indeed, there is no showing that defendant company is injured by the permanent injunction included in the judgment. It is enjoined from interfering with plaintiff's dam and water right. Its witnesses allege affirmatively that its point of diversion is above that of the plaintiff, and that it has not heretofore interfered with his operations or water rights. Giving the affidavits the most favorable construction, the only claim found therein is that the company requires the water to operate its mill and appurtenances. The water may well be employed for this purpose without interference with plaintiff's rights, so far as the affidavits disclose. After such use it would be the duty of the company to return the water to the stream. We have no means of knowing how far below the mill Donlan's works are situated. In order to move the discretion of the court, defendant should have shown how and in what manner it is injured, and not have confined its allegations to general statements, which are mere conclusions. It has no water right, unless it can and does employ water for some useful and beneficial purpose. What water right does the defendant company claim? Has it any? The only evidence in the affidavits of such right is found in the bald assertion that it exists and is prior to that of plaintiff. The attorney asserts that he believes that the defendant has a water right, but it does not appear that the facts in the case have ever been stated to him by his clients. Wenham claims a water right and invites the court to examine the records of Missoula and Sanders counties to ascertain whether he is not correct in his assertion.

While a general denial will suffice, in a proper case, for an answer within time, something more is required where it is sought to open a default. Defendant must make prima facie showing of a good and valid defense on the merits. This defendant was advised that the district court had found that it had abandoned any water right it may have had. It was advised of the date upon which plaintiff claimed to have initiated his right, and of all particulars appertaining thereto; and it still contented itself with

asking for additional time to answer. As was said by this court in *Schaeffer v. Gold Cord Min. Co.*, 36 Mont. 410, 93 Pac. 344, and again in *Pearce v. Butte Electric Ry. Co.*, 40 Mont. 321, 106 Pac. 563, "A party defendant must support his application by an affidavit of merits setting forth the facts constituting his defense, or tender with his motion and affidavit a copy of his proposed answer." See, also, *Bowen v. Webb*, 34 Mont. 61, 85 Pac. 739.

The order of the district court of Sanders county is affirmed.

Affirmed.

BRANTLY, C. J., concurs. HOLLOWAY, J., having been absent, did not hear the argument and takes no part in the foregoing decision.

(158 Cal. 711)

MILLSAP v. BALFOUR. (Sac. 1,797.)

(Supreme Court of California. Dec. 2, 1910.)

1. APPEAL AND ERROR (§ 1097*)—FORMER DECISIONS—LAW OF THE CASE.

Plaintiff having sued to foreclose a street assessment lien for laying sidewalks, defendant demurred to the complaint, and on appeal from an order sustaining the demurrer the Supreme Court reversed the decision, holding that lots on one side of the street might be lawfully assessed to pay the cost of a sidewalk laid on the opposite side, where it was not shown that a sidewalk had already been laid in front of such lots on the side on which they abutted, when the proceeding was instituted for the walk on the opposite side. *Held* that, it not appearing at the time of such decision that defendant had constructed a walk on his side, such decision on appeal was not the law of the case on a subsequent appeal from judgments enforcing a lien against defendant's lots after a trial on the merits, on which it appeared that defendant had previously constructed a sidewalk in front of his lots, under the rule that a prior decision is the law of the case only so far as the facts are the same.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4358-4361; Dec. Dig. § 1097.*]

2. MUNICIPAL CORPORATIONS (§ 428*)—STREET IMPROVEMENTS—SIDEWALKS—ASSESSMENT—CONSTRUCTION OF WORK BY PROPERTY OWNERS—ASSESSMENT FOR WORK ON OPPOSITE SIDE OF STREET.

Deering's Gen. Laws 1909, p. 1290, § 7, subd. 1, relating to municipal improvements, provides that the expenses incurred shall be assessed on the lots and land fronting thereon except as otherwise specifically provided. Subdivision 8 declares that where work with certain exceptions is done on either or both sides of the center line of any street for a block or less, and further work opposite to the work of the same class already done is ordered to complete the unimproved portion of the street, the assessments to cover the total expense of the work so ordered shall be made on the lots or portions of lots only "fronting" the portions of the work so ordered. Subdivision 10 declares that, when the owner of any lots or land fronting on any street shall have done the work in front of his lot at his own expense, such work will be excepted from the order for the work, and subdivision 11 declares that the lots or portions of lots fronting upon any excepted work

already done shall not be included in the frontage assessment for the class of work from which the assessment is made. *Held* that, where an owner of land on one side of a street on which sidewalks were to be constructed on both sides constructed sidewalks in accordance with the specifications in front of his own property, such property was not subject to assessment for any part of the cost of constructing walks on the other side of the street in front thereof.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 428.*]

Department 1. Appeal from Superior Court, Yolo County; N. A. Hawkins, Judge.

Action by Wirt Millsap against Douglass Balfour. Judgment for plaintiff, and defendant appeals. Reversed.

See, also, 154 Cal. 303, 97 Pac. 668.

Hudson Grant, for appellant. E. B. Merling, City Atty., for respondent.

SHAW, J. Appeal by defendant from a judgment foreclosing the lien of a street assessment made under the act commonly known as the "Vrooman Act." St. 1885, c. 153. The work for which the assessment was levied was the laying of a concrete cement sidewalk five feet wide along the south side of Clover street in the city of Woodland from Westcott street to Walnut street, a distance of six blocks, excepting the portions thereof where concrete cement sidewalks had already been constructed and accepted. Balfour owned a lot abutting Clover street on the north side, fronting thereon for a distance of 186 feet, situated on the northwest corner of First and Clover streets, opposite a part of one of the blocks included in the improvement ordered. The work was ordered by resolution adopted on January 21, 1907. Prior to that date Balfour, at his own expense, had laid a concrete cement sidewalk five feet wide in front of his lot, both on Clover street and on First street. It was laid upon the official grade, it complied with the specifications then required by the city, it was constructed in pursuance of permission from the city council, and on January 21, 1907, it was in perfect order and in a condition satisfactory to the street superintendent of the city. The expenses of the sidewalk on the south side of Clover street as ordered by the council under the Vrooman act, amounted to \$1,179.67. The assessment therefor was made upon each and every lot fronting on Clover street, those on the north side as well as those on the south, from Westcott street to Walnut street, excepting certain lots on the south side in front of which a sidewalk had been previously laid, but including all the lots on the north side, whether a sidewalk had already been laid in front of them or not. The plaintiff's lot was assessed for \$48.54. Judgment of foreclosure for that sum and for costs was given. This case was before this court upon a former appeal by the plaintiff from a judgment for the defendant

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

given upon the sustaining of his demurrer to the complaint. 154 Cal. 303, 97 Pac. 668. The judgment was reversed and the sum of \$22.25 was thereupon taxed in the court below for the said plaintiff's costs upon said appeal. The judgment now appealed from declares that the plaintiff is personally liable for this sum. The defendant contends, upon this appeal, that inasmuch as he had already, at his own expense, laid a sidewalk satisfactory to the street superintendent in front of his lot on the north side of the street, that lot could not be lawfully assessed for the cost of a sidewalk upon the opposite side. He also claims that the part of the judgment declaring him personally liable for the costs of the former appeal is erroneous.

1. Upon the first question the respondent claims that the decision upon the former appeal is the law of the case and is conclusive. The record upon that appeal consisted only of the complaint, the demurrer, and the judgment. There was nothing therein to show that Balfour had previously, or at all, constructed a sidewalk in front of his lot. That decision, so far as it was based on the record before the court, was merely to the effect that lots on one side of a street could be lawfully assessed to pay the cost of a sidewalk laid on the opposite side, where it is not shown that a sidewalk had been already laid in front of such lots at the time the proceeding for the walk on the opposite side was begun. It is not the law of the case except in so far as the facts are the same. *Sharon v. Sharon*, 79 Cal. 654, 22 Pac. 26, 131; *Heidt v. Minor*, 113 Cal. 391, 45 Pac. 700; *Klauber v. San Diego St. Car Co.*, 98 Cal. 107, 32 Pac. 876; *Hibernia, etc., Soc. v. Farnham*, 153 Cal. 583, 96 Pac. 9, 126 Am. St. Rep. 129; *Jacks v. Deering*, 150 Cal. 275, 88 Pac. 909; *Flood v. Templeton*, 152 Cal. 158, 92 Pac. 78, 13 L. R. A. (N. S.) 579; *Ellis v. Witmer*, 148 Cal. 534, 83 Pac. 800. Hence, as the record in the present case does show the fact that Balfour had previously constructed a sidewalk in front of his own lot, the former decision does not control. It has the force of a precedent, so far as it is applicable, but it does not constitute a conclusive adjudication of the law. It is true, counsel for Balfour, in his brief upon that appeal, asserted that he had laid a walk in front of his lot at his own cost, and argued that, under subdivision 11 of section 7 of the Vrooman act, his lot must on that account be excepted from the assessment, and the court, in the opinion deciding the appeal, said that, even if the fact were as asserted, the lot would nevertheless be subject to assessment for half the cost of a walk laid on the opposite side. But this was a statement upon a point not presented in the record, and although it was upon a fact asserted and a point argued by counsel, it was not a decision having binding force as an adjudication of the law of the case. That doctrine does not extend to obiter dicta.

Wixson v. Devine, 80 Cal. 338, 22 Pac. 224; *Oakland v. Carpentier*, 21 Cal. 667; *Gwinn v. Hamilton*, 75 Cal. 266, 17 Pac. 212; *Ventura v. Clay*, 119 Cal. 215, 51 Pac. 189. The question must be decided on its merits, and not upon the theory that it was settled by the former decision. The law upon which the question depends is section 7 of the Vrooman act, as amended in 1891. St. 1891, p. 201; *Deering's General Laws* 1909, p. 1290. The portions of this section which bear upon the question, omitting the irrelevant clauses, are as follows:

Subdivision 1: "The expenses incurred for any work authorized by this act * * * shall be assessed upon the lots and land fronting thereon, except as hereinafter specifically provided; each lot or portion of a lot being separately assessed, in proportion to the frontage, at a rate per front foot sufficient to cover the total expense of the work."

Subdivision 8: "Where any work mentioned in this act (manholes, cesspools, culverts, crosswalks, piling, and capping excepted) is done on either or both sides of the center line of any street for one block or less, and further work opposite to the work of the same class already done is ordered to be done to complete the unimproved portion of said street, the assessment to cover the total expense of said work so ordered shall be made upon the lots or portions of the lots only fronting the portions of the work so ordered."

Subdivision 10: " * * * Whenever any owner or owners of any lots and lands fronting on any street shall have heretofore done, or shall hereafter do, any work (except grading) on such street, in front of any block, at his or their own expense, and the city council shall subsequently order any work to be done of the same class in front of the same block, said work so done at the expense of such owner or owners shall be excepted from the order ordering the work to be done, as provided in subdivision eleven of this act; provided that the work so done at the expense of such owner or owners, shall be upon the official grade, and in condition satisfactory to the street superintendent at the time such order is passed." (Special provisions are made for grading work.)

Subdivision 11: "The city council may include in one resolution of intention and order any of the different kinds of work mentioned in this act, and it may except therefrom any of the work already done upon the street to the official grade. The lots or portions of lots fronting upon said excepted work already done shall not be included in the frontage assessment for the class of work from which the assessment is made."

It appears clear that these provisions forbid the assessment of Balfour's lot for any portion of the expense of the work ordered to be done. He had previously laid a similar walk upon the official grade by permission of

the council, and this walk was in a condition satisfactory to the street superintendent at the time the sidewalk on the opposite side of the street was ordered. The above quoted provisions of subdivision 10 had been literally complied with. The order in question provided in terms that a walk should be constructed "along the south side of Clover street" for the specified distance "excepting such portions of said street as are required to be kept in order by any person or company having railroad tracks thereon, and also excepting such portions thereof where concrete cement sidewalks have already been constructed and accepted."

It may be admitted that the terms of the exception quoted, if construed without reference to the statute, would not cover the lot of Balfour upon the north side of the street, since the order itself was for a walk upon the south side only, and an exception of "portions" of that side would not exempt a lot on the north side. But the purpose of the exception in the order must have been to comply with the provisions of the statute on the subject, and it should be given that effect, if reasonably possible. And even if the exception does not, under any possible construction, include the plaintiff's lot, the law would nevertheless control, and if the facts are such as to bring the lot within the exemption of the statute, it would not be liable for any part of the cost of the walk, although not expressly excluded by the terms of the order.

Balfour had complied with the provisions of subdivisions 10 and 11, and was entitled to exemption thereunder, unless those provisions, so far as sidewalks are concerned, are intended to apply only in cases where the walk subsequently ordered is upon the same side of the street as that upon which the walk is already, in part, laid. But in view of the other provisions of the act, this could not possibly have been intended. At all events, if it was so intended, the effect would be that the law, as to such cases, would not be uniform in its operation, would work unequally, unfairly and unjustly, and it would therefore be unconstitutional. An intent to make an unconstitutional law is not to be imputed to the Legislature unless no other interpretation is reasonably possible. If the statute means this, then Balfour, and every person similarly situated, after having paid the whole cost of a walk in front of his lot on the side it abuts, will be compelled to pay one-half of the walk ordered to be laid on the opposite side of the street in front of the opposite lot, while the owner of the opposite lot will be obliged to pay only one-half of the cost of the walk on which his lot abuts and nothing for the opposite walk, or if we concede that such owner of the opposite lot might be assessed for one-half of the cost of a walk to complete the improvement on Balfour's side, whenever such completion is ordered, still he would

pay only one-half thereof, and the sum of his payments would only equal the cost of one walk for the length of his frontage, whereas Balfour, if he is not now exempt, will have to pay one and a half times the cost of a walk of that length. In other words, when the sidewalk is laid on both sides of the street, the man who has laid it in front of his own lot, at his own expense, before any proceedings are begun, will have paid three-fourths of the total cost of his frontage, while his neighbor opposite will have paid only one-fourth. A law which would cause this result would not operate uniformly on persons similarly situated with respect to it, and to that extent it would be invalid.

It is not necessary, however, to give it a construction which would have this effect. Of course, if we should hold that, under the first subdivision above quoted, where a sidewalk is ordered on only one side of a street, the whole cost thereof is to be assessed against the lots on that side only, the question here presented could not arise. The former decision in this case, being the "law of the case" to the extent that both sides may be assessed, where no walk is already laid on the opposite side, we are bound to accept that rule, so far as the present decision is concerned. But if we concede, as we must under that decision, that in the case of a sidewalk on one side only of a street, the lots on the opposite side are to be considered as "fronting thereon" and consequently are to be assessed therefor according to such frontage, under the provisions of subdivision 1, then we must carry this meaning into the other portions of the section relating to the same subject. In this view, a lot fronting on either side is to be considered as fronting upon the whole street and assessable for a sidewalk upon the opposite side, equally with those on the side where it is laid. The necessary consequence is that where, in the part of subdivision 10 above quoted, the statute speaks of an owner of land "fronting on any street," who shall do any work (which includes a sidewalk) "in front of any block," and then refers to similar work afterwards ordered "in front of the same block," it must be understood to include a sidewalk subsequently ordered on the side opposite to the lot of such owner, as well as one on the same side. Likewise, in subdivision 11 the provision that the lots "fronting upon said excepted work already done shall not be included in the frontage assessment, for the work" subsequently ordered, must, in the case of a sidewalk, mean a lot on the side opposite to the side on which the walk is ordered, as well as a lot on the same side. If the lots across the street from a sidewalk ordered are to be considered as "fronting thereon"—that is, on that work, for the purposes of assessment for the cost thereof—then, under subdivisions 10 and 11, such sidewalk ordered must be considered as "in

front of the same block," and the work already done by the owner on the opposite side, must also be deemed to be work "in front" of the block on which the work is ordered, for the purpose of the exemption provided by the last-mentioned subdivisions. In contemplation of the statute the sidewalks on both sides of a street comprise the entire work of that class upon that street, and one who has properly performed at his own expense any part of such entire improvement is to be given credit for that much of the entire work by the exemption. Thus construed, the statute does not authorize any assessment upon Balfour's lot for the sidewalk ordered and laid on the side across the street opposite thereto, in front of which he had already laid a walk. We think it should receive the construction above stated, and that no other would be reasonable or constitutional.

Possibly the same result would be brought about by subdivision 8 if it is applicable to the case. In this case the sidewalk ordered extended over several blocks, while the sidewalk previously laid by Balfour on the side opposite thereto was for less than one block. *San Diego Inv. Co. v. Shaw*, 129 Cal. 275, 61 Pac. 1083, involved the work of grading a street to the official grade, on the east side of the center line thereof, for a distance of 17 blocks. The whole cost was assessed exclusively upon the lots fronting on the east side. The defendant owned one lot on that side. It did not appear that the grading on the west side had been already done. The court said, "The work was not done on one block or less, opposite work of the same class already done," and for that reason subdivision 8 was held not applicable, whether because the work ordered was for more than one block, or because no work had been already done on the opposite side, is not made clear, but from the language of the subdivision it must have been for the latter reason. The exemption of this subdivision, by its terms, applies to a lot on one side of a street in front of which a particular class of work is already done, "for one block or less," where further work of that class on the opposite side thereto is afterward ordered to be done, although the "further work" may extend to more than one block, and so far it undoubtedly includes the case of Balfour. The additional condition is imposed, however, that such "further work" must be "ordered to be done to complete the unimproved portion of said street." As the sidewalk here ordered was for one side only, and that the side opposite to Balfour's lot, it would not, of itself, entirely complete the sidewalk of the street for the entire length of the work ordered, but only one side thereof. But that is not what is meant by this subdivision, as applied to sidewalks. If it were, it would not apply to sidewalks at all, except where the "further work" ordered extended only the same distance along the

street as the work already done opposite, or where it included both sides for the same block, at least. We cannot suppose that this limited application was the one intended. It would be an extremely rare occurrence, and the protection of the exemption could be easily evaded in most instances by extending the further work to a greater distance and improving each side by separate proceedings. Nor is there any necessity for giving it this effect. The words "to complete the unimproved portion of said street" may reasonably be held to refer to that section of the street in front of the work already done. If the work ordered has the effect, in connection with that already done, to complete the whole street for that section thereof, so far as that class of work is concerned, then the case comes within the protection of the statute, and the lot in front of which the work is already done is exempt. In such case the assessment upon the lots fronting upon that section must be upon those fronting directly upon the work ordered; that is, upon the same side of such section. In this way the exemption will apply to all cases, and only in this way can substantial justice always be done, under this subdivision.

For these reasons, we conclude that Balfour's lot, upon the facts found, was not liable for any part of the cost of the work ordered to be constructed and that the assessment thereof was unauthorized and invalid. As this will require a reversal of the judgment, it is unnecessary to consider the clause therein declaring him personally liable for the costs of the former appeal.

The judgment is reversed.

I concur: ANGELLOTTI, J.

I concur in the judgment: SLOSS, J.

(158 Cal. 720)

MILLSAP v. WILBUR. (Sac. 1,783.)

(Supreme Court of California. Dec. 2, 1910.)

Department 1. Appeal from Superior Court, Yolo County; N. A. Hawkins, Judge.

Action by Wirt Millsap against W. P. Wilbur. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

E. B. Mering, for appellant. Hudson Grant, for respondent.

SHAW, J. This is an appeal by the plaintiff from a judgment refusing to allow him a lien upon the lot of the defendant under a street assessment.

The proceeding in which the assessment was levied was the same as that considered in the case of *Millsap v. Balfour* (Sac. 1,797, decided simultaneously herewith) 112 Pac. 450. The findings in this case show that the improvement ordered consisted of the construction of a concrete cement sidewalk along the south side of Clover street from Wescott street to Walnut street in the city of Woodland, crossing First, Second, Third, Fourth and College streets, and that the defendant Wilbur owned a lot on the north side of said street between Second and Third streets. It further showed that prior to

the passage of the resolution of intention to make this improvement the city had given notice to the property owners along the line of the street on each side thereof, that it intended to proceed to cause sidewalks to be constructed thereon, and gave them until October 1, 1905, within which to do the work in accordance with the directions of the city officials, and that in pursuance of this notice and order the defendant Wilbur and the other owners of the lots fronting on said street between First street and Third street had caused such sidewalks to be constructed on both sides of said street for the entire length of the said blocks. The assessment in question was levied upon all the lots fronting on said street between Walnut street and Wescott street, excepting those on the south side of the two blocks aforesaid upon which sidewalks had been already constructed, but including those on the north side thereof. The rate of assessment was \$.2611 per front foot, and the portion assessed upon the lot of Wilbur was \$48.54. The court below concluded that the lots upon the north side of these two blocks could not be assessed for this improvement, and denied the plaintiff any relief.

These facts bring the case within the principle laid down in the decision of *Millsap v. Balfour* above mentioned.

Upon the authority of that decision the judgment is affirmed.

I concur: ANGELLOTTI, J.

I concur in the judgment: SLOSS, J.

(158 Cal. 567)

ALASKA SALMON CO. v. STANDARD BOX CO. (S. F. 5308.)

(Supreme Court of California. Nov. 18, 1910. On Rehearing in Bank, Dec. 17, 1910.)

1. FRAUDS, STATUTE OF (§ 146*)—PLEADING CONTRACT WITHIN STATUTE.

The complaint in an action on a contract need not allege it was in writing, as required by the statute of frauds; but that it was is to be presumed, and defendant relying on the statute against the complaint must plead it.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 352-354; Dec. Dig. § 146.*]

2. CORPORATIONS (§ 519*)—ACTIONS—COMPLIANCE WITH LICENSE LAW—BURDEN OF PROOF.

That plaintiff, admitted by the answer to be a corporation and engaged in business as such, has failed to comply with the corporation license law, and so is not entitled to maintain the action, is matter of affirmative defense.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 2093; Dec. Dig. § 519.*]

3. SALES (§ 99*)—TERMINATION OF CONTRACT—DELIVERY IN INSTALLMENTS—FAILURE TO PAY FOR INSTALLMENT ON DELIVERY.

Though a contract to manufacture and deliver boxes in installments contemplates payment for each installment as delivered, mere failure to pay for an installment when delivered is not a violation of the contract, which avoids it, refusal to pay for them being justified by an insufficient number being delivered, those delivered being of inferior quality, and there being then insufficient time to count and inspect them.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. § 264; Dec. Dig. § 99.*]

4. SALES (§ 108*)—TERMINATION OF CONTRACT—ACTS CONSTITUTING RESCISSION.

Defendant contracted to manufacture and deliver to plaintiff 100,000 boxes in which to

pack canned salmon, 50,000 to be delivered in the first week of April of a certain year, shortly after which, as it was understood, plaintiff's vessel would take them to its canning factory in Alaska; the other 50,000 to be delivered at the same time the next year, each delivery to be paid for as made. Defendant delivered less than 50,000 boxes in time to be taken on the vessel, and those delivered, as noted by plaintiff, and made known to defendant, during delivery, were not up to quality. Held that, as it would have been difficult, if not impossible, to replace them if any were rejected, and the time for inspection being short, and it being plaintiff's duty to minimize the damages, it was justified in taking on board those furnished, and refusing to pay till the damages were determined, so that the contract was not avoided thereby; and there having been an adjustment of the difference by arbitration, and a payment of the award, and defendant not having treated the contract as abrogated, till plaintiff demanded delivery of the remaining boxes for the following year, plaintiff could recover for failure to deliver them.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. § 277; Dec. Dig. § 108.*]

5. SALES (§ 417*)—ACTION BY BUYER—FAILURE TO DELIVER GOODS—PROOF OF PLAINTIFF'S ABILITY TO PERFORM.

Plaintiff, suing for breach of defendant's contract to manufacture boxes and deliver them to it, sufficiently proves that it was ready, able, and willing to perform, where its insolvency is not charged, and the defense is not based on its inability by the fact that defendant's refusal to furnish the boxes involved no question of plaintiff's ability, but arose simply from defendant's demand that new terms, conditions, and price be fixed, the price of such boxes having risen.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. § 1173; Dec. Dig. § 417.*]

6. SALES (§ 418*)—ACTION BY BUYER—FAILURE TO DELIVER GOODS—DAMAGES.

Notwithstanding Civ. Code, § 3354, providing that in estimating damages, the value of property to a buyer, deprived of its possession, is the price at which he might have bought an equivalent in the market nearest to the place where the property ought to have been put in his possession, a purchaser can recover of a seller, who refuses to deliver, the difference between the contract price and what is thereafter paid for a like article in a distant market, the amount paid being less than the price at any market nearer the place at which the seller was to deliver.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 1174-1201; Dec. Dig. § 418.*]

7. TRIAL (§ 252*)—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

Refusal of an instruction as to a state of facts different from that shown by the evidence is proper.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 596; Dec. Dig. § 252.*]

On Rehearing.

8. SALES (§ 411*)—REMEDY OF BUYER—BREACH OF CONTRACT—CONSIDERATION—PLEADING.

Where the complaint in an action for breach of defendant's contract to manufacture and deliver boxes alleges that plaintiff was to pay for the boxes "the price called for by the contract," there is not an absence of allegation of consideration, but, at worst, a defective allegation thereof, to which a special demurrer should be addressed; and it is good in the absence of demurrer.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. § 1161; Dec. Dig. § 411.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

9. CORPORATIONS (§ 519*)—PAYMENT OF LICENSE TAX—PLEADING—NEGATIVE ALLEGATION—BURDEN OF PROOF.

Under Code Civ. Proc. § 1809, requiring proof in support of a negative allegation, when such allegation is an essential part of the statement of the right or title on which the cause of action or defense is founded, defendant, for special defense having pleaded nonpayment by plaintiff of the corporation license tax, has the burden of proof.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2093; Dec. Dig. § 519.*]

10. CORPORATIONS (§ 592*)—FORFEITURE OF FRANCHISE—DESTRUCTION OF EXISTENCE—NONPAYMENT OF LICENSE TAX.

There is not a forfeiture resulting in the destruction of a corporation's existence from its mere failure to pay the corporation license tax; but coupled therewith must be the performance by the Secretary of the State and the Governor of the acts of proclaiming the forfeiture required to be performed by them.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2373, 2396; Dec. Dig. § 592.*]

Department 2. Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by the Alaska Salmon Company against the Standard Box Company. Judgment for plaintiff, and defendant appeals. Affirmed.

P. L. Benjamin, for appellant. Chickering & Gregory, for respondent.

HENSHAW, J. The action was for damages for breach of contract. The case was tried before a jury, whose verdict was given for plaintiff. From the judgment which followed and from the order of the court denying defendant's motion for a new trial, it appeals.

The complaint charged that in October, 1905, plaintiff and defendant entered into a contract whereby defendant agreed to manufacture for plaintiff 100,000 wooden boxes, to be delivered during the canning seasons of 1906 and 1907 as called for by plaintiff for its use in the business of manufacturing and selling canned salmon. Defendant supplied plaintiff for the canning season of 1906 with 44,000 boxes, and plaintiff prior to the commencement of the canning season of 1907 demanded of defendant that it furnish the remaining boxes, to wit, 56,000, for use during the canning season of 1907. It is alleged that plaintiff has always been ready and willing to receive the said 56,000 boxes, and to pay for them at the price called for by said contract and in accordance with the terms thereof, but that defendant has refused to deliver the boxes, whereby plaintiff has been damaged in the sum of \$3,920. The answer was by general denial, and for a special defense it is alleged "that the plaintiff is and for more than three years last past has been a corporation, organized, existing, and doing business under and by virtue of the laws of the state of California";

that plaintiff has at all times since its incorporation wholly failed to comply with the provisions of the act imposing a license tax upon corporations, and has wholly failed to pay the license or any of the licenses required by this act. The jury's verdict was for \$3,640.30.

1. It is asserted that the complaint wholly fails to state a cause of action because it does not allege that the contract of October was in writing. The law will presume the contract to be valid and not invalid, and thus, where required by the statute of frauds, will presume it to be evidenced by writing. *Nunez v. Morgan*, 77 Cal. 427, 19 Pac. 753; *Bradford Investment Co. v. Joost*, 117 Cal. 204, 48 Pac. 1083. If the defendant relies upon the statute of frauds against such a complaint he must plead it. *Broder v. Conklin*, 77 Cal. 330, 19 Pac. 513. Moreover, the execution of the contract was not denied and in the answer the written agreement is expressly set out in a counterclaim for damages; and, finally, the contract was, in fact, in writing, and was proved and legally evidenced by an interchange of business letters between the two corporations.

2. It is argued that, because plaintiff did not affirmatively show the payment by it of the license tax required, it cannot be permitted to maintain this action. It will be remembered that the defense pleaded such nonpayment by plaintiff, but no evidence was introduced in support of the plea. The answer itself avers that the plaintiff is a corporation and is engaged in business as a corporation. This is an admission of the plaintiff's corporate capacity to sue, and is a waiver of the proof contemplated by section 297 of the Civil Code to the effect that a certified copy of the articles of incorporation "must be received in all the courts of this state and in other places as prima facie evidence of the facts therein stated." The corporate existence and general capacity of the plaintiff thus being established by the admission of the pleadings, it was matter of affirmative defense for the box company to have shown the extraneous fact that plaintiff had failed to comply with the corporation license tax law, and therefore should not be permitted to proceed further. The burden of proving a negative thus being cast upon the defendant only slight evidence would be required. But, as has been said, defendant never undertook to furnish any evidence at all, and here rests merely upon the proposition that every corporation must itself affirmatively show a compliance with the corporation license tax act before being permitted to prosecute an action. This view of the law, for the reasons given, cannot be upheld.

3. To the better understanding of the other propositions advanced by appellant, compre-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

hension of the facts becomes necessary. Plaintiff is engaged in the business of canning salmon in distant Alaska. It sends its ships equipped with the necessary supplies to its canneries. Its success for any year is absolutely dependent upon its ability to have its men and supplies at its canneries in time to handle the salmon run. It was important, therefore, that its supplies should be on board the ship, and the ship started for the Arctic as early as practicable. As part of its supplies it required for the years 1906 and 1907 each 50,000 wooden boxes in which were to be packed the tins of salmon. These boxes the defendant undertook to furnish, "50,000 to be delivered f. o. b. ship at wharf in San Francisco during the first week of April, 1906," and 50,000 to be delivered at the same time in 1907. "Boxes to be of standard size and quality, guaranteed to be perfectly dry. The price of shook 10½c. each; cases nailed up 12½c. each, all cash less 2 per cent." In fact, defendant did not deliver all of the first lot of 50,000 boxes, and complaint was made by plaintiff to defendant both of the shortage and of the quality of the boxes which it actually delivered, in that they were wet and not dry. The effect of the wet boxes would be to rust the tin cans of salmon and so impair the value of the pack. The ship started north on April 12th and demand for payment was made by defendant upon plaintiff for the boxes already delivered. The earthquake and fire with the consequent confusion and disturbance of all business occurred on April 18th. Plaintiff insisted that the payment should be made only after adjustment because of the inferior quality of the boxes, and the failure to furnish the full 50,000 contracted for. Finally an agreement was reached, evidenced by a writing signed by the Standard Box Company, to the effect that upon the payment of \$3,000 by plaintiff the box company would leave a balance which it claimed to be due of \$1,175.57 in the hands of plaintiff "until such time that the ship Big Bonanza arrives from the north at about September next, when you can ascertain damage sustained, if any, on account of delivery not being in accordance with contract dated October 26, 1905. Also on account of quality which you claim to be below standard, and we hereby appoint James Madison the sole arbitrator in this matter, and his decision to be final and binding upon this company." The plaintiff then paid the \$3,000 and James Madison, upon his return, declared that there was \$754.40 still due to defendant, the remainder being deducted for damages. Upon October 6, 1906, defendant was paid this \$754.40 in full satisfaction of its claim, and defendant receipted without protest, never intimated its dissatisfaction with the settlement or its desire to terminate the contract. Subsequently, on February 19, 1907, plaintiff made demand for the 56,000 boxes for the year 1907 to be

delivered during the first week in April in accordance with the contract. Then, for the first time, on February 20th the box company replied: "As to cutting your order for 56,000 cases, we would say that if we can agree upon new terms and conditions and prices we are willing to fill same, as we consider your treatment of us an abrogation of your contract, in withholding our money for such a long time." Upon this refusal plaintiff bought boxes from a northern box factory in Astoria, Or., and lays damages for the difference between the defendant's contract price and the price which it was thus compelled to pay.

It was not error for the court to refuse to instruct the jury as requested by defendant to the following effect: "As a matter of law, the contract in this case required payment to be made by plaintiff for each lot of boxes delivered, as the same should be delivered, or, at the very latest, upon the collection day following each lot of deliveries, and it was the duty of the plaintiff to pay the defendant at the very latest on April 13, 1906, if that was a collection day, the amount due for all boxes delivered by collection day; I mean, of course, collection day as known to the business world generally in San Francisco." Such instruction would have made it mandatory for the jury to find that the failure or refusal of plaintiff to pay for all the delivered boxes on April 13th was a violation of the contract, notwithstanding the fact that the refusal to pay might have been fully and completely justified by a delivery of an insufficient and inferior quantity without opportunity for counting and inspection. There is no question but that this contract contemplated a cash payment. It is equally true that it contemplated delivery in the first week in April, a delivery which defendant did not make. The defendant was aware that the boxes were to go north on ship-board under the circumstances noted. The general line of cases to the effect that it is the duty of plaintiff to inspect goods when delivered and reject them if not up to specification, and that the plaintiff cannot accept goods in part and reject them in part, and that having kept the goods it is too late for plaintiff to contend that they did not conform to the contract, are none of them apposite. Each case must be governed by its conditions and facts. A plaintiff, where a defendant has violated his contract, is charged with the general duty of doing every reasonable thing to minimize his own loss and thus reduce the damages for which defendant has become liable by his breach. The time for examination was extremely short. Whatever goods were rejected as not up to quality involved in their rejection trouble and difficulty, if not absolute inability, for their replacement. Plaintiff was, therefore, justified in doing as it did, namely, taking on board the boxes furnished, even though

deficient in number and not up to standard in quality. That they were of inferior quality was noted by plaintiff and made known to defendant during delivery. Under these circumstances, the instruction actually given by the court was all that defendant was entitled to ask. It was as follows: "When a contract for the manufacture and delivery of certain goods provides for the payment of the contract price in installments as the goods are delivered, it is the duty of the party who is to pay for the goods to pay each installment as required by the contract; and if when, under the contract, an installment becomes due, the party who is to pay refuses or fails to pay such installment, the other party to the contract has the right to cease the manufacture and delivery of the goods, and to consider the contract at an end; and the other party to the contract who has so failed to make payment of an installment, when the same became due, cannot, under such circumstances, complain of the refusal of the contractor to proceed further with the manufacture and delivery of the goods, and cannot maintain any action against the contractor for damages because of such refusal of the contractor to proceed with the manufacture and delivery of the goods."

4. The contract was not terminated before this action was brought. The argument herein seems to be based upon the law of the preceding rejected instruction, that the failure to pay upon delivery operated to avoid the contract. But neither then nor thereafter, until its letter of February, 1907, did defendant ever treat the contract as abrogated, annulled, or rescinded. It never gave notice of rescission. To the contrary, it entered into an arbitration agreement for the adjustment of its differences with the plaintiff under the contract. Regardless of the question as to whether or not that arbitration agreement was in strict legal form, it was accepted by both parties, and fully executed by the judgment of the arbitrator and by the payment and acceptance of his award, without sign of protest from either party.

5. It is contended that plaintiff failed to prove that it was ready, able, and willing to perform the contract on its part. Such proof is, of course, required. *Barron v. Frink*, 30 Cal. 486; *McGehee v. Hill*, 4 Port. (Ala.) 170, 29 Am. Dec. 277; *Grandy v. McCleese*, 47 N. C. 142. But where the insolvency of plaintiff is not charged, and where the defense is not in any way based upon such inability, very slight proof will fill the requirement. The complaint alleged that the plaintiff has always been ready and willing to receive the 56,000 boxes and pay for them under the contract. No question in the case arose over any previous inability of the plaintiff to pay. To the contrary, it plainly appears by defendant's letter of February 20th that its refusal to furnish the boxes involved no question of plaintiff's ability, but arose sim-

ply from the defendant's demand that new terms, conditions, and price be fixed. The price of such boxes at this time had risen. We hold the evidence to have been sufficient.

6. The court instructed the jury to the following effect: "The plaintiff claims to have paid 7 cents in excess of this contract price, for each box of the remaining 56,140, making \$3,920, and, if you find that it did make such payment, then plaintiff is entitled to a judgment for this amount, unless the contract was, by some act or omission of the plaintiff, rescinded or terminated." It is contended that this instruction does violence to the provisions of section 3354 of the Civil Code, to the effect that, in estimating damages, the value is deemed to be the price at which one might have bought an equivalent thing in the market nearest to the place where the property ought to have been put in his possession. It is claimed that a purchase from the Astoria Box Factory was not a purchase in the nearest place, and that the purchase by plaintiff of the boxes at seven cents advance of the contract price in no way tended to show the market value. Still further it is said that the boxes for which plaintiff paid the advanced price were not the kind and quality of boxes called for by the contract, but were better boxes, of better material. The evidence on the last point is that the boxes "were the same boxes called for by the contract here, only much better boxes and better material," which is fairly open to the construction that what the witness meant to convey was that the boxes were of the same size and standard make, and general quality, but that the boxes which they received from the Astoria factory were of better material and workmanship. It is in evidence, moreover, that the price obtained from the Astoria Box Company was the cheapest price for which the plaintiff could get the boxes from any one anywhere. The bids of the San Francisco box companies were higher, and therefore if plaintiff had bought the boxes in San Francisco, defendant's damage would have been greater. The provision for the purchase of property in the market "nearest to the place" is a provision designed wholly for the protection and benefit of the vendor in default. It is to prevent any exorbitant or extortionate charge being made against him by the unnecessary purchase of the goods in a distant or foreign market. But where, as here, it is shown that the damages for which defendant was liable were decreased, and the consequent award against him lessened by the purchase in a northern market it will not be said that the purchase was to his injury or in violation of the law.

7. The plaintiff clearly showed that it had sustained damage, and from all that has been said it is apparent that the court was justified in refusing an instruction to the jury to the effect that it was the duty of the plaintiff to have accepted the full quantity

of 50,000 boxes if they were delivered on the wharf before the vessel put out into the stream. No evidence sustains the proposition that the 50,000 boxes were in fact delivered at the wharf. Indeed, it appears that the delivery of the final boxes to complete the 50,000 was made after the ship had left. The contract called for delivery in the first week in April. Defendants were engaged in supplying other ships, the time was extended to the 12th, and when the ship put forth into the stream delivery then was not completed.

For these reasons the judgment and order appealed from are affirmed.

We concur: LORIGAN, J.; MELVIN, J.

On Rehearing.

In Bank.

PER CURIAM. 1. In the petition for a rehearing, it is urged that this court misconceived the position of appellant, which is that the complaint did not state a cause of action in failing to allege that the contract was in writing, and in failing to allege any consideration for the agreement which it pleads that defendant entered into. Except for the petition for rehearing, it would have been regarded as unnecessary to say that no demurrer was interposed to the complaint, either general or special, and that the complaint does allege that plaintiff has always been ready and willing "to receive the said 50,000 boxes, and to pay for them at the price called for by said contract and in accordance with the terms thereof." However defective this allegation might be regarded as an allegation of consideration under the attack of a special demurrer, in the absence of either general or special demurrer, a cause of action is sufficiently stated. In *Moore v. Waddle*, 34 Cal. 145, discussion was had with reference to a demurrer which was therein interposed to the sufficiency of the complaint. It was pointed out that under the common-law rules of pleading a consideration was imported only to an instrument under seal. It was held that the contract sued upon was sealed, and that therefore the ground of demurrer was not well taken. The same is true of *Acheson v. Western Union Tel. Co.*, 96 Cal. 641, 31 Pac. 583. There, too, demurrer was interposed to the complaint. Here, as has been said, no demurrer was interposed to the complaint. There is an allegation in the complaint to the effect that plaintiff was to pay for the boxes "the price called for by the contract." There was therefore not an absence of allegation of consideration, but, at the worst, a defective allegation of consideration to which a special demurrer should have been but was not addressed.

2. Defendant for special defense pleaded the nonpayment of the corporation license tax. It offered no word of evidence in sup-

port of this defense, but argues upon appeal that because it tendered this defense it became incumbent upon the plaintiff to prove, upon its part, the payment of the tax. This in direct denial of the Code declaration to the effect that while evidence need not be given in support of a negative allegation generally, it must be given "when such negative allegation is an essential part of the statement of the right or title on which the cause of action or defense is founded." Code Civ. Proc. 1869. Here was a defense wholly based upon the negative allegation of nonpayment. It was incumbent upon the defendant to support such a defense by some evidence, and, from the nature of the defense such evidence was easily procurable. It is meaningless to cite cases where the courts have held as to certain negative averments that proof is not necessary. The Code provision covers the whole matter. *Byers v. Bourret*, 64 Cal. 73, 28 Pac. 61, is not in point. The discussion there was not directed to the burden of proof. Issue was joined upon the plea in abatement that plaintiffs had not complied with the provisions of 2466 and 2468 of the Civil Code relating to partnerships, and the court made findings thereon. The discussion in this court was upon the sufficiency of the findings to support the judgment. What it said as to the duty of the plaintiffs "to have shown that the certificate had been filed and published once a week for four successive weeks before the commencement of the action" had reference not at all to the burden of proof, but to the fact that by the evidence which they introduced they failed to establish a compliance with the law. As little in point is *Sweeney v. Stanford*, 67 Cal. 635, 8 Pac. 444. There, upon its face, the complaint showed that plaintiffs were partners doing business under a designation which did not show the names of the partners. This made it incumbent upon the plaintiffs to plead that they had filed a certificate as required by section 2468 of the Civil Code. They did so plead. The allegation as to the filing of the certificate was denied by the answer. The certificate which was offered in evidence did not comply with the statute. It was held that since the complaint showed that plaintiffs were doing business as copartners under a designation which did not show the names of the persons, the allegation of compliance with the provisions of the Code was essential to the sufficiency of the complaint, and that plaintiffs could not recover without proving it. In the present case no such question is involved. The same is true of *Bank of British North America v. Alaska Imp. Co.*, 97 Cal. 28, 31 Pac. 726. The law required a foreign bank doing business in California to publish certain statements as a prerequisite to their right to maintain or prosecute any action or proceeding in any of the courts of the state. The answer averred that plaintiffs had not complied with certain provisions of that act. The court's findings were, in effect, that the

plaintiffs had sufficiently complied with the law. Here, again, was no discussion of the burden of proof, this court determining merely that the evidence offered by plaintiff in support of the finding that it had complied with the law was insufficient, and therefore reversed the judgment. It may thus be seen that not only are none of these cases in point, but it may be added that the pleading of the special defense is wholly insufficient to show that a forfeiture was worked by failure to pay the license tax. Manifestly, if a forfeiture did not result, plaintiff's corporate capacity still existed. The allegation of the defense is merely that the plaintiff has "wholly failed to comply with the provisions or any provisions of the act of the Legislature" relating to the license tax upon corporations, and "has wholly failed to pay the license or any of the licenses required to be paid by the provisions of the said act." But a casual inspection of the act itself and of the decision of this court in *Kaiser Land & Fruit Co. v. Curry*, 155 Cal. 638, 103 Pac. 341, will disclose to the legal mind that the forfeiture which destroys the corporate existence does not result from a failure to pay the license tax, but results from a failure to pay the license tax, coupled with the further fact "that the acts required to be performed by the Secretary of State and the Governor (proclaiming the forfeiture) shall have been performed in the manner required." *Kaiser Land & Fruit Co. v. Curry*, supra, page 654 of 155 Cal., page 347 of 103 Pac. Without the performance of such acts, the forfeiture does not result, and the pleading is wholly insufficient by reason of its failure to aver their due performance. The absence of merit in this petition is thus shown. Petitioner seems to have undertaken to supply this lack of merit by disrespectful vehemence.

It is therefore ordered that the petition for rehearing be denied, and that the petition itself be stricken from the files of this court.

(158 Cal. 579)

PENNEBAKER et al. v. SAN JOAQUIN LIGHT & POWER CO. (S. F. 5,276.)

(Supreme Court of California. Nov. 18, 1910.
On Rehearing in Bank, Dec. 17, 1910.)

1. ELECTRICITY (§ 15*)—INJURIES—NEGLIGENCE.

An electric lighting company is not required to discontinue all light and power in a district in which a fire alarm is given, in order to protect firemen and others going on the premises to fight the fire, in absence of special circumstances requiring it in a particular case; nor is it negligent for not having an employé at the fire to disconnect its wires.

[Ed. Note.—For other cases, see *Electricity*, Cent. Dig. § 8; Dec. Dig. § 15.*]

2. ELECTRICITY (§ 15*)—INJURIES FROM USE—NEGLIGENCE.

An electric lighting company was not negligent, making it liable for a fireman's death by

contact with its wires in the yard of a burning building, because an employé who was at the fire, but not in the performance of any duties, did not warn the firemen of the danger from the wires, especially where it did not appear that such employé was there when the wires were charged.

[Ed. Note.—For other cases, see *Electricity*, Cent. Dig. § 8; Dec. Dig. § 15.*]

3. ELECTRICITY (§ 13*)—INJURIES—LIABILITY.

One using a street, as in the case of an electric lighting company for stringing wires, is not an absolute insurer that the street shall be as safe after it has strung its wires as it was before.

[Ed. Note.—For other cases, see *Electricity*, Cent. Dig. § 6; Dec. Dig. § 13.*]

4. ELECTRICITY (§ 15*)—INJURIES—LIABILITY.

Intestate, a fireman, was killed while fighting fire by contact with wires of defendant lighting company in the back yard of the burning premises. It did not appear that defendants had any exact knowledge of the location of the fire, and the current which killed decedent was one which would not ordinarily endanger life. *Held*, that the lighting company was not negligent so as to make it liable for decedent's death.

[Ed. Note.—For other cases, see *Electricity*, Cent. Dig. § 8; Dec. Dig. § 15.*]

5. NEGLIGENCE (§ 32*)—LIABILITY TO LICENSEE—FIREMEN.

In absence of ordinance or statute, a fireman entering a building is only a licensee, who assumes the risks, and to whom the owner of the premises owes no special duty to maintain them in a safe condition.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 42-44; Dec. Dig. § 32.*]

6. ELECTRICITY (§ 19*)—INJURIES—ACTION—ADMISSION OF EVIDENCE.

In an action against an electric lighting company for the death of a fireman by contact with its wires in the yard of a burning building, claimed to have been caused by defendant's negligence in not cutting off the power, a report by the city electrician to the trustees of the city, adopted and filed, showing that the light committee of the city council to which was referred the matter of having cut off cut-off switches installed to control currents in case of fire, reported a meeting with defendant's officers, at which the latter stated that they had made arrangements whereby the fire chief or city electrician could telephone to defendant's substation to have the current shut off in case of fire, was admissible, in connection with testimony that, in case of former fires, the power had been shut off in lighting districts at the request of the city electrician by a person maintained at its substations by defendant, and that no such request was made on this occasion, as bearing on defendant's negligence in not shutting off the power, even though the arrangement between defendant and the city officials did not amount to a municipal by-law.

[Ed. Note.—For other cases, see *Electricity*, Dec. Dig. § 19.*]

Department 2. Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by Elda Marian Pennebaker and others against the San Joaquin Light & Power Company. From a judgment for plaintiffs and an order denying a new trial, defendant appeals. Reversed and remanded. Rehearing denied in bank; Beatty, C. J., dissenting.

Frank H. Short and F. E. Cook, for appellant. Larkins & Feemster, for respondents.

HENSHAW, J. This appeal is from the judgment and from the order denying defendant's motion for a new trial. The action is by the widow and minor child, heirs of Carl G. Pennebaker, for damages resulting from his death. Pennebaker was a member of the fire department of the city of Fresno. A fire occurred about 2 o'clock in the morning in a wooden building on the outskirts of the business portion of the city. Pennebaker, in the performance of his duty, went to the fire to help in extinguishing it. The complaint charged: That an alarm of fire was turned in to and given the fire department of the city, and at the same time, "so plaintiffs are informed and believe, and upon such information and belief allege the fact to be, an alarm of said fire was turned in to and given said defendant at its electric substation in said city. That by said alarm, so plaintiffs are informed and believe, and upon such information allege the fact to be, defendant was notified of the existence and apprised of the location of said fire." The complaint further charged: That wires, carrying powerful and deadly currents of electricity, were maintained by the defendant at and in the building which caught fire. That the fire continued to burn for the space of about 40 minutes after the alarm was turned in. These wires were thus burned from their fastenings and fell to the ground soon after the alarm was given, continued to lie upon the ground during the greater part of the time that the fire was so burning, and while so lying upon the ground continued to be charged with electricity in dangerous and deadly quantities. That defendant neglected and carelessly permitted its wires so charged to lie upon the ground where it was necessary for persons to go and to be for the purpose of combating and extinguishing the fire. "That defendant, although notified of the existence, and apprised of the location of the fire, as aforesaid, and well knowing of the existence of its said wires at said place, and having the entire charge and control of said wires and of its said electricity and currents of electricity, and well knowing that its said wires were then and there charged with and carrying currents of electricity, and well knowing that said wires were, in the event of a fire, liable to be burned from their fastenings, and to fall to the ground and endanger the lives of people, and particularly of persons engaged in fighting the fire, and having full and ample time and opportunity to know and ascertain the condition of said wires at said time and place, and having ample and sufficient time and means to turn off said electricity and to cut said wires, and to render the same safe and harmless, negligently and carelessly failed to

cut said wires, and negligently and carelessly failed to turn off said electricity, and negligently and carelessly failed to do anything, whatever, to render said wires, or any of said wires, safe and harmless during the time of said fire and while its said wires were down and lying upon the ground, as aforesaid." Issue was joined upon the material averments of negligence, and for an affirmative defense the contributory negligence of Pennebaker was charged. The cause was tried by the court without a jury, and the court gave judgment for plaintiffs; its findings conforming exactly to the allegations of the complaint.

The principal contention advanced upon this appeal is that the evidence introduced by plaintiffs, giving to it the fullest weight, utterly fails to show negligence upon the part of the defendant. Appellant contends, for its second proposition, that, if the evidence of the plaintiffs be held sufficient to charge the defendant with negligence, it must be concluded from the same evidence that the deceased was guilty of contributory negligence, and, finally, it is urged that the court erred in its ruling refusing admission to certain evidence proffered by the defendant. A statement of the substance of plaintiffs' evidence is made necessary for a consideration of appellant's contention that it utterly fails to show negligence upon its part.

The evidence disclosed: That defendant, an electric light and power corporation, was under contract to supply, and engaged in supplying, light and power to the municipality of Fresno and to private users and consumers; that at 2 o'clock a. m. a fire was discovered in the building before mentioned. Alarms of fire from two boxes, Nos. 4 and 82, representing contiguous fire districts, were turned in well-nigh simultaneously. Automatically a signal was thus given in the fire department stations, and a more general signal by the blowing of a whistle at a substation of the electric company, about five blocks distant from the actual location of the fire. Each of these fire districts embraced territory of five or six blocks. So that a recognition and understanding of the signal as being from district 4 or district 82 would indicate that the fire was somewhere within one of the five or six blocks embraced respectively in such district. The signal would not, and did not, of course, indicate the building, and would not and did not indicate whether the defendant company had light or power wires that would be affected by the fire, though of course there would be imputed to the company knowledge that it had such wires within the district. The firemen arrived promptly at the scene of the fire and proceeded to fight it with water and chemicals. The building was a bicycle repair shop, into which was conducted power used in operating a small lathe. The wires carried electricity which

by no possibility could exceed 280 volts; 280 volts are not regarded as dangerous to human life, much less as deadly. These wires were burned and fell to the ground by reason of the fire, and lay upon the ground in the back yard of the premises. Certain of the firemen noticed these wires and saw by their sputtering that they were "hot" and "carried juice." One or two of the firemen actually received shocks from these wires and jumped away. Discussion arose amongst the firemen as to whether the wires were dangerous. The fire chief testifies: "I went around in the back, and there was quite a number of the boys (firemen) had been in the yard and they had come out, and of course they hadn't ought to come out, and they said the reason they came out was on account of the juice being in there. Others spoke up and said there was not enough in there to hurt anybody, and I went in there and it didn't bother me at all. I didn't feel it. I never got a particle of a shock at all." The fire being subdued in about three-fourths of an hour from the time the alarm was given, the chief gave orders to his men to carry out their hose and other paraphernalia and make ready to disperse. Pennebaker, in the performance of his duty, went into the yard, his feet touched and became entangled in the wires, and he pitched forward unconscious. He was dragged out by his fellows, never recovered consciousness, and died within an hour. The chief of the fire department testified that he saw one or more of the employes of the defendant at the fire, but it is not shown that they were on duty, were charged with any duty, were informed of or knew that the wires were carrying electricity or even that they were there when the wires were carrying electricity, for in a very few minutes after Pennebaker was struck down the city electrician climbed the pole and cut the wires. The city was divided by the defendant into districts, and the light and power from these districts could be turned off at the substation. A man was maintained there day and night to do this, upon proper demand. No demand or request was made in this instance. The effect in turning out the light in any one of these districts would be to leave it entirely without electric light or power. Pennebaker was a vigorous man in the prime of life.

The foregoing is a fair summarization of all the evidence upon the question of negligence presented by plaintiffs. It is the evidence to which the motion for nonsuit was addressed. It is to be noted that no knowledge was brought home to defendant that the fire had disturbed, or would in any way disturb, its wires; that, if knowledge that there was a fire and the general location of that fire was imputable to defendant by the blowing of the whistle, such knowledge, in the nature of things, could tell them no more than that it was in a district compris-

ing five or six blocks. No knowledge was imputed or was imputable to defendant that the fire was even in a building containing its wires. It is to be noted, moreover, that the wires, whose detachment caused the fatal accident, did not fall upon any public way, but in the back yard of private property. Respondent contends, and the trial court took the view, that this uncontradicted evidence was legally sufficient to establish the negligence of defendant. If it did, it can be but upon one or another of two theories, both of which are advocated by respondent. First, that it was the duty of defendant to have disconnected its wires when the fire alarm was sounded. Second, that it was the duty of the defendant to have an employé at the fire, either to disconnect the wires himself or to signal to the substation to have it done. A third theory of respondent, broader perhaps than either of these, is that by the very happening of the accident, under the indicated circumstances, the law imputes negligence to the defendant, and that therefore the nonsuit was properly denied. This is the invocation of the doctrine *res ipsa loquitur*.

1. In support of the first contention, no authority is cited, nor do we think any can be. It would compel defendant, upon the one hand, to extinguish all light and power in a district, regardless of the necessity of so doing, or be held liable for any consequences that might follow its failure. It takes no account of the fact that by so doing, in the case of a night fire, a district would be left in complete darkness, and that under such circumstances, following the alarm of fire, panic might ensue in hotels, lodging houses, and residences, and that the resulting damage might far exceed that which the extinguishment of the lights was designed to prevent. No such rule of law exists, nor, we take it, will ever exist, and the utmost that will be exacted of lighting companies in this regard is that they shall hold themselves in readiness to cut off the electricity when the necessity arises and they are informed of it by proper authority.

2. Nor is negligence imputable to the defendant because it did not have an employé at the fire, charged with the duty of disconnecting particular wires, or signaling for the disconnection of the district. Any reasonable ordinance in this regard which a municipality might adopt would, of course, be upheld, and, if injury resulted from the negligent failure of the light and power company to obey the terms of such ordinance, undoubtedly negligence could be predicated upon it. But here no such exactions were required by any ordinance, and it cannot be held that the defendant failed in any duty with which the law charged it in not having such employé in attendance at every fire. Indeed, in *New Omaha Thomson-Houston Electric Light Co. v. Anderson*, 73 Neb. 84, 102 N. W. 89, where an ordinance required

electric companies to send one or more competent linemen to fires to report to the city engineer and remove or disconnect wires where directed, the court held that this imposed no further duty upon the company than that of so doing, and that the company was not liable, even when it was shown that the company's lineman invited the firemen to proceed to lower the ladders, declaring that the wires with which it thereupon came in contact, and which proved to be heavily charged, were "dead." The court ruled that his declaration to that effect, being entirely outside of the line of his duty, could not charge the defendant company; that defendant light company owed no duty to the firemen to warn them of danger either in ascending or descending the ladder or in removing it from between the wires after the fire was extinguished. This was a duty, if such duty existed, which, under the ordinance pleaded, devolved upon the officers of the city. See, also, *Trouton v. New Omaha Thomson-Houston Elec. Light Co.*, 77 Neb. 821, 110 N. W. 569. This same reasoning and authority answer the argument of respondent that employes of the defendant were at the fire that night and saw the fire and "undoubtedly the flashing of the electricity and the condition of the wires, yet they did nothing." In addition to what has been said in this regard to the effect that they were not there in the performance of any duty, and that it is not shown that they were there when the wires were charged with the electricity, respondent's argument, for a still further reason, is *felo de se*. For if defendant's employe, a mere bystander and looker-on, can be charged with knowing that electricity in dangerous quantities was escaping from his employer's wires, how much more is Pennebaker himself charged with this knowledge, when he was a fireman, in the immediate vicinity of the wires, when some of his fellow firemen had received shocks, when the matter had been discussed amongst them, when a cry of danger had been given, and when in the resulting conversation it had been argued that the wires were not carrying power enough to injure anybody. Clearly, if knowledge of a dangerous condition arising out of the presence of the electric current in the fallen wires was chargeable to an employe of defendant, under these circumstances, it was even more chargeable against Pennebaker, and the conclusion would be unanswerable that his own negligence, after such knowledge, proximately contributed to his death.

3. The third theory, and that perhaps most strongly relied upon by respondent, is that the facts proved established negligence per se. Herein much reliance is placed upon the decision of the Supreme Court of Missouri in *Gannon v. Laclede Gaslight Company*, 145 Mo. 502, 48 S. W. 968, 47 S. W. 907, 43 L. R. A. 505. This decision was rendered by a divided court. While there are

expressions in the prevailing opinion in accord with respondent's contention, the real question decided was quite different. The action, like the one under consideration, was to recover damages for the death of a husband and father, himself a fireman. The proof by plaintiff was merely to the effect that the deceased, while in the performance of his duty as fireman at a fire, was killed by coming in contact with heavily charged wires of defendant company lying in a public alley. In its essence the proof went no further than this. The defendant company showed that the wires were burned through, or their attachments burned down, through no fault of its own, by an accidental fire; that it received no notice; and, indeed, that there was no time between the falling of the wires and the accident in which it could have received notice so as to cut off the current. It made this proof full and complete by unimpeached witnesses and uncontradicted testimony. The verdict of the jury was for plaintiff. The Supreme Court was divided, not at all, upon the question whether or not the defendant company had made full and complete defense. That was admitted; but upon the question whether or not the jury was bound to believe and decide in accordance with the evidence of the defense, a bare majority holding that the jury alone were triers of the fact, and that a court of appeals would not reverse a case and override the verdict if the evidence proved unsatisfactory to the jury, however satisfactory it might be to the court, the minority of the court holding that such a rule gave juries uncontrolled liberty to disregard and reject evidence which, under the circumstances, it was their duty to have accredited.

This was the principal point of controversy between the members of that court. In the prevailing opinion, it is true, language is used, upon which respondent here relies, which would make not only electric light companies, but every other person using a street, saving foot passengers, absolute insurers in case injury resulted to person or property. An instance of such a declaration is found in the following language: "It was a matter of the plainest duty for the defendant to see that the streets and alleys of the city, along which by permission it was suffered to place its overhead wires for its own private gain, were at all times maintained in the same condition as to safety from the danger of electricity as they were before its overhead use thereof was begun." Every added vehicle upon the street of a city increases the danger to pedestrians in the use of the street. Every street car does the same. Every suspended sign has like effect. If it be true that in all these, and in the innumerable other instances which might be cited, the street must be as safe after as before the new use, then it must necessarily follow that the user becomes an absolute insurer. If that is what the Supreme Court

of Missouri means, it must suffice to say that it stands alone in its opinion, without reason or authority in its support. 1 Thompson Law of Neg.-§ 802; 15 Cyc. 472. If, however, the Supreme Court of Missouri meant but to declare that where the wires of an electric light company, heavily charged with electricity, are shown to be lying upon a public street and injury to a person lawfully upon the highway results from these wires, without negligence on his part, a presumption that the company is negligent thus arises, and the burden is cast upon it to overcome this presumption, the principle of law thus declared is one over which there need be no discussion, for it is not pertinent or applicable to the present case. Here, no wires were upon the public street. They were upon private property and were cast to the ground by the burning of the building upon that property. In the absence of ordinance or statute changing the common-law rule in this regard, a fireman entering a building under imperative public necessity is but a licensee, who assumes the risks as he finds them, and to whom the owner of the premises owes no special duty to maintain those premises in a safe condition. *New Omaha, etc., Light Co. v. Anderson*, supra; *Woodruff v. Bowen*, 136 Ind. 431, 34 N. E. 1113, 22 L. R. A. 198; *Hamilton v. Minneapolis, etc., Co.*, 78 Minn. 3, 80 N. W. 693, 79 Am. St. Rep. 350; 21 Am. & Eng. Ency. of Law (2d Ed.) 475. We would not from this be understood as holding that, in all cases where the owner is exonerated, an electric light or power company, using the building as a means of transmitting into or over it power in dangerous quantities, would also be exonerated. A broad distinction might often exist between the duty of the owner, who had no control over the dangerous current, and the responsibility of the company using the building for the transmission of the dangerous force, and whose duty therefore it was to control it in all proper ways. So, in the very case at bar, the owner, having perhaps little knowledge of the force, and less of methods of its control, might well be held nonliable where dereliction of duty might be charged and consequent liability might be imposed upon the electric company, if, after knowledge of the dangerous condition, it failed promptly to remedy it. But, under the facts here stated, such knowledge was not brought home to it, and it was not chargeable with this knowledge as matter of law.

It should be repeated that in this case there is no question involved of deadly wires lying in a street, to the imminent danger of the traveling public. There is no question of faulty installation or operation. Moreover, the defendant, if chargeable with everything else, could not be charged with the maintenance of deadly wires, since, notwithstanding the fact that the current which they carried caused the death of Pennebaker,

and in this sense they proved deadly, a defendant's conduct is to be judged by the ordinary knowledge of mankind, and it is in evidence that 260 volts was the utmost which the wires could have carried, and that the shock of 260 volts is not regarded as at all dangerous to human life. It is not shown, therefore, that the defendant in this case failed in any duty toward the deceased which was imposed upon it by law. If it has not failed in such duty, it is not legally responsible for his death.

4. The court's ruling in rejecting offered evidence, of which appellant complains, was error. This evidence consisted of a report made by the city electrician of the city of Fresno to the board of trustees, showing that the water and light committee of the Fresno city council "to which was referred the matter of having cut-off switches installed for controlling electric currents in case of fire, reported a meeting with the officers of the San Joaquin Power Company, at which they explained that every circuit in town could be controlled from the power house, and that they had made arrangements with the telephone company whereby the fire chief, or city electrician, by asking the chief operator of the telephone company for the power house, would be given the line immediately; and that the current could be shut off quicker and with a great deal more safety in any district of the city by an attendant at the station." This report was by the trustees of the city adopted and placed on file. It was offered to be shown that the city electrician had, upon occasions of fire when the exigencies of the case in his judgment called for it, requested the cutting off of a district, and the request had always been promptly complied with. And it was offered to be shown, moreover, that the company always maintained a competent man at its substation for the purpose of doing this very thing, and that on the occasion of this fire no request so to do had been made. In fact, the electrician arrived at the fire, cut the wires himself, but, unfortunately, a few minutes after Pennebaker met his death. The evidence was rejected apparently upon the theory that it did not amount to a by-law or ordinance or regulation of the city, and so could not operate to change defendant's legal duty toward the deceased. In this view the court was clearly in error. If the converse of the proposition had been sought to be proved, namely, that with the existence of such an understanding the company had failed upon proper request to disconnect the wires, it would not be doubted that it would furnish strong evidence of the company's negligence. Here, if it be conceded that the understanding or arrangement or agreement or convention of the parties did not have the legal effect of a municipal by-law, it was competent nevertheless to show that it was an accepted regulation by the municipal au-

thorities of the duty of defendant in the matter of fires, that it was an agreement which had been put into force, and which had always been lived up to by the company. The evidence would certainly have a strong tendency to show that in this respect the company was not delinquent in the performance of its duty, and for this purpose and to this extent it should have been admitted and weighed.

These considerations cover all the matters called to the attention of the court, and for the reasons hereinbefore given the judgment and order appealed from are reversed, and the cause remanded.

We concur: LORIGAN, J.; MELVIN, J.

On Rehearing.

In Bank.

PER CURIAM. Rehearing denied.

BEATTY, C. J. I dissent from the order denying a rehearing of this cause. It is here decided, among other things, that the superior court erred in sustaining the objection to the defendant's offer to prove the adoption by the board of trustees of the city of Fresno of the following report of the city electrician: "To the Honorable, the Board of Trustees of the City of Fresno: Gentlemen—The undersigned, the city electrician of the city of Fresno, herewith submits for your consideration his report for the month of December 30, 1905, as follows, to wit: 'On the 13th the water and light committee met representatives of the power company in my office to decide on some safe and practical method of handling dangerous wires at fires. It was agreed that by giving the right of way over all others to the telephone lines, to the city electrician and fire chief, that the current could be shut off quicker and with a great deal more safety in any district of the city, by the attendant at the station. As with switches, it would be necessary to pull at least two to kill the line, and it would be necessary to climb the poles to do so. And besides, it is possible that the switch pole might be in range of the fire, in which case the switch would be useless. Respectfully submitted, C. T. McSherry, City Electrician.'"

If this report had been offered by the plaintiffs in support of their case, I think it would have been harmful error to have excluded it, for it would have proved in their favor that the necessity of providing "some safe and practical method of handling" the wires of the defendant carrying dangerous voltage in case of fires had been recognized and considered both by the city authorities and by the defendant, that it had been agreed that a proper measure of precaution in such case would be the cutting off of the circuit (i. e., the district) affected, and that the defendant's plan of cutting out the whole district at the substation had been adopted

in preference to the alternative plan of providing local switches within the various districts. This, in connection with abundant evidence that the defendant's agent at the substation, knowing that a fire had started within five or six blocks of the station, and in a district to which its wires extended carrying a voltage which the event proved to have been deadly to a grown man in apparently sound health, had neglected for 40 minutes after the alarm of fire to adopt the precaution suggested by defendant itself and claimed to be the safest and most practicable, would have made out a clear case of highly culpable negligence, unless the adoption of the electrician's report can be construed as a valid agreement exempting the defendant from any obligation to cut off the current from a circuit where a fire might be raging until its agent at the substation should be requested to do so by the city electrician or the chief of the fire department. This indeed seems to be the view of the court, and, as appears from the opinion, is the ground upon which the ruling of the superior court is condemned. It is from this view that I dissent. It is perhaps a just inference from the terms of the report that its author assumed it to be a part of the duty of himself and the fire chief to the public (but not to the defendant) to give prompt notice of the occurrence and locality of the fire to the persons in charge of the defendant's substation; but this did not exempt the defendant from the duty of acting promptly upon the same notice coming from any other person or in any other form. That they had such notice, and neglected to act upon it with reasonable promptitude, was in my opinion amply proved, and it was no error as to the defendant to exclude the electrician's report and proof of its adoption, since it had no tendency to prove that the neglect to shut off the current at the station was excused by the failure of the fire chief and electrician to make the request.

I do not think this court can on the evidence set aside the finding of the trial court as to contributory negligence.

As to the status of a fireman who enters a burning building in a city in the vicinity of other buildings for the purpose of extinguishing the fire or saving life or property, it may be that the liability of the owner for any injury received by him while on the premises is no other or greater than it would be to a mere licensee, but the fireman is not there as a licensee of the owner; he is there in performance of his duty as a public servant under the authority and protection of regulations clearly within the police power of the state, and of superior force to the will of the owner of the premises, and he is entitled to the same indemnity for injuries caused by the culpable negligence of others as if he were on a public street.

As to the comparative harmlessness of less

than 500 volts *res ipsa loquitur*: Either these wires carried more than 500 volts, or less than that voltage, though harmless to most men, is deadly to some—and those few are entitled to protection. And, finally, the argument based upon the serious dangers (of panic, etc.) involved in the cutting out of a circuit on an alarm of fire does not appear to consist very well with the choice of a plan of handling its dangerous wires suggested by the defendant itself and approved by the city trustees, which was nothing less than a means of transmitting prompt notice of the outbreak of a fire to the substation and the cutting out of the circuit.

Upon this view of the case, the question presented by the appeal is not whether it can be held as a matter of law that it was culpable negligence on the part of the defendant to wait for official notice of the danger before adopting any precaution against it, but is, on the other hand, whether it can be held as a matter of law that, under the facts disclosed by the evidence, there was no culpable negligence. Negligence is a question of fact and not of law, except in those cases where upon the facts found or proved there can be no reasonable difference of opinion as to the absence of culpability. In this case the judge of the trial court, performing the function of a jury, has found that there was negligence. I do not think that his conclusion was unreasonable. At least I think the case is deserving of further consideration.

(14 Cal. A. 396)

WILLIAMS v. BRAUN. (Civ. 842.)

(Court of Appeal, First District, California. Oct. 31, 1910. Rehearing Denied by Supreme Court Dec. 29, 1910.)

1. BILLS AND NOTES (§ 398*)—PRESENTMENT—NOTICE OF DISHONOR—DILIGENCE—COMMON-LAW RULE.

At common law the maker of a check could not be exonerated by the payee's failure to present the check, or to give notice of its dishonor with due diligence, except so far as he could show injury to himself from such delay.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1045-1060; Dec. Dig. § 398.*]

2. BILLS AND NOTES (§ 15*)—"CHECK"—DEFINITION.

A check is but a request to another to pay to the payee the sum named therein out of funds supposed to be deposited with the drawee to meet the check. If the drawee does not comply with the request, the funds are still there and the debtor still owes the money; the drawer of the check being the principal debtor, and not a surety, like an indorser.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 15.*]

3. BILLS AND NOTES (§ 418*)—CHECK—NOTICE OF DISHONOR—DELAY—EFFECT—STATUTES.

Civ. Code, § 3177, provides that the rights and obligations of a drawer of a bill of exchange are the same as those of a first indorser of any other negotiable instrument, and that a check, so far as notice of its dishonor is concerned, is on the same footing as a bill of exchange.

Section 3255, however, declares that a check is subject to all the provisions of the Code concerning bills of exchange, except that the drawer and indorser are exonerated by delay in presentment only so far as the injury suffered thereby, and that an indorsee after apparent maturity, without actual notice of its dishonor, acquires a title equal to that of the indorsee before such period. *Held*, that since the presentment of a check for payment is the principal thing, and notice of dishonor is but a secondary matter, the drawer of the check, seasonably presented and dishonored, was not released from liability because of the holder's delay in giving notice of dishonor, where the drawer suffered no injury thereby.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 418.*]

4. PAYMENT (§ 21*)—DISHONORED CHECK.

Where a check delivered in payment for merchandise was presented for payment within a reasonable time and dishonored because of the failure of the bank on which it was drawn, and the drawer suffered no injury because of delay in giving notice of dishonor, the delivery of such check was not payment.

[Ed. Note.—For other cases, see Payment, Cent. Dig. § 86; Dec. Dig. § 21.*]

Appeal from Superior Court, City and County of San Francisco; Geo. H. Buck, Judge.

Action by E. H. Williams against George Braun. Judgment for plaintiff, and defendant appeals. *Affirmed*.

Tum Suden & Tum Suden, for appellant. Jos. E. Bien, for respondent.

COOPER, P. J. This action was brought to recover \$800.75 for goods sold and delivered by plaintiff's assignor to defendant at his special instance and request. Plaintiff recovered judgment, and this appeal is prosecuted from the said judgment. The only question is as to a check of \$700 given by defendant to plaintiff, which defendant claims constituted a payment under the circumstances as disclosed by the record.

On the 28th day of October, 1907, defendant gave to plaintiff's assignor a check on the California Safe Deposit & Trust Company for the sum of \$700. The check was presented for payment during banking hours on the 30th day of October, 1907, but was not paid, for the reason that the bank had become insolvent and had just closed its doors a few moments before the check was presented. It is admitted that the check was presented within a reasonable time, or, at least, no question is made as to delay in presenting the check. Written notice of the dishonor of the check was not given to the defendant until December 10, 1907; and the sole contention of defendant is, that by reason of the delay in giving the notice defendant cannot be held liable for the indebtedness to the extent of the check.

The delivery of the goods and the value thereof as alleged were not questioned. No claim is made that defendant suffered any injury by reason of the delay in giving him

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes 112 P.—30

notice of the dishonor of the check. At common law the maker of a check could not be exonerated by the failure of the payee to present the check, or to give notice of its dishonor, with due diligence, except to the extent that he could show injury to himself consequent upon such delay in the presentment of the check or in giving notice of its dishonor. Such rule has its foundation in reason and justice. The person who is indebted to another and gives a check to his creditor does not, by the mere giving of the check, pay the indebtedness. A check is only a request to another to pay to the payee thereof the sum named therein out of the funds supposed to be deposited to meet such check. If the drawee does not comply with the request, the fund is still there and the debtor still owes the money. He is the principal, and not a surety, like an indorser. It is quite different from the case of an ordinary bill of exchange, or of one who indorses such bill, or even of one who indorses such check. It is said in *Daniel on Negotiable Instruments* (5th Ed.) § 1587: "But there is an important distinction as to the extent of the legal consequence of neglect and delay in presentment and notice, between bills and checks. It is true that the indorsers of such instruments stand on the same footing in reference to the effect of delay, or failure in making presentment, or giving notice. They are absolutely and entirely discharged, if presentment be not made within a reasonable time, and due notice given. But the drawer of a bill stands upon a different footing from the drawer of a check. In the case of a bill of exchange, negligence, in respect to presentment or notice, absolutely discharges the drawer. But the drawer of a check is regarded as the principal debtor, and the check purports to be made upon a fund deposited to meet it. And the negligence of the holder in not making due presentment, or not giving him notice of dishonor, does not absolutely discharge him from liability, unless he has suffered some loss or injury from such negligence, and then only to the extent of such loss or injury. He is at most entitled only to such presentment and notice as will save him from loss. Were it otherwise, the drawer would profit by a neglect which could do him no injury."

The rule as stated by the author is supported by many authorities cited in the note to the section. The same rule is laid down in *Story on Promissory Notes*, § 492, where it is said: "In case of a check the drawer is treated as in some sort the principal debtor, and he is not discharged by any laches of the holder in not making due presentment thereof, or in not giving him notice of the dishonor, unless he has suffered some loss or injury thereby, and then only pro tanto."

In *Allen et al. v. Kramer et al.*, 2 Ill. App. 105, the ruling is in accord with the textbooks just quoted. The court there said:

"The law is well settled that want of presentment or notice of dishonor of a check does not discharge the drawer, unless he has suffered some loss or injury thereby." See, further, *Heartt v. Rhodes*, 66 Ill. 351; *Stevens v. Park*, 73 Ill. 387; *Griffin v. Kemp et al.*, 46 Ind. 173; *Henshaw et al. v. Root et al.*, 60 Ind. 220; *Gregg v. George*, 16 Kan. 546; *Spink & Keyes Drug Co. v. Ryan Drug Co.*, 72 Minn. 178, 75 N. W. 18, 71 Am. St. Rep. 477.

The rule as above stated is too well settled even for appellant to dispute it, but he claims that it has been changed by Civ. Code, § 3177, which provides: "The rights and obligations of a drawer of a bill of exchange are the same as those of the first indorser of any other negotiable instrument," and that a check, so far as notice of its dishonor is concerned, is on exactly the same footing as a bill of exchange. It must be admitted that the section, standing alone, lends much plausibility to appellant's argument; but we must read the section in the light of other sections of the Code, and consider them together, if such construction can be reasonably given, so as to uphold the well-settled rule as hereinbefore stated. It would require a very plain and mandatory declaration to induce the court to believe that the Legislature intended to sweep aside a rule long established and founded upon principles of justice, and in lieu adopt a rule that would release the debtor who has not paid his creditor upon mere proof that he was not promptly notified of the dishonor of his check, when such notification could not and did not change his condition or his ability to protect his funds in the hands of the drawee, and no injury was occasioned by such delay. Now, while a check is a bill of exchange, payable on demand without interest, the Code provides (section 3255): "A check is subject to all the provisions of this Code concerning bills of exchange except that (1) the drawer and indorsers are exonerated by delay in presentment, only to the extent of the injury which they suffer thereby; (2) an indorsee, after its apparent maturity, but without actual notice of its dishonor, acquires a title equal to that of an indorsee before such period." This section provides that the drawer and indorsers are exonerated by delay in presentment, only to the extent of the injury which they have suffered thereby. It is therefore plain that if the check in this case had not been presented, the defendant would have suffered no injury, and the act of presenting it was not necessary in order to bind defendant. If, therefore, the plaintiff did an unnecessary thing, it seems reasonable that the failure to notify defendant thereof could not release the defendant. The presentment of the check was the principal thing, and it necessarily had to be presented before the defendant could be notified of its presentment and dishonor. If a delay in the

presentment could not, under the circumstances of this case, have injured the defendant, it is difficult to see how upon principle he could have been injured by the delaying in giving notice of having done an unnecessary thing. The presentment of the check was the first and material thing, and the giving of notice was only a secondary matter. As defendant owed the amount, and as he has not been injured by the delay in giving notice of dishonor, he cannot claim that the check for \$700 was payment. The evident spirit and meaning of section 3255 is that delay in presentment or in giving notice of dishonor exonerates the drawee, only to the extent of the injury he has suffered thereby. This construction is evidently in accord with justice, and with the law which has been long established in regard to a notice of dishonor of checks.

The judgment is affirmed.

We concur: HALL, J.; KERRIGAN, J.

(14 Cal. App. 401)

FOLEY et al. v. NORTHERN CALIFORNIA POWER CO. (Civ. 730.)

(Court of Appeal, Third District, California. Oct. 31, 1910. Rehearing Denied by Supreme Court Dec. 27, 1910.)

1. ELECTRICITY (§ 16*)—INJURIES INCIDENT TO PRODUCTION—CARE REQUIRED.

An electric light and power company on ascertaining the effect of a heavy snow fall on its wires must make an investigation within a reasonable time to ascertain and avert obvious perils caused by down wires, but a delay of about 36 hours in averting a peril through down wires, heavily charged and accessible to its office, is actionable negligence.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 9; Dec. Dig. § 16.*]

2. ELECTRICITY (§ 14*)—INJURIES INCIDENT TO PRODUCTION—CARE REQUIRED.

The owner of an electric plant must exercise reasonable care in maintaining a system of inspection by which any change in the physical condition of any part of the plant, increasing the danger to persons lawfully in the pursuit of their business or pleasure, may be reasonably discovered.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 7; Dec. Dig. § 14.*]

3. NEGLIGENCE (§ 16*)—DANGEROUS SUBSTANCES—CARE REQUIRED.

The care which the law exacts from one engaged in operating an instrumentality is in proportion to the danger reasonably to be apprehended from its use.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 10-21; Dec. Dig. § 16.*]

4. DEATH (§ 58*)—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.

A defendant sued for negligent death has the burden of proving the contributory negligence of decedent.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 75-78; Dec. Dig. § 58.*]

5. DEATH (§ 58*)—ACTION FOR NEGLIGENT DEATH—PRESUMPTIONS.

Where it was shown that decedent killed by electric shock had picked up an uninsulated cop-

per wire detached from a pole, the court must assume that he did not believe and had no reason to believe that the wire carried electricity, because of the presumption that he had such a regard for his life as an ordinary man has.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 75-78; Dec. Dig. § 58.*]

6. ELECTRICITY (§ 19*)—ACTION FOR DEATH—CONTRIBUTORY NEGLIGENCE—EVIDENCE—SUFFICIENCY.

Where, in an action for death by contact with a detached live wire, there was evidence that decedent picked up the wire and that there was no occasion for him to do so, either for his own safety or for the safety of others, a finding of contributory negligence was not unsupported.

[Ed. Note.—For other cases, see Electricity, Dec. Dig. § 19.*]

7. ELECTRICITY (§ 18*)—ACTION FOR DEATH—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

In determining whether one who picked up an uninsulated live wire detached from a pole, thereby receiving a fatal electric shock, was guilty of contributory negligence, the jury must consider the reasonableness of his belief that the wire was harmless and the quality of his act, and where one having reason to believe that a wire was harmless aimlessly and needlessly seized it and received a shock, the jury might find that his act was inexcusable, so as to make him responsible for the consequences.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 10; Dec. Dig. § 18.*]

8. NEW TRIAL (§ 102*)—NEWLY DISCOVERED EVIDENCE—DILIGENCE.

Refusal of a new trial on the ground of newly discovered evidence, consisting of declarations by a witness who testified during the trial, is not erroneous, because the newly discovered evidence might have been produced on the trial with reasonable diligence.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 210-214; Dec. Dig. § 102.*]

9. NEGLIGENCE (§ 111*)—ACTIONS—COMPLAINT—SUFFICIENCY.

In an action for negligence, it is sufficient under the Code to allege the negligence in general terms, specifying the particular act alleged to be negligently done.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 182-184; Dec. Dig. § 111.*]

10. NEGLIGENCE (§ 119*)—COMPLAINT—ISSUES.

One suing for negligence must rely on the particular acts of negligence specified in the complaint.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 200-216; Dec. Dig. § 119.*]

11. ELECTRICITY (§ 19*)—INJURIES—COMPLAINT—ISSUES—INSTRUCTIONS.

Where, in an action for death from electric shock, the complaint specifically alleged that the wires were uninsulated and were charged with electricity so as to endanger the life of any one coming in contact with them, that the wires were of insufficient size and strength for the purposes intended, that defendant negligently failed to remove the wires from the ground to which they had fallen and negligently failed to turn off the current, an instruction that there was no allegation charging defendant with negligent construction or maintenance of any of its crossbars by which it maintained any wires at the point where decedent was killed, and that there was no issue for them as to that, was proper, though evidence as to crossbars as a part of the res gestae was received without objection.

[Ed. Note.—For other cases, see Electricity, Dec. Dig. § 19.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

12. ELECTRICITY (§ 16*)—INJURIES INCIDENT TO PRODUCTION—NEGLIGENCE.

The negligence of an electric light and power company in the construction and maintenance of its wires is actionable, where it contributes to an accident, and there is a causal connection between the injury and the faulty construction and maintenance, but where a storm was so violent that it would have broken the wires regardless of their condition, the storm was the sole cause of the breaking of the wires, and whether there was faulty construction and maintenance was immaterial.

[Ed. Note.—For other cases, see *Electricity*, Cent. Dig. § 9; Dec. Dig. § 16.*]

13. APPEAL AND ERROR (§ 1066*)—HARMLESS ERROR—ERRONEOUS INSTRUCTIONS.

Where, in an action for death by contact with a detached wire, the evidence showed without contradiction that the installation and maintenance of the system were not faulty, and the only theory on which a verdict for plaintiff could be sustained appertained to defendant's negligence in turning on the electric current in the wire and allowing it to remain in its exposed and dangerous position, an instruction that though the installation and maintenance of the wires were inadequate, yet, if the wire became detached by a storm of unexpected force, defendant would not be liable, unless it permitted the wire to remain on the ground for an unreasonable time or failed to turn off the current of electricity after discovering the fact that the wire had fallen on the ground, was not prejudicial, though it implied that negligence in the construction and maintenance of the plant was immaterial.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4220; Dec. Dig. § 1066.*]

14. ELECTRICITY (§ 19*)—INJURIES—MISLEADING INSTRUCTIONS.

Where, in an action for death by electric shock by taking hold of a detached live wire, there was nothing to show that defendant had been employed by an electric company and the proof showed that his only connection with electricity had been in moving a lever one way to turn on electricity and the other way to turn it off, and there was evidence that he had reason to believe that the wire was harmless, an instruction that a man of ordinary prudence, who has lived in a city where electricity is conveyed by power lines, is presumed to know the dangers of electricity, was erroneous, as leading the jury to believe that decedent must be presumed to have known of the danger.

[Ed. Note.—For other cases, see *Electricity*, Dec. Dig. § 19.*]

15. ELECTRICITY (§ 18*)—INJURIES INCIDENT TO PRODUCTION—CONTRIBUTORY NEGLIGENCE.

In determining whether a person who was killed by taking hold of an electric wire which had fallen to the ground was guilty of contributory negligence, the test is whether an ordinarily prudent man under the same circumstances would have believed that there was danger.

[Ed. Note.—For other cases, see *Electricity*, Cent. Dig. § 10; Dec. Dig. § 18.*]

Appeal from Superior Court, Tehama County; John F. Ellison, Judge.

Action by Pauline Foley on her own account and as guardian ad litem of her two minor children and others against the Northern California Power Company. From an order denying a new trial after verdict for defendant, plaintiffs appeal. Reversed.

W. P. Johnson, N. A. Gernon, and Donohoe & Freeman, for appellants. Reid & Dozier and Jas. T. Matlock, Jr., for respondent.

PER CURIAM. The following statement of the facts, substantially in the language of appellants, is sufficiently full and accurate for an intelligent application of the questions of law involved: The action was brought by Pauline F. Foley on her own account and as guardian ad litem of her two minor children against the defendant for damages on account of negligence in causing the death of James M. Foley, husband of the said Pauline Foley and father of said minor children. The case was tried before a jury and the verdict was for defendant. The appeal is from the order denying the motion for a new trial.

The defendant was and is a corporation engaged in the business of generating, selling, and distributing electricity. On the 18th of January, 1907, and prior thereto, it maintained wires over and along the west side of Fourth street, between Park avenue and Douglas street, in the Park addition to the town of Red Bluff, and used said wires for the purpose of producing light and power. There were two unusually heavy snowfalls in that vicinity in January, 1907, the first on the 7th and the second on the 16th of the month. On the morning of the 17th, Charles Hughes, superintendent of defendant corporation for the Red Bluff division, came to town and discovered a number of wires down; all but one being telephone wires. Knowing they might come in contact with power lines, he cut the telephone wires which were hanging down free from the poles, and caused the electricity to be turned off from the town. He then sent three employes to patrol his lines. They returned in a short time, reporting that they had found a few 110-volt lines down and a number of them badly sagged, but not dangerous. Mr. Hughes then turned the current back on the town and 2,000 volts of electricity were carried into the transformer attached to the southernmost pole on Park avenue. Later he found that the employe who had been sent to patrol the lines, including Park avenue, had patrolled them no further than the pumping plant, three blocks north of the Park avenue line. The Sanitary Fruit Company had a packing house and cutting shed and dryer on block N of said Park addition. The season had closed, but James M. Foley was employed to do odd jobs about this property. On Friday afternoon, January 18th, between 12 and 1 o'clock, he left his home to go to work for said company. He was last seen alive between 12 and 2 o'clock of said afternoon within two blocks of and going towards said property. His body was found early in the afternoon of Saturday, the 19th, under a trestle near the said south pole on Fourth street. The

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

wire from this pole was detached and lying coiled up at one end about six feet from his body. It was an uninsulated copper wire about one-tenth of an inch in diameter. His body lay in a little passageway about 4 or 4½ feet high, used by the workmen in going to and from the dryer. His hands were partially closed. The fingers of the glove he wore and the fingers of the hands were burned. The body lay perfectly rigid. There was a hole scooped out by his heels as he fell. Dr. Fife testified: "I judge the moment he touched the wire he received this tremendous shock and the body became rigid and he pitched forward." After Foley was killed, it was ascertained that the 2,000-current wire had become detached from the said southerly pole. The cross-arm was split and hanging down and the wire was broken at the insulator. There is nothing to account for the breaking of the wire except the heavy snow-storm. As the deceased was alone at the time of the fatal affair, the immediate surrounding circumstances are involved in some degree of obscurity. It is, however, reasonably certain that he took hold of the wire—probably to remove it from the path—and he was instantly electrocuted.

As usual in such cases, two main questions are presented, one relating to the negligence of defendant and the other to the contributory negligence of the deceased. As to the first, it is clear that defendant's manager acted prudently in turning off the current when on the morning of January 17th he ascertained the effects of the storm. But the mistake was made in turning on the current without patrolling the line on Fourth street south of Park avenue. It is manifest that if that portion of the line had been explored, the break would have been discovered and the line restored before the current was turned on again. The question is thus presented whether this failure to inspect the line involved herein is imputable to defendant as actionable negligence. In regard to this there can hardly be any difference of opinion. The company was plainly put upon notice by reason of the storm and, in view of the nature of the agency with which it was dealing and the importance of the safety of the citizens, the company could not be held blameless for its failure to ascertain and avert the obvious peril. A reasonable time would, of course, be allowed in which to make an investigation, but the proximity of the scene of the accident and its accessibility to the company's office render the conclusion irresistible that the delay was unnecessary and unreasonable.

The owner or operator of an electric plant is bound to exercise reasonable care in maintaining a system of inspection by which any change in the physical condition of any part of the plant, which would tend to increase the danger to persons lawfully in the pursuit of their business or pleasure, may be reasonably discovered. *Bourke v. Butte Electric*

& Power Co. et al., 33 Mont. 267, 83 Pac. 470. The care which the law exacts from any person, firm or corporation engaged in operating an instrumentality is always in proportion to the degree of danger reasonably to be apprehended from the use of the means employed. *Carroll v. Grande Ronde Electric Co.*, 47 Or. 424, 84 Pac. 391, 6 L. R. A. (N. S.) 290. In the latter case it was held that where defendant permitted a wire charged with a high degree of voltage to remain for nearly 20 hours fastened to a picket fence beside a public highway, in such condition that any living creature coming in contact with the wire must necessarily suffer death, defendant was *prima facie* guilty of negligence. A similar view is announced and other authorities cited in the case of *Tackett v. Henderson Bros. et al.*, 12 Cal. App. 653, 108 Pac. 151. We have therefore no hesitation in declaring that on the question of the negligence of defendant the conclusion should be in favor of plaintiffs.

As to whether the conduct of the deceased was such as to preclude recovery, there is more room for candid difference of opinion. As we have already observed, no one saw the accident which resulted in Foley's death. Appellants argue that to assume that he was guilty of contributory negligence would be to indulge in mere surmise, a mere guess, when all the facts proven are consistent with an entire absence of negligence on his part and, in truth, they affirmatively show that he is not chargeable with negligence. In this state the rule is that the burden of proving contributory negligence is cast upon the defendant, and it is insisted that no such evidence is to be found in the record. Assuming that the deceased picked up the wire, we must conclude, so it is contended, that he did not believe and had no reason to believe that the wire carried electricity. This follows from the presumption that he had such a regard for his life as the ordinary man has. *Texas P. R. Co. v. Gentry*, 163 U. S. 353, 16 Sup. Ct. 1104, 41 L. Ed. 186; *Baltimore & P. R. Co. v. Landrigan*, 191 U. S. 461, 24 Sup. Ct. 137, 48 L. Ed. 262. As to the reason for his believing that the wire carried no electricity, these circumstances are pointed out: The south pole, near which Foley was killed, was the end of the Northern Power Company's line. Foley had been working the preceding season for the Sanitary Fruit Company and the electricity had been shut off, so that it did not enter the transformer in the building. The motor of the company was taken away between the 1st and the 15th days of November, 1906, and after this there was no electricity used by the said company and probably not for a month previous. There was no person to be served with electricity beyond the Sanitary Fruit Company's plant. The Madison place, just beyond and adjoining block N, had used electricity from this line. But no electricity had been used on the Madison place for months. As the deceased had been working about the

company's property, he must have been familiar with these facts. Indeed, the local manager of the company testified that Foley worked "at such times as he saw fit. The days were short out in the shed and the sheds were dark when he was working on block N. He couldn't work long hours on account of the absence of light." Seeing the wire detached from the said south pole, he would therefore naturally conclude that it was not charged with electricity, and his efforts to remove it cannot be said to manifest any recklessness or want of due caution on his part. It is urged also that he was an unskilled laborer and the same degree of care could not properly be exacted of him as of one familiar with the dangerous character of electricity. It is true that there is some evidence that he had occasionally turned on and off the motor. But this was in obedience to the direction of the foreman and it was a very simple operation, as the testimony of the foreman shows: "From time to time Mr. Foley turned on the motor under my instructions. Sometimes I would call to him if I was close enough. At other times I would give him a motion of the hand. He turned on the motor just by moving a little lever. All that was necessary to stop the motor was to move the switch." But granting, as stated in *Shade v. Bay Counties Power Co.*, 152 Cal. 12, 92 Pac. 63, that deceased "was not a backwoodsman who had never heard of electric plants and the danger which lurks in live wires, if, indeed, such a person could be found in California," and, assuming that he realized the probable consequences of taking hold of such a wire, still it is urged that he had a right to believe, under the circumstances, that the wire was not a live one and therefore he was not chargeable with negligence. The contention is quite plausible and the jury might have found accordingly, but we are not prepared to say that the freedom of deceased from negligence is so clear that an adverse finding is entirely unsupported. There is evidence that he picked up the wire with both hands, and the inference from all the circumstances detailed is not unreasonable that there was no occasion for him to take hold of the wire either for the safety of himself or of others. There are two considerations to be weighed in determining whether he was guilty of contributory negligence. The first relates to the rationality of his belief as to the wire being charged and the other to the quality of his act in taking hold of the wire at all. Even if an individual had reason to believe that a wire was harmless, yet if he aimlessly or wantonly or needlessly seized it and thereby received a shock, it would still be competent for a jury to find that his unnecessary and reckless act was inexcusable and to hold him legally responsible for the consequences. Appellants, as we view it, have not given due consideration to this phase of the question.

We cannot hold that the trial court erred

in declining to grant a new trial on account of the newly discovered evidence. This was set forth in an affidavit by one John Berg and consisted of the declaration that he saw the detached wire on the day before Foley's death, and that he did not think "it was more than one foot to the east of that part of the tramway where Foley's body was found. There was a bend in the wire and it stood up from the ground in front of said passage at least two feet." But this witness was on the stand during the trial and the case was brought clearly within the rule that, "where newly discovered evidence might have been produced with reasonable diligence, a new trial will not be granted." *People v. Urquidias*, 96 Cal. 239, 31 Pac. 52. There are other reasons why the foregoing affidavit should not have the effect contended for by appellants, but they need not be considered.

Complaint is made of the following instruction given by the court on the request of defendant: "I charge you that there is no allegation in the amended complaint of plaintiffs in this action charging the defendant with negligent construction or maintenance of any of its cross-arms, by which it maintained any wires at the point where the deceased, James M. Foley, met his death, and this being so, there is no issue before you as to the proper construction or maintenance of any cross-arms." It is true that plaintiff made a general charge of negligence on the part of defendant and followed this by particular specifications, among which no reference is made to the cross-arms. The instances of negligence are pointed out as follows: "That said wires were not insulated and were so heavily charged with electricity as to endanger the life of any person who should come in contact with them. * * * That the said wire was of insufficient size and strength for the purpose for which it was used by the defendant. That the defendant negligently failed to remove the said wire from the ground to which it had fallen and negligently failed to turn off the current of electricity with which said wire was charged, and negligently and wrongfully permitted the said wire, heavily charged with electricity as aforesaid, to remain upon the ground for an unreasonable time after the same had fallen from the pole to which it had been attached." It is further alleged that the death of Foley "was caused by the negligent acts of defendant as aforesaid." The rule undoubtedly is, as stated in *Stevenson v. Southern Pacific Company*, 102 Cal. 148, 34 Pac. 620: "As a result of the application of these principles to code pleading in cases of negligence and to others of kindred character, it is held in this state, and in nearly all of the United States, that it is sufficient to allege the negligence in general terms, specifying, however, the particular act alleged to have been negligently done." The particular acts were specified here and upon these plaintiffs were compelled to rely.

The instruction was in line with the familiar principle requiring a correspondence between the allegations and the proof, and it does not furnish ground for reversal. It is true that some evidence as to the crossbars was received without objection from defendant, but it related particularly to the appearance of the wire attached to the pole nearest the body of the deceased and constituted a part of the *res gestæ*. It cannot be said that defendant's failure to object to the recital of the surrounding circumstances must be held as an acquiescence in the theory that the complaint charged negligence in the construction and maintenance of the said crossbars.

Instruction No. 5, requested by the defendant and given by the court, is in the following language: "Even though the installation and maintenance of the said power line in question were inadequate, insecure, and insufficient, still, if the wire which caused the death of James M. Foley, if his death was caused by the coming in contact with such wire, became detached or broken by reason of a storm or snowstorm of unusual or unexpected force or severity, still the defendant could not be held liable for negligence, unless it allowed and permitted said wire to remain upon the ground for an unreasonable length of time, or failed to turn off the current of electricity after the discovery of the fact that the wire had become detached and had fallen to the ground." The contention of appellants is that this instruction necessarily implies that negligence in the construction and maintenance of the plant is entirely immaterial, although the jury may have believed that a plant properly constructed would have successfully resisted the storm and remained intact. As a proposition of law, this would be manifestly incorrect, as a negligent construction or maintenance of the wire, if it contributed to the accident, would impose liability upon the defendant. It is equally true that there must be some causal connection between the injury and the faulty construction or maintenance. If the storm was so violent that it would have broken the wire regardless of its condition, then the storm could be said to be the sole cause of the breaking of the wire, and, if the jury so believed, it would be immaterial if they also found that there was fault in the construction and maintenance. This is really what was intended by the instruction, and while not very happily expressed and subject to the criticism of uncertainty, the jury must have so understood it, in view of the other instructions supplementary to and qualifying it. But, if abstractly considered, it should be held erroneous, plaintiff cannot complain, for the reason that there is no evidence of any imperfection in the construction or maintenance of said wire. The evidence shows without conflict that the installation and maintenance of the system were not faulty in any respect and the court might have so

instructed the jury without prejudice to plaintiffs. Indeed, the only theory upon which a verdict for plaintiffs could be sustained appertains to defendant's negligence in turning on the electric current in the wire in question and allowing it to remain for such a length of time in its exposed and dangerous position.

Instruction 17 presents a more serious problem. Therein the jury were instructed that "a man of ordinary prudence and understanding, who has lived in a city, neighborhood, or community where electricity is conveyed by means of power and pole lines for purposes of heat, light, and power and where electric power transmission lines are installed and maintained, and who has been around electrical power lines, transmission lines, service lines, machinery and appliances, is presumed to know the powers, dangers, and potentialities of electricity and electric power." If we are to indulge such a presumption, it must be in opposition to what we know to be a fact. Neither the ordinary nor, probably, the extraordinary man knows the "powers and potentialities of electricity." But the instruction as to this feature is not so important as the direction in reference to the dangers of electricity, since the latter is a vital element in the determination of the question of the "contributory negligence" of the deceased. In the light of the undisputed facts, the instruction of the court would be understood by the jury as a declaration that Foley must be presumed to have known "the powers, dangers, and potentialities of electricity and electric power." From this the inference would reasonably follow that he must have known that if he came in contact with a live wire of the voltage in question, death would result. Is this not an invasion of the province of the jury? Is it a matter of such general knowledge that the ordinary man who lives in a neighborhood where electric plants are operated and who has been around the machinery and appliances, however infrequently and whatever his business there, may be declared as a matter of fact to be acquainted with the "dangers and potentialities" of electricity? This does not seem to be one of the unquestioned data of general observation and knowledge that a court is permitted to declare to a jury. Probably the vast majority of such men do understand and appreciate the danger, but, under our system of procedure, the plaintiffs had a right to have the jury determine whether the deceased knew the danger of the electric current. As far as Foley's actual knowledge of electricity is concerned, the record is meager. There is nothing to show that he was ever employed by an electric light company and the only connection of his work with the current was in moving a lever one way to turn the electricity on and the other way to turn it off. Nevertheless, the jury were virtually instructed that they must

find that he knew the danger of coming in contact with the current. In *Giraudi v. Electric Imp. Co.*, 107 Cal. 120, 40 Pac. 108, 28 L. R. A. 596, 48 Am. St. Rep. 114, it is held that "the mere fact that a dangerous agency is used raises no presumption that the public know enough of its nature to avoid the danger which may arise from its use." It is true, as suggested by respondent, that, since said decision was rendered, we have made great progress in the use and knowledge of electricity and the instruction condemned therein is more objectionable than the one before us, but, after all, the evidence does not show that Foley had any greater knowledge of electricity than the general public. Again, it is not improbable that the jury made a wrong and prejudicial application of the instruction to the act of the deceased in taking hold of the wire, ignoring the consideration of whether he had reason to believe that the wire was not charged with electricity. It is easy to see how, in view of the peculiar facts, the jury may have concluded that the court intended that the presumption of knowledge of the danger would accompany this act of the deceased. At any rate, we think the determination of the knowledge of the danger on the part of the deceased should have been left to the jury without any direction from the court unfavorable to plaintiffs.

The plaintiffs requested this instruction: "If you find that James M. Foley, when going to or coming from his work found a wire in his way, and that he did not believe said wire was carrying a current of electricity and that an ordinarily prudent man in his situation at the time would not have believed that said wire was carrying a current of electricity, then if you find that he placed his hands on said wire, in an endeavor to get it out of his way, he was not guilty of negligence." The court modified the proposed instruction by adding after "believed" the following words, "or suspected, and would have had no reason to believe or suspect." The contention is that an ordinarily prudent man might have had some suspicion that the wire was charged and yet not be guilty of negligence if he ignored the suspicion and took hold of the wire. The test that seems to be generally recognized is whether an ordinarily prudent man, under the same circumstances, would have believed there was danger. It is probable that the jury would not be misled by the introduction of the additional element of suspicion, but we think the modification might well have been omitted. As a matter of fact, instruction No. 21, as given by the court is in exact harmony with the proposed instruction No. 20, and, we think, states the rule correctly. We have examined the other assignments of error, but find nothing therein demanding specific notice.

We think a new trial should be granted, and the order denying the motion is therefore reversed.

(14 Cal. App. 481)

In re CHADBOURNE'S ESTATE. (Civ. 748.)

(Court of Appeal, Third District, California. Nov. 9, 1910.)

1. EXECUTORS AND ADMINISTRATORS (§ 22*)—
APPOINTMENT—SPECIAL ADMINISTRATOR.

The appointment of a special administrator is not intended to bring about a general administration of the estate, the administrator's powers being limited, and should not be extended without necessity, or continue longer than is reasonably necessary to secure the appointment of an administrator.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 116; Dec. Dig. § 22.*]

2. EXECUTORS AND ADMINISTRATORS (§ 35*)—
APPOINTMENT—SPECIAL ADMINISTRATOR—
STATUTES.

Code Civ. Proc. § 1411, provides that when an executor or administrator is suspended or removed, the superior court or a judge thereof may appoint a special administrator to collect and take charge of the estate, and to exercise such powers as may be necessary in the preservation of the estate, or he may direct the public administrator to take charge thereof. Section 1426 provides that if all the executors or administrators die or become incapable, or the power and authority of all of them is revoked, the court must issue letters of administration, with the will annexed, or otherwise, to the widow or next of kin, or others, in the same order and manner as directed in relation to original letters of administration. *Held*, that when executors were removed for failure to give notice to creditors for several months after appointment, the court had power, pending an appeal from such removal order, to appoint a special administrator under section 1411, and also to proceed under section 1426 to the hearing of a petition for the appointment of an administrator with the will annexed; but the court had no jurisdiction to appoint a general administrator with the will annexed, until the order of removal had become final.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 259; Dec. Dig. § 35.*]

Appeal from Superior Court, Solano County; A. J. Buckles, Judge.

Judicial settlement of the estate of Edwin Chadbourne, deceased. From an order appointing Dennie May Chadbourne, surviving wife of deceased, special administratrix and appointing J. W. Warboys, administrator of the estate, pending an appeal from an order revoking the appointment of Mrs. Chadbourne and F. A. Chadbourne executors of the estate, F. A. Chadbourne and others appeal. Reversed in part, and remanded for further proceedings.

T. T. C. Gregory, for appellants. Paul O. Harlan, for respondents.

CHIPMAN, P. J. This is an appeal from an order appointing an administrator with the will annexed, pending the appeal from

an order revoking the appointment of the executors of said will.

On December 15, 1909, Dennie May Chadbourne, surviving wife of deceased, filed her petition in which it was alleged that F. A. Chadbourne and she, herself, had been duly appointed executors of the will of deceased; that her co-executor had neglected for two months to give notice to creditors of the estate as had been ordered, and that she did not give notice, "because she relied upon the assurance of said F. A. Chadbourne that the said notice had been given"; that, "subject to the revocation by the court of the letters testamentary issued as aforesaid to the said F. A. Chadbourne, petitioner is willing to, and will, upon such revocation being made, resign her aforesaid appointment as such executor." She prayed that a day be appointed for the said F. A. Chadbourne "to show cause why his said appointment and letters as executor shall not be revoked"; and that until the hearing the powers of the said F. A. Chadbourne be suspended and "your petitioner be appointed special administrator of said estate, and upon the hearing petitioner be appointed administrator."

The court found that F. A. Chadbourne caused directions to be given that notice to creditors should be published in the Solano County Courier, on the day the court ordered notice to be published, and that Dennie May Chadbourne believed such notice had been published and did not know to the contrary, until just before the filing of her petition; that "no damage accrued to the estate by reason of the neglect to give notice to the creditors other than such as may arise from delay in the administration of the estate." On January 14, 1910, the court gave its judgment, which was filed January 20th, that the letters of said executors be revoked, and appointing Mrs. Chadbourne special administrator. On January 14, 1910, respondent, J. W. Warboys, filed his petition for appointment as administrator of said estate, as the nominee of Mrs. Chadbourne, and on the 17th of January appellants, Joseph R. Chadbourne and Grant Chadbourne, brothers of deceased, filed their petition praying for letters of administration with the will annexed of said deceased, and on the same day filed their petition for appointment as special administrators pending the hearing of said petitions. On January 31st, F. A. Chadbourne, Joseph R. Chadbourne, and Grant Chadbourne filed their opposition to the appointment of said Warboys and on the same day F. A. Chadbourne filed notice of appeal from the judgment entered January 20th, revoking his letters and appointing Dennie May Chadbourne special administrator. On January 31st, the petition of Warboys for letters, the opposition thereto, and the petition of Joseph and Grant Chadbourne for letters came on for hearing and evidence, written and oral, was introduced. Among other

things, the court found: That the authority of said executors, F. A. and Dennie M. Chadbourne, was, on January 14th, revoked; that on that day (there being no executor) said Warboys filed his petition for letters "at the request and upon the appointment of the said Dennie May Chadbourne, * * * and said request and appointment were duly and regularly filed herein on January 14, 1910"; that on January 17th Joseph and Grant Chadbourne, brothers of deceased, filed their petition for special letters and also for letters with the will annexed; that "the said Dennie May Chadbourne and said J. W. Warboys are competent to administer said estate," and that the said Dennie "is competent to appoint, designate, and nominate any other person to administer the said estate in her stead; but said Dennie May Chadbourne is not entitled to the appointment as administrator with the will annexed in said estate"; that said Dennie and said F. A. Chadbourne "were removed and their power and authority revoked, as said executors, solely for the reason of their neglect to give notice to creditors for more than two months after their appointment as such executors; that there will be no delay in granting letters of administration with the will annexed to said estate; that the making of the order therefor will not be likely to be protracted; and that said estate will not suffer either loss or damage for the want of some person with authority to take charge of and care for it under special letters of administration; that said J. W. Warboys is entitled to letters of administration with the will annexed herein; and that neither the said Grant Chadbourne nor the said Joseph R. Chadbourne is entitled to either letters of administration with the will annexed, or special letters of administration herein." Judgment was accordingly made bearing date February 2, 1910, and filed February 8, 1910, from which the Chadbournes, on March 4, 1910, duly gave notice of appeal.

Appellant's principal point is that, pending the appeal of F. A. Chadbourne from the order removing him as executor, he was suspended from office, and, while it was within the power of the court to appoint a special administrator to act during such suspension, the court had no power to appoint an administrator with the will annexed, until such order of removal became final. Reliance is placed upon section 1411 of the Code of Civil Procedure, which provides as follows: "When * * * an executor or administrator * * * is suspended or removed, the superior court, or a judge thereof, must appoint a special administrator to collect and take charge of the estate * * * and to exercise such powers as may be necessary for the preservation of the estate, or he may direct the public administrator to take charge of the estate."

Section 1426 of the same Code reads: "If

all the executors or administrators die, or become incapable, or the power and authority of all of them is revoked, the court must issue letters of administration, with the will annexed or otherwise, to the widow or next of kin, or others, in the same order and manner as is directed in relation to original letters of administration. * * *

The court had the power, under section 1411, to appoint a special administrator to take charge of the estate (Estate of Crozier, 65 Cal. 332, 4 Pac. 109); and it also had the power, under section 1426, to proceed to the hearing of a petition for the appointment of an administrator with the will annexed. The appointment of a special administrator is not intended to bring about a general administration of the estate; his powers are limited by the section, and, while they may, by order of the court, be made to embrace duties not strictly within the letter of the statute, under the pressure of necessity made to appear, the appointment should not continue longer than is reasonably necessary to secure the appointment of an administrator, who would have all the powers given executors. We do not doubt the power of the court to proceed under section 1426 (In re Pina, 112 Cal. 14, 44 Pac. 332; Estate of Strong, 119 Cal. 663, 51 Pac. 1078), unless, as is contended, the appeal from its order removing the executors stayed all proceedings to appoint a general administrator.

In *Re Moore*, 86 Cal. 72, 24 Pac. 846, the precise question was before the court and it said: "Pending the appeal of Thomas W. Moore from the order removing him, he was suspended from office, and it was within the power of the court to appoint a special administrator to act during the period of suspension, but not to appoint a general administrator until such order or removal became final." This case is cited in *More v. More*, 127 Cal. 460, 463, 59 Pac. 823, 824, and in *Guardianship of Van Loan*, 142 Cal. 429, 76 Pac. 39. The proposition decided in 86 Cal. supra, was approved and applied to the case of the removal of a guardian in the *Van Loan Case*. Mr. Justice Angellotti gives what appears to be the reason for the rule, namely, that "the question as to who shall be the general administrator of the estate is involved in the appeal, and proceedings thereon are stayed by such appeal."

The notice of the appeal from the judgment removing the executors was filed January 31, 1910, and although the petition for the appointment of Warboys was heard on that day, the order appointing him was not made until February 2d, following. Respondents' claim that the appointment was made prior to the appeal is not borne out by the record.

A question is raised as to the sufficiency of the nomination of Warboys by Mrs. Chadbourne and also as to whether she was en-

titled to make a nomination. It is not necessary to decide the point, inasmuch as we must hold, in view of the decisions above cited, that the court was without authority to appoint a general administrator.

The record does not disclose the outcome of Mrs. Chadbourne's appointment as special administrator by the same order which revoked her letters as executor. Just how it came about that the court removed her as executor for cause, and yet appointed her by the same order to take charge of the estate, does not appear. Nor does it appear whether she gave the bond required and qualified. It would rather be inferred from the record that the court and counsel treated that part of the order as a nullity. Indeed, section 1511 of the Code of Civil Procedure requires the court, upon the neglect of an executor for two months after his appointment to give notice to creditors, to revoke his letters and "appoint some other person in his stead." However, this feature of the proceedings does not affect the main question.

In the judgment appointing J. W. Warboys administrator, the court denied the petition of Joseph R. and Grant Chadbourne to be appointed special administrators and also administrators with the will annexed. The appeal is from the whole of the judgment. The denial of the petition of the Chadbourne brothers doubtless was because, in the opinion of the court, Mrs. Chadbourne, as widow, had the superior right to administer or to nominate a person in her stead. As the appointment of her nominee was without authority, it seems to us that the question of appointing a special administrator pending the appeal from the judgment revoking the letters of the executors, should go back unembarrassed by any proceedings now here on this appeal.

The judgment dated February 2, 1910, and filed February 8, 1910, is reversed, with directions to the court to take such further proceedings in the matter as it may be advised.

We concur: HART, J.; BURNETT, J.

(14 Cal. A. 442)

PEOPLE v. DANFORD. (Cr. 168.)

(Court of Appeal, Second District, California. Nov. 3, 1910. Rehearing Denied by Supreme Court Dec. 29, 1910.)

1. TELEGRAPHS AND TELEPHONES (§ 79*)—FORGERY OF TELEGRAM—STATUTES—EVIDENCE.

Evidence held sufficient to sustain a conviction on an information framed under Pen. Code, § 474, and charging defendant with willfully delivering to another a message falsely purporting to have been received by telegraph knowing the same to be false, and with the intent to injure and deceive the person to whom it was delivered.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 22; Dec. Dig. § 79.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

2. TELEGRAPHS AND TELEPHONES (§ 79*) — FORGERY OF TELEGRAMS — INJURY FROM FORGERY.

It is not necessary that the person intended to be injured or deceived by a forged telegraph message in violation of Pen. Code, § 474, should be actually injured.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 22; Dec. Dig. § 79.*]

3. JURY (§ 5*)—JURY LIST—APPORTIONMENT.

Code Civ. Proc. § 206, requiring that the list of jurors be selected from the different townships or wards of the respective counties in proportion to the number of inhabitants therein, as near as can be estimated by the persons making the list, is directory, and, in the absence of any abuse of discretion, the action of the judges of the superior court in making the selection should not be disturbed.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 8; Dec. Dig. § 5.*]

4. INDICTMENT AND INFORMATION (§ 129*) — JOINING OF COUNTS—OFFENSE RELATING TO SAME TRANSACTION.

Under Pen. Code, § 954, providing that an information may charge different offenses under separate counts, but that they must all relate to the same transaction, an information charging in one count forgery of a telegraph message, and in a second count an attempt to obtain money by false pretenses, based on the same transaction, was not demurrable as stating more than one offense.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 414-418; Dec. Dig. § 129.*]

5. INDICTMENT AND INFORMATION (§ 41*) — CONFORMITY OF INFORMATION TO PRELIMINARY COMPLAINT.

Where defendant was committed by a magistrate upon an affidavit charging forgery of a telegraph message, in violation of Pen. Code, § 474, he cannot be charged in the information with attempting to obtain money under false pretenses though it grew out of the same transaction.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 152, 163-169; Dec. Dig. § 41.*]

6. CRIMINAL LAW (§ 1167*)—HARMLESS ERROR—DEFECTS IN INFORMATION.

Where an information sufficiently charges the commission of the offense for which defendant was committed by a magistrate on an affidavit of complaint, that the information also charges another offense arising out of the same transaction, but not included in the preliminary complaint and commitment, was not ground for reversal, especially where the latter count was dismissed at the commencement of the trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3101-3106; Dec. Dig. § 1167.*]

7. INDICTMENT AND INFORMATION (§ 138*) — MOTION TO SET ASIDE—GROUNDS—FORM.

A motion to set aside an information, on the ground that the second count charges defendant with an offense for which he was not committed, should be directed against the second count alone, and not to the entire information.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 472; Dec. Dig. § 138.*]

8. CRIMINAL LAW (§ 1167*)—HARMLESS ERROR—DISMISSAL OF COUNT—OPERATION AND EFFECT.

Whether one of the counts of an information was or was not for an offense for which defendant was not committed by a magistrate, defendant had no ground of complaint to its

dismissal on motion of the district attorney, leaving the information sufficient to charge the offense for which he was committed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3101; Dec. Dig. § 1167.*]

9. INDICTMENT AND INFORMATION (§ 144*) — MOTION TO DISMISS—"DISMISSAL."

The dismissal of a count of an information is not an amendment thereof, but is in the nature of an election to proceed on the remaining counts.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 488; Dec. Dig. § 144.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2105-2106; vol. 8, p. 7639.]

10. INDICTMENT AND INFORMATION (§ 144*) — MOTION TO DISMISS—DISMISSAL OF COUNT—OPERATION AND EFFECT.

Under Pen. Code, § 1019, providing that a plea of guilty puts in issue every material allegation of the information, the dismissal of one count after the plea is entered, leaving another count, the allegations of which are complete and independent of the dismissed count, does not leave the case without issue joined.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 488; Dec. Dig. § 144.*]

11. INDICTMENT AND INFORMATION (§ 110*) — LANGUAGE OF STATUTE—FORGERY—FACTS EXTRINSIC TO INSTRUMENT.

An information for forgery, which charged the offense in the language of the statute (Pen. Code, § 474), without averment of extrinsic matter showing in what manner the forged message deceived the complaining witness, is not defective, as it cannot be said that the instrument, if genuine, would not have efficacy to or that it could not injure or deceive.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 289-294; Dec. Dig. § 110; * Forgery, Cent. Dig. §§ 61, 64.]

12. CRIMINAL LAW (§ 1167*)—HARMLESS ERROR—VARIANCE.

Where the information charged the forgery of a telegram, setting out a copy of the message, and on trial an identical copy was offered in evidence, in connection with the rules and regulations of the telegraph company without objection by the defendant, the variance involved in admitting the rules and regulations in evidence was without prejudice to defendant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3101-3106; Dec. Dig. § 1167.*]

13. CRIMINAL LAW (§ 552*)—EVIDENCE—INCrimINATING CIRCUMSTANCES—IDENTITY OF DEFENDANT AS PARTY AT TELEPHONE.

In a trial for forgery of a telegraph message, where there was evidence tending to show that some one, claimed by the state to have been defendant, telephoned to the telegraph office, asking that the message be returned to him for correction, but the employés of the telegraph company failed to identify defendant as the person who telephoned, circumstantial evidence was admissible to prove such identity.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1257, 1259-1262; Dec. Dig. § 552.*]

14. CRIMINAL LAW (§ 1166½*)—TRIAL—PREJUDICIAL CONDUCT OF JUDGE.

At the trial of an information for forgery of a telegraph message, defendant, after a colloquy, said, "I desire to assign here prejudicial error," to which the court replied: "That is for the Supreme Court to say. You take your exception to the adverse ruling, and you have your record made." *Held*, that the state-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ment made by the court was not prejudicial misconduct.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3125; Dec. Dig. § 1166½.*]

15. CRIMINAL LAW (§ 730*)—TRIAL—MISCONDUCT OF COUNSEL—ACTION BY COURT.

Alleged misconduct of the district attorney was cured where the court, on its own motion, instructed the jury that they should disregard those acts of the district attorney which defendant considered offensive and prejudicial, especially where it was apparent from the verdict that the jury was not influenced by such misconduct.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1693; Dec. Dig. § 730.*]

16. CRIMINAL LAW (§ 829*)—TRIAL—INSTRUCTIONS — INSTRUCTION COVERED BY THOSE GIVEN.

Where the jury have been fully and fairly instructed upon a point covered by a requested instruction, its refusal is not error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

Appeal from Superior Court, Los Angeles County; George R. Davis, Judge.

W. J. Danford was convicted of forgery, and he appeals. Affirmed.

Grove E. Walter, L. L. Cardwell, and W. J. Danford, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for respondent.

SHAW, J. Defendant was convicted upon an information charging him with willfully delivering to another a message falsely purporting to have been received by telegraph, knowing the same to be false, and with the intent to injure and deceive the one to whom it was delivered. The information was as follows:

"The said W. J. Danford is accused by the district attorney of and for the county of Los Angeles, state of California, by this information, of a felony committed as follows: That the said W. J. Danford on the 23d day of December, 1909, at and in the county of Los Angeles, state of California, did willfully, unlawfully, feloniously, knowingly, and with intent to deceive, injure and defraud one C. J. O'Keefe, deliver and cause to be delivered to C. J. O'Keefe a certain false and forged message, which said false and forged message is in the following words and figures, to wit, 'Dated Telluride, Colo., Dec. 22, '09. To C. J. O'Keefe, Los Angeles, Calif. —Bonds inquired about will be redeemed at par 5,000 dollars and interest upon maturity, May, 1910. I. E. Brown, Cashier;' and which said false and forged message then and there falsely purported to have been received by telegraph and from a telegraph office and from one I. E. Brown, cashier; that in truth and in fact the said message was false and forged, and had not been received by telegraph, and had not been received from any telegraph office, and had not been received from I. E. Brown, cashier; and that he, the said W. J. Danford, then and there well

knew that said message was false and forged and had not been received by telegraph, and had not been received from any telegraph office, and had not been received from I. E. Brown, cashier—contrary to the form, force and effect of the statute in such cases made and provided, and against the peace and dignity of the people of the state of California."

A number of alleged errors are assigned as grounds for reversal, among which it is urged that the verdict is not justified by the evidence.

1. The evidence tended to show that the defendant, who was at the time engaged in the practice of law in the city of Los Angeles, had in his possession a \$5,000 bond, which purported to have been issued by the San Miguel Gas, Light & Power Corporation of Telluride, Colo.; that defendant desired to negotiate a loan of \$1,000 upon this bond as security, and to that end called upon C. J. O'Keefe, the complaining witness, in said city of Los Angeles. In the course of the conversation defendant gave to O'Keefe the names of certain alleged bond brokers in Denver and suggested that he (O'Keefe) wire them as to the value of the bond. On the day following O'Keefe called at defendant's office, where, at O'Keefe's suggestion, it was arranged that a telegram signed by him (O'Keefe) should be sent to the First National Bank, Telluride, Colo., the expense thereof to be borne by defendant. Thereupon, a telegram was prepared as follows: "First National Bank, Telluride, Colo. Please advise as to value of five thousand dollar bond, No. 32, Series A, issued by San Miguel, Gas, Light & Power Corporation, of date May first, 1900, due 1910, signed by E. W. Weed, Prest., and Jas Herman, Secty., and is same likely to be paid when due. [Signed] C. J. O'Keefe." Defendant telephoned for a messenger boy, and after writing upon the telegraphic blank containing the message that the expense of transmitting the message was to be charged to him and the answer delivered at his office, gave it to the messenger, who delivered it to the Western Union Telegraph office. Shortly after this message was delivered to said office, some one claiming to be, and who gave the name of defendant, phoned the telegraph office, advising them not to transmit the message, but to return it to defendant's office. Pursuant to such instructions, the message was not transmitted, but the same was returned to the office of defendant and delivered to him. On the following day O'Keefe called at defendant's office, in response to a phone call from defendant, at which time defendant gave him what purported to be a reply to the message which O'Keefe had written and which he supposed had been transmitted to the First National Bank, Telluride, Colo. This reply was inclosed in a sealed envelope of the Western Union Telegraph

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Company and addressed to C. J. O'Keefe. It contained a telegram in the words and figures following: "Dated Telluride, Colo., December 22, 09. To C. J. O'Keefe, Los Angeles, Calif. Bond inquired about will be redeemed at par, 5000 dollars and interest, upon maturity, May, 1910. [Signed] I. E. Brown, Cashier." O'Keefe at the time believed the message to be genuine and sent in reply to the one prepared by him, which he supposed had been transmitted. Nevertheless, he later made some inquiry at the telegraph office, and learned that no such message had been received or delivered through the Western Union telegraph office. It further appeared at the trial that I. E. Brown, whose name purported to be signed to the telegram, never signed the same, that the bond was valueless, and that there was no such corporation as San Miguel Gas, Light & Power Company of Telluride. O'Keefe did not make the loan, and sustained no loss or injury by reason of the alleged deception.

Appellant made no attempt to controvert these facts, but based his defense upon the claim that he was an innocent victim of another, one Jeffrey Ryan, who, as a client, employed the defendant to negotiate a loan for him upon the bond, assigning certain reasons for not being known in the transaction himself. The testimony of defendant and the inferences to be drawn therefrom are, in effect, that Ryan personated defendant in intercepting and by telephone recalling the message signed by O'Keefe and addressed to the First National Bank at Telluride, and that Ryan forged the telegram, made the basis of the prosecution, and gave it to defendant, claiming that it had been delivered at defendant's office in the absence of the latter and received by Ryan, who left it with defendant for delivery to O'Keefe; that defendant, believing it to be genuine and in answer to O'Keefe's telegram to the First National Bank, gave it to him when he went to defendant's office in response to a telephone call requesting him to do so. Ryan did not appear at the trial, nor was it made to appear that any one other than defendant had ever seen or heard of such a person. Evidently the jury did not believe the defendant to be the victim, as he claimed, of Jeffrey Ryan, and, as they had a right to do, discredited his testimony in this regard. Eliminating his explanation, there can be no question but what the testimony justified the finding of the jury that at the time defendant delivered the message to O'Keefe he knew the same was forged and was not a telegraph message received from a telegraph office, and that he committed the act with the intent to deceive and defraud O'Keefe of his money. Indeed, it is impossible to conceive of the jury reaching a verdict other than that of guilty. The fact that O'Keefe subsequently learned the true facts and did not part with his money is immaterial. *People v. Chadwick*, 143 Cal. 116, 76 Pac. 884.

2. Defendant interposed a challenge to the panel of jurors; the court denied the challenge and appellant assigns the ruling as error. One of the grounds of the challenge, and the only one now urged by appellant, is that in selecting the names of jurors suitable and competent to serve as jurors, the statute (section 206, Code Civ. Proc.), requires that such lists shall be selected from the different wards or townships of the respective counties in proportion to the number of inhabitants therein, as nearly as the same can be estimated by the persons making such lists. The record discloses that at the time the list of jurors were selected Catalina township, in said county, contained 25 inhabitants competent and in every way qualified to act as jurors in the trial of cases in the superior court of said county during the ensuing year, but that no one of the 25 inhabitants of said township was selected and included in said list of jurors. In our judgment, such fact standing alone affords no just ground for challenge. The section (206 Code Civ. Proc.) does not require jurors to be selected from every ward and township in the county, but from the different wards and townships therein, the total number of jurors required to be apportioned in accordance with the estimated number of inhabitants in each ward or township, as nearly as the same may be estimated. Whether or not the number of inhabitants of Catalina township, when compared with the number of inhabitants in the other townships of the county, was sufficiently large to entitle it to representation on the jury list, is not made to appear. Conceding such fact, however, to have been established, nevertheless it cannot be said the persons (in this case, a majority of the judges of the superior court) whose duty it was to make the lists of the names of jurors failed to select them from the different townships in proportion to the number of inhabitants therein, as nearly as such persons could estimate the same. In our judgment, the provision of the section in this regard is directory, and, in the absence of an abuse of discretion in making such estimate, the action of those whose duty it was to make the selection should not be disturbed. No such abuse is made to appear, and there was no error in denying defendant's challenge. *People v. Durrant*, 116 Cal. 194, 48 Pac. 75.

3. In addition to charging the defendant with the offense of which he was convicted, the information, by a second count, as it was originally filed, charged him with another offense, that "of attempting to obtain money by false and fraudulent representations and pretenses," which was based upon the same act and transaction set forth in the first count. A demurrer interposed to the information upon the ground that it stated more than one offense was overruled. There was no error in this ruling. Section 954, Pen. Code, provides that "the * * * information may charge different offenses, * * *

under separate counts, but they must all relate to the same act, transaction, or event. * * * Both counts in stating the offense with which defendant was charged related to and were predicated upon the same act and transaction, and, hence, the information was not subject to demurrer upon the ground specified. Section 1004, Pen. Code. The case of *People v. Clement*, 35 Pac. 1022¹ has no application, for the reason that section 954, Pen. Code, as it stood prior to the amendment of 1905, provided that the information should charge but one offense.

4. Defendant also made a motion to set aside the information upon the ground that he had not been legally committed by a magistrate, which motion was denied. It appears that in the affidavit of complaint filed with the justice of the peace defendant was charged with a violation of section 474, Pen. Code, as set forth in the first count of the information, and for which offense only he was by the magistrate committed; hence, it must be conceded the district attorney had no power to charge defendant with the offense specified in the second count thereof. *People v. Nogiri*, 142 Cal. 596, 76 Pac. 490. The charge set forth in the first count, however, was not subject to this infirmity, and therefore was not subject to the objection. To be effective the motion should, in our judgment, have been directed to the second count alone, and not to the entire information. Moreover, conceding the ruling to have been erroneous, it clearly appears that defendant's substantial rights were not prejudiced thereby, for the reason that, at the commencement of the trial, the district attorney moved the court to dismiss the second count, which motion was by the court, over defendant's objection granted.

5. There was no error in granting the motion to dismiss the second count. As the charge set forth therein was unwarranted by the commitment of the magistrate, it was mere surplusage and had no proper place in the information. "When a sufficient information charging the offense for which he stood committed remained, the accused could in no sense be injured by the action of the district attorney or the court in striking out such surplusage." *Ex parte Danford*, 110 Pac. 692; *Commonwealth v. Tuck*, 20 Pick. (Mass.) 356. The dismissal was not an amendment, but in the nature of an election to proceed against defendant for the offense charged in the remaining count alone. *Wooster v. State*, 55 Ala. 217. Even had the offense charged in the second count been authorized by the commitment, defendant would not be in a position to complain that he was relieved from prosecution thereon. His rights could not be prejudiced by such action.

6. Neither is there any merit in appellant's contention that the dismissal after

plea had been entered left the case without issue joined. Defendant's plea of not guilty put in issue every material allegation of the information. Section 1019, Pen. Code. The allegations of the first count were complete and in no wise dependent upon those contained in the second. The plea of not guilty to the allegations stating the offense for which defendant was committed was not affected by the dismissal. *Ex parte Danford*, supra.

7. Appellant further contends that the information is fatally defective by reason of the fact that it does not contain averments of extrinsic matter showing in what manner the forged message deceived the complaining witness. An answer to this contention is that the information charged the offense in the language of the statute, and in *People v. Chadwick*, 143 Cal. 116, 76 Pac. 884, involving a like offense, this was held sufficient, the court saying: "The information charges in the language of the section, and it cannot be said that the instrument, if genuine, would not have efficacy to, or that it could not injure, defraud, or deceive."

8. It is insisted there was a variance between the telegram offered in evidence and the forged message set out in the information. The record discloses no basis for such contention. The copy of the telegram set out in the information was identical with that offered in evidence. In addition to the message, however, there was read in evidence, without objection on the part of defendant, the printed rules and conditions of the telegraph company under which it receives and transmits telegraphic messages. In no event, conceding the alleged error, were the rights of defendant prejudiced by such wholly immaterial evidence.

9. A line of testimony was introduced, over defendant's objection, tending to show that a short time after the telegram signed by O'Keefe had been received at the telegraph office, defendant by telephoning to the office intercepted it and caused the message to be returned to him at his office. It is insisted that such evidence was erroneously admitted, for the reason that the employees of the telegraph office with whom the conversation was had over the telephone did not recognize defendant, and could not say that it was defendant who ordered the sending of the telegram stopped and returned to his office for correction. While there was no direct evidence that defendant was the person who gave the instructions, the circumstances disclosed by the record strongly point to him as the person who described the telegram as one signed by O'Keefe, addressed to the Bank at Telluride, Colo., marked "Charge W. J. Danford," and ordered it returned to him for correction, and it was so returned. There can be no doubt as to the admissibility of such line of testimony. The fact in dispute was susceptible of proof by circumstantial evidence.

¹ Reported in full in the Pacific Reporter; reported as a memorandum decision without opinion in 101 Cal. xvii.

10. Appellant insists that the court was guilty of misconduct whereby his rights were prejudiced. During the trial, and in response to defendant's objection to a question asked by the district attorney, the court said: "Upon the avowal (of the district attorney) that the fact sought to be proven will be connected and corroborated by circumstances, the objection will be overruled." Whereupon, defendant said: "I desire to assign here prejudicial error." The court then said: "That is for the Supreme Court to say. You take your exception to the adverse ruling, and you have your record made." It is apparent from the above statement of the proceedings that the remark of the court was prompted by a desire on its part to aid defendant's attorney in obtaining a proper record for review on appeal, by suggesting that he except to the ruling of the court in admitting the evidence, rather than to assign it as prejudicial error. In no sense can the statement made by the court be regarded as misconduct.

11. A number of assignments of error are predicated upon the alleged misconduct of the district attorney, all of which, after careful examination, are found to be of such a trivial character as to merit no discussion. Moreover, the court, of its own motion, instructed the jury that they should disregard what defendant considered offensive and prejudicial action on the part of the district attorney. Suffice it to say that, in view of the evidence, it clearly appears that the verdict of the jury could in no wise have been controlled or affected by the alleged misconduct.

12. Defendant requested the court to give to the jury an instruction as follows: "If you believe from the evidence that the defendant did not know the contents of the envelope, namely, defendant's Exhibit B (the alleged forged telegram), which complaining witness testified that the defendant delivered to him, before or at the time of delivering it, you must find the defendant not guilty"; which instruction, and others of like tenor, the court refused to give. Conceding the instruction to have been a correct statement of the law, there was no error in the ruling, for the reason that the substance of this requested instruction was fully covered by other instructions, in one of which the jury was instructed that, in order to justify conviction, they must find beyond a reasonable doubt that "the defendant, with intent to deceive, injure and defraud the said C. J. O'Keefe, did, as charged, willfully and knowingly deliver or cause to be delivered to said O'Keefe, the certain message so as aforesaid set forth and described in the information; and further believe from the evidence, beyond a reasonable doubt, that such message was false and forged, and falsely purported to have been received by tele-

graph, and from a telegraph office, and from the said I. E. Brown, cashier, as alleged in said count of the information, but that, in truth and in fact, it had not been received by telegraph, nor from a telegraph office, nor from the said I. E. Brown, cashier; and further believe from the evidence, beyond a reasonable doubt, that the said defendant, at the time, well knew the said message was so false and forged, and had not been received by telegraph, nor from a telegraph office, nor from said I. E. Brown, cashier." There were others of like import, from all of which it clearly appears that the jury were fully and fairly instructed upon the points covered by the instructions offered by defendant and which the court refused to give.

Other alleged errors are without sufficient merit to justify consideration. It appears from the entire record that defendant was accorded a full and fair trial. The evidence is ample to justify the verdict. No defect or error appears either in the information, the trial, or the proceedings therein which could have prejudiced the substantial rights of defendant. Pen. Code, §§ 960, 1258, 1404.

The judgment and orders appealed from are therefore affirmed.

We concur: ALLEN, P. J., JAMES, J.

(14 Cal. App. 487)

WALKER v. WALKER. (Civ. 755.)

(Court of Appeal, Third District, California.
Nov. 9, 1910.)

1. DIVORCE (§ 40*)—DEFENSES—SEPARATION AGREEMENT—CONSTRUCTION—STATUTES.

Civ. Code, § 158, provides that either the husband or wife may enter into any engagement with the other respecting property which either might, if unmarried, etc. Section 159 provides that they cannot, by any contract with each other, alter their legal relations, except as to property, and except that they may agree to an immediate separation, and may make provision for the support of either of them, etc. Plaintiff, who had a good cause of action for divorce against defendant, his wife, for desertion, entered into an agreement with her to adjust their property rights and to live apart; the contract reciting that it had become impossible for them to longer live together as husband and wife, etc. Held, that the sole purpose of the agreement was to adjust the property rights of the parties, and did not affect the legal consequences flowing from the prior desertion and bar the husband's action for divorce.

[Ed. Note.—For other cases, see Divorce, Dec. Dig. § 40.*]

2. DIVORCE (§ 37*)—DESERTION—OFFER TO RETURN.

Where the offense of desertion has continued for the statutory period, Civ. Code, § 102, requiring a return or offer to return in good faith to cure such desertion, must be substantially complied with in good faith to effect such result.

[Ed. Note.—For other cases, see Divorce, Dec. Dig. § 37.*]

Appeal from Superior Court, Napa County; Henry C. Gesford, Judge.

Action by Samuel Walker against Anna E. Walker. From a judgment for defendant and from an order denying plaintiff's motion for a new trial, he appeals. Reversed.

Frank L. Coombs, for appellant. James M. Palmer and E. S. Bell, for respondent.

CHIPMAN, P. J. Action for divorce. Defendant had judgment, from which and from the order denying his motion for a new trial plaintiff appeals. The complaint was filed October 30, 1907. The court found that the parties were married in 1862 and ever since have been husband and wife; that on April 1, 1903, defendant willfully and without cause, and contrary to plaintiff's wishes, separated from him, "with intent then and there to desert and abandon plaintiff, and from said 1st day of April, 1903, up to and including the 16th day of February, 1905, said defendant, without plaintiff's consent, and contrary to his wishes continued to live separate and apart from said plaintiff with intent at all of said times to desert and abandon him." The court then finds: That on the 16th day of February, 1905, said plaintiff and defendant effected a complete reconciliation of all of the differences existing between them at the said time as husband and wife, by reason of having upon said day made, executed, and delivered the following agreement. This agreement states: "That whereas certain unhappy differences have arisen between the parties hereto, whereby it has become impossible for them longer to live together in that condition of amity and accord essential between husband and wife; and whereas, it is therefore necessary that some arrangement be arrived at whereby the respective property and personal rights may be forever settled and adjusted; * * * Now, therefore, * * * said party of the first part does hereby release and forever absolutely discharge said party of the second part of and from any and all claims and demands, action, and causes of action of any and every name and kind whatsoever as the wife of the said party of the first part; and does hereby discharge her, the said party of the second part, of and from any and all claims upon the separate property, upon any property she acquires under the terms of this agreement, or upon any other property she may hereafter acquire, for the support and livelihood of said party of the first part. And said party of the first part does hereby relinquish forever any right or interest in or to the separate property of said second party and in or to any property she may hereafter acquire by right of succession or otherwise and does further covenant and agree that she shall and may live separate and apart from him, the said first party, and shall and may choose her residence and place of abode without let or hindrance from said first party." Then follow clauses similar in language expressing like covenants on the part of de-

fendant. "And the parties hereto agree to an immediate separation and each does hereby relinquish to the other all claims, rights, benefits, and privileges to which he or she may be entitled from the other by reason of their marriage relations." The concluding paragraph reads: "In consideration of fifteen hundred dollars * * * said party of the second part agrees and does accept the same in full satisfaction of any and all of her claims or rights in or to the property of the said parties as wife of the said first party; and the said second party relinquishes as wife of the said first party all right in law or in equity, by succession or descent, any further share in the community property or in any property the said first party now has or which he may hereafter acquire." These are all the provisions which seem to have any bearing upon the questions now raised. As a conclusion of law the court found: "That said agreement, by its terms and agreements constitutes a bar to this action as brought by the plaintiff against the defendant."

The evidence was sufficient to justify the finding of the court upon the fact of defendant's desertion of plaintiff in 1903, and the evidence was that she never, after having deserted him, returned to his home or offered to do so up to the time of the trial, May 12, 1908. There was no evidence of her having made any attempt at reconciliation or ever offered to resume marital relations after April 1, 1903. The case may be stated to be simply this: On February 16, 1905, plaintiff had a good cause of action for desertion; on that day the parties came together long enough to enter into an agreement to adjust their property rights and to live separate and apart, and they have ever since done so. Can the action be maintained, based upon the desertion prior to the execution of this agreement?

No evidence was offered as to the intention of the parties in making the agreement of separation other than is found in the agreement itself. The court limited its finding of desertion to the 15th day of February, 1905, inclusive, doubtless holding that the desertion ceased after that date by reason of the contract of separation. This would seem to follow from the finding that by the contract the parties "effected a complete reconciliation of all the differences existing between them at the said time as husband and wife"; and the trial court held that, as to the prior desertion, the agreement barred any action upon it.

"Either the husband or wife may enter into any engagement or transaction with the other, or with any other person, respecting property, which either might, if unmarried," subject to certain rules governing trust relations. Civ. Code, § 158. But "a husband and wife cannot, by any contract with each other, alter their legal relations, except as to property, and except that they may agree,

in writing, to an immediate separation, and may make provision for the support of either of them and of their children during such separation." Civ. Code, § 159. These sections, it is contended by appellant, prescribe the limit of their power to contract with each other; that marriage is a legal relation and they are powerless to alter that relation by contract, except as to property and except, also, that they may agree in writing to an immediate separation, i. e., to live separate and apart.

At the time the defendant entered into this contract, she had given plaintiff a sufficient ground for divorce; she had willfully deserted him for a period considerably beyond the statutory time prescribed; her matrimonial offense was complete and plaintiff's right of action had accrued. "If one party deserts the other, and before the expiration of the statutory period required to make the desertion a cause of divorce, returns and offers in good faith to fulfill the marriage contract and solicits condonation, the desertion is cured." Civ. Code, § 102. There is no pretense that defendant did this or even made the slightest conciliatory advance towards her husband. The evidence was that she had previously declared that she never would again live with him. The contract shows on its face that she returned for no purpose of remaining and fulfilling her marital obligations and soliciting condonation, but quite to the contrary, for the agreement declares that "It has become impossible for them longer to live together in that condition of amity and accord essential between husband and wife"; and she relinquished to him "all claims, rights, benefits, and privileges to which she may be entitled by reason of their marriage." It is impossible to find in this agreement any suggestion of a purpose on her part, or either of them, for that matter, ever again to resume the marriage relation. Furthermore, she declared in the agreement, as showing her purpose in making it, that "it is therefore necessary that some arrangement be arrived at whereby the respective property and personal rights of the parties and their future relations be forever settled and adjusted." It is in view of this state of the case we are asked to hold that the parties intended by their contract to obliterate the past, execute an accord and satisfaction of any right of action arising out of past conduct, and continue the separation, but upon a different footing.

In *Benkert v. Benkert*, 32 Cal. 468, the wife had manifested no intention to return to her husband, until after the statutory period constituting desertion had elapsed. The court said: "Her repentance did not obliterate the offense. If it had been accepted and acted on by the plaintiff, by receiving her and renewing the cohabitation, it would be regarded as a condonation. But he may, after the lapse of the statutory period, re-

fuse to accept the offer. Bishop (§ 530), in speaking of the offer to return, says that if it is made in good faith within the period prescribed by the statute to complete the offense, it will bar the suit. 'But after the time has expired and the right of action has fully accrued, the injured party is not obliged to accept such an offer; it comes too late.'" *Kenniston v. Kenniston*, 6 Cal. App. 657, 92 Pac. 1037. The statute requires that the action shall be commenced within a reasonable time (Civ. Code, § 124), and "unreasonable lapse of time is such delay in commencing the action as establishes the presumption that there has been connivance, collusion, or condonation of the offense, or full acquiescence in the same with intent to continue the marriage relation notwithstanding the commission of the offense." Civ. Code, § 125. In *McMullin v. McMullin*, 140 Cal. 112, 117, 73 Pac. 803, 809, the court said: "Of course, the original offense is not destroyed by the fact that after the desertion has continued for the period essential to make it a ground of divorce, the status of the separation changes and the separation becomes in every way agreeable to the deserted party. She has still her right of action for a divorce because thereof, and is not obliged to condone the offense."

There was no such lapse of time here as would bar the action, for there is not the slightest indication of "connivance, collusion, or condonation of the offense," and there was no showing of full acquiescence in the desertion "with intent to continue the marriage relation," with all its rights and privileges. The "status of the separation" was not changed by the agreement, for to all intents and purposes this status was to continue precisely as it had existed while the offense was being committed. We are unable to discover anything in the conduct of the parties or in the language of the agreement indicating any intention to condone past offenses, or ever again to live together as man and wife. It seems to us that the purpose of the agreement and its sole purpose was to adjust the property rights of the parties, and that their agreement to live thereafter separate and apart did not affect the legal consequences flowing from the prior desertion of the wife. Where the offense of desertion has once been committed and has continued for the statutory period, the statute (Civ. Code, § 102) points out how "the desertion is cured." Anything short of substantial compliance in good faith therewith does not cure the desertion.

But it is claimed, and this was apparently the view of the trial court, that the provision of the agreement of separation is a bar to the action by reason of the clause, "said first party does hereby release and forever absolutely discharge said party of the second part of and from any and all claims and demands, action and causes of action of any

and every name and kind whatsoever as the wife of the said party of the first part." It will be observed that the language purports only a release of the wife by the husband of all claims and causes of action, as the wife. If the husband intended to release all claims and causes of action he had against his wife, the language fails to so express such intention. However, if we treat the clause as intended to import a discharge of any claim or cause of action the husband then had against his wife, it seems to us that, taking the contract in its entirety and considering the context, the intention was to discharge any causes of action involving property rights. The contract was drawn pursuant to the authority given by the Code (Civ. Code, §§ 158, 159, *supra*), and in any construction given it we must keep not only its main purpose in view, but also the statute which authorized it, and this statute forbade altering their "legal relations, except as to property," and except as "to an immediate separation."

Appellant urges with much force that the instrument is void, in so far as it attempts a contract not permitted by the Codes. The argument is that "the Code establishes the law of this state respecting the subject to which it relates" (Civ. Code, § 4); that the common law of England is the rule of decision in the courts of this state, so far as not repugnant to the Constitution or laws of the state (Pol. Code, § 1468); that by the common law contracts between husband and wife are void for want of the wife's power to consent; that where the statutory right is given them to contract, it must be exercised only in the manner prescribed and cannot be enlarged. 9 Am. & Eng. Ency. of Law (1st Ed.) 793. We do not find it necessary to decide the point, for, conceding the power to enter into a contract waiving the right to bring an action for divorce, it does not seem to us that any such waiver was contemplated by the parties in making the contract, or that it was a consideration (if such a covenant could be treated as a valid consideration) for its execution on their part.

Nor can we see any good reason for giving the contract the construction contended for by respondent, inasmuch as she manifests no desire to resume marital relations; and, to declare the relation of husband and wife to be still subsisting, after all property rights are adjusted, would be to perpetuate a relation which she repudiates and has done all she could to terminate, and which she declares she never will resume. Why then, should we give the contract a construction so out of harmony with her acts and express declarations?

The finding that plaintiff and defendant, on February 15, 1905, effected a complete reconciliation of all the differences existing between them, by reason of having executed

the agreement of that date is, we think, unsupported by the evidence.

The judgment and order are reversed.

We concur: HART, J.; BURNETT, J.

(14 Cal. App. 462)

In re PRICE'S ESTATE. (Civ. 724.)
(Court of Appeal, Third District, California.
Nov. 7, 1910. Rehearing Denied by
Supreme Court Jan. 11, 1911.)

1. WILLS (§ 130*)—OLOGRAPHIC WILLS—VALIDITY—DATE.

Under Civ. Code, § 1277, providing that an olographic will is one that is entirely "written, dated, and signed by the hand of the testator himself," and that it is subject to no other form, an instrument reading, "dated the _____ day of _____, 1906," was invalid.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 336; Dec. Dig. § 130.*]

2. WILLS (§ 69*)—STATUTORY REQUIREMENTS.

Wills are creatures of the Legislature, and while some of the formalities required may appear immaterial, the right to thus dispose of one estate being purely statutory, the manner of such disposal as prescribed must be observed with substantial strictness.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 183; Dec. Dig. § 69.*]

3. TIME (§ 2*)—STATUTORY PROVISIONS—DATE—CONSTRUCTION.

The term "date," as used in a statute requiring an instrument to be dated, means the day, month, and year, and giving the year alone is insufficient.

[Ed. Note.—For other cases, see Time, Dec. Dig. § 2.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1830-1831.]

4. WILLS (§ 130*)—OLOGRAPHIC WILL—VALIDITY—DATE.

That in a given case the writer of a pretended olograph will is found to have capacity to make a last will at any time during a certain year does not render such will valid, where no date is given, except the year.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 130.*]

Appeal from Superior Court, Tehama County; John F. Ellison, Judge.

Proceedings to probate the last will and testament of Elizabeth Price, deceased, as olographic. From an order denying probate, Judd Allen Page appeals. Affirmed.

Jas. T. Matlock, Jr., for appellant. John J. Wells and W. A. Fish, for respondent.

HART, J. This is an appeal from an order denying probate of an instrument purporting to be the last will and testament of Elizabeth Price, deceased, as olographic. The appeal is by one Judd Allen Page, who is named in said purported will as the executor thereof, and who was the petitioner for the probate of the same. The instrument was denied probate upon the ground that it was not "dated" by the deceased within the meaning of section 1277 of the Civil Code, defining an olographic will.

The instrument was written by and in

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the handwriting of the deceased, but the purported date of its execution reads: "Dated this — day of —, 1906." Thus it will be noticed that there is nothing definite about the "date," except the year; the day and month being omitted. Therefore, the only question submitted for solution here is, whether the numerals combined together as representing the year "1906" constitute a "date" within the meaning or contemplation of the section of the Civil Code referred to.

Said section reads: "An olographic will is one that is entirely written, dated, and signed by the hand of the testator himself. It is subject to no other form, and may be made in or out of this state, and need not be witnessed."

We are of the opinion that the instrument, by reason of the incompleteness of the date as noted, does not meet the requirements of the statute prescribing the requisites of an olographic will, and that the court below properly denied the petition for its probate. Last wills and testaments are entirely creatures of the Legislature, and, while some of the formalities with which they are required to be executed may appear to be immaterial and unnecessary, yet the right to thus dispose of one's estate being purely statutory, the manner of such disposal, as prescribed by the statute, must be observed with at least substantial strictness. If, therefore, there be a substantial departure from such formalities in an attempted testamentary disposal of one's property, there is no last will in law, and the decedent's estate must go to the administrator.

The term "date," in its common and accepted signification, means the "day, month, and year" (see Century Dictionary, the Encyclopædic Dictionary, and Bouvier's Law Dictionary), and we can perceive no sound reason that would or could prompt the Legislature in using the term in any other sense when making it one of the essentials of a legal instrument in writing of any character. If the "year" alone shall be held to be sufficient to satisfy the statute as to the date of an olographic will, we can see no good reason why the "day" or the "month" only would not likewise be sufficient to meet the requirements of the statute in respect of the date, between which and the other requisites of such a testament we can discover no difference in importance.

In the case of *Estate of Martin*, 58 Cal. 531, an instrument purporting to be an olographic will, while entirely written and signed by the deceased, bore no date. It was there contended that the dating of a will "is a mere formal matter, not absolutely necessary." The Supreme Court, denying the soundness of this contention, said: "The Legislature has seen fit to require three things to concur for the execution of an olographic will, viz.: That it be written, dated, and signed by the hand of the testator. We are not at liberty to hold that the Legislature

intended any one of these requirements to be of greater or less importance than the others. If we may omit one, why not either of the others? 'It is subject to no other form.' It is subject to the form prescribed."

Professor Page, in his work on "Wills," says: "It is generally provided that an olographic will must be dated. The date must show the year, month, and day in order to make the will valid."

"The date is an important part of every holographic will and consists of the year, month, and day, the omission of any of which is fatal." Am. & Eng. Ency. of Law, vol. 30, p. 583; *Fuentes v. Gaines*, 25 La. Ann. 85; *Heffner v. Heffner*, 48 La. Ann. 1088, 20 South. 281; *Robertson's Succession*, 49 La. Ann. 868, 21 South. 586, 62 Am. St. Rep. 672.

The Louisiana statute defining and prescribing the requisites of an olographic will is substantially in the same language as is found in our own. In the case of *Fuentes v. Gaines*, supra, an attempt was made to establish by parol the contents of a lost olographic will. Some of the witnesses testified that the alleged will was dated "A. D. 1813," and others that it was dated "July, A. D. 1813." The Supreme Court of Louisiana declared that the proof failed to disclose all the essentials of an olographic will. It said: "Is a testament, which is dated A. D. 1813, or July, A. D. 1813, to be deemed dated in the sense of the law? Certainly not, if the term 'dated' is to be understood in its 'common and usual signification.' Webster defines the word 'date' thus: 'That addition to a writing which specifies the year, month, and day when it was given or exercised.' * * * It is essential, therefore, to specify the day, month, and year, to give a date to a testament in the sense of article 1588 of the Civil Code."

In the case of *Heffner v. Heffner*, 48 La. Ann. 1089, 20 South. 281, the trial court rendered judgment annulling the will, olographic in form, of William Heffner, deceased, on the ground that it was not dated. Upholding the judgment, the Louisiana Supreme Court said: "The Code defines the olographic will to be that written, dated, and signed by the testator himself. The date, signature, and the entirety of the will in the handwriting of the testator are the essentials. * * * The policy of the law to secure the true representation of the testator's wishes and guard against fraudulent wills is marked in the requisite of the testator's handwriting, including the expression of the date when he writes the paper and affixes the signature it bears. The date in the testator's handwriting is part of the evidence the law requires of the verity of the instrument. If the paper is forged, the date it must bear may furnish the means of detection. On any issue of the sanity of the testator the dates indicate and restrict the period of inquiry. * * * The date in its

ordinary sense imports the day of the month, the month, and the year. That is also the legal significance of the date. The day of the month is quite as much a part of the date as the month or the year. If the law requires the olographic will to be dated, the exaction extends to every part of the date.

* * * The hardship of the case has prompted us, in the absence of any direct adjudication of our own courts on the point, to examine the views of the French commentators, dealing with the corresponding article of the Napoléon Code. They disclose the reason of the law in exacting the date, and maintain the day of the month to be essential. We find the distinction drawn by them between a wrong date, which it seems has been held will not vitiate, and no date or a deficient date, which will avoid the will. But the necessity of the day of the month in the date of the olographic testament is rigidly enforced by the jurisprudence under the Napoléon Code." See, also, *SucceSSION of Robertson*, 49 La. Ann. 868, 21 South. 583, 62 Am. St. Rep. 672.

Counsel for appellant cites and relies upon the cases of *Gaines v. Lizardi*, 3 Woods, 77, Fed. Cas. No. 5,175, and *Estate of Fay*, 145 Cal. 82, 78 Pac. 340, 104 Am. St. Rep. 17, as supporting his interpretation of the testament involved here. But there is a clear distinction between these cases and the Louisiana cases to which we have referred. In *Gaines v. Lizardi*, supra (which seems to have involved the same testament that was considered in *Fuentes v. Gaines*, supra), it is not held that the word "dated," as used in describing the essentials of an olographic will, does not include the day, the month, and the year. To the contrary, the opinion in this regard seems to be based upon the assumption that the will bore a date within the full meaning of that term. The court in that case merely held that a fair and reasonable interpretation of the testimony bearing upon the question of the date of said testament justly led to the conclusion that "it bore the year, month, and day" in the date thereof. The case of *Estate of Fay* was where the date of the will, olographic in form, was inconsistent with the testimony. The instrument was dated "May 25, 1859," and it made provision for the son of the testator, Luke Fay, who was born in 1861; for his son, John Fay, who was born about the year 1865, and for a daughter, who was married in January, 1887, and died in March, 1900. From these facts it was evident that the instrument was not written in 1859. But the Supreme Court held that the will was "dated" within the meaning of the statute, and that the error with regard to the year, having obviously been the result of inadvertence, would not vitiate the instrument. It is there said: "The Legislature has not used the words 'truly dated' nor 'correctly

dated,' but the word 'dated,' which must be construed according to the approved use of the language (Civ. Code, § 13), and in its primary and general sense. Code Civ. Proc. § 1861."

But the proposition in the case at bar does not present the question, whether the testament has been "truly dated" or "correctly dated." It does not, in other words, involve the question, whether the writer of the document made a mistake in writing the date and thus erroneously inserted an impossible day of the month or a year in which the testimony shows that it was impossible to have written the instrument. The question propounded here is, whether the instrument was dated at all, within the meaning of the law prescribing the essentials of an olographic will. We can find no other answer to this question than that to which reason and the cases have led us, unless we are bold enough to arbitrarily substitute the will of the court as to the essentials of olographic testaments for that of the Legislature.

Nor is the fact that the court in this case found that, during all of the year 1906, in which the instrument sought to be established as the last will of the deceased was written, deceased was mentally sound and capable of making a testamentary disposition of her estate, an argument against the construction which we have given our code section pointing out the essential requisites of an olographic will. As we have seen, the right to dispose of one's belongings by testament is conferred by the Legislature, in which body there exists full and unrestricted power to require any reasonable mode or manner of a testamentary disposal of one's estate; and whatever might be the reason inspiring the Legislature to impose certain restrictions or conditions on or the manner in which a party may name the successors to his estate after his death, so long as they be not unreasonable or absurd, the formalities or essentials so prescribed must be performed. And if, as is suggested in *Heffner v. Heffner*, supra, one of the reasons requiring an olographic will to be dated is because it may have some bearing on the question of the mental soundness and competency of the decedent, if that issue should be submitted, it does not follow that because, in a given or a particular case, the writer of the pretended olographic will is found to have had capacity to make a last will, any one of the essentials of such a testament, as prescribed by the law, may, in the writing thereof, be omitted.

It follows, from the foregoing views, that the order must be affirmed, and it is so ordered.

We concur: CHIPMAN, P. J.; BURNETT, J.

(14 Cal. App. 463)

SLADE v. BUTTE COUNTY. (Civ. 706.)(Court of Appeal, Third District, California.
Nov. 7, 1910.)**1. PUBLIC LANDS (§ 53*)—LANDS IN LIEU OF SCHOOL LANDS.**

By Act Cong. Feb. 26, 1859, c. 59, 11 Stat. 385, the United States appropriated other lands of like quantity in lieu of the sixteenth and thirty-sixth sections granted to a state where those sections were lost to the state by previous pre-emption settlement, and subsequent statutes made like provision in cases of homestead settlement, or where the lands were mineral or are otherwise disposed of by the United States. The act of 1859 also provided that lands granted in lieu of those sections might be selected by the state or territory in which they lie. *Held*, that no title passed to the lieu lands by the statute alone, but the statute provided that, when locations and selections were made by the state, the government, if the lands selected were unoccupied public land, would inform the state, and thereupon title would vest in it, and patent would issue by the state to the locator.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 143; Dec. Dig. § 53.*]

2. TAXATION (§ 61*)—PROPERTY TAXABLE—CERTIFICATES OF PURCHASE OF SCHOOL LAND.

Certificates of purchase of land which the state anticipates will be granted to it in lieu of school lands, which, by reason of homestead or pre-emption or other cause, have not been received by the state, are not taxable, where the state did not acquire title to the land, and the purchaser received no land under the certificates.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 61.*]

3. TAXATION (§ 543*)—RECOVERY OF TAXES PAID—ACTIONS—SUFFICIENCY OF COMPLAINT.

In an action against a county, plaintiff alleged that he was the holder and owner, by assignment, of certificates of purchase issued by the state for lands situated in defendant county, selected in lieu of other lands in the sixteenth and thirty-sixth sections, that plaintiff for three enumerated years delivered to the county assessor his sworn statement that he was the owner of lands described in the certificates, that he did so under the erroneous belief that the said certificates and their conveyances to him conveyed the equitable title therein to him, that he paid to the tax collector on a date specified specified sums as taxes on said land for the years enumerated, that the title to all of said lands at all times was in the United States, that all of said lands have been and now are vacant public lands, that plaintiff has never been in either constructive or actual possession thereof, nor ever asserted or made a possessory claim thereto or any part thereof, that he paid all of said taxes under the erroneous belief that such lands were taxable to plaintiff, that on a date specified he filed with the county board of supervisors a verified claim for a refund of said taxes under Pol. Code, § 3804, that a copy of his claim was made an exhibit to the complaint and a part thereof, and that said board considered the claim and on a date specified at a regular meeting rejected the claim. *Held*, that the complaint stated a cause of action under Pol. Code, § 3804, providing for the refunding of any taxes erroneously collected; and that it was not objectionable because of failure to allege the names of the persons to whom the certificates of purchase were issued.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1012; Dec. Dig. § 543.*]

4. TAXATION (§ 537*)—RECOVERY OF TAXES PAID—ESTOPPEL.

Where the state issues certificates of purchase of lands which it anticipates will be given it by the United States government in lieu of school lands which because of prior settlement or other reason the state never received, and the assignee of those certificates delivers to the assessor of the county his sworn statement that he is the owner of such lands and pays the taxes thereon, and the state never gets title from the United States to the lands described, the assignee is not estopped from asserting the invalidity of the assessment by his statement that he owned the property, as the state is not prejudiced by his having paid the taxes, and Pol. Code, § 3804, authorizes the refunding of taxes erroneously collected.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 996; Dec. Dig. § 537.*]

Appeal from Superior Court, Butte County; Warren Sexton, Judge.

Action by Spencer E. Slade against the County of Butte. Judgment for defendant on demurrer to complaint, and plaintiff appeals. Reversed, with directions to overrule the demurrer.

Leo H. Susman, for appellant. Lon. Bond, Dist. Atty., for respondent.

CHIPMAN, P. J. Defendant had judgment on its demurrer to plaintiff's complaint, from which plaintiff appeals.

It is alleged in the complaint that plaintiff is the holder and owner, by assignment thereof, of certain certificates of purchase, issued by the state, for lands situated in defendant county selected, in lieu of certain other lands, in the sixteenth and thirty-sixth sections; that plaintiff, for the fiscal years, ending respectively June 30th of 1905, 1906, and 1907, "delivered to the assessor of said county his sworn statement, setting forth that he was the owner of the lands described respectively in Schedules A, B, and C, hereinafter mentioned, under the erroneous and mistaken belief that the said certificates of purchase issued by said state and the said conveyances made to him thereof mentioned in paragraph 3 of this complaint, conveyed the equitable title therein to him"; that plaintiff paid to and it was received by the tax collector of said county, on November 19, 1904, the sum of \$236.48, assessed as taxes on said land for the fiscal year ending June 30, 1905; and on November 27, 1905, the sum of \$224.80 for the fiscal year ending June 30, 1906, and on November 17, 1906, the further sum of \$178.20 for the fiscal year ending June 30, 1907; "that the title, both legal and equitable, to all of said lands at all times was and now is in the United States of America, and that all of said lands have at all times been and now are vacant public lands"; that plaintiff "has never been in either constructive or actual possession of said lands or any part thereof nor has he ever had, asserted or made a possessory claim thereto or to any part thereof; and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

that plaintiff paid all of said taxes to the tax collector of said county of Butte under the erroneous and mistaken belief that such lands were then taxable to plaintiff by said county and state." It is then alleged that on November 9, 1907, plaintiff filed with the clerk of the board of supervisors of said county his duly verified claim for the refunding to him of said taxes, "in conformity with and for the purpose of availing himself of the provisions of section 3804 of the Political Code of the state of California," and copy of his said claim is made an exhibit to the complaint and part thereof; that said board considered said verified claim "and at a due and regular meeting of said board of supervisors, held on the 10th day of February, 1908, did, on said last-mentioned day, first and finally reject the said claim and the whole thereof." In the claim presented to the board of supervisors it is averred that after the issuance of said certificates of purchase "the said state of California, by its proper officers, applied to the proper authorities of the United States of America, to accept and approve the selection by the said state of the said lands in lieu of an equivalent amount of state school lands, and to list the same to the state; that thereafter the said United States refused to accept and approve the selection of any of the said lands, and to list the same to such state, and canceled the said entries thereof." In the said verified claim it is further set forth that plaintiff "did not and could not know that the selection of said lands by said state of California, would not be accepted and approved by the United States authorities and listed to the state; but that all of said taxes were collected under the mistaken belief that such lands would be so accepted, approved and listed to said state." Judgment is demanded for the sum of \$639.48, the amount of said several payments, with interest thereon from February 10, 1908, at 7 per cent.

The grounds of the demurrer are: (1) Insufficiency of facts alleged; (2) that the action is barred by sections 3804 and 4076 of the Political Code; (3) that the complaint is uncertain in that it does not disclose the names of the persons to whom the alleged certificates of purchase were issued; and (4) that plaintiff is estopped from asserting the illegality of the tax assessment by reason of his having sworn to and delivered to the county assessor a list of the property involved as taxable.

Section 3804 provides that "any taxes * * * heretofore or hereafter * * * erroneously or illegally collected, * * * may by order of the board of supervisors be refunded by the county treasurer."

The statute of 1909 relating to the disposition of school lands and the acquisition of lands in lieu thereof does not apply to locations of lieu lands previously made and need not be considered.

By Act Feb. 26, 1859, c. 59, 11 Stat. 385, the United States appropriated other lands of like quantity in lieu of the sixteenth and thirty-sixth sections or fraction thereof, granted to a state, where lost to the state in which the lands lie, by reason of having previously been settled upon "with a view to pre-emption." Subsequent statutes made like provision where the loss was by reason of settlement with a view to homestead, or where the lands are mineral, or "are included within any Indian, military, or other reservation, or are otherwise disposed of by the United States." See Act Feb. 28, 1891, c. 384, 26 Stat. 796 (U. S. Comp. St. 1901, pp. 2275, 2276). The act appropriates and grants lands in lieu of the sixteenth and thirty-sixth sections so lost to the state, and provides that other lands of equal acreage "may be selected by said state or territory in which they lie." Obviously, no title passed of these so-called lieu lands by virtue of the statute alone, i. e., it was not a grant in present, as was the grant of the school lands (sixteenth and thirty-sixth sections, in place). The statute looked to possible losses to the state and provided that, when such losses were ascertained and locations or selections were made by the state, the government would, if the land selected were unoccupied public land subject to such location, approve such selection and so officially inform the state, and thereupon title would vest in it, and patent would issue by the state to the locator. The state of California passed no legislation on the subject (until in 1909) except as found in sections 3398 and 3406 (St. 1872), by which the Surveyor General was declared to be the "general agent of the state for the location in the United States land offices of the unsold portion of * * * land granted to the state for school purposes * * * and lands in lieu thereof," and, "whenever application is made to him for any portion of the lands mentioned in section 3398," he must "communicate with the United States Land Office, and ask that the lands described in the application be accepted in part satisfaction of the grant under which it is sought to be located."

Under these statutes the United States Land Department and the Surveyor General of California evolved a method of giving practical effect to the law, in pursuance of which all lieu locations have been made, those of plaintiff presumably included. Briefly, this method may be thus stated: A. B. makes application to the state Surveyor General in which he sets forth, under oath, certain required facts and states that he desires to purchase the land described therein pursuant to the provisions of title 8 of the Political Code (in which are found sections 3398 and 3406); an examination is made by the Surveyor General of his records, and, if the land appears to be unoccupied and open to entry in the United States Land Office,

district in which the land lies, he issues a certificate of purchase to the applicant, and later makes out an application to the United States Land Office to have the land applied for listed to the state in lieu of certain described school land (sixteenth and thirty-sixth sections) which he designates as the base for the listing by the government of the land applied for. This application is sent through the local land office of the district and is there indorsed by the register and receiver certifying that the application has been "filed and accepted, subject to future approval; that there is not of record in this office any adverse filing entry, or claim to the land selected by the state." The General Land Office at Washington, finding that the base is valid, and that the land applied for is free and open to entry, approves the application and lists the land to the state. By operation of the law of the United States and of the state of California, the title to the school land is relinquished to the United States and the title to the land selected in lieu thereof passes to the state.

It was held by our Supreme Court, in *Roberts v. Gebhart*, 104 Cal. 67, 37 Pac. 782, in a case where the General Land Office refused its approval, that the certificate of purchase issued on an application for lieu lands, followed by a selection made by the state "does not confer even an equitable right upon the state, or upon one claiming under it, such as would authorize a court of equity in reviewing the grounds or basis for such refusal." In *Allen v. Pedro*, 136 Cal. 1, 68 Pac. 99, it was said: "If plaintiff sought to get the land as lieu land, he acquired no title from the state, because the latter could get no title until the land had been selected, and the selection approved by the United States Land Department, and the land listed to the state"—citing *Roberts v. Gebhart*, supra. See, also, same case, 138 Cal. 202, 70 Pac. 1128.

The term "property" includes "all matters and things real, personal, or mixed, capable of private ownership"; and the term "real estate" includes "the possession of, claim to, ownership of, or right to the possession of land." Pol. Code, § 3617. And possessory rights to and possession of public land have been held taxable in this state, notwithstanding the compact contained in the act of Congress admitting California into the Union, exempting public lands of the United States from taxation. *People v. Donnelly*, 58 Cal. 144. But it was held in that case that "land which has been such can be taxed only when a patent has issued, or when the private proprietor has acquired a 'perfect equity.'" Here not only the averments of the complaint are that plaintiff has never been in possession, has made no possessory claim, and has never claimed the right of possession, but, as we have seen, neither the legal nor equitable title vests in the state or the United States has

by the state and listed it to the state. It was held in *People v. Frisbie*, 31 Cal. 146, that the terms "claim to land" mean not only an assertion to title; "it involves also the idea of an actual possession of the land claimed."

It was held by the Supreme Court of North Dakota that the selection must be approved before the lands become taxable. *Jackson v. La Moure County*, 1 N. D. 238, 46 N. W. 449; *Wells County v. McHenry*, 7 N. Dak. 246, 74 N. W. 241. These were cases of indemnity lands under grants to railroad companies but they discuss the question here involved.

Section 3804, as amended in 1889, and as now existing, was interpreted in *Hayes v. County of Los Angeles*, 99 Cal. 74, 33 Pac. 766, which was a case where the property had been twice assessed and the double tax paid. The court said: "That the object of the statute was to obviate these difficulties (pointed out as existing under the statute previous to its amendment), and provide a means for the recovery of moneys collected by mistake and to which the county and state have neither a moral nor a legal right, is apparent." Again: "Section 3804 was enacted to do justice to a class of cases where, but for its provisions, the application of the doctrine of caveat emptor would work a hardship to citizens who had paid money which it was inequitable for the county to retain." It was also held that the word "may," as applied to the duty of the board of supervisors, means "shall." In *Pacific Coast Co. v. Wells*, 134 Cal. 471, 66 Pac. 657, plaintiff had by mistake, in its verified statement made of its property, shown that its assessable property was greater than it was in fact. Plaintiff voluntarily paid the tax and upon the discovery of the mistake made claim for the excess paid. *Hayes v. County of Los Angeles*, supra, was relied upon and followed, as well as cases in other jurisdictions, and plaintiff was held to be entitled to recover. Among other things, the court said: "If the Legislature had intended to restrict the power of the board to refund to cases where the taxes had been involuntarily paid or paid under protest, it would have so said, as it did in the cases brought under section 3819, where relief is given by action in the courts." In *Palomares Land Co. v. County of Los Angeles*, 146 Cal. 530, 80 Pac. 931, the section was held to authorize the recovery of money erroneously paid on redemption from tax sale.

Respondent urges with apparent sincerity that the certificates of purchase, apart from the land, were property and assessable as such. There is nothing in the point. The assessment purported to be of the land and not of the pieces of paper representing whatever rights plaintiff had in the land. If the state acquired neither legal nor equitable title to, or right in the land, it would be hard to hold that the certificates them-

selves, which conveyed nothing, would be taxable.

We think the complaint states sufficient facts to constitute a cause of action under section 3804.

Section 4076 of the Political Code relates to the form of the claim. In the present case the facts were very fully stated in the claim presented to the board and substantially complied with the statute. Nor do we see any reason for holding that section 3804 is a bar to the action.

The point that the complaint is uncertain in not giving the names of the persons to whom the certificates of purchase were issued is without merit. Plaintiff alleged possession and ownership of the certificates by assignment, and this was sufficient. He was not called upon to plead his derangement of title.

One question only remains: Is plaintiff estopped from asserting the invalidity of the assessment because he filed with the assessor a verified statement of the property in question for taxation? The answer must be in the negative. The transaction lacks the necessary elements of estoppel. Besides, if the facts bear the semblance of estoppel they show the state to be the greater offender, for it was through the promise of the state that the land could be acquired under lieu location that plaintiff and his predecessors parted with their money. If any one was misled, it was the plaintiff. However, we cannot perceive that the state has been injured or prejudiced by plaintiff's having paid the tax; and injury or prejudice resulting from plaintiff's conduct is of the essence of estoppel. Furthermore, estoppel is of equitable cognizance, and only in exceptional cases is it allowed where equity and good conscience forbid, and this case furnishes no exception to the general rule. The simple fact is the state got something for nothing, and it is asked to make restitution. This section 3804 authorizes it, in a case such as this.

The judgment is reversed, and the trial court is directed to overrule the demurrer.

We concur: HART, J.; BURNETT, J.

(61 Wash. 533)

STATE v. LAWS.

(Supreme Court of Washington. Jan. 6, 1911.)
INDICTMENT AND INFORMATION (§ 125*)—DUP-
LICITY.

An information charging that accused stole several specified articles, belonging severally to two persons, does not violate Rem. & Bal. Code, § 2059, providing that the information must charge but one crime, and in one form only.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 334-400; Dec. Dig. § 125.*]

Department 1. Appeal from Superior Court, Lewis County; A. E. Rice, Judge.

C. A. Laws was convicted of grand larceny, and he appeals. Affirmed.

Gus L. Thacker and Hayden & Langhorne, for appellant. J. R. Buxton, for the State.

PARKER, J. The defendant was convicted of the crime of grand larceny upon an information, the charging part of which is as follows: "The said C. A. Laws in said Lewis county, state of Washington, on to wit, the 16th day of December, A. D. 1909, then and there being one certain watch of the value of \$20.00; one gold plated chain of the value of \$1.00; one twenty dollar gold piece of the United States of America of the value of \$20.00; one certain bank note for the payment of and of the value of \$5.00; one certain silver dollar of the United States of America of the value of \$1.00; sundry silver and nickle coins of the United States of America of the value of \$1.15 of the personal property of one Ed. Johnson, and one gold filled watch of the value of \$40.00; one watch chain of the value of \$4.00; one certain cloth overcoat of the value of \$8.00 of the personal property of one Axel Johnson, from the person of the said Ed. Johnson and Axel Johnson did feloniously take, steal and carry away." The defendant demurred to this information upon the ground, among others, "that more than one crime is charged in said information." The demurrer was overruled by the court; and thereafter, upon a trial, verdict and judgment were rendered against the defendant, from which he appeals to this court, assigning as error the overruling of the demurrer.

The only contention made by learned counsel for appellant is that the information charges more than one crime, and for that reason does not conform to the requirements of section 2059, Rem. & Bal. Code, which provides that: "The indictment or information must charge but one crime, and in one form only. * * *" It is insisted that this case is controlled by State v. Bliss, 27 Wash. 463, 68 Pac. 87, since this information is in substance the same as the one there held to be demurrable upon the ground here urged. That decision, it must be conceded, seems to fully support the contention of learned counsel for appellant. There are, however, two decisions of this court rendered since then, which have the effect of overruling State v. Bliss, and clearly support the contention here made by the learned prosecuting attorney, that the information does not charge more than one crime. They are State v. Butts, 42 Wash. 455, 85 Pac. 33, and State v. McCormick, 56 Wash. 469, 105 Pac. 1037. The holding of these cases seems to be supported by the weight of authority. Chief Justice Jordan speaking for the Supreme Court of Indiana in the case of Furnace v. State, 153 Ind. 93, 54 N. E. 441, reviewing the question

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

somewhat critically and citing many authorities said:

"The information charges: 'That William Furnace * * * on the 29th day of March, 1898, at the county of Sullivan and state of Indiana, did then and there unlawfully and feloniously steal, take, and carry away of the personal goods and chattels of said Jane Engle \$5 in money, and the personal goods and chattels of Samuel Engle, \$4.50 in money, contrary,' etc. It is urged by appellant's counsel that the pleading embraces two distinct and separate larcenies in the same count, and is thereby rendered bad for duplicity. The question in respect to the duplicity of the information depends upon whether it *prima facie* can be said to disclose that two distinct, separate offenses were committed by the defendant in stealing the property as charged. The amount of money stolen in the aggregate was \$9.50, \$5 of which, it appears from the averments of the pleading, belonged to Jane Engle, and the remainder to Samuel Engle. The information, with a slight or immaterial change, may be read as follows: That William Furnace, at the time and place stated, 'did then and there unlawfully and feloniously steal, take and carry away' \$5 in money of the personal goods of Jane Engle and \$4.50 in money of the personal goods of Samuel Engle. 'Then,' as an adverb of time, means 'at the time,' referring to the time stated, and the necessary import of the words 'then and there,' as employed in the information, is that the larceny of the \$9.50 in money as a whole, a part of which is charged as belonging to Jane Engle and a part to Samuel Engle, occurred at the same time and place, and constituted but a single transaction. * * *

"We recognize no good reason to depart from what may be considered the great current of authority and hold the pleading in question bad when it can reasonably be said that it discloses that the larceny complained of was but a single act or transaction in violation of the law against larceny, although the property which was the subject of the crime belonged to several different persons. The particular ownership, as charged in the pleading, of the money stolen did not give character to the act of stealing it, but was merely a part of the description of the particular crime charged to have been committed. The information, *prima facie*, under the circumstances, can be said to charge but one offense against the state, and is not open to the objection that it is bad for duplicity. The following authorities support our conclusion: *Holles v. United States*, 3 MacArthur (D. C.) 370 [36 Am. Rep. 106]; *State v. Hogan*, R. M. Charl. (Ga.) 474; *State v. Larson*, 85 Iowa, 659, 52 N. W. 539; *State v. Paul*, 81 Iowa, 596, 47 N. W. 773; *State v. Nelson*, 29 Me. 329; *State v. Warren*, 77 Md. 127, 26 Atl. 500, 39 Am. St. Rep. 401; *Bush-*

man v. Commonwealth, 133 Mass. 507; *People v. Johnson*, 81 Mich. 573, 45 N. W. 1119; *Lorton v. State*, 7 Mo. 55, 37 Am. Dec. 179; *State v. Morphin*, 37 Mo. 373; *State v. Merrill*, 44 N. H. 624; *State v. Hennessey*, 23 Ohio St. 339, 13 Am. Rep. 253; *Fulmer v. Commonwealth*, 97 Pa. 503; *Addison v. State*, 3 Tex. App. 40; *Alexander v. Commonwealth*, 90 Va. 809, 20 S. E. 782; *Territory v. Heywood*, 2 Wash. T. 180, 2 Pac. 189; *Regina v. Bleasdale*, 2 Car. & K. 765; *Regina v. Giddins*, Car. & M. 634; *United States v. Patty* [D. C.] 2 Fed. 664; *United States v. Scott* [C. C.] 74 Fed. 213."

The judgment is affirmed.

RUDKIN, C. J., and MOUNT, GOSE, and FULLERTON, JJ., concur.

(61 Wash. 458)

HOLDEN v. ROMAMO.

(Supreme Court of Washington. Jan. 4, 1911.)

1. APPEAL AND ERROR (§ 907*)—REVIEW—PRESUMPTION.

In the absence of a statement of facts, it will be presumed on appeal that the testimony supports the findings of the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2911–2916; Dec. Dig. § 907.*]

2. APPEAL AND ERROR (§ 889*)—REVIEW—AMENDMENT REGARDED AS MADE.

In the absence of a statement of facts, the complaint on appeal will be deemed amended, if need be, to support the findings and conclusions of law.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3621, 3622; Dec. Dig. § 889.*]

3. APPEAL AND ERROR (§ 1009*)—REVIEW—FINDINGS OF COURT.

In an equity case, no findings being necessary, the appellate court will not reverse for insufficiency of the findings to support the decree, but only where the findings are complete in themselves and show affirmatively that a different judgment should have been rendered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3970–3978; Dec. Dig. § 1009.*]

Department 2. Appeal from Superior Court, King County; Ben Sheeks, Judge.

Action by Z. T. Holden against Livia Quaglini Romamo. From a decree in favor of plaintiff, defendant appeals. Affirmed.

Eugene A. Childe, for appellant. Edgar S. Hadley, for respondent.

PER CURIAM. This is an appeal from a decree cancelling a deed obtained through fraud.

The case comes here on the judgment roll, without a statement of facts or bill of exceptions, and but two errors are assigned: First, that the findings of fact and conclusions of law are inconsistent with the cause of action set forth in the complaint; and, second, that the findings of fact do not support the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

conclusions of law and decree. We find no merit in either of these assignments.

The contention that the action was prosecuted solely on the theory that the deed was obtained from the respondent, while intoxicated, is not supported by the record. The complaint alleged other fraudulent acts and alleged the intoxication of the respondent largely by way of inducement. Furthermore, in the absence of a statement of facts, we must presume that the testimony supports the findings, and would deem the complaint amended, if need be.

We are further of opinion that the findings support the decree, but if they do not, that fact of itself affords no ground for reversal. This is an equity case and no findings were necessary. In such cases it is only where the findings are complete in themselves, and show affirmatively that a different judgment should have been rendered, that this court will interfere or reverse the judgment of the trial court. *Clambey v. Copland*, 52 Wash. 580, 100 Pac. 1031, and cases there cited.

There is no error in the record, and the judgment is affirmed.

(61 Wash. 520)

CAMPBELL et ux. v. GLAZIER et ux.

(Supreme Court of Washington. Jan. 6, 1911.)

1. REFORMATION OF INSTRUMENTS (§ 45*)—MISTAKE—DESCRIPTION—PROOF.

Courts will not reform a deed on the ground of mutual mistake and error in the description of the premises conveyed, unless the evidence leaves little or no doubt as to what the real agreement of the parties was.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 157-193; Dec. Dig. § 45.*]

2. REFORMATION OF INSTRUMENTS (§ 45*)—DESCRIPTION OF PREMISES—MISTAKE—EVIDENCE.

Evidence held to justify a finding that a deed excluding from its description a street, which had been just previously vacated, was not executed by mutual mistake of the parties, on the theory that it was intended to convey the property covered by the vacated street.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 157-193; Dec. Dig. § 45.*]

Department 2. Appeal from Superior Court. Yakima County; E. B. Preble, Judge.

Action by Nelson V. Campbell and wife against George H. Glazier and wife. Judgment for plaintiffs, and defendants appeal. Affirmed.

Edward V. Lockhart and Frank A. Luse, for appellants. Roberts & Udell, for respondents.

MORRIS, J. Prior to March 15, 1907, respondents were the owners of lots 6, 7, and 8, block 412, Capitol Hill addition to North Yakima. To the south of lot 8 was a street named West Walnut street, which had not

been used as a street since about 1902. Respondents since August 5, 1903, had been in possession of this street, under a deed describing the land originally platted as West Walnut street. They also owned the lots to the south of what was originally West Walnut street. Proceedings had been pending for some time to obtain a vacation of this street, and the vacation ordinance was finally passed on March 4, 1907, taking effect on March 25th. On February 19, 1907, the parties hereto entered into an agreement for the sale and purchase of lot 8 and the south half of lot 7, and on the 15th of March a deed was executed, in which the property was described as all of lot 8 and the south half of lot 7, block 412, Capitol Hill addition. Thereafter respondents brought this action, setting forth that, at the time of the sale and purchase, it was understood between the parties that the lands conveyed comprised a tract 75x140, being lot 8 and the south half of lot 7, as shown on the plat, and that it was understood that respondents conveyed, and intended to convey, no portion of the vacated street, and that the deed as written was the mutual mistake of the parties thereto in not so excepting any property south of the south line of lot 8; that appellants claimed title under such deed to a portion of the vacated street; and praying for a reformation of the deed so as to exclude therefrom the vacated street, to quiet title to the same in respondents, and to enjoin appellants from asserting any title thereto. Appellants denied any mistake in the deed, and asserted title thereunder to the vacated street. The issues thus being framed, trial was had, resulting in a decree for respondents as prayed for, and this appeal follows.

It will readily be admitted that the courts will not reform a written instrument conveying title to land, upon the ground of a mutual mistake and error in the description of the premises conveyed, unless the evidence of such error is clear and leaves little or no doubt as to what the real agreement of the parties was; and that the determining fact upon such an issue is what property was actually intended to be conveyed by the one party and acquired by the other. In determining this question, the courts will not only look into the circumstances surrounding and affecting the making of the conveyance, but will take into consideration any and all other facts which throw light upon the real intention of the parties in the making and accepting of the instrument of conveyance. Having these rules in mind, we have carefully examined the record herein, and having done so, we are clear, as was the court below, that it was the intention to confine the area to a tract 75x140, which would be lot 8 and the south half of lot 7 as platted, and excluding any portion of the vacated street

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

as belonging to or a part of lot 8. Appellants never sought, nor intended to buy, a greater area than 75x140; while respondents were careful in all their transactions to refer to the vacation proceedings then pending, and the effect upon lot 8 as a corner lot, contending if the proceedings to vacate failed, and lot 8 thus became a corner lot in reality as well as upon the plat, it would be worth more money than the price then suggested.

We cannot detail all the evidence but there is one feature of it that shows as conclusively, as any interpreting fact can show, that it was the intention to reserve and exclude any portion of the street area from the conveyance made. At the time of the conveyance, there was a small barn on lot 8 which respondents desired to retain in case of a sale. To this appellants agreed and respondents moved the barn onto the disputed tract, just across the south line of the lot, where it has since remained in the possession of, and occupied by, respondents. It seems clear that the barn would not have been, by consent of the parties, so placed, unless it was then understood that respondents were moving it onto their own land.

Upon the record we conclude that the judgment of the court below was right, and the same is affirmed.

RUDKIN, C. J., and CHADWICK, DUNBAR, and CROW, JJ., concur.

(61 Wash. 425)

STATE v. CRADDICK.

(Supreme Court of Washington. Jan. 4, 1911.)

1. CRIMINAL LAW (§ 369*)—EVIDENCE OF OTHER OFFENSES—ADMISSIBILITY.

Generally, evidence of another offense by accused is inadmissible to show guilt of the offense charged.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 822-824; Dec. Dig. § 369.*]

2. CRIMINAL LAW (§ 376*)—ACCUSED PERSON'S CHARACTER.

Accused's character can be questioned only through his own initiative.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 836; Dec. Dig. § 376.*]

3. CRIMINAL LAW (§ 20*)—CRIMINAL INTENT—ESSENTIALITY.

To convict of a crime a criminal intent must be found.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 21, 24, 25; Dec. Dig. § 20.*]

4. CRIMINAL LAW (§ 372*)—EVIDENCE OF OTHER OFFENSES—ADMISSIBILITY.

Under the rule that other offenses can be shown, where the acts were done as part of the same plan or scheme of fraud, the state, in a trial for obtaining money through fraudulent representations concerning worthless mining stock sold, could show similar offenses against other persons under a general scheme to defraud.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 833, 834; Dec. Dig. § 372.*]

5. CRIMINAL LAW (§ 422*)—EVIDENCE—WRITTEN ADMISSION OF CODEFENDANT.

In a trial for obtaining money under false pretenses through accused's codefendant's pretension to occult knowledge and vision, the state could show two photographs of codefendant in oriental costume with "The great" waiting for a "sod-buster" with sufficient shekels to make it interesting," written on one, and "The great" at work on a sucker," written on the other.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 422.*]

6. FALSE PRETENSES (§ 41*)—EVIDENCE—MATERIALITY.

In a trial for obtaining money through fraudulent representations concerning worthless mining stock sold, it was not error to exclude evidence of the value of land which, just before the trial, accused had traded to the victim for the stock so sold.

[Ed. Note.—For other cases, see False Pretenses, Dec. Dig. § 41.*]

Department 2. Appeal from Superior Court, Spokane County; J. D. Hinkle, Judge.

J. E. Craddick was convicted of receiving money through false pretenses, and he appeals. Affirmed.

J. F. Blake and John Willey, for appellant. Fred C. Pugh and D. W. Hurn, for the State.

DUNBAR, J. The information in this case charges that the defendant J. E. Craddick and John Doe, alias Sahara, unlawfully and by false and fraudulent representations, received from one Ed. Thompson \$800 in money; that they represented that the Pinar Del Rio Mining Company was the owner of a gold mine situated in Okanogan county, Wash.; that said mine had been opened, and that a ledge of ore about 75 feet in width had been discovered; that the extent of said ledge had not been ascertained, because the same had not been cut out to its full extent; that said mine was located adjacent to, and immediately connected with, another mine of the same character, and was close to and in the immediate vicinity of the Alden mine, the Alden mine being one of the richest gold mines in the country; and that said Pinar Del Rio was located a short distance north of Oroville, state of Washington, in close proximity to a railroad; whereas, in truth and in fact, the said Pinar Del Rio mine had not been opened, and no ledge of ore of any kind or character had been struck, and said mine was not adjacent to or connected with any mine of like character or any other mine whatever, and was not close to or in the immediate vicinity of the said Alden mine, but was at least 25 miles distant therefrom; that in fact said mine was not located near Oroville, but was at least 75 miles distant therefrom; and in fact said mine was not located near any railroad line, but was at least 75 miles distant from a railroad line; that Thompson, then and there relying upon said representations and pretenses, paid to said

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Craddick and said Sahara the sum of \$800, etc. It is the claim of the state that the false and fraudulent representations and pretenses charged against the defendant in the information are the direct result of a conspiracy entered into between Conlin, alias Sahara, Sampson, alias Haas, and defendant Craddick, to defraud generally any and all persons who might become patrons of the clairvoyant, Sahara, and, through his seductive influences and deceptive practices, seek of him advice as to how to make good, safe, and profitable investments of their savings. Under the arrangements made between them, Sahara was to furnish the purchasers, the defendant Craddick, the alleged profitable securities, and Sampson was the go-between, the man who introduced the one selected by Sahara as the probable victim to Craddick; and the spoils were to be divided equally between Sahara and Craddick, after the payment to Sampson of his commission out of the transaction. It appears that, in furtherance of the combination and to furnish investments, stock called "Brittle Silver" was used for a time, and after that stock had become too generally known, the Pinar Del Rio Mining Company was organized, and represented to be the owner of a gold mine in Okanogan county, of promising wealth such as we have described. The transaction between this trio and Thompson was proven. Thompson, after having been steered into Sahara's offices, consulted him concerning profitable investments. Sahara, after going into an alleged clairvoyant state, pretending to occult knowledge and vision, interspersing his performances with all the little tricks of the trade used for deceiving victims, pretended to Thompson to see by the aid of this extraordinary occult power a man who had stock to sell, the purchase of which would be very profitable to Thompson. This man was Craddick, the defendant in this case, and the result of the whole conspiracy was that, by reason of these representations and this fraudulent performance, Thompson, who was rather a credulous, ignorant Swede, invested his \$800 in this worthless stock.

There could seem to be, from the testimony in this case, but one conclusion as to the guilt of this appellant, and his participation in this conspiracy to defraud. There are, however, some technical questions that are raised by the appellant which we will notice.

It is alleged that the court erred in permitting evidence tending to show a conspiracy between Sahara, Sampson, and Craddick; in permitting evidence tending to show the commission of a similar offense in inducing or attempting to induce Eric Johnson to invest in mining stock held by defendant; in permitting evidence tending to show the commission of a similar offense in inducing or attempting to induce J. M. Wallace to invest in mining stock held by the defendant; in per-

mitting evidence tending to show the commission of a similar offense in inducing or attempting to induce an unnamed person who had lumber to sell to invest in mining stock held by the defendant. These four assignments may all be considered together, and in this is embraced the question, whether these alleged offenses were distinct, separate, and apart from the case as made, or attempted to be made against the defendant, to such an extent that they could not be accepted in evidence as competent proof on the case charged, viz., the attempt to defraud Thompson. It is claimed that these were separate and distinct negotiations, in no way tending to prove the crime charged, and appellant relies upon the rule announced by this court in *State v. Bokien*, 14 Wash. 403, 44 Pac. 889; *State v. Gottfreedson*, 24 Wash. 398, 64 Pac. 523; and *State v. Oppenheimer*, 41 Wash. 630, 84 Pac. 588.

There is no doubt that the general rule is firmly established that it is not competent to show the commission of another distinct crime by the defendant, for the purpose of proving that he is guilty of the crime charged. This would only go to the extent of proving his character, and under the general rule a defendant's character cannot be put in question, except through his initiative. Under such circumstances, the defendant would be called upon to defend himself against crimes of which he had had no notice, and the effect of such testimony, as has often been said, would be to divert the minds of the jurymen from the main question in issue, viz., whether the particular crime charged was proven. As we interpret the cases above cited from this court, they only sustain the general rule recognizing the exception that, when the testimony offered tends to prove a general scheme for the perpetration of a crime similar to the one with which the defendant is charged, the testimony is admissible. In the prosecution of criminal actions a criminal intent must be found to exist, and such proof is admitted, because the establishment of such a scheme, and crimes committed in pursuance thereof, affords grounds for inference against the defendant as to intent in the matter under examination. But, of course, the class of cases must be cognate, or it would result, as we have said, in convicting a man of one crime, because he had been shown to be guilty of another.

In *State v. Bokien*, supra, we held that, in a prosecution for obtaining goods under false pretenses by the giving of a check upon the bank in which the defendant had no funds, it was error to allow the prosecution to introduce testimony of other checks having been given by defendant to other persons, when he had no funds or deposits. In *State v. Gottfreedson*, supra, it was held, in a prosecution for horse stealing, that it was error to admit testimony that defendant had stolen

another horse at about the same time that the one for whose theft he was standing trial had been taken, because, as was said, the sole effect of the testimony would be to establish the bad character of the defendant and prejudice the jury against him. It seems plain that the ruling could not have been otherwise in this case without violating the well-established rule. The latest expression of opinion by the court on this subject is in *State v. Oppenheimer*, supra, where it was held that, upon a charge of obtaining money under false pretenses by means of making a collection upon a day named, falsely representing that the accused was an agent of the prosecuting witness and authorized to collect his accounts, evidence of similar collections from other parties, under similar fraudulent pretenses, is inadmissible for the purpose of showing intent, or for any purpose, where there is nothing unusual or extraordinary in the means employed, and no connection between the collections made. In that case, *State v. Bokien* and *State v. Gottfreedson* were approved. But there was no attempt to overrule the case of *State v. Pittam*, 32 Wash. 137, 72 Pac. 1042, where it was held that, in a prosecution for embezzling funds of an employer, evidence of other acts of the defendant, in giving receipts to patrons of his employer and making entries on the books for less amounts than the money received, was admissible for the purpose of showing a general scheme which he adopted in keeping his employer's accounts, as tending to show a system employed on his part in furthering such embezzlement. The decision in this case was virtually reaffirmed in the *Oppenheimer* Case, by distinguishing it from the case there under consideration.

In the case at bar, there certainly is something unusual or extraordinary in the means employed, which would bring it within the exception mentioned in *State v. Oppenheimer*, and the testimony shows a more general and far-reaching scheme or system to defraud, not only the prosecuting witness in the particular case, but credulous people generally, than any case which has been called to our attention. The testimony objected to, so far as Eric Johnson is concerned, was that, through a conspiracy with Sahara and Sampson, the appellant defrauded Johnson out of a ranch valued at \$15,000, as well as personal property connected with the ranch. In relation to the Wallace transaction, Mr. Wallace testified that he went to see Sahara as a fortune teller, and that Sahara told his fortune; that Sahara did not tell him much on the first visit, but encouraged him to come again, and that he did go again, and Sahara then told him that if he would do as he directed, he could sell his place for him; that after going into one of these alleged trances, Sahara said: "I see a man come to see you in your place of business." The witness continued: "He says, 'I can see

him,' and he described the man. He says he was a large man, probably weighed 175 to 180 pounds. He says, 'He wears glasses.' He says, 'He has a very thick, heavy nose.' He says, 'He is a powerfully built man.' He says, 'I can't tell you his name, but,' he says, 'the first letter of his name is C,' and he says, 'the next letter of his name is R.' 'But,' he says, 'it is the most peculiar thing that ever come to me,' he says, 'I can't tell you the rest of his name.' He says, 'He will come to see you some time this week.'" It will be noticed that these letters are the first two letters in the defendant's name, and the description was the description of the defendant, so that the dupe could readily recognize him when he put in an appearance. The testimony was that Craddick did appear, calling upon him at his place of business, and the result was that he sold him a lot of worthless stock. In the trance into which Sahara went, he scribbled off the words, "Brittle Silver stock," showed them to Wallace, and told him that, if it was possible for him to make a deal in any way with the man who called upon him and whom he had described, to make it.

Such was the testimony in relation to the attempt of these three men through the medium of this swindling clairvoyant to defraud others. So that this case is not governed at all by the rules laid down in the cases cited by the appellant. There there was no charge of any organized conspiracy, but they were all merely cases where the defendants had committed other crimes of a similar nature. "The admission of evidence, in a trial for uttering counterfeit bills or base coin, of the utterance of similar bills or coin to other persons about the same time * * * is fully recognized in the courts of this state." *Commonwealth v. Jackson*, 132 Mass. 16; *Commonwealth v. Stone*, 4 Metc. (Mass.) 43; *Commonwealth v. Bigelow*, 8 Metc. (Mass.) 235. For the purpose of showing guilty knowledge in a class of cognate cases, where false plate or jewelry has been sold, evidence of other sales of similar ware is admissible. *Regina v. Francis*, L. R. 2 C. C. 128. Another exception to the general rule that independent crimes cannot be proved is found in that class of cases where acts are shown to have been done as part of the same plan or scheme of fraud. *Jordan v. Osgood*, 109 Mass. 457, 12 Am. Rep. 731. Where there was evidence of a conspiracy between the defendant and a deputy collector to defraud the revenue, by entering goods at an undervaluation, evidence of other transactions in the conduct of criminal enterprises was admissible. *Bottomly v. United States*, 1 Story, 135, Fed. Cas. No. 1,688. Where a conspiracy to defraud is alleged, other fraudulent purchases than those set out in the indictment, made about the same time and in pursuance of the conspiracy, are admissible for the purpose of showing the intent with

which the goods were purchased. *Commonwealth v. Eastman*, 1 Cush. (Mass.) 189, 48 Am. Dec. 596. And a great many cases involving the same principle are reported, too numerous for special citation.

While it is difficult sometimes to distinguish between the circumstances which properly fall within the rule and those which fall within the exception, it is universally held, we think, that, where the testimony offered shows an act committed in furtherance of a general scheme or conspiracy, the testimony is admissible. The rule is happily stated by Wharton, in his work on Criminal Evidence (9th Ed.) § 32, where it is said, in discussing this question: "In order to prove purpose on the defendant's part, system is relevant, and in order to prove system, isolated crimes are admissible from which system may be inferred." See, also, *Yakima Valley Bank v. McCallister*, 37 Wash. 566, 79 Pac. 1119, 1 L. R. A. (N. S.) 1075, 107 Am. St. Rep. 823. We think there was no error in the admission of the testimony objected to.

It is also alleged that the court erred in admitting certain photographs of Sahara, with certain written legends shown on the margin. One of these exhibits is a photograph of Sahara in a sort of oriental costume, in a quiescent attitude, with the following written on the face of the photograph: "The great' waiting for a 'sodbuster' with sufficient shekels to make it interesting." Another represented him in the same costume, apparently telling a woman's fortune from the lines in the palm of her hand, which he was closely scrutinizing, and on this card was written: "'The great' at work on a sucker." There were other photographs of similar character. It is a well-known psychological fact that tinsel and trappings and unaccustomed brilliant garbs make an impression on the ignorant mind. Sahara knew this. These things were a part of his stock in trade. They were aids to the perpetration of his frauds, and the jury had a right to be informed of any circumstance tending to prove the fraudulent scheme and the manner in which it was conducted. The writing on the photographs was a vaunting admission by Sahara of the falsity of his pretenses, and constituted a scoffing at the gullibility of his victims. There was competent testimony to the effect that he was the author of the writings.

It is also contended that the court erred in not permitting appellant to show the value of certain land which, just before the trial, he had traded to Thompson for the stock which he had sold him. The value could not have been material. If it had been proven that at that time appellant had returned to Thompson the \$300 which he had obtained from him, with interest, it would not in any event have been a defense to the action. A thief will not be accorded immunity by

the law by simply returning the stolen property when he finds that his crime has been discovered.

We have examined the other assignments of error, but find them entirely without merit.

The judgment is affirmed.

RUDKIN, C. J., and CROW, CHADWICK, and MORRIS, JJ., concur.

(61 Wash. 419)

CLEMENS v. E. H. STANTON CO.

(Supreme Court of Washington. Jan. 4, 1911.)

1. BILLS AND NOTES (§ 1*)—PRINCIPAL AND AGENT.

Under Rem. & Bal. Code, § 3520, providing that where in a bill the drawer and drawee are the same person, the holder may treat the same as a bill of exchange or a promissory note, a bill drawn by an agent upon his principal may be treated by the holder as either a bill or a note.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 1.*]

2. PLEADING (§ 418*)—DEMURRER—WAIVER.

Where defendant demurred to a complaint on an inland bill of exchange drawn by an agent upon his principal, upon the ground that the acceptance of the drawee should have been in writing, and the demurrer was overruled, and defendant answered, setting up partial failure of consideration, and the parties went to trial upon that issue, the demurrer was waived.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1403-1406; Dec. Dig. § 418.*]

Department 2. Appeal from Superior Court, Spokane County; Henry L. Kennan, Judge.

Action by H. N. Clemens against E. H. Stanton Company. From judgment for plaintiff, defendant appeals. Affirmed.

Merritt, Oswald & Merritt, for appellant. Geo. E. Canfield, for respondent.

CROW, J. In his complaint the plaintiff, H. N. Clemens, in substance alleged that the defendant, E. H. Stanton Company, is a corporation engaged in the general butchering and meat packing business, the defendant E. F. Humason being its agent to buy live stock; that on September 13, 1909, E. H. Stanton Company by its agent, Humason, bought a drove of hogs from plaintiff, and in payment delivered to him a draft in words and figures as follows, to wit: "\$1,688.10. (Buyers' Draft.) Spokane, Wash. Sept. 13, 1909. No. 129. E. H. Stanton Company, at three days sight, pay to the order of H. N. Clemens sixteen hundred eighty-eight 10/100 dollars, for hogs. Payable at the Spokane & Eastern Trust Co., Spokane, Wash. To E. H. Stanton Company, 212 Bernard St., Spokane, Wash. [Signed] E. F. Humason." That the draft at its maturity was presented for payment, which was refused, and that it was duly protested. To this complaint E.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

H. Stanton Company interposed a demurrer which was overruled. Thereafter, answering the complaint, E. H. Stanton Company admitted the agency of Humason, the sale by plaintiff, the execution of the draft, and alleged that on September 13, 1909, Humason as its agent purchased from plaintiff 91 head of hogs, which were shipped from Hay to Spokane, Wash.; that before shipment they were weighed on an old, dilapidated, and incorrect set of scales at Hay, which incorrectly registered their weight as 19,860 pounds, showing their value to be \$1,888.10; "that said plaintiff and said defendant Humason mutually believing that said scales had weighed said hogs correctly, and believing the fact to be that said hogs did actually weigh 19,860 pounds and acting upon such mutual belief and believing that there would be due the plaintiff \$1,888.10, said defendant made and delivered said sight draft to plaintiff and plaintiff received and accepted the same in said sum; both the plaintiff and said Humason believing that said sight draft was for the sum to which plaintiff would be entitled for said hogs at the price of 8 1-2 cents per pound"; that the hogs were again weighed at Spokane on September 15, 1909, with the result that their correct weight was ascertained to be 16,945 pounds; that in addition thereto the defendant, E. H. Stanton Company, allowed plaintiff 750 pounds for shrinkage incurred during shipment; that it informed plaintiff of the mistake, asked him to again weigh the hogs, which he refused to do, and that it was ready, willing and able to pay plaintiff \$1,504, their true value, which sum with accrued costs it tendered into court. The cause was tried to a jury. At the close of all the evidence the action was dismissed as to the defendant Humason, it being conceded that he had acted as agent only. A verdict was returned against E. H. Stanton Company for the full amount claimed. Final judgment was entered thereon, and E. H. Stanton Company has appealed.

Appellant's controlling assignment is that the trial court erred in overruling its demurrer. It contends that respondent attempted to plead a cause of action upon an inland bill of exchange drawn by Humason upon appellant, and that to charge appellant its acceptance in writing should have been alleged. Appellant did not elect to stand upon its demurrer, but interposed an answer admitting Humason's agency, the sale to appellant, the agreed price of 8½ cents per pound; alleging that appellant's agent had executed the draft, and that there had been a partial failure of consideration, caused by the mutual mistake in weight. With the pleadings in this condition, the only issue was the correct weight. That issue was tried and determined in respondent's favor. The complaint not only contains allegations sufficient

to state a cause of action for the purchase price of the hogs, but must be sustained if construed as intended only to state a cause of action on the written instrument. It alleges Humason was appellant's agent, and that as such he executed the draft. His act was appellant's act; the draft therefore was in effect drawn by appellant upon itself. "A bill may be drawn upon the drawer himself, and is then in effect the promissory note or the accepted bill of the drawer, at the holder's election; and this is true in general of a bill or draft drawn by a principal on his agent, by an agent on his principal, or, in the principal's business, by one agent on another, and of a bill drawn by one partner on his firm." 7 Cyc. 569, and cases cited.

Under the facts here pleaded nothing other than a drawing of the bill by appellant upon itself and its delivery to respondent in payment for the hogs sold to appellant could have been, or was, intended. Section 3520, Rem. & Bal. Code, reads as follows: "Where in a bill drawer and drawee are the same person, or where the drawee is a fictitious person, or a person not having capacity to contract, the holder may treat the instrument, at his option, either as a bill of exchange or a promissory note." The bill here drawn by appellant through its authorized agent upon itself could be and was treated by respondent, either as a bill of exchange or a promissory note upon which appellant would be liable.

The judgment is affirmed.

DUNBAR and MORRIS, JJ., concur.

RUDKIN, C. J., and CHADWICK, J. We express no opinion as to the right of the respondent to recover on the draft or bill of exchange as such, but inasmuch as the only issue between the parties was fully tried out on the merits, we concur in the result.

(61 Wash. 415)

BARKLEY v. AMERICAN SAVINGS BANK & TRUST CO.

(Supreme Court of Washington. Jan. 4, 1911.)

1. HUSBAND AND WIFE (§ 272*)—COMMUNITY PROPERTY—DRAFT.

In 1908 a draft was indorsed by the payee to the order of the plaintiff and his wife. The wife alone indorsed it with her own and plaintiff's name, and defendant, after collecting the draft, issued a certificate of deposit for the full amount to the wife, subject to her check. Plaintiff and his wife were divorced in 1908; she having checked out nearly all of the deposit. *Held*, that the entry of the decree in the divorce proceedings dissolved the community, and the court having found that there was no community property, plaintiff was only entitled to one-half of the draft.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 1003-1007; Dec. Dig. § 272.*]

2. HUSBAND AND WIFE (§ 272*)—DIVORCE—COMMUNITY PROPERTY.

Community property ceases to be such after divorce, and the husband cannot thereafter continue as manager, but the former spouses hold it in equal shares as tenants in common.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 1003-1007; Dec. Dig. § 272.*]

3. APPEAL AND ERROR (§ 931*)—RECORD—FINDINGS OF FACT.

In the absence of evidence, the findings of a trial court are conclusive on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3762-3771; Dec. Dig. § 931.*]

4. ESTOPPEL (§ 68*)—CLAIM OR POSITION IN JUDICIAL PROCEEDINGS.

In a suit by a divorced husband against a bank for converting a draft indorsed to the order of himself and his wife, and paid to the wife upon her indorsement, the finding of the court in the divorce proceedings, in accordance with the allegations of the complaint therein, that there was no community property, did not estop the wife and those claiming under her from asserting the contrary.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 165-169; Dec. Dig. § 68.*]

Department 1. Appeal from Superior Court, King County; J. T. Ronald, Judge.

Action by Philip S. Barkley against the American Savings Bank & Trust Company for conversion of draft. Judgment for plaintiff for one-half of draft, and he appeals. Affirmed.

Faben & Kelleran, for appellant. Farrell, Kane & Stratton, for respondent.

GOSE, J. This action was brought by the plaintiff to recover damages for the amount of a draft which he alleges the defendant converted. There was a judgment for the plaintiff for one-half of the amount of the draft, with interest and costs, and he has appealed.

The court found that the appellant and his wife, S. A. Barkley, were divorced at the suit of the wife, on the 18th day of July, 1908; that in 1903 a draft for \$694.87 was drawn in favor of W. S. Upham, and indorsed by him to the order of the appellant and S. A. Barkley, they then being husband and wife and residents of this state; that the respondent collected the draft, upon an indorsement by the wife, for her husband and herself, she writing the husband's name upon the draft at the instance of the respondent; that the respondent then knew that the indorsees were husband and wife, and that she had no authority to indorse for the husband; that the respondent, after collecting the draft, issued a certificate of deposit for the amount to the wife; that thereafter and in September, 1907, she deposited the same with the respondent, subject to her check; that on the date the decree of divorce was granted there remained in the bank, of the proceeds of the draft, the sum of \$259.02; and that the draft was the property of the

community composed of the husband and wife. The court further found that one of the findings in the divorce suit, in accordance with the allegations of the complaint, was that there was no community property.

The appellant contends that the draft was the personal property of the community, and that as such it was subject to his management and control, and that he had the same power of disposition over it as he had of his separate property. Assuming that it was community property before the divorce was granted, under the uniform holdings of this court, it thereafter ceased to be such. The entry of the divorce decree dissolved the community, and the appellant could not continue as manager of an entity that had ceased to exist. In *Ambrose v. Moore*, 46 Wash. 463, 90 Pac. 588, 11 L. R. A. (N. S.) 103, it was held that, after the divorce, there is no community and, in the nature of things, no community property; and that, when the community property is not brought before the divorce court for adjudication, the former spouses thereafter hold it in equal shares as tenants in common. *Graves v. Graves*, 48 Wash. 664, 94 Pac. 481, and *James v. James*, 51 Wash. 60, 97 Pac. 1113, 98 Pac. 1115, are to the same effect.

It is also contended that the allegations in the divorce complaint and the finding of the divorce court in response thereto, that there was no community property, estop the wife and those claiming through or under her from asserting the contrary. *Eckert v. Schmitt*, 110 Pac. 635, is cited in support of this view. The point is not well taken. The case is here for review upon the findings of fact and conclusions of law only. In the absence of the evidence, we will accept the findings as conclusive. It may well be that the wife was asserting ownership of the draft in the divorce proceedings in good faith. If so, it is apparent that such a course would not work an estoppel. The other authorities cited by the appellant have reference to the power of the husband over the community property while the marriage relation exists, and are not applicable to the issue before us.

The argument that, as against the respondent, the appellant can recover the full amount of the draft is not sound. Assuming that there was a conversion when the proceeds of the draft were paid to the wife, and that the husband could then have recovered from the respondent the full amount thereof, it is obvious that, since his control over the community property terminated and his interest has become fixed by operation of law, he can recover no more than the value of his interest in the draft. He is now in the same position he would have occupied had he sold a half interest in the cause of action before commencing his suit. It is

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clear that the respondent is subrogated to the rights of the wife.

We have treated the case as though the draft was controlled by the law pertaining to community property, inasmuch as the parties and the court below so treated it. It is the opinion of the writer, however, that the husband and wife, as joint indorsees of a negotiable instrument, sustained the same relation to a third party in reference to it as any other joint holders of a negotiable instrument would occupy. This view, however, would lead to the same end.

The judgment is affirmed.

CHADWICK, FULLERTON, PARKER,
and MOUNT, JJ., concur.

(61 Wash. 422)

JONES v. KEHOE.

(Supreme Court of Washington. Jan. 4, 1911.)

1. BROKERS (§ 43*)—COMMISSIONS—WRITTEN AGREEMENT.

Laws 1905, c. 58, providing that agreements for commissions for sale or purchase of real estate shall be void unless in writing, applies only to contracts between the owner and the agent, and not to contracts between two brokers.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 44; Dec. Dig. § 43.*]

2. BROKERS (§ 66*)—CONTRACT FOR COMMISSIONS.

An agreement between two brokers to divide the commission on sale of certain lands means net commission, and one of them having expended \$200 in making the sale was entitled to a credit for that sum on the whole commission.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 51; Dec. Dig. § 66.*]

3. ESTOPPEL (§ 88*)—ADMISSIONS.

Where a broker had previously stated that he had expended \$200 in making a sale of land, he will not be permitted on the trial to claim he expended \$300.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 235-241; Dec. Dig. § 88.*]

4. COSTS (§ 234*)—APPEAL—REDUCTION OF AMOUNT OF RECOVERY.

On appeal a reduction of a judgment from \$400 to \$300 is a substantial reduction, and the appellant is entitled to appeal costs.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 892-899; Dec. Dig. § 234.*]

Department 2. Appeal from Superior Court, Spokane County; Henry L. Kennan, Judge.

Action by H. H. Jones against W. H. Kehoe. From a judgment for plaintiff, defendant appeals. Modified.

Carl W. Swanson, for appellant. Attwood A. Kirby, for respondent.

DUNBAR, J. The complaint in this case alleged, in brief, that the plaintiff and defendant were each engaged in the real estate business in the city of Spokane; that they entered into a parol agreement wherein defendant agreed with the plaintiff that, if plaintiff would furnish him (the defendant) a purchaser for certain farm lands that de-

fendant had listed or might list for sale, he (the defendant) would, in consideration thereof, in event he succeeded in making a sale of said lands to such purchaser procured by plaintiff, pay to plaintiff one-half of the commission received by him for negotiating and closing the sale of said lands; that the purchaser was procured; that the sale was made by the defendant; that he received therefrom \$900 as commission, and refused to pay over to the plaintiff any part of said commission, except the amount of \$50, and demanded \$400, with interest at the legal rate from the time of the sale. The answer was a general denial. The case was tried by the court without a jury, and the court found that the agreement set forth in the complaint was entered into between the plaintiff and defendant; that the plaintiff procured and furnished the defendant a purchaser; that the defendant sold said land to such purchaser and received as commission from said sale \$900; that he neglected and refused to pay plaintiff one-half of the said commission, or any part thereof, except the sum of \$50; concluded that the plaintiff was entitled to the sum of \$400, and judgment was entered in accordance therewith. From this judgment this appeal is taken.

At the commencement of the trial, the appellant objected to any testimony under the complaint, for the reason that the agreement was void under the provisions of the Laws of 1905, p. 110, which provides that an agreement authorizing the employing of an agent or broker to sell or purchase real estate for compensation or commission shall be void, unless in writing. From an examination of this statute, we are of the opinion that the law applies only to contracts between the owner of the land and the agent who sells or agrees to sell the same, and that it does not apply between two brokers or real estate men.

The only other question presented involves the correctness of the findings of the court. The testimony was absolutely conflicting on all essential propositions. The testimony of both respondent and appellant was somewhat inconsistent in some particulars, and had such testimony stood alone, it is doubtful if the respondent should have prevailed. But that of respondent was strengthened by a straightforward statement of one Brown, who substantiated in all particulars the testimony of the respondent. It is true that Brown was a party in interest; the respondent having agreed to divide his half of the commission with him, if he would assist him in procuring a purchaser for the land. But, of course, the appellant was also a party in interest. The court saw the witnesses on the stand, heard them testify, and under the circumstances we do not feel justified in disturbing the findings made.

There is one feature of the case, however, upon which the court made no findings, and which seems to have been disregarded. Conceding the right of the respondent to recover half of the commission under the contract, the appellant gave testimony to the effect that he had spent \$300 necessary expenses incurred in selling this land, and, of course, regarding the spirit of the contract, the respondent would be entitled to only half the net commission obtained. The appellant stoutly maintained that this \$300 was a necessary expense, but it seems probable that a portion of this expense was incurred in the transaction of other business. In any event, the appellant confessed that he stated to the respondent's attorneys, when they were discussing this matter, that his expenses in relation to this particular piece of land had been \$200, and we think that he must be bound by this statement. We see no reason, however, why he should not have credit for the \$200 and the \$50, which he had paid to the respondent after the sale and for which he was given credit by the court. With this deduction, the net commission would be \$700, of which amount the respondent would be entitled to \$350, \$50 of which he has received.

The judgment will therefore be modified to that extent; the respondent obtaining judgment for \$300. This being a substantial reduction of the judgment, considering the amount involved, the appellant will recover the costs of this appeal.

RUDKIN, C. J., and CROW, MORRIS, and CHADWICK, JJ., concur.

(61 Wash. 536)

HAYES v. CITY OF VANCOUVER.

(Supreme Court of Washington. Jan. 6, 1911.)

MUNICIPAL CORPORATIONS (§ 832*)—SEWERS—OVERFLOW—CITY'S LIABILITY.

A city having permitted a sewer to become obstructed, attempted to remove the obstruction by turning a large and powerful stream of water into the sewer. The water did not flow through, but stopped at the obstruction, backed up into, and overflowed water-closet connections in the basement of a building in which plaintiff had stored a large quantity of goods, resulting in injury thereto. The city's representatives were warned beforehand of the probable damages that would result from such act. *Held*, that the city in such operations did not act in a governmental capacity and was liable for the injuries sustained.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1782; Dec. Dig. § 832.*]

Department 1. Appeal from Superior Court, Clarke County; Donald McMaster, Judge.

Action by C. D. Hayes against City of Vancouver. Judgment for defendant, and plaintiff appeals. Reversed, with instructions.

J. P. Stapleton and F. W. Tempes, for appellant. P. J. Kirwin, for respondent.

PARKER, J. The questions involved in this appeal arise upon the defendant's demurrer to the plaintiff's complaint. The complaint alleges in substance that the defendant is a city of the third class; that plaintiff and certain other persons were the owners of certain merchandise kept by them for storage and sale in the basements of the buildings situated at the intersection of Main and Seventh streets in the city of Vancouver the defendant at the time of the doing of the acts by the city which are complained of; that the defendant maintained a sewer on Main street running north and south past the buildings having its outlet south of the buildings; that the buildings have the usual water-closet connections with the sewer; that on March —, 1909, the sewer became clogged and obstructed at a point south of the buildings so that the flow of water therein was interrupted; that the defendant city, in attempting to remove the obstruction, turned a large and powerful stream of water into the sewer at a point north of the buildings; that the water so turned into the sewer did not flow through it, but stopped at the obstruction, and backed up into and overflowed the connections made therewith, and flooded the basements where the merchandise was stored, thereby damaging it; "that the defendant's servants, agents, and employes in so flooding said premises were cautioned about said water coming into basements and damaging goods of plaintiff and others, but disregarded said caution and carelessly, negligently, and willfully, said defendant, through its said servants, agents, and employes, continued to pump said stream of water into said sewer and against said obstruction and willfully, carelessly, and negligently continued to so pump after knowing said basements were being flooded." After alleging the amount of damages to the merchandise of the respective owners, it is alleged that their claims were assigned to plaintiff; and judgment is prayed for accordingly. The defendant's demurrer was interposed upon the ground that the complaint does not state facts sufficient to constitute a cause of action. The demurrer being sustained by the court and plaintiff declining to plead further, judgment was accordingly entered dismissing the action. From this disposition of the cause, the plaintiff has appealed.

Learned counsel for the city contends that, in turning the stream of water into the sewer to remove the obstruction, the city was performing a governmental function of such nature that it was not liable for the injuries alleged to have resulted to the merchandise belonging to respondent and his assignees. When damages result to persons or property

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

from the acts of the city through its servants, it is not always easy to determine as to whether or not such acts are so purely governmental in their nature as to relieve the city of liability for damages resulting therefrom. We do not find it necessary, however, in this case, to determine the exact line of demarcation between these two classes of acts on the part of the city; for we think the great weight of authority supports the view that the results of the acts of the city here alleged, performed with the knowledge it then possessed, are such as the city is bound to respond in damages for. According to the allegations of the complaint, it is plain that this injury was the result of an obstruction in the sewer, combined with a positive direct act of the city, with knowledge on its part of the damage likely to result from the obstruction and such act. Even if this injury be regarded as the result of a defective sewer outlet and the natural flow of water therein, it would not fall within that class of governmental acts performed by a city resulting in damages to private property, from which the city would be relieved of liability.

In *Abbott*, *Municipal Corporations*, § 959, it is stated: "The determination to construct a system of drains or sewers is regarded as a discretionary act and the adoption of a location or a plan of work or a comprehensive scheme and plan for drainage, unless palpably bad, partakes of the same nature. Any injuries which may result, therefore, from defects in a reasonable plan or scheme as a whole or in part, can create no liability. The operation of this rule, however, will not prevent a recovery for injuries suffered by a failure to provide a suitable outlet for such a system, or for the construction of drains or sewers lacking in capacity to carry off the natural drainage or sewage from the territory designed." If this was the sole ground of recovery here, the city might be able to escape liability upon failure of respondent to prove there was negligence on its part in allowing the sewer to become obstructed, but that would not relieve the city upon the ground that it was performing a governmental act of the class contended for. Under such circumstances, the city would be relieved of liability for the same reasons only as a private corporation or person would be. According to these allegations, the city not only allowed the sewer to become obstructed, whether negligently or not is immaterial to this inquiry, but by its positive act artificially increased the flow of water in the sewer, resulting in the damage, and knowing at the time that such damage would probably result from its act.

In the case of *Ashley v. Port Huron*, 35 Mich. 295, involving the flooding of premises by the act of the city from one of its sewers, Judge Cooley, at page 300, said: "It is

very manifest from this reference to authorities, that they recognize in municipal corporations no exemption from responsibility where the injury an individual has received is a direct injury accomplished by a corporate act which is in the nature of a trespass upon him. The right of an individual to the occupation and enjoyment of his premises is exclusive, and the public authorities have no more liberty to trespass upon it than has a private individual. If the corporation send people with picks and spades to cut a street through it without first acquiring the right of way, it is liable for a tort; but it is no more liable under such circumstances than it is when it pours upon his land a flood of water by a public sewer so constructed that the flooding must be a necessary result. The one is no more unjustifiable, and no more an actionable wrong, than the other. Each is a trespass, and in each instance the city exceeds its lawful jurisdiction. A municipal charter never gives and never could give authority to appropriate the freehold of a citizen without compensation, whether it be done through an actual taking of it for streets or buildings, or by flooding it so as to interfere with the owner's possession. His property right is appropriated in the one case as much as in the other."

The decisions of the courts relating to damage caused by cities in maintaining sewers and drains, especially where the damage is the result of a positive direct act of the city, seem to be quite uniform in holding that the city is liable for such damage, and that it cannot escape upon the plea that it was the result of the performing of a purely governmental act. *City of Eufaula v. Simmons*, 86 Ala. 515, 6 South. 47; *City of Atlanta v. Warnock*, 91 Ga. 210, 18 S. E. 135, 23 L. R. A. 301, 44 Am. St. Rep. 17; *City of Dixon v. Baker*, 65 Ill. 518, 18 Am. Rep. 591; *City of Evansville v. Decker*, 84 Ind. 325, 43 Am. Rep. 86; *Van Pelt v. City of Davenport*, 42 Iowa, 308, 20 Am. Rep. 622; *Allen v. City of Boston*, 159 Mass. 324, 34 N. E. 519, 38 Am. St. Rep. 423; *Seaman v. City of Marshall*, 116 Mich. 327, 74 N. W. 484; *Thurston v. City of St. Joseph*, 51 Mo. 510, 11 Am. Rep. 463; *Nims v. City of Troy*, 59 N. Y. 500; *City of Seymour v. Cummins*, 119 Ind. 148, 21 N. E. 549, 5 L. R. A. 126, note 128; *Hart v. City of Neillsville*, 125 Wis. 546, 104 N. W. 699, 1 L. R. A. (N. S.) 932.

We are of the opinion that if the allegations of the complaint are true, the city is liable the same as if the alleged damage had been caused by a private corporation or person. It follows that the complaint states a cause of action.

The judgment is reversed, with instructions to overrule the demurrer.

RUDKIN, C. J., and MOUNT, FULLERTON, and GOSE, JJ., concur.

(61 Wash. 489)

WALKER et ux. v. McMURCHIE et al.
(Supreme Court of Washington. Jan. 5, 1911.)

1. VENDOR AND PURCHASER (§ 95*)—NONPAYMENT—FORFEITURE OF CONTRACT—WAIVER.

A vendor's right to forfeit his contract to convey on account of the purchaser's failure to make payments as stipulated is postponed by the vendor's forbearance for more than three years, until demand for payment or other distinct notice of a purpose to enforce a forfeiture unless payment be made, and lapse of a reasonable time to comply therewith.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 158-160; Dec. Dig. § 95.*]

2. EQUITY (§ 24*)—FORFEITURES—WHEN ENFORCEABLE IN EQUITY.

Equity will enforce a forfeiture only when the right thereto is clearly established.

[Ed. Note.—For other cases, see Equity, Dec. Dig. § 24.*]

3. CONTRACTS (§ 316*)—DEFAULTS—WAIVER.

A party to a contract, who waives a default in its terms as to payment, cannot again establish his right to proceed strictly thereunder, until he has given due notice of his intention to the other party.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1382-1387, 1480-1492; Dec. Dig. § 316.*]

4. VENDOR AND PURCHASER (§ 93*)—CONTRACTS TO PURCHASE—FORFEITURE—PREVIOUS DEMAND—SUFFICIENCY.

Demand for payment of interest on deferred payments due under a contract to convey, and a notice, were insufficient as a basis for forfeiting the contract, where they were served on the original purchaser, who, with the vendor's knowledge, had assigned his interest to a company in possession, and where the vendor had agreed with the company's representative to waive strict performance, though the original purchaser was a trustee of the company.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 153, 154; Dec. Dig. § 93.*]

Department 2. Appeal from Superior Court, Snohomish County; R. S. Steiner, Judge.

Action by George Walker and wife against Robert McMurchie, trustee, and another. From an order granting plaintiffs a new trial, defendants appeal. Reversed and remanded.

Cooley & Horan and Robert McMurchie, for appellants. Hathaway & Alston, for respondents.

MORRIS, J. On June 17, 1904, the Walkers and Robert McMurchie, trustee, entered into an agreement for the sale and purchase of certain lands in Snohomish county. The purchase price was \$2,750. Of this amount \$350 had been paid and received as earnest money, and the balance was to be paid as follows: \$337.50 on the day of the date of the contract, \$412.50 on or before August 1, 1905, and \$412.50 on or before each succeeding August 1st, until the full purchase price had been paid. Time was made of the essence. On July, 1904, \$337.50, by the terms of the contract due June 17th previous, was

paid, and on December 6, 1905, \$180 30, balance due August 1st previous, after deducting the agreed price of an improvement, was paid. No other payments were made. On July 2, 1904, McMurchie, trustee, assigned the contract to the Snohomish Berry & Fruit Company, which immediately went into possession of the property, and commenced making improvements thereon, and ever since has so remained in possession. The two payments in July, 1904, and on December 6, 1905, were made by the company to Walker, and it is apparent from the record that Walker knew that the company had succeeded to McMurchie's rights under the contract, and was in possession because thereof. Although he denies any dealings with any one representing the company, he admits he understood McMurchie sold his interest. McMurchie was at all times a trustee of the company, and part of the time its secretary. Subsequently to December 6, 1905, neither party seems to have paid any attention to the contract, until in April, 1909, Walker deposited the contract in a bank and instructed its cashier to demand the payment of interest, and the bank did in writing so demand of McMurchie, who was at the time a trustee of the company, but taking no active part in its management. The general manager and treasurer of the company was H. S. Wright, and after the bank made its demand of interest of McMurchie, one of its officers requested McMurchie to see Wright and have him pay the interest. This it appears was not communicated to Wright. Nor is it shown he had any knowledge of the previous demand of McMurchie. No interest was paid and on May 11, 1909, a written notice of forfeiture was served on McMurchie, addressed to him as trustee. On May 14th, the company tendered to Walker \$2,300, the amount then due on the contract, which was refused as coming "too late," and on May 17th, the complaint in this action was served on Wright. The complaint seeks to declare a forfeiture, and the company by its answer asks for a specific performance upon payment of the amount found due. Upon the trial the court found in favor of appellants, holding there was no demand for any of the deferred payments prior to the commencement of the action, and that respondents had waived the time feature of the payments and the right to forfeit, and ordered a decree for specific performance. Subsequently, upon motion for a new trial, the court took the view that the demand for interest revived the right to forfeiture, and ordered a new trial, from which order defendants appeal.

The basis of the court's finding, that there was a waiver of the time feature of the contract, was its finding from the evidence that, after the company went into possession of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the land, and had expended about \$1,000 in improving and cultivating it, an understanding was reached between Walker and Wright that a strict performance of the contract would be waived, and that no money need be paid thereunder, until demanded by Walker. Although Walker denies such an understanding, we agree with the court that the evidence establishes its existence, strengthened by the fact that Walker lived near the land, knew at all times what was being done thereon in the way of improvement and cultivation, and from December 6, 1905, until April, 1909, made no effort to obtain any payment of either principal or interest upon the contract. Such a forbearance was the result of either an understanding or waiver, or else it was laches. In either event, it would defeat a right of forfeiture, until a demand for payment or other distinct notice of a purpose to enforce a forfeiture unless payment be made, and the lapse of a reasonable time to comply therewith. Equity has ever been jealous of the right of forfeiture, and has never enforced it, unless the right thereto has been so clear and insistent as to permit of no denial. And when a party to a contract waives a default in its terms as to payment, he cannot again establish his right to proceed strictly thereunder, until he has given due notice of his intention to the other party. 29 Am. & Eng. Ency. 685; *Cole v. Hines*, 81 Md. 476, 32 Atl. 196, 32 L. R. A. 455; *Watson v. White*, 152 Ill. 364, 38 N. E. 902. Such is the announced rule in this court. *Douglas v. Hanbury*, 56 Wash. 63, 104 Pac. 1110, 134 Am. St. Rep. 1096.

It is understood that it frequently occurs that a party to a contract, who does not take immediate steps to forfeit it upon default being made, does not thereby lose his rights thereunder, as in *Garvey v. Barkley*, 56 Wash. 24, 104 Pac. 1108. It also frequently occurs, as in *Beltinck v. Tacoma Theater Company*, 111 Pac. 1045, where the payments are not made when due, but are accepted thereafter, but frequent demands for payment are made and frequent protests against the failure to pay, that such acts do not constitute a waiver. The insistent demands and the frequent protests in the latter case sufficiently assert the right to insist upon a strict performance and protect such right when asserted. But where, as here, we find no demand upon the one in possession for over three years and there is evidence that it was because of an understanding that a strict compliance with the contract would not be insisted upon, it would be inequitable to hold the right to forfeit existed, without putting the other party upon notice of such an intention to so claim. The demand of interest of McMurchie in April, 1909, was not such a notice. Walker knew McMurchie had parted with his interest; he knew the company was in possession of the land; he knew Wright, with whom we find, as did the court

below, he had made his agreement to waive a strict performance, was representing the company in its possession and cultivation of the land. Under such circumstances, the demand of McMurchie, although a trustee of the company, was not a sufficient or proper demand to revive the right to forfeit. Neither was the notice addressed to McMurchie, May 11th, sufficient to forfeit the contract against his assignee, the company, under the knowledge of the facts of the situation then known to Walker.

We are therefore of the opinion that the court below was right in its findings upon the trial, and that it was error to grant the new trial, and the order granting same is reversed and the cause remanded for the entry of judgment upon the findings and conclusions as made by the court.

RUDKIN, C. J., and CHADWICK, CROW, and DUNBAR, JJ., concur.

(61 Wash. 397)

GARRETT v. SPARKS BROS.

(Supreme Court of Washington. Jan. 3, 1911.)

PRINCIPAL AND AGENT (§ 158*)—RELATIONS TO THIRD PERSONS—WRONGFUL ACTS—LIABILITY OF AGENT.

The agent of a disclosed principal is liable for his own fraud in falsely representing to a prospective purchaser of land that the principal has title, when it has only a contract to purchase.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. § 597; Dec. Dig. § 158.*]

Department 1. Appeal from Superior Court, Spokane County; J. Stanley Webster, Judge.

Action by Samuel Garrett against Sparks Bros., a corporation. From a judgment for plaintiff, defendant appeals. Affirmed.

John M. Gleeson and Joseph F. Morton, for appellant. Barker & Barker and C. C. Upton, for respondent.

GOSE, J. This is a suit to recover money alleged to have been obtained from the plaintiff through the fraud of the defendant. There was a verdict and judgment for the plaintiff. The defendant has appealed.

There is abundant evidence to support the judgment. The testimony of the respondent shows that the appellant was acting as agent for the Plantations Company for the sale of certain tracts of orchard land; that the appellant represented to the respondent that the Plantations Company owned a piece of land called "Plantations," divided into small tracts, free and clear of all incumbrances; that the respondent, believing and relying upon the representations, paid the appellant \$1,000 on the purchase price of one of the tracts; that the representations were false, and that the Plantations Company, as the appellant well knew, did not own the land, but that it had only a contract of purchase, which it later forfeited.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

The appellant argues that the only issue is "the responsibility of an agent to answer to a third person for the default of a disclosed principal." On the contrary, the issue is the liability of the appellant to answer for its own fraud. The appellant cites in support of its contention *Wilson v. Wold*, 21 Wash. 398, 58 Pac. 223, 75 Am. St. Rep. 846, *Nelson v. Title Trust Company*, 52 Wash. 258, 100 Pac. 730, and *Davis v. Lee*, 52 Wash. 330, 100 Pac. 752, 132 Am. St. Rep. 973. They have no application to the present issue. It is fundamental that a party, whether acting for himself or another, is liable in damages for his own fraud. The fact that the principal is also liable does not relieve from responsibility the party who actually commits the wrong. In such cases, the liability of the principal can only rest upon the delict of its agent. The party who has been wronged may elect to sue either or both.

The judgment is affirmed.

RUDKIN, C. J., and FULLERTON, PARKER, and MOUNT, JJ., concur.

(61 Wash. 383)

WHITE v. RATLIFF et ux.

(Supreme Court of Washington. Dec. 30, 1910.)

1. APPEAL AND ERROR (§ 275*)—PRESENTATION OF QUESTIONS IN TRIAL COURT—EXCEPTIONS—SUFFICIENCY.

Written exceptions to instructions filed with the clerk after verdict, which were not served on the attorney for the opposite party, nor in any way considered by the court, will not be considered on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 1674; Dec. Dig. § 275.*]

2. APPEAL AND ERROR (§ 1002*)—REVIEW—QUESTIONS OF FACT—VERDICT.

Where the testimony is conflicting, and there is some evidence to sustain the verdict, it will not be disturbed on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.*]

3. APPEAL AND ERROR (§ 216*)—REVIEW—FAILURE TO INSTRUCT.

Failure to instruct cannot be reviewed, in the absence of a requested instruction.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 216; * *Trial*, Cent. Dig. §§ 627-641, 660-676.]

4. APPEAL AND ERROR (§ 1073*)—REVIEW—HARMLESS ERROR—JUDGMENT.

Where the complaint alleged that defendants were husband and wife, but no proof was offered of that fact, a judgment that the plaintiff recover of the defendant L. R., and of the community composed of L. R. and E. R., husband and wife, is not injurious to E. R., if she is not the wife of L. R., since the judgment does not bind her in such case.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4240-4247; Dec. Dig. § 1073.*]

Department 2. Appeal from Superior Court, Spokane County; Henry L. Kennan, Judge.

Action by W. P. White against L. L. Rat-

liff and wife. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

Robertson & Miller and E. E. Brennan, for appellants. Henry Jackson Darby, for respondent.

PER CURIAM. Respondent, who was plaintiff below, brought this action to recover for services performed under an oral contract. His term of service ran over a period of five months, and, as he alleges and the jury found, he was to receive the sum of \$300 per month. Appellants denied the employment of respondent, and alleged affirmatively that, if the respondent performed any service, it was for the New Crystal Mining Company, of which appellant L. L. Ratliff was manager. The jury returned a verdict in favor of the respondent.

Error is assigned as follows: In instructions given and refused; insufficiency of the evidence to sustain the verdict; and in rendering judgment against appellant Etta Ratliff. The record shows the verdict to have been rendered on the 21st day of January, 1910. A motion for a new trial was filed on January 22d, and overruled on February 19th following. A formal judgment was signed by the court, and filed on February 24th. On January 22d, written exceptions to some of the instructions given by the court were filed with the clerk, and are brought here as a part of the transcript. It does not appear that they were served on the attorney for respondent, or in any way considered by the court. Under the rule announced in *Coffey v. Seattle Electric Co.*, 109 Pac. 202, and followed in *Gerber v. Aetna Indemnity Co.*, 112 Pac. 272, decided December 12, 1910, the exceptions to the instructions given are not properly before us. Nor does the record show a refusal to give any requested instructions.

Passing this assignment, it only remains to say that the testimony was conflicting, and, while the veracity of the verdict may well be questioned, there is some evidence to sustain it. In such cases the judgment will not be disturbed on appeal.

Objection is also made to the form of the judgment, in that it is against appellant L. L. Ratliff and Etta Ratliff, his wife. It is alleged in the complaint that appellants are husband and wife. This is denied. No testimony was offered to sustain the complaint in this regard. No personal judgment was taken against Etta Ratliff. The judgment recites: "That said plaintiff do have and recover of and from the said defendant L. L. Ratliff, and of the community composed of L. L. Ratliff and Etta Ratliff, husband and wife, the sum of \$1,500," etc. We think the judgment goes no further, and could go no further, if appellants be in fact husband and wife, than to establish the community character of the debt (*Anderson v. Burgoyne*, 111 Pac. 777); and it would follow that, if

Etta Ratliff is not the wife of L. L. Ratliff, she is in no wise injured by the form of the judgment.

Judgment affirmed.

(61 Wash. 499)

HAGGARD v. CITY OF SEATTLE.

(Supreme Court of Washington. Jan. 6, 1911.)

1. MASTER AND SERVANT (§ 267*)—ACTIONS—ADMISSIBILITY OF EVIDENCE—RELEVANCY—PRINCIPALSHIP OF DEFENDANT.

In an action against a city for injuries sustained while working in its electric plant, testimony as to the character of acts of persons alleged to have been in authority at the plant was admissible to show who was in charge thereof at the time of the accident.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 911; Dec. Dig. § 267.*]

2. EVIDENCE (§ 471*)—ADMISSIBILITY—STATEMENT OF OPINION.

Testimony of plaintiff that he would not have passed through a passageway in close proximity to a battery of switches carrying a high voltage current from which he received his injury had he known that it was dangerous was not inadmissible as the statement of an opinion, being only a statement that plaintiff did not know of the danger, and a reaffirmance of the legal intentment from an allegation in the complaint that he was not guilty of contributory negligence.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 471.*]

3. WITNESSES (§ 260*)—EXPLANATION OF TESTIMONY.

It was not error to permit a witness to explain an answer which he had made to a question on a former trial of the case, by stating how he had understood the question which was then asked him.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 898; Dec. Dig. § 260.*]

4. WITNESSES (§ 236*)—EXAMINATION—FORM OF QUESTIONS.

A question asked defendant's witness as to the practice in electric plants similar to the one in which the injury occurred of sending inexperienced boys 18 years old who have had no technical education in electricity, and no instruction as to its characteristics and methods of operation, and no experience in handling it, to work about switches, where the wires were carrying 25,000 volts, was not objectionable as not sufficiently specific as to the capacity and discretion of boys of that age but if the capacity of plaintiff who was a boy 18 years old was out of the ordinary, it could be shown in defense.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 236.*]

5. NEW TRIAL (§ 140*)—PROCEEDINGS TO PROCURE—SUFFICIENCY OF AFFIDAVIT.

On a motion for new trial of an action against a city, an affidavit of the city's counsel that certain articles had been published in the city newspapers tending to influence the jury to the city's prejudice, that eight members of the jury were citizens of the city, that the papers publishing the articles had a general circulation in the city, and that affiant was informed and believed that a majority of the jurors actually read such articles was not sufficient where there was no testimony of the jurors showing that they had read the articles and no testimony other than the affidavit.

[Ed. Note.—For other cases, see New Trial, Dec. Dig. § 140.*]

6. DAMAGES (§ 132*)—PERSONAL INJURIES—EXCESSIVENESS.

Plaintiff, an 18 year old boy employed in a city electric lighting plant, was injured by electricity. He was burned about the face and head until, as some of the witnesses testified, his face looked like a big piece of meat. The flesh was burned off the back of his hand, and his arm below the elbow was severely burned. One of his legs was so deeply burned that a portion of the flesh sloughed out, and skin grafting had to be resorted to. He was confined to the hospital for over two months immediately succeeding the accident before the skin grafting was resorted to. His thigh was left with a depression in it, and his sight was impaired so that he had to give up work that did not require very acute vision, and the growth of cataracts has been induced, which would ordinarily mature in from 5 to 10 years, when total blindness would ensue unless an operation for its removal proved successful, a successful operation being where the patient is left with a vision ranging from one-half to one-twelfth the normal, and there being about an even chance that the operation would not be successful in any degree. Held, that a recovery of \$16,333 was not excessive.

[Ed. Note.—For other cases, see Damages, Dec. Dig. § 132.*]

Department 2. Appeal from Superior Court, King County; Boyd J. Tallman, Judge.

Action by R. F. Haggard against the City of Seattle. Judgment for plaintiff, and defendant appeals. Affirmed.

Scott Calhoun and James E. Bradford, for appellant. Higgins, Hall & Halverstadt, for respondent.

DUNBAR, J. The respondent alleged in his complaint that, while working as a servant for appellant at and in the substation of its lighting plant in the city of Seattle, he being at the time of the age of 18 years, was ordered by one McKean, whom he alleges was the agent of defendant with authority to order and direct the plaintiff in his work, to wipe up some oil under the oil switches definitely described in the complaint, and that it was necessary for him, in carrying out said orders, to go through a certain narrow passageway in close proximity to such switches; that a person passing through said passageway was exposed to great danger from shocks of electricity, which might be received without actual contact with the oil switches or by contact with the insulators thereon; that he was ignorant of this fact, and ignorant of all matters concerning electricity; that he did not know, and had not been informed, that such passageway was dangerous, or that shocks might be received therein without actual contact; that this knowledge was possessed by the defendant, and that, knowing the dangers incident to the place, it sent the plaintiff there to perform the labor which he was ordered to do, without warning and without instruction, and that while so working, ignorant of the dangers aforesaid, he was burned and injured by the electricity passing over the switches, describing the in-

juries which he received. The complaint is long and definite, but we have stated the substance of it. The damages alleged were \$20,000. The defendant denied negligence on its part, and charged the plaintiff with contributory negligence and assumption of risk. Upon the issues so framed, the cause was tried by a jury, and verdict was returned for \$16,333. Motion for judgment notwithstanding the verdict and motion for a new trial were overruled. Judgment was entered, and appeal followed.

There are 54 assignments of error presented here. We will notice those which we consider pertinent. It is insisted that the court erred in admitting testimony relative to the authority of McKean and Moores. It is insisted that there is no evidence that either of them had authority in any way to bind the city, and no authority to give orders. The witness testified that McKean had charge of the substation and all the men in it, and that Moores, who was an operator, gave orders in the presence of McKean, and ordered the respondent in McKean's presence to use waste in wiping up the oil. He testified further, over appellant's objection, as follows: "Moores was ordering the men about. McKean had charge of the substation and all the men in it, and he ordered everybody around as far as I could see, and everybody did what he told them to." Conceding the law to be as announced in the many cases cited by learned counsel for appellant, we think the testimony was admissible, and that the best possible way to prove who was actually in charge was to prove the acts of those who were charged with principalship. Contractual relations are sometimes hard to prove by opposing litigants, and the respondent had a right to introduce the best testimony he could command. At least, the testimony offered was some evidence of principalship, and hence was admissible. Assignments 30 and 31 are grouped with assignment 2 just noticed, and as appellant has made no especial argument to sustain them, we conclude they will fall within the rule just discussed.

It is urged that the court erred in allowing respondent to state that he would not have passed through the passageway had he known it was dangerous, and it is appellant's contention that this was one of the questions for the jury to determine from the facts proven, and should not have been testified to by the respondent as a question of opinion. This was nothing more, in effect, than a statement that he did not know of the danger, and this, as counsel for respondent aptly says, amounts simply to a reaffirmance of the legal intentment from the statements of his complaint that he was not guilty of contributory negligence; and hence it was without prejudice. Neither do we think any error was committed by permitting the witness to explain an answer which he made to a question on a former trial, by stating how he understood the question which was then ask-

ed him. Assignments 6, 8, 9, and 27 are to the effect that the court erred in allowing the witness McKean to answer, over appellant's objection, certain questions propounded.

The assignments are so numerous in this case and the questions objected to so many, that it will not be practicable to discuss them all at length, but we will select one question which practically embraces the principal objections to all of them: "Q. Is it the practice in plants of the character similar to this plant in question to send inexperienced boys, we will say of the age of eighteen years, who have had no technical education in electricity, and who have had no instruction as to its characteristics and methods of operation, and who have had no experience in methods of handling it, to work about such switches as that battery of switches in the northeast corner room—of the high tension room of this plant—when the wires are carrying high voltage; that is, 25,000 voltage?" The objection was as follows: "By Mr. Bradford: I object to that question and all questions eliciting this line of evidence, for the reason that it is incompetent, irrelevant, and immaterial, not within the issues here, asking for a conclusion of the witness, and asking for testimony on an issue of fact which is the exclusive province of the jury to pass upon; it could not in any way bind the city, what somebody else does at some other time or place; for the further reason that it is indefinite as to time, place, or circumstance. The Court: On the last ground I think the objection is well taken." The succeeding questions eliminated the objection as to time, and were asked with reference to the time at which the accident occurred. From the whole testimony on this branch of the case it affirmatively appears that there was no prejudice and that the inadvertence, if there was an inadvertence, in the first question could not in any possible way have affected the merits of the case. So far as the objection that the questions were not specific enough is concerned, and the argument to sustain the objection that there is a great variety of capacity and discretion in boys of the same age, it is apparent that it would be impracticable to frame a question disclosing the distinguishing capacity of the particular child in all particulars. If it was out of the ordinary, it could be shown in defense. On the general question of the admissibility of testimony showing custom in such cases, this court said, in *Crooker v. Pacific Lounge & Mattress Co.*, 34 Wash. 191, 75 Pac. 632, referring to this question: "As to the second objection, we think the proof complained of was relevant on the question whether the appellant had exercised reasonable care in not following a custom in guarding ripaws, not that a compliance with the particular custom would necessarily exonerate, or noncompliance necessarily charge it with negligence; but its conduct in that regard was a material

fact for the consideration of the jury, in connection with the other facts and circumstances developed by the evidence in the case"—citing *Bodie v. Charleston, etc., R. Co.*, 61 S. C. 468, 39 S. E. 715, where the court said: "It was for the jury to say whether such usual or customary method was such as a careful and prudent person should adopt under the circumstances."

In *Sipes v. Puget Sound Electric Railway*, 54 Wash. 47, 102 Pac. 1057, it was said: "The ruling of the court admitting testimony tending to show the flag system in use on other roads of like character is next assigned as error. The standard of due care is the conduct of the average prudent man, and it would doubtless have been competent for the appellant to show that its flagging system was the one in general use on other roads of like character throughout the country, and it would seem equally competent for the respondent to prove that a like flagging system was not in use elsewhere. Such testimony would not be at all conclusive against the appellant, but it was proper for the consideration of the jury"—citing *Myers v. Hudson Iron Co.*, 150 Mass. 125, 22 N. E. 631, 15 Am. St. Rep. 176, where it was said: "In order to aid the jury in determining whether the defendant had exercised reasonable care in providing and maintaining the machinery actually in use, it was competent to show what other kind of machinery or appliances were used elsewhere, and might have been used at the shaft." The admission of such evidence was indirectly approved in *Thomson v. Issaquah Shingle Company*, 43 Wash. 253, 86 Pac. 588. The latest expression of the court upon this subject will be found in *Shaw v. Woodland, etc.*, 111 Pac. 1070. All that was decided in *Carlson v. Wilkeson Coal & Coke Company*, 19 Wash. 473, 53 Pac. 725, cited by appellant, was that the boy's size, age, previous experience, strength, and intelligence could properly be considered by the jury. But the admission of the testimony, objected to in this case did not in any way deprive the defendant of submitting such testimony for the consideration of the jury.

In support of a motion for a new trial an affidavit was made by the attorney for the appellant to the effect that certain articles had been published in the city newspapers which tended to influence the jury to the prejudice of the appellant; that eight members of the jury were citizens of Seattle; that the papers publishing this article had a general and popular circulation in the city; and that he was informed and believed that a majority of the jurors actually read said articles. There was no testimony of the jurors showing that they had read the articles, and no testimony other than the affidavit mentioned. Under the authorities generally the showing of prejudice would not be sufficient; but the question has been squarely decided to that effect in *State v. Murphy*, 13 Wash. 229, 43 Pac. 44, and *State v. Simmons*, 52 Wash.

132, 100 Pac. 269. We have examined all the errors assigned, but without specifically discussing them we think they are too technical to in any way affect the merits of the case.

We are unable to indorse the criticism on the instructions of the court. Those given properly stated the law, and those refused had either been given in substance or did not properly present the law. Both sides had their respective cases fairly presented in the instructions. We are unable to discover any error in admitting or rejecting testimony. The two meritorious questions (1) whether the plaintiff was guilty of neglect, including the question of whether he had been instructed in regard to his duties and notified of the dangers of the place, and (2) whether the plaintiff was guilty of contributory negligence, were fairly submitted to the jury whose province it was to determine them, and it has determined them both, on competent and legally sufficient testimony, against the contentions of the appellant.

It is lastly contended that the verdict is excessive, indicating passion and prejudice on the part of the jury. We have examined the testimony on this phase of the case most carefully, and while it is true that this is a large verdict, it is also true that the injury sustained was terrible and lasting. The respondent was burned about the face and head until, as some of the witnesses testified, he did not resemble a human being, but his face looked like a big piece of meat. The flesh was burned off the back of his hand, and his arm below the elbow was severely burned. One of his legs was so deeply burned that a portion of the flesh sloughed out, and skin grafting had to be resorted to to cover the area burned. He was confined to the hospital for over two months immediately succeeding the accident, before the skin grafting was resorted to. The thigh is left with a depression in it, and his face is left deformed. In addition, his sight is impaired to the extent that he had to give up work that did not require very acute vision, and that according to the testimony the growth of cataracts has been induced, which are steadily maturing. The testimony shows that cataract will ordinarily mature in from 5 to 10 years, when total blindness will ensue unless an operation for its removal proves to be successful, and what is termed a successful operation is where the patient is left with a vision ranging from one-half to one-twelfth the normal, and that there is about an even chance that the operation will not be successful in any degree. Considering the pain and suffering endured with the permanent injuries sustained, we are unable to say that the verdict is excessive.

The judgment will be affirmed.

RUDKIN, C. J., and CROW, CHADWICK, and MORRIS, JJ., concur.

(61 Wash. 507)

**STATE ex rel. CITY OF TACOMA v.
TACOMA RY. & POWER CO.**

(Supreme Court of Washington. Jan. 6, 1911.)

1. CONSTITUTIONAL LAW (§ 133*)—FRANCHISES—TRANSFERS.

A city granted a franchise to a street railway company and provided for single fares over all lines controlled by it, and for a transfer system covering such lines. Subsequently the city granted a franchise to a traction company to operate street railways and provided for a transfer to any other line within the city which might give and receive transfers to and from the lines operated under the franchise. A corporation acquired a majority of the stock of the two companies, and for convenience and economy a physical connection between the two was made, and the offices of the traction company were closed, and all the office work was put on the officers and employes of the railway company. *Held*, that the court could not compel the giving of transfers from one system to the other, because the railway company and the traction company continued to exist as independent corporations, and since the franchises granted to them did not require the giving of such transfers.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 133.*]

2. CORPORATIONS (§ 1*)—NATURE OF CORPORATION.

A corporation is an entity and exists irrespective of the persons owning its stock.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1; Dec. Dig. § 1.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1608-1621; vol. 8, pp. 7619-7620.]

Dunbar, J., dissenting.

Department 2. Appeal from Superior Court, Pierce County; M. L. Clifford, Judge.

Mandamus by the State on the relation of the City of Tacoma against the Tacoma Railway & Power Company. From a judgment for relator, defendant appeals. Reversed and remanded.

B. S. Grosscup and W. C. Morrow, for appellant. T. L. Stiles and F. R. Baker, for respondent.

CHADWICK, J. The Tacoma Railway & Power Company having, prior to April 1, 1903, acquired a number of separate franchises and detached pieces of street railroads in the city of Tacoma, upon which separate fares had been charged and only a partial transfer system inaugurated, entered into a contract with the city, which was designed to settle existing disputes and differences, provide a single fare over all lines controlled by the railway, and to establish a transfer system covering all the lines controlled by it. Thereafter, by ordinance 1809, a franchise was granted to the Pacific Traction Company to build and operate a line of street railway in the city of Tacoma. Section 12 of the ordinance is, in part, as follows: " * * * and the payment of a fare shall entitle the passenger to a transfer to any other line within the city of Tacoma which may give and receive transfers to and

from the lines operated under this franchise, and the presentation of a transfer from any other lines which may give and receive transfers shall entitle the holder thereof to passage on the cars operated under this franchise to any point within the city limits." The railway company had at all times a line in operation upon Pacific avenue, thence up Ninth street to C street. This line was known as the "Old Town" line. Several of its lines ran up and down C street, so that the intersection of Ninth and C streets was a sort of common center for passenger traffic. The city terminus of the traction company's line was on Commerce street, a street lying between Pacific avenue and C street. The traction company was owned and controlled as an opposition company, each line running to, and serving the population residing in, what is known as "South Tacoma." The traction line crossed the railway line at several places, but there was no physical connection between the roads. Nor did the one transfer passengers to the other. Each maintained different offices and employes, and each owned and operated shops and terminals where cars were kept and repaired. A majority of the stock of the railway company is owned by the Puget Sound Electric Railway. In the summer of 1909, the Puget Sound Electric Railway acquired a majority of the stock of the traction company, since which time, as it is said, for convenience and economy of administration and for the mutual benefit of both roads, and especially for the advantage of the traction company, a physical connection between the two lines has been made at the intersection of O and Commerce streets, and also at Fifty-Fourth street. Freight is transferred from one line to the other. The cars of one line, to some extent at least, have been used on the other line. The offices of the traction company have been closed, and all its office work has been put upon the officers and employes of the railway company. The shops of the traction company have been closed and its machinery dismantled; the repairing being all done at the shops of the railway company. The testimony shows that the accounts and books of the two companies are separately kept; that the freight earnings on transferred freight are apportioned between the two companies by a traffic manager who acts in the same capacity for both lines; that all repairing chargeable to the traction line is done at actual cost by the railway company, with 10 per cent. added. Since the Puget Sound Electric Railway acquired control of the stock of the traction company, that company and the railway company have been managed by the same person, and the same person has been superintendent of both companies. The manager of the railway and of the trac-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

tion company is not paid by either of them, but by a concern known as the Stone-Webster Company. It is pertinent to add that the railway company is a New Jersey corporation, having at the time of the trial the following officers and board of directors: President, Russell Robb; first vice president, Guy E. Tripp; treasurer, Henry B. Sawyer; secretary, Alvah K. Todd; directors, T. Nelson Perkins, John S. Bartlett, Henry B. Sawyer, Chandler Hovey, Russell Robb, A. S. Michener, John R. Turner, Sidney Z. Mitchell, and Guy E. Tripp. The traction company is a Maine corporation, with the following officers and board of directors: President, Guy E. Tripp; first vice president, Fred S. Pratt; treasurer, Henry B. Sawyer; secretary, Alvah K. Todd; directors, A. S. Michener, E. Howard George, Fred S. Pratt, Alvah K. Todd, and Guy E. Tripp. It is not shown, nor is any attempt made to show, that the appellant railway company owns any stock in the traction company, or in any way directs and controls its policy. Nor is the traction company or the Puget Sound Electric Railway the owner of a majority of the stock of both the local companies made parties to the suit; the relator's whole claim being that the appellant should bring the traction company within the terms of its settlement agreement with the city, and issue transfers "because every external circumstance pointed toward the conclusion that it was at least operating the traction line of street railway, if it did not in fact own and control it."

The following clause of the contract is relied on: "Fifth: On and after the 1st day of April, 1903, the said party of the first part shall transport any person from any point or place within the corporate limits of the city of Tacoma, on any line or lines of street railway owned, operated, or controlled by said party of the first part, to the terminus of its line in Point Defiance Park for a single fare not exceeding five cents, and the party of the first part agrees that it will from and after the date of this agreement extend its present transfer system for a continuous trip one way to and from all lines within the city of Tacoma (and including that portion of the Point Defiance line outside of the city of Tacoma), but nothing in this section shall be so construed as to require the issuance of transfers which can be so used on parallel or other lines as to make it possible for a passenger to make a round trip for one fare, nor to prevent the party of the first part from making and enforcing all reasonable rules and regulations necessary, in its judgment, to prevent fraud."

We would be glad to hold with the relator, for nothing can work greater hardship and inconvenience to the public than two lines of street railway, operating in the same community, but denying the right of transfer. But the legal effect of such ruling

would be to make a judicial decree consolidating two companies which under their franchises were designed to be competing lines, a result generally held to be void on the ground of public policy, or to work a dissolution of the corporate franchise. Not only would the majority stockholders of the traction company have a right to be heard, but the minority stockholder must have his day in court as well. The right of transfer from one system to another is a matter of contract or right reserved in the franchise, and there is nothing in the railway company's franchise that would compel it to transfer passengers to another, if it be independent in law. The remedy is legislative, and not judicial.

The decisions of the Supreme Court of the United States and other authorities which we shall cite sustain appellant in the legal position it has assumed. In *Pullman Palace Car Co. v. Missouri Pac. Ry. Co.*, 115 U. S. 587, 6 Sup. Ct. 194, 29 L. Ed. 499, the Pullman Company sought to compel the Missouri Pacific Railway Company to haul its cars over certain lines owned, operated, or controlled by lease; the fact further appearing that the Missouri Pacific owned a majority of the stock of the other lines. The Supreme Court of the United States held that the contract of the Pullman Company was inoperative, except on the line originally contracted with, the court saying: "The Missouri Pacific Company has bought the stock of the St. Louis, Iron Mountain & Southern Company, and has effected a satisfactory election of directors, but this is all. It has all the advantages of a control of the road, but that is not in law the control itself. Practically it may control the company, but the company alone controls its road. In a sense, the stockholders of a corporation own its property, but they are not the managers of its business or in the immediate control of its affairs. Ordinarily they elect the governing body of the corporation, and that body controls its property. Such is the case here. The Missouri Pacific Company owns enough of the stock of the St. Louis, Iron Mountain & Southern to control the election of directors, and this it has done. The directors now control the road through their own agents and executive officers, and these agents and officers are in no way under the direction of the Missouri Pacific Company. If they or the directors act contrary to the wishes of the Missouri Pacific Company, that company has no power to prevent it, except by the election, at the proper time and in the proper way, of other directors, or by some judicial proceeding for the protection of its interest as a stockholder. Its rights and its powers are those of a stockholder only. It is not the corporation, in the sense of that term as applied to the management of the corporate business or the control of the corporate property."

In *Button v. Hoffman*, 61 Wis. 20, 20 N.

W. 667, 50 Am. Rep. 131, it was said: "From the very nature of a private business corporation, or indeed of any corporation, the stockholders are not the private and joint owners of its property. The corporation is the real, though artificial, person substituted for the natural persons who procured its creation, and have pecuniary interest in it, in which all its property is vested, and by which it is controlled, managed, and disposed of. It must purchase, hold, grant, sell, and convey the corporate property, and do business, sue and be sued, plead and be impleaded, for corporate purposes, by its corporate name. The corporation must do its business in a certain way, and by its regularly appointed officers and agents, whose acts are those of the corporation only as they are within the powers and purposes of the corporation. In an ordinary copartnership the members of it act as natural persons and as agents for each other, and with unlimited liability. But not so with a corporation; its members, as natural persons, are merged in the corporate identity."

In *McTighe v. Macon Construction Company*, 97 Ga. 5, 25 S. E. 328, 33 L. R. A. 802, the rule is stated: "Every corporation is a person—artificial, it is true—but nevertheless a distinct legal entity. Neither a portion nor all of the natural persons who compose a corporation, or who own its stock and control its affairs, are the corporation itself; and when a single individual composes the corporation, he is not himself the corporation. In such case the man is one person, created by the Almighty, and the corporation is another person, created by the law. It makes no difference in principle whether the sole owner of the stock of a corporation is a man or another corporation. The corporation owning such stock is as distinct from the corporation whose stock is so owned as the man is from the corporation of which he is the sole member."

The case of *Missouri Pacific Railway Company v. Bolling*, 48 S. W. 806,¹ furnishes a concise statement of the rule. Speaking of "evidence tending to prove that the St. Louis, Iron Mountain & Southern Railway Company acquired a greater part of the stock of the Little Rock & Fort Smith Railway Company, and that the Missouri Pacific Railway Company acquired a greater part of the stock of the St. Louis, Iron Mountain & Southern Railway Company, and that several of the officers of the last-mentioned companies were the same persons," the court said: "But the evidence shows that the two companies remained separate corporations, and that they, by consent, appointed or selected the same persons officers in each company to reduce their expenses. The facts stated do not show that the existence of one was merged in that of the other. The cor-

porations, and their officers and stockholders, are separate persons. The stockholders and officers might be the same and the corporations different." To the same effect: *Porter v. Pittsburg, etc., Co.*, 120 U. S. 670, 7 Sup. Ct. 1206, 30 L. Ed. 830; *Jessup v. Illinois Central Ry. (C. C.)* 36 Fed. 741; *White v. Pecos Land Co. (Tex. Civ. App.)* 45 S. W. 209; *Atchison, Topeka & Santa Fe Ry. Co. v. Cochran*, 43 Kan. 225, 23 Pac. 151, 7 L. R. A. 414, 19 Am. St. Rep. 129; *Queen v. Anrud*, 16 L. J. 50.

The general law is laid down in Cook on Stocks and Stockholders and Corporation Law, Vol. 1, § 6: "A corporation is an entity and exists separate from its officers and stockholders. And the inclination of some writers to assimilate a corporation as nearly as possible to a partnership, and to apply to the former the rules applicable to the latter, leads only to confusion and is contrary to the law. The difference between a corporation and a partnership and the advantages of a corporation over a partnership as a means of doing business are very marked, and should not be limited by construction. A corporation is an entity, an existence, irrespective of the persons who own all its stock. The fact that one person owns all the stock does not make him and the corporation one and the same person. Although one railroad corporation owns all the stock of another railroad corporation, yet the separate existence of the two corporations continues and they are not thereby merged."

No authority is cited by the city to meet these cases. But we are asked to find as a fact that the traction company is controlled by the railway company, when the testimony shows that an independent company controls both of them. The underlying principle in all these cases, whether so stated or not, is the contract clause of the federal Constitution. Courts are powerless to compel one company, holding its own franchise, to contract with another, although a majority of the stock be held by the same persons, for the very obvious reason that courts cannot abrogate contracts formally entered into by competent parties. It may be a grave question whether mergers of corporate interests are to be more favored than the preservation of independence between corporations. In the absence of legislative direction, the courts have generally resolved against the policy of merging independent corporations, although in some cases hardship has followed the rule.

The city council of the city of Tacoma having failed to reserve the right to compel the two companies to transfer passengers, the courts are powerless to compel such transfers, so long as they are legally independent of each other. Courts cannot make contracts or supply omissions in contracts, or bind one company by the contract of the other. It may be that at the time the franchise was granted to the traction company, the city purpose-

¹ Reported in full in the Southwestern Reporter; reported as a memorandum decision without opinion in 66 Ark. 646.

ly waived the right it might have retained to compel transfers with other lines, but whether the omission comes through design or oversight, the law is the same. The franchise and contract is binding upon both parties as it was written.

Reversed and remanded, with instructions to deny the writ.

RUDKIN, C. J., and CROW, and MORRIS, JJ., concur.

DUNBAR, J. I dissent.

I have no fault to find with the principles of law which are enunciated by the majority opinion, or the rule laid down by the authorities therein cited, but think they have no application to this particular case. They apply to bona fide transactions and actual conditions. But from an examination of the record in this case, I am convinced that appellant is attempting to evade its obligations by a denial of the truth; certainly, so far as the operation of the different tracks is concerned; probably, so far as ownership is concerned. The contractual obligation was with reference to lines owned, operated, or controlled; and, interpreting the actions of the appellant rather than its assertions, if the proof in this case does not sustain the city's contention that the appellant is at least operating and controlling the traction line, then in my opinion no proof which will satisfy the law can ever be made, where a bare denial is offered by the defendant. These were two lines built and operated as competing lines. The competition was intense, to the extent that ordinary courtesies were refused. There was no trackage connection and, of course, no exchange of cars. The traction company managed its affairs in every particular. But in 1909 the Puget Sound Electric Railway purchased a majority of the stock of the traction line; it already owning the stock of the railway company. They are managed largely by the same directors. Physical connections were then made. The traction company gave up its business office in Tacoma. Cars of each company are used on the lines of the other indiscriminately, a general superintendent was appointed to take charge of both, and in this appointment the traction company had no voice. The repair shops of the traction line were discontinued and machinery removed to the appellant's shops. All of the managing officers of the traction company quit its service, and it passed absolutely and wholly into the hands of appellant, and its identity was lost. I am assuming, of course, that the Puget Sound Electric Railway, the Tacoma Railway & Power Company, and Stone & Webster are all the same concern. This assumption is justified by the testimony. After this merger, there was nothing left of the traction company as an entity but the

filmy system of bookkeeping, where the traction company is credited and charged as though it really enjoyed a separate existence. I am satisfied from the testimony that this is simply a subterfuge, and that the expense of the bookkeeping is many times repaid by the fees which are saved to the company through its agency. The majority say: "We would be glad to hold with the relator, for nothing can work greater hardship and inconvenience to the public than two lines of street railway, operating in the same community but denying the right of transfer. But the legal effect of such ruling would be to make a judicial decree consolidating two companies which under their franchises were designed to be competing lines, a result generally held to be void on the ground of public policy." This would be sound doctrine applied to two actually competing lines; but the legal effect of the majority opinion, as I read the testimony, is to permit the inconvenience and hardship, which is regretted by the majority, in a case where the public is even deprived of the benefit of competition.

The judgment should be affirmed.

(51 Wash. 450)

PIERSON et al. v. NORTHERN PAC.
RY. CO.

(Supreme Court of Washington. Jan. 4, 1911.
On Petition for Rehearing, Feb. 8, 1911.)

1. PARTIES (§ 76*)—CAPACITY TO SUE—FILING
NAME OF FIRM—WAIVER OF OBJECTION.

Under Laws 1907, c. 145, providing for the filing of the names of persons doing business under an assumed name, and that no person carrying on business under such a name can sue in the courts of this state without alleging and proving that they have filed a certificate, the objection to the capacity of partners to sue because of failure to file such a certificate is waived where it is not presented by demurrer or answer.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 117-121; Dec. Dig. § 76;* Pleading, Cent. Dig. §§ 436, 494.]

2. CARRIERS (§ 218*)—CARRIAGE OF LIVE
STOCK—LIMITATION OF LIABILITY—EFFECT.

A contract for the shipment of live stock, stating the value of each of the animals shipped, if freely and fairly entered into, measures the rights and obligations of the parties to the contract.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 674-696, 933-949; Dec. Dig. § 218.*]

3. CARRIERS (§ 228*)—CARRIAGE OF LIVE
STOCK—ACTION FOR INJURIES—EVIDENCE.

In an action for injury to live stock, evidence held insufficient to impeach a contract limiting the liability of the carrier for injuries.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 957-960; Dec. Dig. § 228.*]

4. CARRIERS (§ 218*)—CARRIAGE OF LIVE
STOCK—LIMITATION OF LIABILITY—VALIDITY.

That a contract limiting the liability of a carrier was not read or explained to the shipper of live stock, that he asked no questions, and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

that the contract was signed hurriedly, does not relieve the shipper from its obligations.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 674-696, 933-949; Dec. Dig. § 218.*]

5. CARRIERS (§ 228*) — CARRIAGE OF LIVE STOCK—LIMITATION OF LIABILITY—CONSIDERATION.

Where a contract limiting the liability of a carrier of live stock recites, as the consideration, a reduced rate for the shipment, it is presumed that a fair consideration was given, and such a consideration need not be proved.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 228.*]

6. CARRIERS (§ 218*) — CARRIAGE OF LIVE STOCK—LIMITATION OF LIABILITY—EFFECT OF VIOLATION OF STATUTE.

That the injury to live stock shipped was caused by confining the stock in a car for more than 28 hours, in violation of a federal statute, does not relieve the shipper from the limitation of liability in contract of shipment.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 674-696, 933-949; Dec. Dig. § 218.*]

7. CARRIERS (§ 218*) — CARRIAGE OF LIVE STOCK—LIMITATION OF LIABILITY—NOTICE OF CLAIM FOR INJURY.

An agreement by a shipper of live stock that, as a condition precedent to a recovery for loss or injury to any of the stock, he will give notice in writing of his claim therefor to some agent of the company before the stock has been removed from the place of destination or mingled with other stock, is unreasonable and inapplicable to animals surviving, where the nature and extent of the injury could not be ascertained with any degree of certainty within the limited time.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 674-696, 933-949; Dec. Dig. § 218.*]

8. CARRIERS (§ 218*) — CARRIAGE OF LIVE STOCK—LIMITATION OF LIABILITY—NOTICE OF CLAIM FOR INJURY.

Such agreement has no application to animals which died before their removal from the place of destination.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 674-696, 933-949; Dec. Dig. § 218.*]

Department 2. Appeal from Superior Court, Spokane County; E. H. Sullivan, Judge.

Action by Victor Pierson and another, doing business under the name of Pierson Brothers, against the Northern Pacific Railway Company. From a judgment in favor of plaintiffs, defendant appeals. Reversed and remanded.

Edward J. Cannon, Arthur B. Lee, George M. Ferris, Charles E. Swan, and Thomas A. E. Lally, for appellant. D. W. Hurn and C. C. Upton, for respondents.

RUDKIN, C. J. On the evening of August 6, 1906, the plaintiffs, Pierson Bros., shipped a car load of horses over the Oregon Short Line Railroad from Dillon, Mont., to Silver Bow, Mont., a distance of 60 miles. On the arrival of the train at the latter point soon after midnight of the same day, the car containing the horses was transfer-

red from the Oregon Short Line to the road of the defendant company for shipment to Sandpoint, Idaho. Before the train left Silver Bow for Sandpoint, the plaintiff Victor Pierson, who had charge of the horses, entered into the common form of live stock contract with the defendant company, which contained the following stipulations and provisions, among others: "And it is hereby further agreed that the value of the live stock to be transported under this contract does not exceed the following mentioned sums, to wit: Each horse, seventy-five dollars; each mule, seventy-five dollars; each stallion, one hundred dollars; each jack, one hundred dollars; each ox or steer, fifty dollars; each bull, fifty dollars; each cow, thirty dollars; each calf, ten dollars; each pig, ten dollars; each sheep or goat, three dollars; such valuation being that whereon the rate of compensation to said carrier for its services and risks connected with said property is based. * * * The said shipper further agrees that as a condition precedent to his right to recover any damages for loss or injury to any of said stock, he will give notice in writing of his claim therefor to some officer or station agent of the said company before said stock has been removed from the place of destination or mingled with other stock." The car arrived at Sandpoint on the afternoon of August 8th, and after their removal from the train 11 head of the horses died, and the remaining 8 head were materially injured through the alleged negligence of the defendant in the course of the shipment. The present action was instituted to recover damages for the loss thus sustained. A more detailed statement of the case will be found in Pierson v. Northern Pacific Ry., 52 Wash. 595, 100 Pac. 999. From a judgment in favor of the plaintiffs, the railroad company has appealed.

The first assignment of error is based on the denial of a motion for nonsuit, interposed at the close of the respondents' testimony, on the ground that they failed to allege or prove a compliance with chapter 145 of Laws of 1907, which provides for the filing of the names of persons doing business under an assumed name, and that "no person or persons carrying on, conducting or transacting business as aforesaid, or having an interest therein, shall hereafter be entitled to maintain any suit in any of the courts of this state without alleging and proving that such person or persons have filed a certificate as provided for in section 1 hereof, and failure to file such certificate shall be prima facie evidence of fraud in securing credit."

Waiving the question whether "Pierson Brothers" is an assumed name, and whether the act applies to a copartnership doing business in the state of Idaho, we held, in Rothchild Bros. v. Mahoney, 51 Wash. 633.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

99 Pac. 1031, that section 7 of the act of March 12, 1907 (Laws 1907, p. 270), which contains a similar provision relating to the commencement and maintenance of suits by corporations, only goes to the capacity to sue, and that the objection is waived unless raised by demurrer or answer. That case is decisive of the question here presented.

The remaining assignments of error are based on the refusal of the court to give effect to the stipulations in the contract of shipment as above set forth. If this contract was freely and fairly entered into, it measures the rights and obligations of the parties under repeated rulings of this and other courts. *Hill v. Northern Pacific R. Co.*, 33 Wash. 697, 74 Pac. 1054; *Jensen v. Spokane Falls & N. R. Co.*, 51 Wash. 448, 98 Pac. 1124; *Windmiller v. Northern Pac. R. Co.*, 52 Wash. 613, 101 Pac. 225; *Gomm v. Oregon R. & Nav. Co.*, 52 Wash. 685, 101 Pac. 361, 25 L. R. A. (N. S.) 537; *Hart v. Pennsylvania R. Co.*, 112 U. S. 331, 5 Sup. Ct. 151, 28 L. Ed. 717.

The testimony offered by the respondents to impeach the contract is, as a matter of law, utterly insufficient for that purpose. The following given by Victor Pierson, one of the respondents, is the only testimony bearing upon that question: "Q. Who presented that contract to you for signature, if you know? A. Why, supposed to be the agent, or I thought it was the agent. Q. What did he say to you when he came to you with it? A. 'Are you the man that owns this car of horses?' I said, 'Yes, sir,' and then, 'Well,' he says, 'you got to come in here and sign this contract if you want to go. You only have 10 minutes, because they are ready to pull out.' And I went in and signed the contract. Q. Did you say anything to him when he said that to you? A. I said that I had a contract. Q. What did he say? A. 'Well,' he said, 'you got to sign this contract in order to go, your horses as well as yourself.' Q. What did you do then or say? A. I just went in and signed the contract, took one of them. Q. Where did you sign the contract? A. I signed the contract in the office. I went into the office and signed the contract, or two of them rather, and I got one of them and walked right out of the depot and went right to the train. We started right out of the yards, but backed in again. Q. What kind of an office was that? That is, how many rooms did you go into? A. It had one room, just one room. Q. How was that room lighted? A. With one lamp. Q. What, if anything, did this contract lay on when you signed it? A. Laid on the desk, or whatever you might term it, as in front or kind of to one side of the partition, and he says just sign up here. It was quite dark in there on account of the lamp was small, and I just signed it, and I was in a hurry to catch the train because the car had already passed. Q. Where was that lamp with reference to where you signed? A. It was right on the desk, the coun-

ter. Q. How far from where you signed? A. Just a foot or two. Q. Then you could see to read the contract? A. Not plain; no, sir. Q. What did the agent say to you, if anything, about when your car was going to leave while you were in there with him signing the contract? A. In 10 minutes. Q. Where were you when he told you that? Were you in the office, or was that before you went into the office? A. Just as we went into the office. Q. Did he say anything to you at the time you signed that contract about there being more than one rate of freight? A. No, sir. Q. Did he say anything to you at the time as to what rate of freight you would have to pay under that contract? A. No, sir. Q. Was anything said at any time or place about rates? A. No, sir. Q. Was anything said to you in any way about the value of the horses? A. Nothing. Q. Have you told us all that was said between you and the agent as far as you can tell us at the time you signed that contract? A. As far as I can recollect now; it is so long ago that is all I can recollect. Q. Was there anything said about a pass or your having a pass? A. Yes, sir. Q. Who said it to you, and when? A. This man that had me sign the contract. Q. What did he say? A. He said, 'This is your pass for yourself and horses.' Q. When did he say that? A. When I was in the office. It was before—after I signed the contract. Q. Well, after signing the contract, what did you do? A. I went right to the caboose and we pulled right out. Q. How long after you got on the caboose before it pulled out? A. Just a few minutes, not over five minutes. Q. Where did it go then? A. It went out of the yard limits and backed in again. Something wrong with the train, the boys said; that is, the trainmen."

At another point in his testimony the witness testified that he did not read or examine his contract until the horses were dying at Sandpoint two or three days after its execution. The claim of the witness that he already had a contract for the shipment to Sandpoint is not borne out by the testimony. The Oregon Short Line contract only covered the shipment from Dillon to Silver Bow, and the freight was only paid between these points. It is a significant fact that this was also a limited liability contract, differing in degree but not in kind from the contract now under consideration. Under the first contract the animals were shipped as range horses, and the liability in such cases was limited to not exceeding \$10 per head. The fact that the contract was not read or explained to the shipper, or that he was asked no questions, or that the contract was signed hurriedly, cannot be permitted to relieve the respondents from its obligations. Written contracts will prove of little avail if parties can avoid the burdens imposed by signing in haste and closing their eyes to their contents. "The shipper cannot evade the

limitations imposed by the special contract by showing that he executed it hurriedly or without due care, nor by showing that he was ignorant of the provisions of the contract. If he executes the contract by affixing his signature, or by accepting without objection a receipt containing the limitation, he will be conclusively presumed to have assented to its provisions; no fraud on the part of the carrier appearing." 5 Am. Enc. of Law (2d Ed.) p. 300. "A contract, *ex vi termini*, implies the assent of two or more minds to the same proposition. It follows, therefore, if one sign a written instrument containing mutual stipulations between himself and another, without any knowledge of its contents, there will not be in fact, in the strict sense of the term, a contract between them, though in a legal sense there may be. Where a party of mature years and sound mind, being able to read and write, without any imposition or artifice to throw him off his guard, deliberately signs a written agreement without informing himself as to the nature of its contents, he will nevertheless be bound; for in such case the law will not permit him to allege, as a matter of defense, his ignorance of that which it was his duty to know, particularly where the means of information are within his immediate reach, and he neglects to avail himself of them. Applying this elementary principle to the case in hand, it was clearly the duty of appellant to have examined the contract in question, and fully advised himself as to its contents, before signing it; and if, by a failure to perform this duty, he has sustained an injury, he must suffer the consequences, unless such failure was occasioned by the fraud or artifice of appellee—and this, we understand, appellant claims was the case." *Black v. W., St. L. & P. Ry. Co.*, 111 Ill. 351, 53 Am. Rep. 628. "The shipper was not obliged to sign the contract without reading it, and, if he saw fit to do so, he must take the consequences." *Johnstone v. Richmond*, 39 S. C. 55, 17 S. E. 512. "It would tend to disturb the force of all contracts if one in possession of ordinary capacity and intelligence were allowed to sign a contract and act under it in the enjoyment of all its advantages, and then to repudiate it upon the ground that its terms were not brought to his attention. In the absence of all fraud, misrepresentation, or mistake, it must be presumed that he read the contract, and assented to its provisions." *Bethea v. Northwestern R. R. Co.*, 26 S. C. 96, 1 S. E. 376. "There being no special parcel contract, and there being nothing in the written contract contrary to public policy, plaintiff cannot now assert that the written contract is not binding because he signed it in haste, without reading." *Hengstler v. Flint & P. M. Ry. Co.*, 125 Mich. 530, 84 N. W. 1067. See, also, *N. C. & St. L. Ry. v. Stone & Haslett*, 112 Tenn. 348, 79 S. W. 1031, 105 Am. St. Rep. 955; *McMillan v. Mich. Southern Ry.*, 16 Mich. 79, 93 Am.

Dec. 208; *Arthur et al. v. T. & P. Ry.*, 139 Fed. 127, 71 C. O. A. 391; *Cau v. T. & P. Ry.*, 194 U. S. 431, 24 Sup. Ct. 663, 48 L. Ed. 1053. But this rule is elementary, and sound public policy would not permit of the adoption of any other. We are therefore clearly of opinion that the rights of the parties are measured by the limitations contained in this contract.

It is said that no evidence was offered tending to show that the stock was shipped at a reduced rate, but the contract so recites, and there is no evidence to the contrary. "In the absence of any proof to the contrary, it will be presumed that a fair consideration was given for the special contract in the way of reduced rates of transportation or of special privileges, and such a consideration need not be proved." 5 Am. & Eng. Ency. of Law (2d Ed.) p. 300.

Again, it is said that the injury was caused by confining the stock in the car for more than 28 hours, in violation of a federal statute, and that the contract does not relieve the carrier in such cases. We are not aware that any such distinction exists. This was an act of negligence and nothing more, and in the *Windmiller Case*, *supra*, we held that the limited liability would prevail even in a case of theft.

As stated above, the contract contained a further stipulation that, as a condition precedent to the right to recover damages for loss or injury to any of the stock, the shipper would give notice in writing of his claim therefor to some officer or station agent of the company, before the stock was removed from the place of destination or mingled with other stock. This clause of the contract would perhaps be effectual in some cases; but in a case like the present, where the nature and extent of the injuries to the animals surviving could not be ascertained, with any degree of certainty, within the limited time provided in the contract, the stipulation is unreasonable and inapplicable. *Western R. Co. v. Harwell*, 97 Ala. 341, 11 South. 781; *Harned v. Missouri Pac. R. Co.*, 51 Mo. App. 482; *Gulf, etc., R. Co. v. Stanley*, 89 Tex. 42, 33 S. W. 109; *Houston, etc., R. Co. v. Davis*, 11 Tex. Civ. App. 24, 31 S. W. 308; *Ormsby v. Union Pac. R. Co. (C. C.)* 4 Fed. 170. Nor has it any application to the animals which died before their removal from the place of destination. *Kansas, etc., R. Co. v. Ayers*, 63 Ark. 331, 38 S. W. 515.

On the entire record we are therefore of opinion that the recovery should have been limited to \$75 per head for the animals that died, with legal interest from the date of the commencement of the action, and to such further sum as the jury might award for injuries to the remaining animals. Inasmuch as the record does not disclose the amount allowed by the jury for this latter claim, we are unable to direct a final judgment at this time. The judgment will therefore be

reversed, and the cause remanded for further proceedings not inconsistent with this opinion. It is so ordered.

DUNBAR, CROW, CHADWICK, and MORRIS, JJ., concur.

On Petition for Rehearing.

PER CURIAM. A petition for a rehearing has been filed by the respondents in this cause, in which it is asserted that under our former opinion no recovery can be had for the expenses incurred in good faith in attempting to effect a cure of the injured horses or for the burial of the dead horses. These items of damage were not in issue at the former hearing, nor was a recovery therefor objected to, except on the general ground that no notice of the loss was served on the appellant, as required by the terms of the contract of shipment. We are of opinion that a clear right of recovery exists for the expenses thus incurred in good faith, and we did not intend to decide or intimate otherwise on the original hearing.

With this explanation the petition for rehearing is denied.

(61 Wash. 528)

SMITH v. CRAIG.

(Supreme Court of Washington. Jan. 6, 1911.)

1. BROKERS (§ 94*)—REAL ESTATE BROKERS—UNAUTHORIZED CONTRACTS.

A contract by a landowner's brokers to sell the land at less than the price authorized, and exceeding their authority by including a water right and guaranteeing the number and varieties of fruit trees, does not bind the owner.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 136; Dec. Dig. § 94.*]

2. BROKERS (§ 103*)—REAL ESTATE BROKERS—UNAUTHORIZED CONTRACTS.

A contract by brokers to sell land at less than an authorized price, and their unauthorized inclusion of a water right and a guaranty of the number and varieties of fruit trees, was not ratified by the owner's letter stating that he was not anxious to do business under the contract; that, on receipt of the earnest money deposited and expense money, he would list all trees on the land; that the price might be \$9,000, as agreed to by the brokers, because they had gone to the expense of showing the place and had not received his letter; "otherwise the price is \$10,000."

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 147; Dec. Dig. § 103.*]

3. BROKERS (§ 103*)—REAL ESTATE BROKERS—UNAUTHORIZED CONTRACTS.

An owner of land cannot be held to have approved a contract of sale made by his brokers prior to submission of the contract to him, though it was in such form that his previous letter indicated he might not have objected to it; he being entitled to withhold his approval for any reason.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 147; Dec. Dig. § 103.*]

Department 1. Appeal from Superior Court, Chelan County; Wm. A. Grimshaw, Judge.

Suit by Chester S. Smith against Charles S. Craig. From a judgment dismissing the suit, plaintiff appeals. Affirmed.

Herr, Bayley, Wilson & Smith, for appellant. Reeves & Reeves, for respondent.

PARKER, J. This is an action to enforce specific performance of a contract alleged to

have been entered into by the defendant, by his duly authorized agents, with the plaintiff, for the sale of land in Chelan county. A trial upon the merits, resulted in a judgment in favor of the defendant dismissing the case, from which the plaintiff has appealed.

The facts upon which the rights of the parties depend are for the most part undisputed, and may be briefly stated as follows: On December 31, 1909, the respondent, being the owner of the land, signed and gave to Wright & Dow, real estate agents of Seattle, written authority to sell the land, agreeing to compensate them therefor by paying 5 per cent. commission upon the sale price. The provisions of the writing giving such authority to sell and fixing the terms of the sale are as follows:

"Seattle, Wash., Dec. 31st, 1909.

"Wright & Dow: In consideration of one dollar and services to be performed by you in endeavoring to effect a sale of the following described property, viz. * * *

"The undersigned owner of said property hereby give and grant unto you for the period of _____ days from date hereof and thereafter until withdrawn by ten days' written notice, the right to sell said property, and agree to convey the same or to cause the same to be conveyed by good and sufficient warranty deed to the person or persons designated by you. The price of said property to be \$10,000 and upon the following terms: $\frac{1}{2}$ cash, balance in three annual payments at 8%. * * * Chas. S. Craig, Owner."

Thereafter, on January 4, 1910, assuming to act under this authority, Wright & Dow, in pursuance of negotiations with appellant, executed a writing with him, the provisions of which, so far as necessary to be here noticed, are as follows:

"\$500.00. Seattle, Wash., Jan. 4, 1910.

"Received of Chester S. Smith, hereinafter mentioned as the purchaser, the sum of five hundred dollars (\$500.00) as earnest money and in part payment for the purchase of certain real estate in Chelan county, state of Washington, and particularly described as follows, to wit, * * * together with any and all improvements thereon, which includes a good and sufficient water right to above described land which we have this day sold to the said purchaser for the sum of nine thousand (\$9,000.00) dollars on the following terms, to wit, five hundred (\$500.00) dollars as hereinabove receipted for. Three thousand (\$3,000.00) dollars on approval of abstract. Two thousand (\$2,000.00) dollars on or before one year. Two thousand (\$2,000.00) dollars on or before two years. One thousand five hundred (\$1,500.00) dollars on or before three years. Interest at 8 per cent., payable annually. * * *

"It is agreed that if the title to the said

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

premises is not good, or cannot be made good within 60 days, or if the owner does not approve the above sale, this agreement is void, and the earnest money herein receipted for shall be refunded. But if the title to the said premises is good, and the above sale is approved by the owner, and the purchaser neglects or refuses to comply with any of the conditions of this sale, then the earnest money herein receipted for shall be forfeited to Wright & Dow to the extent of their agreed-upon five per cent. commission, and the residue to the owner of the said premises. * * *

"The purchaser would want owner to guarantee that the following varieties are within 10 per cent. of being correct: Rome Beauties 120, 6 and 7 yrs. old. Winesap 400, 2 yrs. old. Winesap 160, 6 and 7 yrs. old. Spitzenberg 90, 6 and 7 years old. Grimes Golden 90, 6 and 7 yrs. old. Lovers 50, 6 and 7 yrs. old. * * *

"Time is the essence of this contract.

"Wright & Dow,

"By C. H. Dow, Agents.

"I hereby agree to purchase said property on the above terms and pay \$9,000.00 as specified above.

"Chester S. Smith, Purchaser.

"Approved by _____, Owner."

Soon thereafter this writing was sent to respondent at Spokane for approval. He declined to approve it and wrote to Wright & Dow the following letter: "Hale Hotel, Spokane, Wash., Jan. 7, 1910. Wright & Dow, Seattle, Wash.—Dear Sir: I am not anxious to do business under the contract you sent me. Upon receipt of the \$500.00 earnest money to me and car fare both ways to Peshastin and expense otherwise incurred, I will make a list of all trees on the 10 acres I have for sale. Price to be \$9,000.00 because you have went to the expense of going to show the place, also because you did not get my letter of Jan. 2nd. prior to the sale you referred to. Otherwise price is \$10,000. Yours very truly, Chas. S. Craig." Wright & Dow, with consent of appellant, then struck out of the writing the clause relating to the guaranty of fruit trees, and sent it to a Spokane bank with the \$500 for appellant, notifying him thereof by letter. Respondent went to the bank, examined the writing, and refused to approve it or accept the \$500.

The contentions of learned counsel for appellant, as we understand them, present two questions. It is contended, first, that the authority of Wright & Dow was sufficient to enable them to enter into a contract of sale binding respondent such as that executed by them and appellant; and, second, that such writing as modified by striking out the fruit tree guaranty was ratified by respondent by his letter of January 7th. A comparison of the sale contract of January 4th with the written authority given to Wright & Dow as agents on December 31st will show that in

several particulars that sale contract exceeded their authority. It assumed to contract for the sale at a less price than was authorized; it assumed to include a "good and sufficient water right," in effect guaranteeing that such water right went with the land; and it assumed to guarantee the quantity and varieties of the fruit trees upon the land. We find nothing in the agents' authority enabling them to bind respondent by such a contract as this. Their authority seems to be clearly defined in the writing of December 31st, and had they entered into a contract of sale for the land strictly within that authority, no doubt it would have been binding upon respondent, as heretofore held by this court. *Peirce v. Wheeler*, 44 Wash. 327, 330, 87 Pac. 361, and authorities there cited. In this connection some contention is made that after giving the written authority and before January 4th, respondent orally authorized the sale at \$9,000. The evidence upon this question is not very satisfactory and is somewhat in conflict; but we are inclined to resolve it in respondent's favor. However, it is not pretended that there was any oral authorization for the other matters in which the contract exceeds the written authority. In addition to all this, it will be noticed that the very terms of the contract clearly indicate that it was made subject to respondent's approval, amounting practically to an admission that the agents were not authorized to enter into a binding contract with appellant like that of January 4th. We are of the opinion that at the time of making such contract Wright & Dow were without authority to make the same for respondent.

We are not able to reach the conclusion that the letter of January 7th amounted to an approval of the contract. That letter clearly was not an approval of the contract then submitted to respondent, and we do not think it can be construed as an approval of the contract which was submitted to him thereafter. It is true that the contract finally submitted was like the first one, with certain features eliminated, which respondent had objected to, but it was, after all, another contract, and he cannot be held to have approved it prior to its submission to him, notwithstanding it may have been in such form that his letter of January 7th indicates he might not have objected to it. He was privileged to withhold his approval for any reason he saw fit.

The judgment is affirmed.

¹ RUDKIN, C. J., and MOUNT, GOSE, and FULLERTON, JJ., concur.

(61 Wash. 523)

LEPPER v. STEINSON & POST LUMBER CO.

(Supreme Court of Washington. Jan. 6, 1911.)

1. MASTER AND SERVANT (§ 278*)—INJURIES—ACTIONS—SUFFICIENCY OF EVIDENCE.

In a sawmill employee's action for personal injuries sustained by having his hand caught

in an edging machine, claimed to have been caused by failure to properly guard certain rollers on the machine, into which his hand was drawn, evidence held to sustain a finding that such rollers were not guarded, and that plaintiff in the performance of his duty was liable to come in contact therewith.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 961; Dec. Dig. § 273.*]

2. MASTER AND SERVANT (§ 289*)—INJURIES—ACTIONS—JURY QUESTIONS—CONTRIBUTORY NEGLIGENCE.

In a sawmill employe's action for personal injuries sustained by having his hand drawn into certain rollers on an edging machine while he was oiling a part thereof, whether plaintiff was negligent in not stopping the rollers before attempting to oil the mechanism held a question for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1120; Dec. Dig. § 289.*]

Department 1. Appeal from Superior Court, King County; John A. Shackelford, Judge.

Action by Otto Lepper against the Stetson & Post Lumber Company. From a judgment for plaintiff, defendant appeals. Affirmed.

John P. Hartman, for appellant. Caldwell & Riddell, for respondent.

PARKER, J. This is an action to recover damages for personal injuries alleged to have resulted to the plaintiff from the negligence of the defendant in not having certain live rollers upon an edger machine in its sawmill properly guarded as required by the factory act. A trial before the court and a jury resulted in a verdict and judgment in favor of plaintiff, from which the defendant has appealed.

The contentions of learned counsel for appellant upon this appeal, involve little else than questions of fact. They arise upon the challenge to the sufficiency of the evidence made by appellant's motion for a nonsuit, by its motion for a directed verdict, and by its motion for judgment notwithstanding the verdict; all of which were denied by the trial court. The evidence is in conflict upon some of the material facts; but a careful review of it convinces us that there was competent evidence submitted to the jury warranting the conclusion that the following facts were established thereby:

The appellant operates a sawmill at Seattle. The respondent had been employed by appellant for some time prior to the time of his injury as an operator of an edger machine in the mill of appellant. He was then 28 years old, and was experienced in work of that nature. The machine was the one through which the lumber passed next after leaving the head saw, where it was first sawed from the logs into pieces called cants, varying in thickness from one to six inches. These were then passed through the edger reducing the lumber to smaller dimensions. This was the work of respondent. There were several circular saws in the edger revolving upon a common shaft, attached thereto in such manner that they could be shifted

by certain levers and adjusted at varying distances apart, as might be necessary to produce the varying dimensions of lumber required to be cut from the cants coming from the head saw. In front of the saws, a few inches from their edges, and running parallel with the shaft upon which they revolved, were the rollers, one above the other, which it is claimed by respondent were not properly guarded. These rollers were about six inches in diameter, about five feet long, and extended horizontally across the front of the edger about three feet above the floor. Respondent's working position was immediately in front of these rollers, and consisted principally in passing the cants through them to the saws, the lumber emerging on the other side of the edger reduced to the desired dimensions. It was also his duty to adjust the saws at proper distances apart, by means of levers extending from the shaft upon which the saws revolved, out under the rollers. The outer ends of these levers extended beyond the front of the edger and the rollers—some 12 inches—where respondent could readily grasp them. The saws required change of position as to their distance apart very often, because of the difference in the width of the cants coming from the head saw. These changes in the positions of the saws, became necessary, on an average, upon the arrival of every other cant from the head saw. These levers rested by bearings upon a rod extending horizontally some six inches from their outer ends. It was necessary that the rod and these bearings be oiled about ten times each day. This was also respondent's duty. Almost immediately above this rod and these bearings there was the dial plate, with figures on it by which the saws could be adjusted at proper distances apart. This plate was parallel with and about four inches from the lower roller, and was about on a level with the lowest part of the lower roller. The lower roller was stationary, except that it revolved, while the upper one could be raised from the lower one as much as six inches. This was accomplished by a lever, worked by a rod running horizontally clear across the front of the edger, parallel with and a few inches higher than the top of the upper roller, and about ten inches out from it. The pulling of this rod away from the front of the edger raised the upper roller, while the pushing of the rod towards the edger let the upper roller down upon the lower one, or whatever object was between them, causing the object to be tightly grasped and drawn in upon the saws. There was nothing between respondent's working position and these rollers except the objects we have described. It was customary to keep the oil can on top of the edger directly over the rollers, the place being a little above respondent's head while standing at his working place. Respondent was injured by having his hand caught by the rollers and drawn

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

in upon one of the saws. He was brushing the sawdust off the rod upon which the bearings of the levers rested, preparatory to oiling the rod, and was reaching for the oil can on top of the edger when his other hand was caught and drawn into the rollers upon one of the saws. As his hand was caught he was drawn against the rod which raised and lowered the upper roller in such manner that he could not pull it from the edger, which would have released the grip of the rollers upon his hand. This he tried but was unable to do. The injury caused by the roller was evidently not near so serious as that caused by the saw. Had the grip of the rollers been released by pushing the rod towards instead of pulling it away from the edger it is probable that even the injury from the rollers would have been much less, since their grip would have been released at almost the same instant of the catching of his hand. The rod could have been connected so as to raise the roller by pushing instead of pulling. These facts, it seems to us, clearly warrant the conclusion that these rollers were not guarded, and that respondent in the performance of his duties was liable to come in contact with them. As to the practicability of effectively guarding them with due regard to their use, there was evidence tending to show that they might have been effectively guarded by having a stationary rod across the front of the edger at a suitable distance from the upper roller, of course high enough to admit a six-inch cant under such rod, and by having a dead roller or some obstruction immediately in front of the lower live roller. The rod for raising and lowering the upper roller, proved to be more of a trap than a guard. These conclusions can be reached almost from an examination of the photographs of the edger put in evidence, without the aid of the testimony of experienced machine men which was produced. We are of the opinion that in no event could these questions be decided as a matter of law in favor of appellant.

It is contended by learned counsel for appellant that respondent should have stopped the rollers before attempting to oil the bearing rod under the saw levers, there being an appliance by which this could be done by respondent without stopping the mill. This contention has to do with the question of contributory negligence of respondent, rather more than the question of guards to the rollers, though counsel seem to argue that this stopping device was in effect a guard. We think, however, that this presents only the question of whether or not respondent was guilty of contributory negligence in attempting to oil the rod while the rollers

were in motion. There was competent evidence tending to show that respondent was instructed by the foreman how to oil this rod while the rollers were in motion, and that it was the custom to oil the rod without stopping the rollers. The evidence tended to show that the head saw sent the cants to the edger as fast as they could there be taken care of by rapid work of the edger operator, so that he had to watch his opportunity and act very quickly in oiling the rod. It was not impossible to stop the rollers for that short time, but it evidently would take some time. It also appears that the stopping of the rollers would also stop certain other rollers which carried pieces to the edger from another place, and it was desirable, though possibly not absolutely necessary, to keep such rollers in motion. We think that the jury were fully warranted in believing that the appellant intended that respondent should not stop the rollers while oiling the rod, and we cannot say in the light of this record that the acts of respondent were so apparently dangerous as to make him guilty of contributory negligence as a matter of law. This question was also for the jury. *Green v. Western American Co.*, 30 Wash. 87, 70 Pac. 310; *Hall v. West & Slade Mill Co.*, 39 Wash. 447, 81 Pac. 915; *Whelan v. Washington Lumber Co.*, 41 Wash. 153, 83 Pac. 98, 111 Am. St. Rep. 1006; *Hoveland v. Hall Bros., etc., Co.*, 41 Wash. 164, 82 Pac. 1090; *Hansen v. Seattle Lumber Co.*, 41 Wash. 349, 83 Pac. 102; *Erickson v. McNeely & Co.*, 41 Wash. 509, 84 Pac. 3; *Thomson v. Issaquah Shingle Co.*, 43 Wash. 253, 86 Pac. 588; *Benner v. Wallace Lumber Co.*, 55 Wash. 679, 105 Pac. 145; *Anderson v. Pacific National Lumber Co.*, 111 Pac. 337.

Learned counsel for appellant place some reliance upon *Daffron v. Majestic Laundry Co.*, 41 Wash. 65, 82 Pac. 1089, and *Johnston v. Northern Lumber Co.*, 42 Wash. 230, 84 Pac. 627. We think, however, that these cases can be readily distinguished from the one before us. In those cases, not only was there a bona fide effort to comply with the factory act but the injuries occurred in a manner not reasonably to be anticipated. We think that so far as the dangers of the rollers are concerned this injury occurred in just such a manner as would be expected. Their danger consisted of the possibility of a person being caught between them. Suitable guards would have prevented a person coming in contact with them, except in a deliberate attempt to do so.

The judgment is affirmed.

RUDKIN, C. J., and FULLERTON, GOSE, and MOUNT, JJ., concur.

(61 Wash. 471.)

JAMES BLACK MASONRY & CONTRACTING CO. v. NATIONAL SURETY CO.

(Supreme Court of Washington. Jan. 4, 1911.)

1. PRINCIPAL AND SURETY (§ 117*)—COMPENSATED SURETY—RELEASE—PREJUDICE.

A compensated surety will not be released from his obligation, unless he has been in fact prejudiced by a breach of the contract, so substantial as to work a pecuniary disadvantage to him, or a deprivation of some protection or privilege reserved in the bond.

[Ed. Note.—For other cases, see Principal and Surety, Dec. Dig. § 117.*]

2. PRINCIPAL AND SURETY (§ 117*)—BUILDING CONTRACT—DISCHARGE OF SURETY—PAYMENT TO CONTRACTOR.

A subcontract for the construction of the stonework of a building at a price of \$16,500 provided for payment of 85 per cent. of the amount of work finished on the first day of each month, and on final completion of the work, the remainder of the contract price. The subcontractor was delayed by the acts of the contractor, whereupon the contractor advanced \$3,500 to the subcontractor before any work had been done, and paid \$8,632.46 before any material was delivered on the ground and \$9,571.19 before any payment was due. Held, that such payments constituted such a departure from the contract as to release the surety on the subcontractor's bond.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 283-285; Dec. Dig. § 117.*]

Dunbar and Crow, JJ., dissenting.

Department 2. Appeal from Superior Court, King County; Wilson R. Gay, Judge.

Action by James Black Masonry & Contracting Company against the National Surety Company. Judgment for plaintiff, and defendant appeals. Reversed, with instructions.

Roberts, Battle, Hulbert & Tennant, for appellant. Arthur E. Griffin, for respondent.

CHADWICK, J. Respondent took a contract for the erection of the Leary building in the city of Seattle. He let a subcontract to the Ellis Granite Company, to cut and place all the stone in the first two stories of the building. It was agreed that the entire work should be finished within 125 days from the date of the contract, which was December 12, 1908. The work was delayed, through no fault of the Ellis Company, for about 60 days, but was finally finished without any changes or alterations material to this inquiry. The contract price was \$16,500, to be paid as follows: "On the 1st day of each month the contractor shall render to the general contractor an itemized statement of the work placed in the building during the preceding month, which statement shall be verified by the architects, and upon the certificate of the architects there shall immediately be paid to the contractor by the general contractor, eighty-five (85) per cent. of the amount of work finished. On the final completion of the work and the acceptance thereof by the architects, as evidenced by

their certificate, the remainder of the contract price, together with the percentage retained shall be immediately payable." The contract provided that "the contractor shall furnish a bond in the amount of \$5,000 for the proper performance of the terms of this agreement." Appellant furnished this bond, which by its terms provided that the contract should be a part of its contract of indemnity. The bond contained the usual provisions with reference to notice to the surety of any material alterations or changes in the contract. On February 3, 1909, the Ellis Company gave notice that it was ready to begin the work of installing the stone, but owing to some delay on the part of the general contractors, it was not permitted to begin the work of placing the stone at the time provided in the contract. This delay continued for 60 days. The Ellis Company, having no other immediate source of income, was unable to meet its pay rolls, and accordingly called upon respondent to make some advances. Respondent, in conjunction with and by the direction of the Leary Company, and having satisfied itself that a considerable quantity of the stone, about \$7,000 worth, had been cut and was in the yards of the Ellis Company, ready for delivery, did make the following advances: February 11, 1909, \$500; February 17, 1909, \$2,000; March 6, 1909, \$1,000. It being apparent to respondent and the Leary Company that additional advances would have to be made, their respective superintendents went to the local agent of the appellant, and asked him to approve in writing of the payments already made and give his indorsement to the payment of such additional sums as were necessary to meet the expense account of the Ellis Company. This request was referred by the agent of appellant to its attorneys, and on the next day respondent and the Leary Company were informed that appellant conceived the contract to have been broken, and that it was no longer liable on its bond, and accordingly refused to approve the payments that had been made or to give its indorsement to the additional payments required. On March 26th, respondent notified the Ellis Company to forthwith proceed with the erection of the granite for the Leary building, "under and pursuant to your contract dated December 12, 1908," and on March 30, 1909, respondent notified the appellant that the Ellis Company had "defaulted in the performance of its contract and has refused to proceed therewith, and further that the wages of the employes of said company for the week ending March 20, 1909, were due and had not been paid, and no work has been done under said contract since that date." This notice was of date May 25th, and repudiated by appellant, on the theory that, by the advancements referred to and other advancements made thereafter, it was

no longer liable, and refused to recognize any further liability on the bond. The court found that, when the Ellis Company made default in payment of its workmen and failed to proceed with the work of installing the stone in the building, it was impossible for the respondent to procure the stone elsewhere, without great delay which would have been disastrous to respondent and subjected it to great loss. At or about March 26th and prior to the notice given by the respondent to the appellant that the Ellis Company had abandoned its contract, its president and secretary went to respondent and to the Leary Company and told them, that the Ellis Company would not be able to carry out its contract, that it was without funds, and that the party who had been financing it had refused to make any further advances, and thereupon offered to respondent and to the Leary Company the material in its yards, and the use of its yards and appliances, in the event that they desired to perform the work upon their own account. Whereupon the Ellis Company discharged its bookkeeper, took out its telephone, and from that time on did nothing in the way of performance of its contract. The Leary Company and respondent put their own man in charge of the yard as timekeeper and bookkeeper, and employed the president of the Ellis Company as superintendent at a salary of \$50 a week, and at each week end the Leary Company drew a check to cover the pay rolls and necessary expenses. This check was drawn in favor of Mr. Sayre, the superintendent, and by him converted into cash, which was paid over to the laborers. It does not appear in evidence that anything was paid by the Leary Company or the respondent over and above the actual cost of labor and material, unless it be some charges for the timekeeper, telephone, and other items which might be deducted without affecting the real question before us.

The trial court found: "That the defendant National Surety Company was not prejudiced, injured, or damaged in any way or to any extent whatsoever either by the first three payments made February 11, 1909, February 17, 1909, or March 6, 1909, aggregating \$3,500, and that said defendant was not prejudiced, injured, or damaged in any way whatsoever by the subsequent payments made by the plaintiff to the defendant Ellis Granite Company to secure the completion of the contract of said Ellis Granite Company." The court concluded: "That the plaintiff is entitled to a judgment against the defendant National Surety Company for the full sum of \$5,000, together with interest thereon at the rate of 6 per cent. per annum from the 24th day of November, 1909."

Appellant relies upon five propositions to sustain its appeal: "First, the advancement of \$3,500 before any work whatever was done; second, payment of \$6,632.46 before any material was delivered upon the grounds;

third, payment of \$9,571.19 before any payment was due; fourth, advancements and payments at all times over and beyond the 85 per cent.; fifth, making final payment without notice and without holding back reserve fund as stipulated." The contentions of respondent are sufficiently indicated by the statement of the facts and the findings which we have quoted or summarized.

This court has held, and it is a doctrine from which we are not inclined to depart, that a compensated surety will not be relieved of his obligation, unless it be shown that he has been in fact prejudiced by a breach of the contract; that is to say, the breach must not have been technical but substantial, working a pecuniary disadvantage to the surety, or depriving him of some protection or privilege reserved in the bond. *Beebe v. Redward*, 35 Wash. 622, 77 Pac. 1052; *Cowles v. U. S. Fidelity & Guaranty Co.*, 32 Wash. 121, 72 Pac. 1032, 98 Am. St. Rep. 838; *Title Guaranty & Trust Co. v. Murphy*, 52 Wash. 194, 100 Pac. 315; *Denny v. Spurr*, 38 Wash. 352, 80 Pac. 541; *Heffernan v. United States Fidelity & Casualty Co.*, 37 Wash. 477, 79 Pac. 1095; *Monro v. National Surety Co.*, 47 Wash. 488, 92 Pac. 280; *Leghorn v. Nydell*, 39 Wash. 17, 80 Pac. 833.

Respondent relies principally upon *Leghorn v. Nydell*, supra, and *Monro v. National Surety Co.*, supra. These were cases holding that payments advanced to a contractor before the time stipulated in the contract would not exonerate the bond, in the absence of a positive showing of prejudice. In each of these cases, as in others of a like nature, there was a substantial compliance with the terms of the contract by the contractor. The payment was made in accordance with the terms of the bond, and having thereafter become due by reason of a performance of the contract, it was held that the objection was technical, and the surety was held to its obligation. As was said in *Cowles v. United States Fidelity & Guaranty Co.*, supra, the bond is subject to the contract, and was made after the contract. It is the contract instead of the bond which is primarily to be construed. And, as there suggested, the inquiry should be, whether another or a new contract has been substituted for the old one. We think that in this case there was not only a substantial departure, but a clear abandonment of the original contract, and a new contract whereby respondent and the Leary Company undertook to do the work upon their own account and for their own benefit. The contract provided that payment should only be made when the stone had been placed in the building, and then upon the certificate of the architect; but without notice to the surety, payments aggregating \$3,500 were made upon a \$16,500 contract, before they became due and without any certification on the part of the architect.

There is evidence to the effect that, but

for the delay occasioned by the Leary Construction Company, amounting to nearly 60 days, the Ellis Company could have performed its contract. It was because of the act of the Leary Company then, rather than because of the fault of the Ellis Company, that it was put in default and compelled to abandon its work. The work being taken over by respondent and the Leary Company, the situation made by them cannot be evaded by showing that accounts were kept with the Ellis Granite Company; that Sayre had been and was in name still its president, and like circumstances. Facts and legal conclusions cannot be overcome by mere bookkeeping. The whole record shows that the Ellis Company never performed, nor attempted to perform, any part of its contract, and that the \$3,500 or any part thereof never became due it, as was so in the cases relied upon by respondent. No obligee should assume to pay a substantial part of the contract price—as counsel for respondent contend, and as it seems probable, a sum equal to or greater than the profit on the job—without notice to the surety. Advances or overpayments are allowed and held to be without prejudice where, under the facts of the particular case, they afterwards become due to the party to whom they have been paid. But here, not only were the time and manner of the payment changed, but more than one-half of the contract price was paid before it was due under the contract. It was never paid under the contract or to the contracting party. It was paid for the actual cost of material and labor, to those who had furnished these items for the benefit of the respondent. The general rule is, if the building owner advances to the builder more than he is entitled to under the contract, the surety will be released. The rule rests upon two reasons. The one is that such advance deprives the surety of the security which the owner or principal contractor has agreed to hold for his benefit, and the loss of the inducement which otherwise would have operated on the contractor's mind to induce him to finish the work in accordance with the terms of his obligation. Hudson, Building & Engineering Contracts, 694; Pingrey, Suretyship & Guaranty, §§ 103, 138; 27 Am. & Eng. Enc. Law, p. 496; Peters v. Mackay, 20 Wash. 172, 54 Pac. 1122; Calvert v. London Dock Co., 2 Keen, 638; Wehrung v. Denham, 42 Or. 386, 71 Pac. 133; Glenn County v. Jones, 146 Cal. 518, 80 Pac. 695; Lelendecker v. Aetna Indemnity Co., 52 Wash. 609, 101 Pac. 219.

The case of County of Glenn v. Jones, *supra*, is directly in point. Upon a \$5,580 contract, \$1,860 was paid prematurely, without the consent of the sureties, although \$1,900 worth of the material had been put on the ground. The motive was, as in this case to help the contractor along with his work and, as here, the board satisfied itself that enough material was on the ground to cover

the payment. The court said: "In our opinion, the obligation of the principal was altered in a material respect without the consent of the sureties. The contractor was under the obligation of placing all the materials on the building site before he was entitled to any money under the terms of his contract. By the payment to him before he had done so, he secured the money before performing his obligation. The pressure which would have been exerted upon him to continue in the performance of his contract, and place all the materials on the site, was removed when he received the money. He received it before he was entitled to it, without the consent of the sureties. The sureties had bound themselves upon the assumption that the plaintiff would keep its contract in good faith. We can see no difference in principle, if the whole of the contract price had been paid before any of the materials were placed on the ground. In such case, could any one doubt that the sureties would have been exonerated? The risk of guaranteeing the construction of a building to be paid for when completed and accepted, is quite different from the risk of guaranteeing its construction, if the whole contract price should be paid in advance. In the one case, the contractor can only get the money by performing his contract, while in the other he would only pay out the money already received, in performing it. In this case the sureties agreed and guaranteed that Jones would place all the materials on the building site, on condition that he was to receive no money until he had done so; they did not agree that if paid in advance, he would place such materials on the site. By the payment, the hope of reward for further performance was lost; the temptation to act dishonestly was increased."

Counsel for respondent seeks to distinguish this case, because the contractor pocketed the money and then abandoned the contract. But the legal principle involved rests, not upon the fact that the contractor took the money and appropriated it to his own use, but upon a breach of the contract by the obligee. Where the money went is immaterial to the surety. If the owner could pay a part when nothing was due, and recover when nothing ever became due under the contract to the principal of the bond, he could then pay all, and upon abandonment hold the surety upon the plea of good motive, and that the payment was made for the benefit of the obligor. In all the cases decided by this court, and by all other courts holding that payment by the owner would not discharge the principal, the facts have been such that no prejudice resulted by reason of such payments to the surety. But in this case the surety was prejudiced in the two essentials noticed and indorsed as sufficient by all the books; that is, that they were deprived of that security which their contract gave them; and, furthermore, the

contractor was relieved of the inducement to perform the labor and furnish the material stipulated in his contract.

The case most relied upon by respondent is *Smith v. Molleson*, 148 N. Y. 241, 42 N. E. 669. There the contract was "to furnish, cut, set and clean," all the granite work for a building, and provided for payments in installments not to exceed a certain per cent. "of the estimated value of the work performed on the building." It was properly decided that the contract should not turn on the words "on the building," so as to render payments made on the estimates of the work done elsewhere a departure available as a defense to the surety; it being evident from the situation of the parties, the nature of the work, and other provisions of the contract, that the intention was to make the payments as the work progressed. In so holding, however, the court expressly affirmed the rule as we have announced it, and as that court had previously declared it to be. The object of the courts should be to ascertain and enforce the contract as made, and not to hold the surety to a condition not within the fair contemplation of the parties. Here the contract was to pay for the work placed "in the building" during the preceding month. We have held that compensated sureties would not be heard to invoke the rule of strictissimi juris, but our holdings have gone no further than to hold that such sureties could not claim the same rule of strict construction available to non-compensated or voluntary sureties or guarantors. When the contract is plain and unambiguous, or when its doubtful terms have been reconciled, whether by the one rule or the other, this court has, like all others, held the parties to their contract; for, as is said in the books, "a surety is bound by the contract he made, and not by some contract which he did not make, even though the latter may be more favorable to him than the former." Sureties and guarantors are not to be made liable beyond the express terms of their contract. The only question open in such cases is to determine what the contract is and enforce it. "It is unquestionably the well-settled rule of law that a surety is entitled to a somewhat rigid construction of his contract; but before this rule is applied, his contract is subject to the same construction as any other contract, in order to ascertain and give effect to the intent of the parties, and it is not until this is ascertained that its language is to be regarded as strictissimi juris." *Pingrey, Suretyship & Guaranty*, § 67, citing *Belloni v. Freeborn*, 63 N. Y. 383; *People v. Backus*, 117 N. Y. 196, 22 N. E. 759; *Locke v. McVean*, 33 Mich. 473; *Shreffler v. Nadelhoffer*, 133 Ill. 536, 25 N. E. 630, 23 Am. St. Rep. 626. The rule is stated in the last case as follows: "The rule of strict construction, as applied to the contracts of sureties and guarantors, in no way

interferes with the use of the ordinary tests by which the actual meaning and intention of contracting parties are ordinarily determined, but merely limits their liability strictly to the terms of their contract when those terms are ascertained, and forbids any extension of such liability by implication beyond the strict letter of those terms."

Here the contract is plain. It was agreed that no payment should be made until the first day of the month following the installation of the stone. The conduct of respondent and the Leary Company shows that they so understood it. The payment of \$3,500 was made in defiance of the terms of the contract and, under the authorities cited, operates to the legal prejudice of appellant. That this court has never held that the obligee of a bond was not bound to observe the terms of his contract, or that the surety was bound in any event, it is only necessary to refer to the case of *Lelendecker v. Aetna Indemnity Co.*, supra, which is in line with an unbroken current of authority flowing from the leading case of *Calvert v. London Dock Co.*, supra, and all holding that when ascertained the stipulations of the contract were binding on both parties. In the *Lelendecker Case*, after setting out the specification that the last payment should be reserved for the protection of the surety, Judge Dunbar said: "There was a contractual relation existing by reason of this bond between the indemnity company and the appellant. This provision was accepted by the appellant when he accepted the bond as a specification of his duties in the premises; and it seems to us that it was a fraud upon the indemnity company to neglect to notify it that a payment had been made, which was not disclosed in the contract upon which the bond was given, and the making of which rendered unavailing the provision in the bond just quoted. Having accepted the bond with a provision of this kind, we think the appellant is bound by such provision."

Judgment reversed, with instructions to the lower court to enter a decree in favor of appellant.

RUDKIN, C. J., and MORRIS, J., concur.

DUNBAR, J. I dissent. The whole record convinces me that the court was justified in finding that the surety company was not prejudiced to any extent, or in any way, by the payments made, and this under our uniform holdings is the test of whether the deviation is material. In the *Lelendecker Case*, cited above, it was apparent that the payments out of order were made to the detriment of the surety company. So that the case is in no wise in point.

CROW, J., concurs in the dissent of DUNBAR, J.

(61 Wash. 395)

STATE v. McDOWELL.

(Supreme Court of Washington. Jan. 3, 1911.)

1. JURY (§ 11*)—RIGHT TO TRIAL BY JURY—CONSTITUTIONAL PROVISIONS—APPLICATION OF FEDERAL CONSTITUTION.

Const. U. S. Amend. art. 6, guaranteeing the right of accused to a speedy and public trial by an impartial jury, does not apply to prosecutions in state courts for violations of state law.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 23; Dec. Dig. § 11.*]

2. JURY (§ 33*)—RIGHT TO TRIAL BY JURY—DEPRIVATION OF RIGHT—QUALIFICATIONS OF JURORS.

Laws 1909, c. 73, requiring jurors to be taxpayers, does not violate Const. art. 1, § 21, providing that the right of trial by jury shall remain inviolate.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 226-232; Dec. Dig. § 33.*]

3. CRIMINAL LAW (§ 365*)—EVIDENCE—SIMILAR ACTS—RES GESTÆ.

In a prosecution for assault with intent to commit sodomy, testimony that immediately after the act charged accused attempted to commit the same act upon a boy who was present was admissible as part of the res gestæ.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 807; Dec. Dig. § 365.*]

4. CRIMINAL LAW (§ 656*)—TRIAL—PROVINCE OF COURT AND JURY.

In a criminal prosecution, remarks of the judge, in ruling on objections to leading questions, that the witness was only 13 years old, and that he was a very young witness, are not comments on the facts prohibited by Const. art. 4, § 16.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1524-1533; Dec. Dig. § 656.*]

5. CRIMINAL LAW (§ 1136*)—APPEAL—PARTIES ENTITLED TO ALLEGE ERROR.

On defendant's appeal, the state's contention that defendant was sentenced under the wrong statute, and that he should have received a heavier sentence, cannot be considered.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1136.*]

Department 1. Appeal from Superior Court, Kittitas County; Ralph Kaufman, Judge.

Alex McDowell was convicted of assault with intent to commit sodomy, and appeals. Affirmed.

William M. Thompson, for appellant. E. K. Brown and Austin Mires, for the State.

GOSE, J. The defendant was convicted of the crime of assault with intent to commit sodomy, and has appealed from the judgment entered upon the verdict.

The first question raised is that the requirement that a juror shall be a taxpayer (Laws 1909, p. 131) conflicts with the sixth article of amendment to the federal Constitution, which guarantees that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury. This amendment has no reference to prosecutions in state courts for the violation of a state law. 8 Cyc. 1091; Cooley, Const. Llm. p. 46; Twitchell v. Commonwealth, 7

Wall. 321, 19 L. Ed. 223; Edwards v. Elliott, 21 Wall. 532, 22 L. Ed. 487; Pearson v. Yewdall, 95 U. S. 294, 24 L. Ed. 436; Maxwell v. Dow, 176 U. S. 581, 20 Sup. Ct. 448, 494, 44 L. Ed. 597. In the Maxwell Case the accused was tried for a felony in the state of Utah, in the state court, before a jury composed of eight jurors, and convicted and sentenced to imprisonment. The Constitution of Utah provides "that in courts of general jurisdiction, except in capital cases, a jury shall consist of eight persons." Article 1, § 10. It was contended, among other things, that the clause quoted violated the sixth amendment of the federal Constitution. The court said that the contention had merit if the amendment was applicable to criminal prosecutions of citizens of the United States in state courts, that the amendment was not applicable, and that "the states so far as the amendment is concerned are left to regulate trials in their own courts in their own way." Thompson v. Utah, 170 U. S. 343, 18 Sup. Ct. 620, 42 L. Ed. 1061, and Rassmussen v. United States, 197 U. S. 516, 25 Sup. Ct. 514, 49 L. Ed. 862, cited by the appellant, hold that the amendment is operative in criminal prosecutions in the territories, and that the term "jury" means a jury of twelve persons.

It is also contended that the requirement that a juror shall be a taxpayer is violative of section 21 of article 1 of the state Constitution, which provides that "the right of trial by jury shall remain inviolate." A juror was not required to be a taxpayer under the laws of the territory when the Constitution was adopted. The precise point raised is that the Legislature is powerless to prescribe any qualification for jury service in addition to that required at the time of the adoption of the Constitution. This contention, we think, is without merit. While we think the point was ruled adversely to appellant's contention in State v. Newcomb, 109 Pac. 355, we will proceed to a consideration of the question as if it were not controlled by that case. In Redford v. Spokane Street Ry. Co., 15 Wash. 419, 46 Pac. 650, in considering another statute fixing the qualifications for jury service, this court said: "That the act requires that jurors shall be householders—a qualification not required by the old law—furnishes no sufficient reason in our judgment for holding that it is unconstitutional." The guaranty, says Johnstone, C. J., in Wheeler v. Caldwell, 68 Kan. 776, 75 Pac. 1031, means "that the right of trial by jury shall be and remain as ample and complete as it was at the time when the Constitution was adopted." In Vaughn v. Scade, 30 Mo. 600, it was held that the guaranty means a jury of 12 men, but that "the nonessentials of that institution such as concern the qualifications of jurors, the mode of summoning them, and many other such

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep't Indexes

matters," are left to the wisdom of the law-making body, and that the guaranty is preserved "in retaining the substance of that form of trial as it was known and practiced among those from whom we derived it." In *State v. Strasburg*, 110 Pac. 1020, we said that the guaranty means something more than the "preservation of the mere forms of trial by jury." In *State v. McClear*, 11 Nev. 39, it was said: "We think that the term 'jury,' as it is used in the Constitution, means 12 competent men who are free from all the ties of consanguinity and all other relations that would tend to make them dependent on either party. It means 12 men who are not interested in the event of the suit, and who have no such bias or prejudice in favor of, or against, either party as would render them partial toward either party." And that the statute which took away the right of the state and the accused to challenge a juror for actual bias contravened the constitutional guaranty, in that the right of the parties to have the case tried by an impartial jury was of the essence and substance of the guaranty. We fully acquiesce in this view. In *Work v. State*, 2 Ohio St. 296, 59 Am. Dec. 671, it is said that the term "jury" has been variously defined as "twelve good men and true," "neighbors and equals," "peers" of the parties to the litigation. In *Stokes v. People*, etc., 53 N. Y. 164, 13 Am. Rep. 492, it was held that "the mode of procuring and impaneling" the jury may be regulated by statute, but that the right of trial by an impartial jury must be preserved. In *People v. Harding*, 53 Mich. 48, 18 N. W. 555, 51 Am. Rep. 95, the court said that all the essential incidents of trial by jury as it existed at the time of the adoption of the Constitution are protected by the guaranty. In *Lommen v. Minneapolis, etc., Co.*, 65 Minn. 196, 68 N. W. 53, 33 L. R. A. 437, 60 Am. St. Rep. 450, it was said that the three essential attributes of a jury trial are numbers, impartiality, and unanimity. In *State ex rel. Mullen v. Doherty*, 16 Wash. 382, 47 Pac. 958, 58 Am. St. Rep. 39, the principal question presented was whether a party was entitled to a jury trial in a quo warranto proceeding. Preliminary to giving a negative answer to that question, it was said that "the right of trial by jury as it existed in the territory at the time when the Constitution was adopted should be continued unimpaired and inviolate." Elliott, J., speaking for the court in *Anderson v. Caldwell*, 91 Ind. 451, 46 Am. Rep. 613, said that "matters of practice may always be changed and regulated by the Legislature." In *Reese v. Knott*, 3 Utah, 451, 24 Pac. 737, cited by appellant, it is held that the statute of the territory of Utah, providing that only taxpayers shall be eligible to jury service, is violative of the seventh amendment to the federal Constitution. The court in that case says arguendo that, if the Legislature may require the juror to be a taxpayer, it may

say that, before he is eligible, he shall be worth \$10,000, and that, if the power to so fix the qualification is once conceded, it can be extended so as to become oppressive. We do not agree with either the conclusion or the reasoning of the court. We entertain no doubt that the standard of qualification for jury service might be so raised as to be subversive of the right of trial by jury. We think that the logic of the cases is that the right to a jury trial shall remain inviolate where the right existed when the Constitution was adopted; that the term "jury" signifies a body of 12 impartial men, peers of the parties; and that the guaranty is that these essential features cannot be taken away by the lawmaking power. This, we think, has been the construction from the beginning. The Legislature, in harmony with this view, has from time to time changed the qualifications of jurors, but has always preserved the essential and fundamental features of the jury system as we had it when the Constitution was adopted. This, we think, satisfies the guaranty. See, also, 24 Cyc. 187.

The testimony of the state shows that the act charged was committed in a barn between the hours of 10 and 11 o'clock p. m., and that three boys were present. One of the boys was permitted to testify that immediately after the crime charged had been committed and at the same place the defendant attempted to commit a similar indecent act upon him. The admission of the latter testimony is assigned as error. "Evidence of another and distinct crime is admissible if it was committed as part of the same transaction, and forms a part of the *res gestæ*." 12 Cyc. 407. In *State v. Gainor*, 84 Iowa, 209, 50 N. W. 947, the defendant was prosecuted on a charge of murder in the first degree, and convicted of manslaughter. The witness testified that immediately after the shooting the defendant pointed his pistol at another party. The court held that the evidence "was essentially a part of the *res gestæ*," and competent. See, also, *Wigmore on Evidence*, § 218; *People v. Mead*, 50 Mich. 228, 15 N. W. 95; *Wilkerson v. State*, 31 Tex. Cr. R. 86, 19 S. W. 903; *Blanton v. State*, 1 Wash. St. 235, 24 Pac. 439; *State v. Craemer*, 12 Wash. 217, 40 Pac. 944; *State v. Burton*, 27 Wash. 538, 67 Pac. 1097; *State v. Gottfreedson*, 24 Wash. 398, 64 Pac. 523. In the *Wilkerson Case* the appellant was convicted of the murder of his wife. The state was permitted to prove that immediately after killing his wife and within forty steps of her dead body the defendant shot and killed another person. The court said that the evidence of the second killing was competent as *res gestæ*.

The appellant cites in support of this assignment *Buell v. Aberdeen State Bank*, 108 Pac. 931, and *State v. Oppenheimer*, 41 Wash. 630, 84 Pac. 588. The objectionable evidence in these cases was not a part of the *res gestæ*.

tæ. We think the second act was admissible as a concomitant part of the criminal act charged in the information.

During the examination of one of the state's witnesses, a boy 13 years of age, objections were several times interposed on the ground that the questions were leading. In ruling upon the objections the court remarked: "Oh, the boy is only 13 years of age." "This is a very young witness, remember." "You can ask leading questions of a witness who is only 13 years old." These remarks, it is said, are comments on the facts within the meaning of article 4, § 16, Const. We cannot accede to this view. The court was speaking to counsel, and had a right to assign a reason for his ruling. The boy had testified that he was only 13 years of age, and there was no other testimony on that subject. In *State v. Gohl*, 46 Wash. 408, 90 Pac. 259, this court remarked upon the distinction between technical and prejudicial error. It said that the instructions "manifestly do comment on the facts, but erroneous instructions do not necessitate a reversal unless they tend in some manner to prejudice a party's cause before the jury," and that a party was not prejudiced by a mere statement of an uncontroverted fact. It was further said that the trial judges should scrupulously avoid such comment, but that appellate courts cannot reverse a judgment for error without prejudice. See, also, *State v. Belknap*, 44 Wash. 605, 87 Pac. 934. In *State v. Surry*, 23 Wash. 655, 63 Pac. 557, the court, speaking to the constitutional provision here invoked, said: "But we do not think it was intended by this provision to prevent the judges from giving counsel the reasons for their rulings upon questions presented during the progress of a trial, or to prohibit them, in all cases, from stating, when necessary, the facts upon which they base their conclusions." *State v. Hyde*, 20 Wash. 236, 55 Pac. 49, *State v. Crotts*, 22 Wash. 245, 60 Pac. 403, *State v. Thield*, 36 Wash. 365, 78 Pac. 919, *State v. De Pasquale*, 39 Wash. 260, 81 Pac. 689, and *State v. Phillips*, 109 Pac. 1047, cited by the appellant, were decided upon facts so dissimilar that they are not in point. In *Hicks v. United States*, 2 Okl. Cr. 626, 103 Pac. 873, cited by the appellant, one Fred Warren was the only witness who connected the defendant with the crime charged. During his cross-examination, the trial judge interrupted counsel, and, among other things, said: "That boy is all right." At another time the judge said to the witness while still upon the witness stand: "After the trial is all over, I want to see you and your father in my room." The conduct of the judge was, of course, held to be error. Further comment on the case is unnecessary. There is no merit in the assignment that the evidence is insufficient to support the verdict. Two boys who

were eyewitnesses to the crime testified positively to its commission. A discussion of the evidence would be neither profitable nor edifying. The state suggests that the appellant was sentenced under the wrong statute, and that he should have received a heavier sentence. That question cannot be reviewed on this appeal.

The judgment is affirmed.

RUDKIN, C. J., and FULLERTON, PARKER, and MOUNT, JJ., concur.

(61 Wash. 393)

ANDERS v. BOUSKA.

(Supreme Court of Washington. Dec. 31, 1910.)

HUSBAND AND WIFE (§ 267*)—COMMUNITY PROPERTY—ACTION AGAINST HUSBAND—PROPERTY OF WIFE—BONA FIDE PURCHASERS.

Where a wife owning certain real estate was not made a party to an action against her husband to enforce an alleged community debt in which the husband's interest in the property was attached, and, pending the attachment, the wife sold the property to plaintiff, who purchased without knowledge of the attachment, which the abstract of title failed to show, plaintiff was a bona fide purchaser for value, and was not chargeable with the attachment lien.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 934; Dec. Dig. § 267.*]

Rudkin, C. J., dissenting.

Department 2. Appeal from Superior Court, Spokane County; E. H. Sullivan, Judge.

Action by Elmer P. Anders, against Joseph Bouska, to quiet title to real estate in the city of Spokane. From a decree in his favor, the defendant has appealed. Affirmed.

Ernest E. Sargeant, for appellant. N. D. Walling and John C. Kleber, for respondent.

CROW, J. The evidence shows that Logan Snell and Clara Snell were husband and wife; that on October 31, 1906, Clara Snell acquired record title to the real estate, the presumption being that it became community property; that on November 19, 1906, Joseph Bouska commenced a personal action in the superior court of Spokane county against Logan Snell alone, to recover judgment on an account for necessities sold to him; that on the same date he caused a writ of attachment to be issued and levied upon the real estate here involved; that on February 1, 1907, after procuring an abstract of title which did not disclose the attachment lien, Elmer P. Anders, the respondent herein, purchased the real estate from Clara Snell for a valuable consideration, taking title thereto under and by virtue of a deed executed by her and Logan Snell, her husband; that respondent then had no notice of the attachment, or the pending action commenced by Bouska; that thereafter

judgment was entered in favor of Bouska against Logan Snell, in pursuance of which an order of sale was issued to the sheriff of Spokane county, directing him to sell the attached property; and that it was sold on August 1, 1908, by the sheriff to Bouska, who now claims title. The action commenced by Bouska was against Logan Snell alone. The attachment was against his interest in the real estate. Clara Snell was not a party to the action or attachment, although appellant must have known she then held the record title. Before any judgment was obtained by Bouska, the property had been sold and conveyed to Anders, for a valuable consideration, without notice to him of the pending action or attachment.

In *Clerf v. Montgomery*, 15 Wash. 483, 46 Pac. 1028, 48 Pac. 733, the record title stood in the name of S. F. Montgomery, wife of J. M. Montgomery, the judgment debtor and only defendant in an attachment proceeding. Before judgment was obtained against her husband, the wife sold to one Christianson, a bona fide purchaser. We there said: "Without specially reviewing the other assignments, we are satisfied that no error was committed by the court excepting in its finding that Christianson took the lands subject to the lien of the attachment. Christianson, we think, was a bona fide purchaser without notice of any incumbrance. The record title was in S. F. Montgomery, and the fact that the copy of the attachment writ, together with a description of the property attached, was filed in the county auditor's office where such writ of attachment ran against the property of J. M. Montgomery, the order being to attach the interest of J. M. Montgomery, only, could in no wise, it seems to us, be notice to a purchaser of the attachment of property the record title of which was in the name of another, even though that other should be the wife of J. M. Montgomery." See, also, *Johnson v. Irwin*, 16 Wash. 652, 662, 48 Pac. 345.

The abstract of title procured by respondent did not disclose the attachment lien which under section 8787, Rem. & Bal. Code, was undoubtedly indexed in the name of Logan Snell only. Respondent purchased from Clara Snell, holder of the record title. Had the appellant Bouska, knowing she held the record title, made her a party defendant to the action which he commenced on a community obligation, and also to his writ of attachment, the lien which he obtained would have been indexed in her name also, thus giving constructive notice to any person who might thereafter deal with her as holder of the record title. This appellant failed to do, and under the case above cited we think the respondent, shown to be a purchaser for

value without notice of the lien, should be protected.

The judgment is affirmed.

DUNBAR, CHADWICK, and MORRIS, JJ., concur.

RUDKIN, C. J. I dissent. Under section 5917, Rem. & Bal. Code, property "acquired after marriage by either husband, or wife, or both," except such as is acquired by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is community property. Under the succeeding section, community real estate is subject to the lien of judgments, recovered for community debts, and to sale on executions issued thereon. The land in controversy was the community property of Logan Snell and Clara Snell, his wife, on the 19th day of November, 1906, when levied upon under a writ of attachment, sued out in an action prosecuted against the husband for a community debt. That the levy of the writ created a lien on the community property I presume will not be denied, and that a deed from the wife alone would convey no title to a purchaser will not be gainsaid. The majority seems to proceed on the theory that, inasmuch as the record or paper title stood in the name of the wife, a purchaser from the community was not chargeable with notice of liens for community debts recorded against the husband alone. By a parity of reasoning it might be argued that neither was he chargeable with notice of any interest or claim the husband might have in or to the property. Yet all will concede that the purchaser was bound to take notice of the marriage relation of the parties, and of the community character of the property, and that a deed from the wife alone would be mere waste paper. And, if the purchaser was chargeable with notice of the community interest of the husband in the property, why was he not likewise chargeable with notice of recorded liens against that interest? In *Mable v. Whitaker*, 10 Wash. 656, 39 Pac. 172, this court held that "a deed of lands under the conditions specified in the statute vested the ownership in the community, no matter which spouse was named as grantee in the deed, and the title of one spouse therein was a legal title as well as that of the other." It is now held that that legal title vested in the husband may be acquired free from attachment liens for community debts recorded against it. In such a conclusion I cannot concur. I do not think that the majority opinion is supported by the two cases cited from this court, but, if so, they are so entirely out of harmony with our community property system that they should be overruled.

(19 Idaho, 18)

WINTER v. NOBS et al.

(Supreme Court of Idaho. Dec. 9, 1910.)

*(Syllabus by the Court.)***1. BILLS AND NOTES (§ 497*)—ACTION BY INDORSEER—BURDEN OF PROOF—BONA FIDE PURCHASER.**

Where the indorsee of a promissory note sues the makers and on the trial they establish the fact that the note was given in payment of the purchase price of an animal sold under fraudulent misrepresentation as to the character and condition of the property sold, and under a false and fraudulent guaranty, by section 3516, Rev. Codes, the burden of proof shifts from the defendants to the plaintiff, to show that he acquired the note before maturity and in good faith for value.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1675-1687; Dec. Dig. § 497.*]

2. BILLS AND NOTES (§ 537*)—ACTION BY INDORSEER—QUESTION FOR JURY—INNOCENT PURCHASER.

Whether plaintiff in such a case has satisfactorily met the burden of proof to make good his claim to be an innocent purchaser is a question of fact for the jury, and is subject to the same rule as to its weight and sufficiency as any other fact in the case.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 1879; Dec. Dig. § 537.*]

3. BILLS AND NOTES (§ 337*)—BONA FIDE PURCHASERS.

Under the provisions of section 3513, Rev. Codes, mere suspicious circumstances are not sufficient to charge the purchaser of a promissory note with bad faith and notice of equities and defenses, but in order to charge the paper in his hands with prior equities and defenses, his notice must be actual, either of the facts constituting the equities and defenses or of such circumstances that his action in taking the paper in the face of such knowledge amounts to bad faith. The rights of the holder are to be determined by the simple test of honesty and good faith, and not by speculative issues as to diligence or negligence.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 818, 856-863; Dec. Dig. § 337.*]

4. BILLS AND NOTES (§ 344*)—BONA FIDE PURCHASERS.

The mere failure to pay a periodical installment of interest does not amount to a dishonor of a negotiable instrument, and that fact alone will not charge the purchaser with notice of any fraud or misrepresentation in the contract out of which the note arose, or in the issuance and circulation of the note.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 866-868; Dec. Dig. § 344.*]

Appeal from District Court, Kootenai County; Robert N. Dunn, Judge.

Action by Bert Winter against John Nobs and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Reed & Boughton and Robert H. Elder, for appellant. R. T. Morgan and Ezra R. Whitla, for respondents.

AILSHIE, J. The appellant is the indorsee of the note sued upon. The note was executed by the respondents in favor of McLaughlin Bros., in part payment for an

imported stallion. The sale was made at Coeur d'Alene City through one V. E. Woods, as agent for the McLaughlin Bros. At the time the sale was made and the promissory note was executed, Woods, acting as agent for the vendors of the horse, executed and delivered to the vendees, who are the makers of the note, a certificate of warranty and guaranty as to the utility and general condition of the animal sold. The note came due on the 29th day of March, 1908, but prior thereto and on the 6th day of February, 1908, the payees, the McLaughlin Bros., sold, assigned, and transferred the note to the appellant herein. At the time of the sale of the note to appellant, the respondents were in default of the payment of the annual interest due thereon. Defendants refused to pay the note on the ground of failure of consideration and fraud in the inception thereof, and the holder of the note thereupon commenced this action.

The defendants set up as a defense that the note was procured through fraud and deception and pleaded the guaranty which was given with the animal at the time of the execution of the note, and further alleged a breach of the guaranty and warranties, and alleged that the plaintiff was not a bona fide holder of the note in due course. The evidence was submitted to the jury and they returned a verdict in favor of the defendants, from which plaintiff appealed.

The evidence in the record is abundant to establish the first proposition, namely, that there was fraud in the inception of the contract; in other words, that the note was procured through fraudulent misrepresentations. It was shown by competent evidence that the horse was not what he was represented to be, and this defect was of such character that it must have been known to the vendors at the time the sale was made, and the facts and circumstances all point to that conclusion. The respondents gave notice to the agent, or agents, of the McLaughlin Bros. at Spokane as soon as they discovered the defects and condition of the horse, which was within a very short time after the purchase. It is claimed, however, in the briefs that it was impossible for the unsound condition of the horse and his defects to be discovered in so short a period of time. That might be true under some circumstances, but the condition in which he was at the time and his defects as to loss of vital energy were of such a character that they could as well be discovered and their effect foretold at the time and in the manner the discovery was made, as could have been done months later. We conclude without any hesitation that the first proposition was sufficiently established to go to the jury, and to justify a verdict that there was fraud in the inception of the contract. The second proposition involves the con-

struction of our statute. It is contended by respondent that under the provisions of section 3516, Rev. Codes, the moment the defendants proved that McLaughlin Bros.' title to the note was defective and subject to defenses, the burden was at once shifted from the defendants to the plaintiff, of showing that he was a bona fide holder of the note in due course.

Section 3516, Rev. Codes, provides as follows: "Every holder is deemed prima facie to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as a holder in due course. But the last-mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title."

Section 3509, Rev. Codes, defines a holder in due course as follows: "A holder in due course, is a holder who has taken the instrument under the following conditions: First, that the instrument is complete and regular upon its face; second, that he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact; third, that he took it in good faith and for value; fourth, that at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it."

The foregoing sections of the statute are parts of what is commonly designated as the uniform negotiable instruments law which has been adopted in this state, and which is now in force in most of the states in the Union. We are therefore not without judicial expression and construction on these provisions of the statute. This same statute is in force in the state of Washington; section 3516 of our statute corresponding to section 59 of the negotiable instruments law of Washington (Sess. Laws, c. 149), while section 3509 of our statute corresponds to section 52 of the Washington statute.

In Cedar Rapids Nat. Bank v. Myhre Bros., 57 Wash. 596, 107 Pac. 518, the Supreme Court of Washington had occasion to consider these two sections of the statute. The question before them was, whether the plaintiff was a bona fide holder of a promissory note that had been given for some worthless jewelry. The court first observed: "The testimony is overwhelming that the jewelry was worthless and that the note was obtained by misrepresentation and fraud." After citing and quoting the above-mentioned sections of the statute, the court concluded: "So it appears that the burden was upon the plaintiff in this case to show that it was a holder in good faith, and the question of whether or not that burden was suc-

cessfully met was one which was submitted to the jury, and by its verdict it has decided that question against the appellant. On both questions involved there was sufficient testimony for the legal consideration of the jury, and their verdict will therefore not be disturbed."

In Tredick v. Walters, 81 Kan. 828, 106 Pac. 1067, the Supreme Court of Kansas, in considering the effect of a certain contract which was executed in connection with the promissory note sued upon and the burden of proving the good faith of the indorsee of the note, said: "This admission was not that the appellant knew of these contracts at the time he purchased the notes, but it stood in lieu of proof of the contracts at the time of the trial. We think that the contracts afforded sufficient evidence of illegality to shift the burden of proof, which usually rests upon the defendant to prove the plaintiff's knowledge of the illegality at the time of purchasing the notes, and to place the burden upon the appellant to prove that he bought the notes before maturity, in due course of business, for value, and without any notice of the illegality of the consideration between the maker and the original payee, his grantor."

In Schultheis v. Sellers, 223 Pa. 513, 72 Atl. 887, 22 L. R. A. (N. S.) 1210, the Supreme Court of Pennsylvania, in considering the burden of proof as to the good faith or lack of good faith of the indorsee of the promissory note, said: "Almost a century ago, in Holme v. Karsper, 5 Bin. 469, it was held, in an action on a promissory note, that the holder was required to show the consideration he paid for it and how it came into his hands, where the defendant proved that it was put into circulation fraudulently. This rule has been recognized and enforced in subsequent decisions. In Lerch Hdw. Co. v. First Nat. Bank, 109 Pa. 240, it is said in the opinion of the court (page 244): 'To support an action by the indorsee of negotiable paper, against the maker, in the first instance it is only necessary for the plaintiff to put the paper in evidence. Then, if the defendant proves that the paper was put in circulation by fraud or undue means, his defense will prevail, unless the plaintiff establishes that he acted fairly and paid value.'" The court then adds: "This is now the statutory declaration of the law," and proceeds to quote section 59 of the negotiable instruments law of that state, which corresponds exactly with section 3516 of our Revised Codes. So it seems to have been the general rule of the law merchant long previous to the adoption of the uniform negotiable instruments law that, in an action by the indorsee of a negotiable instrument against the maker, the indorsee might introduce the paper and then rest upon the prima facie presumption that he was a bona fide purchaser in due course, but that as soon as this presumption was overcome by proof tending to show that the paper was put

into circulation by fraud or procured through fraudulent representations, the burden at once shifted to the indorsee to prove his good faith and that he had no notice of the fraud or defects in the instrument. Whatever the rule may have been, however, the statute (section 3516, *supra*) settles the question in this state.

It is contended by appellant that mere suspicious circumstances are not sufficient to put a purchaser of a note on inquiry, and that it is necessary, in order to defeat his right of recovery, to either show actual notice of the fraud or notice of such facts and circumstances as would charge him with actual bad faith in taking the paper without investigating the circumstances under which it was issued.

In support of this position, counsel rely on section 3513, Rev. Codes, which reads as follows: "To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith."

We readily agree with this contention. We think it is only actual knowledge of the defect or infirmity, or notice of such facts and circumstances as would put a man on inquiry and would charge him with bad faith or the imputation of dishonest dealing, that was intended by the statute to defeat a recovery. This view is abundantly supported by the authorities.

Mr. Justice Weaver, speaking for the Supreme Court of Iowa, in *Arnd v. Aylesworth*, 123 N. W. 1001, said: "In some of the states it seems to have been held that one who takes a transfer of negotiable paper, under circumstances to put a reasonable person on inquiry as to defenses against it, is considered as having notice of the facts which such inquiry would develop; but the more general trend of the decisions from an early day has been to the effect that mere ground of suspicion as to possible defects in the title of the negotiator, or of the existence of defenses to the instrument negotiated is not the equivalent of notice to the transferee; and, to be regarded as an innocent purchaser, he need not as a matter of law be diligent to investigate the circumstances of the origin of the paper, though, if the negligence be of a marked or gross character, it may be competent to establish the mala fides of the purchase. That which will charge the paper in his hands with prior equities and defenses is actual or direct notice of the facts, or, in the absence of such notice or knowledge, the existence to his notice of such facts or circumstances that his action in taking the paper amounts to bad faith. Of this class of cases an illustrative example is *Goodman v. Simonds*, 61 U. S. 343, 15 L. Ed. 934, which is a leading case upon the subject. * * * "Whether plaintiff has sufficiently satisfied the burden resting upon him and made good his claim to be an inno-

cent purchaser is therefore a question for the jury, save in those instances where the testimony is not only consistent with the good faith of such purchase, but is such that no fair-minded person can draw any other inference therefrom. A categorical denial of notice or knowledge is something which in many, if not in most, instances cannot be opposed by direct proof; and the credibility of the witnesses, their interest in the case, the reasonableness or unreasonableness of their statements, the time, place, and manner of the transaction, its conformity to or its departure from the ordinary methods of business, and all the other facts and circumstances which, though of slight moment in themselves, yet, when taken together, give character and color to the purchase under inquiry, constitute a showing which the court cannot properly pass upon as a matter of law. Observing this principle, it has frequently been held that a denial of notice by the purchaser, though he be uncontradicted by any other witness, is not sufficient to justify a directed verdict in his favor."

In considering the same question, Mr. Chief Justice Rudkin, speaking for the Supreme Court of Washington, in *Gray v. Boyle*, 55 Wash. 580, 104 Pac. 829, 133 Am. St. Rep. 1042, quoted with approval the following extract from Crawford's *Annotated Negotiable Instruments Law*, page 68: "The holder is not bound at his peril to be on the alert for circumstances which might possibly excite the suspicion of wary vigilance. He does not owe to the party who puts the paper afloat the duty of active inquiry in order to avert the imputation of bad faith. The rights of the holder are to be determined by the simple test of honesty and good faith, and not by a speculative issue as to his diligence or negligence. The holder's right cannot be defeated without proof of actual notice of the defect in title or bad faith on his part evidenced by circumstances. Though he may have been negligent in taking the paper, and omitted precautions which a prudent man would have taken, nevertheless, unless he acted mala fides, his title, according to settled doctrines, will prevail."

We are in full accord with this construction of the law. In the case at bar the plaintiff did not offer any evidence as to his lack of knowledge of the fraud and misrepresentations practiced by McLaughlin Bros. in procuring this note. He simply rested by showing that the note was sent to him through the mail for discount prior to maturity, and that he paid the holders of the note its face value. It appears, also, that the defendants resided in Kootenai county, Idaho, and that plaintiff resides at Minneapolis. The record fails to show as to whether the plaintiff was previously acquainted with any of the defendants or with the McLaughlin Bros. It stands to reason, however, that the plaintiff must have had some information, either as to the financial standing of some one or all of the

defendants or of the McLaughlin Bros., or else he would not have invested the sum of \$1,125 in this note. Of course, if he knew the McLaughlin Bros. and knew them to be financially responsible, then he could safely purchase the note on their indorsement. If, however, he did know them, judging from the reported cases in which they have figured, he must have known that they were engaged in just the kind of business that is disclosed by this record. The following cases reported from courts of last resort show that this is not the first transaction of the kind in which they have been engaged: *Union Investment Co. v. Wells*, 11 Am. & Eng. Ann. Cas. 33, 39 Can. Sup. Ct. 625; *Union National Bank v. Winsor*, 101 Minn. 470, 112 N. W. 999, 118 Am. St. Rep. 641. The plaintiff, Union Investment Company, in the former of the above cases, seems to have been the company of which appellant herein is secretary and treasurer. If, on the other hand, he did not know the McLaughlin Bros., he must have had some information as to the financial standing of some one or all of the defendants, and that information might have given him some intimation as to the nature or character of the transaction out of which the notes arose. Whatever the circumstances may have been, it still remains true that the question of the good faith of the purchaser of the note was one of fact instead of law, and the jury had a right to determine it in the light of all the facts and circumstances presented in the case.

It has been contended by the respondent that the fact that there was one or more installments of interest overdue on this note

was of itself evidence that the appellant did not purchase the note in due course. Upon this question the authorities seem to be divided, but we are inclined to think that the better reason is with the holding that a mere failure to pay a periodical installment of interest does not amount to a dishonor of a negotiable instrument and will not charge the purchaser with notice of any fraud or misrepresentation in the contract, or in the issuance and circulation of the note. This question is very exhaustively treated in *Union Investment Co. v. Wells*, 11 Am. & Eng. Ann. Cas. 33. In a note to that case, the editors say: "There is a conflict in the decisions as to whether a negotiable instrument becomes overdue upon the failure to pay a periodical installment of interest, where the principal itself is not yet due. The weight of authority supports the rule that a mere failure to pay a periodical installment of interest will not amount to a dishonor of a negotiable instrument and will not render the instrument overdue." The authorities cited in the note will disclose, however, that it has been frequently held that knowledge on the part of a purchaser of overdue installments of interest constitutes a circumstance which may be considered by the jury, along with other facts and circumstances, in determining the good faith of the purchaser of the note.

From what has been said, it follows that the judgment in this case should be affirmed, and it is so ordered. Costs awarded in favor of respondents.

SULLIVAN, C. J., concurs.

(57 Or. 547)

ULMEN v. TOWN OF MT. ANGEL.

(Supreme Court of Oregon. Jan. 17, 1911.)

1. MUNICIPAL CORPORATIONS (§ 837*)—DISCHARGE OF SEWAGE—INJUNCTION—"SEW-AGE."

A city constructed an underground tile drain that collected surface water and drainage from houses, which ran from the drain into an open ditch and thence into a gully near the corner of plaintiff's residence property, which was low ground. The water in plaintiff's well, which was within 16 feet of the gully, was affected by the condition of the water in the ditch. *Held*, that water is sewage, and the city may be enjoined from discharging it into the gully, although the water in plaintiff's well at its best is not good.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1786; Dec. Dig. § 837.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6457, 6458.]

2. MUNICIPAL CORPORATIONS (§ 837*)—DISCHARGE OF SEWAGE—PRESCRIPTIVE RIGHT.

The convenience of the public will not authorize a city to direct surface or other waters in a public sewer or drain and empty them upon the land of an individual to his injury; and the right to do so cannot be acquired by prescription.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1786; Dec. Dig. § 837.*]

Appeal from Circuit Court, Marion County; Wm. Galloway, Judge.

Suit by Anna Ulmen against the Town of Mt. Angel. Judgment for plaintiff, and defendant appeals. Affirmed.

This is a suit to enjoin the defendant town from draining certain streets into a gully, referred to in the pleadings as a ditch or waterway, which extends along plaintiff's residence property. A decree was rendered by the trial court in favor of plaintiff, and defendant appeals.

Carson & Brown, for appellant. M. A. Seitz (Rauch & Senn, on the brief), for respondent.

EAKIN, J. It appears from the evidence that a gully, formed by surface water, extending westerly through the southern part of the town of Mt. Angel, drains that portion lying south and east of the corner of College and Main streets, together with other ground. It crosses Main street about 1,000 feet southerly from said street corner, and passes westerly along the north line of plaintiff's lot, which is 100 feet wide, north and south, and 330 feet, east and west, on the west side of, and adjacent to, Main street. The course of that street is N. 21° 54' E., and the Southern Pacific railroad crosses it in a course a little west of north near the intersection of Church street; Charles and College streets being next north of Church, extending east and west. In the summer of 1908 the defendant town constructed a tile drain, about 10 inches in diameter and 4 or

5 feet under the surface, commencing on the north side of Charles street some distance east of Main street, and extending westerly to Main, thence southerly on the east side of Main street to a point within 60 feet of the gully, and thence by an open ditch to the gully near the northeast corner of plaintiff's property. The drainage on Charles street into the tile extends from a point 700 feet east of Main street, and the witness Zollner, when asked, "if that is all the water from any of the streets conducted into the tile," answered: "Most of the streets." Much of the business part of the town is situated on the east side of Main street and extending east on Charles street; there being as many as 14 or 15 business houses in that vicinity mentioned incidentally in the evidence. There is also a creamery in that neighborhood, which is drained into the tile on Main street. Plaintiff's property is low ground, described by some witnesses as a swale, the well thereon being within 16 feet of the gully or ditch on the north line, and the evidence tends to show that the water in the well is, to some extent, affected by the conditions of the water in the ditch; that, when the water in the ditch is discolored, it is also discolored in the well. One witness testifies that in the summer there is no water in the gully at all; that since this tile drain was laid the surface water is dark, and does not flow entirely through the ditch at first, but is absorbed by the dry ground, some description being given of the character of offal going into the drain, both from the streets and buildings, also the creamery; that there is a bad odor from the water in the gully, noticeable upon the street, as well as at plaintiff's residence, and from the water in the well. One of defendant's witnesses, when asked by counsel if there were any impurities put into the drain by authority of the town, says: "Of course, when there is a heavy rain, the water is not clean. Everybody knows that." Another says: "Several years back there was a closet run out in the street. We made them change that. There was a smell when walking along the sidewalk. We got them to make a change."

It is very evident that in a town of that size there will be a much greater quantity of water drained off the streets and through the ground than is caused by rain and snowfall, and that it carries with it a very different quality of water. Every building must have a water supply, either from a well or by a method provided by the city, the great bulk of which is used for cleansing purposes. Much of it goes directly into the drain, which, with the rainfall, carries all kinds of filth and impurities from the surface of the streets, as well as underground drainage, which is equally polluting, into the drain tile, and, when cast upon the surface of a dry gully or into a small or sluggish

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

stream, necessarily creates a nuisance, and is a menace to the health, comfort, and convenience of those residing in its vicinity and of the public generally, and we think the findings of fact made by the trial court are fully sustained by the evidence. Gould on Waters, § 546.

Defendant's principal contention is that the drainage is not sewage, but ordinary surface drainage unaffected by the fact that it is from the streets of the town. It is immaterial by what name it is called. If the water is polluted by the filth from the buildings and streets, it may well be called "sewage." The Universal Dictionary says "sewage" includes the water by which the foul matter, which passes through the drains, conduits, or sewers of a town, is carried off, the waste water of baths, washhouses, and other domestic operations, and of the greater part of the surface drainage of the area drained. Joyce on Nuisance, at sections 284-286, discusses the rights and liabilities of municipal bodies in the deposit of sewage or any polluted drainage, and is to the effect that it cannot so deposit such pollutions as to create a public or private nuisance. The corporation is liable if, without authority of law, it collects surface or other waters in a public sewer or drain and empties them upon the land of an individual to his injury, either immediately or by the force of gravitation. Gould on Waters, § 262. At section 546 Mr. Gould says: "If any nuisance of this kind be shown, though causing considerable damage, equity will enjoin its continuance. * * * The inconvenience is one of the public's own creation, and should be borne by it rather than the individual." And the convenience of the public will not be considered. So also the right to maintain a nuisance cannot be acquired by prescription. *People v. Gold Run Ditch & Mining Co.*, 66 Cal. 138, 4 Pac. 1152, 56 Am. Rep. 80.

Some proof was offered tending to show that the water from plaintiff's well at its best is not good, but, if so, that fact would constitute no excuse for the town to discharge its drainage on her property and make it worse.

It is the duty of the town to dispose of its drainage in some manner that will not create a nuisance to individuals or the public, and the decree will be affirmed.

(58 Or. 803)

CALAPOOIA LUMBER CO. v. RICE et al.
(Supreme Court of Oregon. Jan. 10, 1911.)

ARBITRATION AND AWARD (§ 16*)—AGREEMENT OF SUBMISSION—REVOCATION—OPERATION OF LAW.

An agreement between plaintiff and defendant to submit to arbitrators the amount of damage sustained by defendant from a dam to be erected by plaintiff, in case the parties could not agree upon the damage sustained after the

dam was erected, was revoked by operation of law, by defendant's subsequent conveyance to another of the premises affected by the erection of the dam.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. § 69; Dec. Dig. § 16.*]

Appeal from Circuit Court, Linn County; William Galloway, Judge.

Action by the Calapooia Lumber Company against H. W. Rice, as administrator of the estate of James N. Rice, substituted for the said J. N. Rice, and another. From a decree for plaintiff, defendants appeal. Affirmed.

In 1903 plaintiff had in contemplation the erection of a sawmill on the Calapooia river and also a dam to be used in connection therewith. It being apparent that the construction of the dam would cause to be overflowed certain lands owned by J. N. Rice and occupied by defendant Finley, as lessee, and it not being possible to ascertain the extent of such overflow and consequent damage until the dam should be completed, the parties entered into an agreement for future arbitration which, in effect, provided that plaintiff might proceed to erect its dam to any height it might see fit, and that when it should be completed and the extent of overflow actually demonstrated, the plaintiff should pay to defendants the damages caused thereby and the defendants should thereupon execute a deed, conveying to plaintiff the right to maintain the dam and cause such overflow; that in the event the parties should not agree as to the amount of damages, then each party should appoint a disinterested person, in writing, and these two should designate, in writing, a third person to act as arbitrator; and that upon their decision the plaintiff should pay the sum awarded and the defendants should thereupon make a deed conveying the right to maintain the dam. There are other stipulations in the agreement not material to the decision of this case. Subsequently, and before arbitrators were chosen, defendant Rice conveyed all his right, title, and interest in the premises to Ina Finley, wife of defendant George Finley, but this fact was unknown to plaintiff. In 1907 George Finley wrote to plaintiff, demanding that it appoint an arbitrator, and designating D. C. Swann as his agent and arbitrator. After some delay plaintiff selected John McKercher as his arbitrator and these two selected J. M. Taylor as the third, and they made an award of \$2,000 damages in favor of defendants and directed that it should be paid to Ina Finley. The plaintiff refused to pay the award and an action to recover was brought by the defendants. A decree was rendered in favor of plaintiff, and defendants appeal.

J. K. Weatherford, for appellants. C. E. Sox (Hewitt & Sox, on the brief), for respondent.

McBRIDE, J. (after stating the facts as above). Many reasons are urged by plaintiff for setting aside this award, which in the main seems to have been conducted in the informal manner common in such proceedings.

Without discussing all the objections urged against the validity of the award, we are of the opinion that the conveyance by Rice to Ina Finley operated as a revocation of the submission, and that the arbitrators were without power to act under the written agreement. Ina Finley was not bound by the written agreement to submit to arbitration, and Rice had voluntarily put it out of his power to perform his agreement to make a conveyance. Only the parties who sign the agreement of submission are bound by it. Practically this is an attempted arbitration between plaintiff on the one hand, and Rice and Finley, and Ina Finley, who is a stranger to the agreement, on the other. The agreement of submission was revoked by operation of law when Rice conveyed the premises. Billings on Awards, p. 20; Smith v. Reeves, 5 Dowl. Pr. C. 513.

The decree of the circuit court is affirmed.

(58 Or. 119)

DUNNIGAN v. WOOD.†

(Supreme Court of Oregon. Jan. 10, 1911.)

1. ADVERSE POSSESSION (§ 65*)—ENTRY AND POSSESSION BY MISTAKE—INTENTION—EFFECT.

Where a party holds possession of land under mistake or ignorance as to the true line and with no intention to claim beyond the true line, when it should be discovered, his possession is not adverse.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 365-370; Dec. Dig. § 65.*]

2. ADVERSE POSSESSION (§ 85*)—HOSTILE CHARACTER OF POSSESSION—EVIDENCE—PRESUMPTIONS.

Actual, open, notorious, distinct, and continuous possession of real property under a claim of right, and not inconsistent with the other acts of the party or with the circumstances of the case, raises a presumption that such possession is hostile to all other claimants.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 498; Dec. Dig. § 85.*]

3. ADVERSE POSSESSION (§ 65*)—INCLOSING LAND BY MISTAKE—CLAIM OF TITLE—EFFECT.

Where a person incloses land of another by mistake, claiming it as his own, actual possession will work a disseisin of the owner.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 365-370; Dec. Dig. § 65.*]

4. ADVERSE POSSESSION (§ 114*)—TITLE ACQUIRED BY ADVERSE POSSESSION—EVIDENCE.

In a suit to determine the ownership of a strip of land along the boundary between defendant's and plaintiff's land, evidence held to show defendant's actual, notorious, continuous, undisturbed, and hostile possession of the land in dispute, under a claim of right, for more than 40 years prior to plaintiff's assertion of

title, sufficient to vest title in defendant by adverse possession.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 682-690; Dec. Dig. § 114.*]

Appeal from Circuit Court, Marion County; William Galloway, Judge.

Suit by Edward A. Dunnigan against Amer Wood, by Jacob Ogle, his guardian. Judgment for plaintiff, and defendant appeals. Reversed.

This is a suit to determine the ownership of a strip of land along the entire south line of defendant's land, 87 links wide at the east and 72 links wide at the west end, containing about 5 acres; the south line of defendant's and the north line of plaintiff's land being a common boundary. Dividing the two farms is an old rail fence, constructed by the predecessors of plaintiff and defendant more than 45 years ago; the strip of land in dispute being north of the old fence. Defendant denies ownership in plaintiff, alleges ownership in himself, and pleads possession, and title by prescription. The lands of the plaintiff and defendant are portions of the donation land claim of Thomas C. Howell, in township 6 south, range 2 west of Willamette meridian, Marion county, state of Oregon. Plaintiff purchased his land about two years before the commencement of this suit from one Charles Arnold, at a given price per acre; Arnold claiming pay for 165 acres. A survey was made, and, for the first time, it was claimed that the old fence was not on the line, and something like 5 acres of the Arnold land was within Wood's inclosure. The court below found in favor of the plaintiff, and entered a decree accordingly, from which defendant appeals.

John A. Jeffrey and George G. Bingham, for appellant. W. M. Kaiser and M. E. Pogue, for respondent.

BEAN, J. (after stating the facts as above). There is no conflict in the testimony in the case. The contention is as to the effect or deductions to be drawn from the testimony, or from the facts as disclosed thereby. It appears that the defendant's land and a tract on the east, not in question, was conveyed by Howell to one Swegle, November 29, 1858, and described as follows: "Commencing at the northwest corner of our land claim at a stake; thence east 101 chains and 81 links to a stake; thence southwest 78 chains to a stake; thence west 23 chains and 31 links to a stake; thence north 42 chains and 3 links to a stake; thence west 76 chains and 13 links to a stake; thence north 37 chains and 2 links to the place of beginning, containing 480 acres of land be the same more or less. Said described land is a part of our donation, notification No. 291, claim No. 47." On May 17, 1865, the land of the same de-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

† Rehearing denied February 23, 1911.

scription was conveyed to the defendant Wood. On November 11, 1858, Howell conveyed to Pleasant Howell the premises now owned by plaintiff, and described them as follows: "The same being in Marion county, O. T., in township 6 south, range 2 west of the Willamette meridian, commencing at a stake three rods north of the township line at a stake; thence west 76 chains and 15 links to a stake; thence north 21 chains 87 links to a stake; thence east 76.15 chains to a stake; thence south 21 chains 87 links to a stake, being the beginning corner, containing 160 acres of land be the same more or less. Said described land is a part of our donation claim under the act of Congress approved September 27, 1850, notification No. 291, claim No. 47, as on file in the surveyor's office in Oregon Territory." On June 8, 1859, Howell conveyed to one Buford, and on October 3, 1862, Buford, by the same description, conveyed to plaintiff's predecessor, Charles Arnold.

It appears from the uncontradicted testimony that the rail fence was constructed some time prior to 1862; that there are trees from 5 to 15 inches in diameter, and apparently from 20 to 30 years old, growing along and in the corners thereof; that the defendant Wood, during his ownership, has resided upon, cleared, and cultivated his land, and, for a portion of the distance, close to the fence in question; that in the eastern part, next to the fence, there was a garden; and that, for a portion of the way, the fence is constructed through timber and brush. It also appears that Arnold, plaintiff Dunnigan's predecessor, during about the same time resided upon his land, and cleared and cultivated a portion thereof to the line of the fence mentioned. That each of the respective parties, during all that time of more than 40 years, recognized the old worm fence as the true division line between the two tracts, contributing their portion in building and maintaining the fence, which, for that purpose, was divided into four sections, and each party, in erecting his portion thereof, constructed it on his own land, making slight offsets in the fence, except that at the west end, running up and down a hill for about 100 feet (in order to obtain a better grade), the line of fence was varied by defendant Wood, and constructed on his own land.

According to the survey of plaintiff's land, made by the county surveyor, beginning at the re-entrant corner of the Thomas C. Howell donation land claim, which, according to the government field notes, is 1 chain and 8 links north of the township line, and running north 21.87 chains (to a point 87 links north of the rail fence on the line as claimed by the defendant); thence west 76.15 chains to the west line of Thomas C. Howell's claim; thence south 21.87 chains to the southwest corner of the claim (a point located from witness' trees); thence east 76.15 chains to

place of beginning, making the line, as claimed by plaintiff, 87 links north of the fence at the northeast corner and 72 links north of the fence at the northwest corner of plaintiff's land, it would embrace, within defendant's inclosure, about 5 acres, the premises in dispute. That, when the survey was made, the stakes mentioned in the deeds were, and had been for a long time prior thereto, obliterated. That the township line near these points is in cultivated fields, with nothing to mark its location, and that the surveyor, in running the south line of defendant's land, followed along an old fence between the Thomas C. Howell donation land claim and the John Howell donation land claim.

The contention of the plaintiff is that the possession by defendant of the land in controversy was not adverse to plaintiff's rights. If the claim of the defendant, as alleged in his answer, that he has been in the open, notorious, exclusive, and adverse possession of the strip of land, under claim of right, for more than 10 years is sustained by the evidence, it is decisive of this case, regardless of where the line between the two tracts originally should have been located.

Plaintiff cites the cases of *King v. Brigham*, 19 Or. 570, 25 Pac. 150, and 23 Or. 262, 281, 31 Pac. 601, 606, 18 L. R. A. 361, as applicable to the facts herein. In the latter case, it appears that the plaintiff occupied land up to a fence, or the line, as he alleged, because he believed it to be the true boundary, but without any intention of claiming thereto, if it should be determined by the suit to be beyond the true line; that at the time of the second suit, the plaintiff, by a leading question, was made to claim to own the land in controversy, whether covered by his patent or not, concerning which Mr. Chief Justice Lord said: "But claims of this sort, unless consistent with the acts of the parties and other circumstances of the case, are not very satisfactory proof to establish title by adverse possession to the lands covered by title of others." In the opinion in the first case, at page 570, 19 Or., at page 153, 25 Pac., it is noted by Mr. Justice Bean that "the evidence shows that Mr. King held this possession, if at all, under mistake or ignorance as to his true line, and with no intention to claim beyond the true line when discovered. Such a possession is not adverse and cannot ripen into a title as against the real owner"—citing in support thereof *Caulfield v. Clark*, 17 Or. 473, 21 Pac. 443, 11 Am. St. Rep. 845.

However, the facts in the case of *King v. Brigham* differ materially from the one at bar. In this suit the fence between the plaintiff's and defendant's tracts was constructed soon after the execution of the deeds describing stakes at the ends of the division line, and the circumstances do not indicate that there was any mistake in the gen-

eral location of the fence, but rather that it was built while the line dividing the tracts was evidenced by stakes, and was therefore the true boundary line. All of the acts of the defendant and of the predecessors in interest of the plaintiff, and the circumstances of the case relating to the occupancy and cultivation of the respective tracts, and the construction and maintenance of the division fence ever since 1862, show the possession of the land by defendant was complete and rightful and adverse to plaintiff, and not subservient to any title asserted by the latter.

Actual, open, notorious, distinct, and continuous possession of real property, under a claim of right, and not inconsistent with the other acts of the party or circumstances in the case, raise a presumption that the possession is hostile. *Greene v. Anglemire*, 77 Mich. 168, 172, 43 N. W. 772.

In *Meyer v. Hope*, 101 Wis. 125, 77 N. W. 720, the court says: "The doctrine that evidence of adverse possession must be construed strictly and every reasonable presumption be made in favor of the true owner is well understood, but that does not avail against the fact of exclusive, notorious, unexplained, continuous, occupation for the requisite period to acquire title by prescription. When that is established, it is conclusive as to the nature of the possession, till rebutted by some satisfactory evidence. It overcomes the presumption previously existing in favor of the true owner, and a presumption arises from the facts in favor of the occupant, that his occupancy was characterized by all the other elements requisite to adverse possession."
* * *

In *Gist v. Doke*, 42 Or. 225, 70 Pac. 704, Mr. Justice Wolverton, citing *Ramsey v. Ogden*, 23 Or. 347, 31 Pac. 778, says: "It was held that in case of a person inclosing land of another by mistake, claiming it as his own, actual possession will work a disseisin of the owner." See, also, *Caufield v. Clark*, 17 Or. 473, 21 Pac. 443, 11 Am. St. Rep. 845.

We think it clearly shown by the evidence on the part of defendant that he has been in the actual, visible, notorious, exclusive, continuous, undisturbed, and hostile possession of the land in dispute, under a claim of right, for more than 40 years prior to plaintiff or his predecessor asserting any claim to the tract in dispute. *Cooper v. Blair*, 50 Or. 394, 92 Pac. 1074. That the defendant is the owner in fee simple, and entitled to the possession thereof. That the general line of the old fence, not following the slight curves through the timber, or the angles or the diversion at the west end on the side of the hill, is the true boundary line between the tracts of land of plaintiff and defendant.

It follows that the decree of the lower court must be reversed, and one entered here in accordance herewith.

(42 Mont. 348)

YANCEY et al. v. NORTHERN PAC. RY. CO.
(Supreme Court of Montana. Dec. 12, 1910.)

1. ASSIGNMENTS (§ 137*)—ACTIONS—SUFFICIENCY OF EVIDENCE—IDENTITY OF PARTIES.

In an action on an assigned claim for wages, evidence held to show that the assignment was made to both of plaintiffs, and not merely to one of them.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 234; Dec. Dig. § 137.*]

2. REPLEVIN (§ 1*)—TROVER AND CONVERSION (§ 13*)—ACTION (§ 28*)—REMEDIES.

The owner of converted goods may in a proper case either proceed in claim and delivery to recover them, or sue for damages for their conversion, or may waive the tort and sue for their value upon an implied promise.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. § 1; Dec. Dig. § 1.* Trover and Conversion, Cent. Dig. §§ 103-116; Dec. Dig. § 13.* Action, Cent. Dig. §§ 199-203; Dec. Dig. § 28.*]

3. PLEADING (§ 146*)—COUNTERCLAIM.

The sufficiency of a counterclaim should be determined by the rules applicable to a complaint.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 294-296; Dec. Dig. § 146.*]

4. PLEADING (§ 374*)—PROOF—ALLEGATIONS OF COMPLAINT.

Plaintiff must prove all facts which it is necessary to allege in the complaint to state a cause of action.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1217-1223; Dec. Dig. § 374.*]

5. SALES (§ 353*)—IMPLIED CONTRACTS—ACTIONS—ALLEGATIONS—NONPAYMENT.

An allegation of nonpayment is as essential in an action upon an implied contract as for goods sold and delivered, as in an action upon an express contract, so that, in an action on an assigned claim, a counterclaim as for goods sold and delivered, based on the assignor's conversion of defendant's goods, must allege nonpayment.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1003; Dec. Dig. § 353.*]

6. SALES (§ 357*)—BURDEN OF PROOF.

Under Rev. Codes, § 7886, requiring a party to prove the affirmative of his own allegations, one counterclaiming on an implied contract as for goods sold and delivered must prove nonpayment; it being necessary to allege nonpayment.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1044-1048; Dec. Dig. § 357.*]

Appeal from Sixth Judicial District Court, Park County; Frank Henry, Judge.

Action by Dan Yancey and another, co-partners as Yancey & Laurens, against the Northern Pacific Railway Company. From a judgment for plaintiff and an order denying a motion for new trial, defendant appeals. Affirmed.

Wm. Wallace, Jr., John G. Brown, R. F. Gaines, and A. P. Stark, for appellant. Yancey & Laurens, John T. Smith & Son, E. M. Niles, and E. C. Jones, for respondents.

HOLLOWAY, J. The complaint in this action alleges that on February 8, 1909, the defendant railway company was indebted to W. A. Malone in the sum of \$140 for wages

earned by Malone while employed by the railway company as a locomotive fireman; that on February 8, 1909, for a valuable consideration, Malone assigned his claim for wages to the plaintiffs; that plaintiffs notified the railway company of the assignment and demanded payment of the amount of the claim; and that this demand was refused. The answer of the railway company denies any indebtedness to Malone, denies any sufficient knowledge to form a belief as to whether Malone made an assignment to plaintiffs, and whether plaintiffs notified the defendant or demanded payment. As a set-off or counterclaim, it is alleged that on February 7, 1909, Malone had earned not more than \$110 by reason of his employment by the railway company, and "(2) that between the 1st day of September, 1908, and the 5th day of February, 1909, the said W. A. Malone took from the possession of the defendant, and converted to his own use certain goods, wares, and merchandise belonging to the defendant, of the value of \$500, and thereby became indebted to the defendant in the sum of \$500; that the said Malone did not at any time, or at all, pay the defendant for said goods, wares, or merchandise, and that amount has never been paid; and that on the 7th day of February, 1909, the indebtedness of said Malone to defendant more than offset the amount which had been earned by him as above set forth." The cause originated in a justice of the peace court, was appealed to the district court, and there submitted to the court sitting with a jury. A verdict was returned in favor of the plaintiffs for \$117.65, and judgment was rendered and entered thereon. From that judgment and an order denying it a new trial the defendant railway company appealed. In their brief counsel for appellant say: "Two questions arise: Variance and the amount of the verdict."

1. It is claimed that there is a fatal variance between the pleading on the part of the plaintiffs, and the proof offered by them in support thereof in this: That, while the complaint counts upon an assignment of a claim to Yancey & Laurens, the evidence shows an assignment to the plaintiff Yancey alone. The only evidence in the record touching the assignment is that furnished by the testimony of plaintiff Yancey himself, as follows: "Mr. Malone was indebted to Mr. Laurens and myself for services as his attorney, and also for money advanced. * * * I had several talks with Mr. Malone, and he engaged me to represent him as counsel, Mr. Laurens and I, and we were to get our pay some way or other; and in talking this matter over he said to me, 'I will give you my pay for January and February. I have worked up until yesterday,' I think he said, and I accepted that as pay for my work, and for money I was to advance him and other people; just a verbal statement that he assigned it to me, his time, what he had coming from

the Northern Pacific Railway Company for the months of January and February, 1909. This was the 8th day of this last February this conversation occurred." While there does not appear to be any excuse for the witness' use of the singular pronouns "I," "my," and "me," yet it does seem a fair construction of the testimony as a whole that the assignment was made to Yancey & Laurens. The transaction apparently took place between Malone and Yancey, but it was the firm which had been employed by Malone, and the language, "I will give you my pay for January and February," is not only consistent with the idea that Malone employed the pronoun "you" as plural, but is really inconsistent with any other view. If this is correct, and Malone actually made the assignment to Yancey & Laurens, it is wholly immaterial that Yancey may have given undue prominence in his testimony to one particular member of the firm.

2. The other contention made is that the verdict is so far excessive as to show passion and prejudice on the part of the jury in returning it. This contention is based upon the theory that had the jury allowed the defendant's counterclaim for the difference between the value of the goods converted and the value of the goods which the evidence shows were returned the verdict could not have exceeded \$11.82. In their briefs both parties to this action treat the evidence in the record as proving whatever it tends to prove. Upon that theory we may say that the evidence proves these facts: (1) That during January and up to February 8, 1909, Malone earned \$117.66 by reason of his employment by the railway company; (2) that his claim for that amount was assigned to the plaintiffs on February 8th, and was not paid; (3) that between September 1, 1908, and February 8, 1909, Malone had converted goods belonging to the defendant company of the value of \$241.92; and (4) that of these goods so converted a portion thereof of the value of \$136.08 had been reclaimed by, and returned to, the railway company before this action was commenced. It must be conceded at once that, in case the goods of one person are taken and converted by another, the owner may, if the facts warrant it, proceed either in claim and delivery or for damages for the conversion, or he may waive the tort and sue upon the implied promise for the value of the goods. *Yore v. Murphy*, 10 Mont. 304, 25 Pac. 1039. A counterclaim is in effect a complaint on the part of the defendant against the plaintiff, and its sufficiency as a pleading is to be determined by the same rules which are applied to determine the sufficiency of a complaint. *Bliss on Code Pleading*, § 367.

Omitting for the present any reference to the assignment by Malone to plaintiffs, and the counterclaim pleaded in this action is in effect a complaint by the railway company against Malone for the value of the goods

converted and not returned. In other words, the railway company waived the tort, and is now seeking to recover the value of the goods as though they had been sold and delivered to Malone, who impliedly promised to pay for them. We adopt the following from 16 Encyclopedia of Pleading & Practice, 178: "Whatever, in general, it is necessary for a plaintiff to prove to make out his cause of action, it is necessary for him to allege in his complaint, and whatever facts it is necessary for a plaintiff to allege it 'follows as a logical sequence' must be proved." So manifestly just and sensible is this rule, that one is surprised to find that it is not universally recognized and applied. While many courts refuse to follow it, we insist that any other rule leads to the most absurd results. To determine upon whom rests the burden of proof in this instance, then, it is only necessary to determine what allegations are necessary to state a cause of action for goods sold and delivered, where the law implies a promise to pay. The action is upon the contract, and therefore the complaint must allege a breach. In *Lent v. New York & M. Ry. Co.*, 130 N. Y. 504, 29 N. E. 988, the court said: "It does not admit of controversy that, upon an ordinary contract for the payment of money, nonpayment is the fact which constitutes the breach of the contract and is the essence of the cause of action, and, being such within the rule of the Code, it must be alleged in the complaint."

In *Frisch v. Caler*, 21 Cal. 71, the same rule is announced as follows: "In an action for the breach of a contract, it is necessary to allege that the contract has been broken, and there is no difference in this respect between a promissory note and other contracts. The failure to pay constitutes the breach and must be alleged." In *Hersfield v. Aiken*, 3 Mont. 442, this court referred to the case of *Frisch v. Caler*, above, and held that in an action on a promissory note the complaint which did not allege nonpayment did not allege a breach of the contract. In *Burke v. Inter-State S. & L. Ass'n*, 25 Mont. 315, 64 Pac. 879, 87 Am. St. Rep. 416, it was assumed that in an action upon a promissory note the plaintiff must allege nonpayment. In *Van Horn v. Holt*, 30 Mont. 69, 75 Pac. 680, the action was upon an injunction bond, and we said: "This action is upon the bond, and plaintiff sets forth at length the damages which he suffered by reason of the injunction, but does not say that such damages have not been paid. The gist of the action—that which gives rise to the action—is the failure of Howard or his sureties (appellants here) to pay such damages, or, in other words, the gist of the action is the breach of the contract; and, in the absence of an allegation of a failure to pay, there is no allegation of any breach whatever, and consequently nothing which can give rise to an action."

In *State v. Lagoni*, 30 Mont. 472, 76 Pac. 1044, in considering an action on a bail bond or recognizance, this court said: "The complaint is also fatally defective because it fails to state that the amount due the plaintiff by the terms of the undertaking has not been paid." *Bebbe v. Jackson*, 32 Mont. 217, 79 Pac. 1051, was an action upon an injunction bond, and upon the authority of the last two cases we again held that the allegation of nonpayment is "necessary to the sufficiency of the complaint."

If the allegation of nonpayment is necessary in an action upon an express contract, it is equally necessary upon an implied contract. Our conclusion is that the allegation of nonpayment in this counterclaim is a material allegation—one necessary to state a cause of action—and, being deemed denied, must be proved; and the defendant, having the affirmative of that issue, had the burden of proof. Rev. Codes, § 7886. Since the defendant failed to prove nonpayment, it failed to establish its counterclaim, and the verdict returned was fully justified.

The judgment and order are affirmed.
Affirmed.

BRANTLY, C. J., and SMITH, J., concur.

(42 Mont. 335)

SULLIVAN v. FRIED et al.

(Supreme Court of Montana. Dec. 7, 1910.)

1. APPEAL AND ERROR (§ 1245*)—LIABILITY ON BONDS—COMPLAINT.

In an action upon an undertaking to stay execution pending appeal from a judgment ordering a return of certain property or the payment of a specified sum, the plaintiff alleged that defendants gave the undertaking that the judgment appealed from was affirmed that the property had not been returned, that execution had been issued, and remained wholly unsatisfied, and that no part of the sum specified has been paid, and further set out the undertaking in full. *Held*, that while the complaint was indefinite, in that it does not allege the amount was fixed by the court, as required in section 7103, Rev. Codes, the undertaking recites this fact, and since the filing of the undertaking, the amount being fixed by the court, operates *ipso facto* to stay execution so that that need not be alleged, the complaint states a good cause of action.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1245.*]

2. APPEAL AND ERROR (§ 1232*)—LIABILITY ON BONDS—BREACH.

Where an undertaking to stay execution pending appeal from a judgment directing the return of certain property on the payment of a specified sum was conditioned that the appellants or either of them would obey the order of the appellate court upon the appeals or either of them, the affirmation of the judgment was a direction to the district court to execute its judgment, and was equivalent to an order of the appellate court to the appellants to submit to and satisfy the judgment, and a failure so to do was a breach of the undertaking.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4753; Dec. Dig. § 1232.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

3. APPEAL AND ERROR (§ 1223*)—LIABILITY OF UNDERTAKING—NATURE OF OBLIGATION.

Where, in an undertaking to stay execution pending appeal, there are several obligations, and, the first being in the usual form, another refers to "said judgment so appealed from," the appropriate reference to the description of the subject-matter set out as an introduction to the first undertaking was sufficient to include it in the whole series of obligations under section 7107, Rev. Codes, which declares the "undertaking prescribed in the preceding sections may be one instrument or several at the option of appellant."

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1223.*]

Appeal from District Court, Silver Bow County; John B. McClernan, Judge.

Action by Sophia Sullivan against Max Fried and others. From a judgment for defendants, plaintiff appeals. Reversed and remanded for new trial.

Nolan & Donovan, for appellant. J. E. Healy, for respondents.

BRANTLY, C. J. Action to recover upon an undertaking to stay execution pending appeal from a judgment recovered by the plaintiff in an action in claim and delivery. The judgment in question was affirmed by this court in *Sullivan v. Girson et al.*, 39 Mont. 274, 102 Pac. 320. The trial in the district court resulted in a judgment of nonsuit in favor of defendants. Plaintiff has appealed from the judgment.

The complaint recites the history of the litigation in the original action terminating in the judgment in favor of plaintiff declaring her entitled to recover the property in controversy, or, in case delivery thereof could not be had, to recover the sum of \$850, with the costs of the action. It alleges that, upon rendition of the judgment, the defendants Girson and Neer, instead of delivering up the property or paying the plaintiff the value thereof as declared by the judgment, appealed to the Supreme Court and executed the undertaking with defendants Fried and Rafish sureties thereon. The undertaking is set out in *hæc verba* and contains three distinct obligations: The first in the form of the usual undertaking on appeal in the sum of \$300, and conditioned to pay the costs awarded upon an affirmance of the judgment or a dismissal of the appeals; the second in the form of an undertaking on supersedeas to stay the judgment for costs in the district court and in double the amount thereof; and the third, the one upon which recovery is sought in this action. This last is as follows: "And whereas the appellant is desirous of staying the execution of the said judgment so appealed from, in so far as it relates to the delivery of the possession of the said personal property, we further, in consideration thereof, and of the premises, jointly and severally undertake and promise and do acknowledge ourselves further joint-

ly and severally bound in the further sum of seventeen hundred dollars (being the amount for that purpose fixed by the judge of this court) to the effect that the appellants and each of them will obey the order of the appellate court upon the appeals or either of them herein." It is then alleged:

"(4) On the 11th day of June, 1909, at the June term, A. D. 1909, said appeal was argued in the said Supreme Court, and on the 17th day of June, 1909, the said Supreme Court affirmed the judgment of the district court made and entered on the 11th day of March, 1908, as aforesaid, declaring the plaintiff to be the owner of and entitled to the possession of said personal property.

"(5) On the 7th day of July, 1909, the remittitur of said Supreme Court was received and filed in the office of the clerk of said district court, and thereafter plaintiff served and filed upon Girson and Neer her claim for costs incurred on said appeal in the sum of \$16.55, to which no objection was filed by said Girson and Neer within the time allowed by law.

"(6) That said Girson and Neer, nor either of them, have returned or offered to return said property.

"(7) That on the 10th day of August, 1909, an execution was issued to the sheriff of said county on said judgment against said Girson and Neer, and returned wholly unsatisfied on the 21st day of August, 1909.

"(8) That the defendants Rafish and Fried have paid the costs of the Supreme Court and of the district court, to wit, \$45.55. That they have not paid the principal sum of \$850, nor any part thereof, nor the interest due thereon, nor returned the said property to plaintiff, nor has plaintiff now the said property.

"(9) That plaintiff has sustained damages in the premises in the sum of \$850, together with interest at the legal rate from the 8th day of December, 1908."

The answer of the defendants Fried and Rafish admits all the allegations of the complaint, except that a return or an offer to return the property has not been made to plaintiff, and that execution has been issued against defendants Girson and Neer, and returned wholly unsatisfied. The answer of defendant Neer is substantially a copy of that of Fried and Rafish. Girson did not appear in the action. The trial court granted a nonsuit on the ground that the complaint does not state facts sufficient to constitute a cause of action. In our view the ruling was erroneous. It is alleged that the undertaking was given by the defendants to procure a stay of execution; that the judgment of the district court was affirmed; that the property has not been returned; that an execution has been issued and returned wholly unsatisfied; and that no part of the sum of \$850, the value of the property, has been

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

paid. If in stating his cause of action the plaintiff shows a right in himself, a corresponding duty owed to him by the defendant concerning this right, and a breach of this duty by the defendant, the statement of a cause of action is complete. The allegations contained in the complaint are sufficient to meet this requirement. The section of the statute under which the undertaking was given is the following: "Sec. 7103. If the judgment or order appealed from direct the assignment or delivery of documents or personal property, the execution of the judgment or order cannot be stayed by appeal, unless the things required to be assigned or delivered be placed in the custody of such officer or receiver as the court may appoint, or unless an undertaking be entered into on the part of the appellant, with at least two sureties, and in such amount as the court, or a judge thereof, may direct, to the effect that the appellant will obey the order of the appellate court, upon the appeal." Rev. Codes. It is not specifically alleged that the amount of the undertaking was fixed by the court, but the instrument is set forth in full and contains a recital that such was the fact. This renders the complaint indefinite in this particular, but we think it is sufficient to withstand attack by general demurrer. Under the provisions of the statute the filing of the undertaking after the amount has been fixed by the court for that purpose operates ipso facto to stay execution, and that it was stayed need not be specifically alleged.

It is said by counsel for respondents that the judgment should be affirmed for the reason that the sureties undertook only to obey the order of the appellate court, and, that since no order was made other than that affirming the judgment of the district court, it does not appear that there has been a breach of the undertaking. There is no merit in this contention. The obligation assumed by the sureties as the statute provides was that the appellants in the case of *Sullivan v. Girson et al.* should obey the order of the appellate court. The affirmance of the judgment was a direction to the district court to execute the judgment it had theretofore rendered. This was tantamount to an order by this court directing the appellants to submit to and satisfy the judgment, either by delivering up the property or paying the value of it. Any other view would defeat the purpose of the statute, viz., that the respondent, in case execution is stayed, shall have the assurance that at the end of the litigation he may have satisfaction of his judgment, if not by the appellant, then by those by whose intervention the judgment was stayed.

The further contention is made that the undertaking is too indefinite and uncertain to furnish a basis of recovery, because it contains no sufficient description by way of

introductory recital, to identify the judgment. This contention is without merit. The reference in the undertaking is to "said judgment so appealed from." The statute (Rev. Codes, § 7107) declares that the "undertakings prescribed in the foregoing sections may be in one instrument or several, at the option of the appellant." Clearly the purpose of this provision is to enable an appellant to have one set of sureties execute one instrument instead of several, and to make the merely formal parts of one of the obligations assumed by them answer for all, and thus relieve him of the necessity of writing out each instrument in full. The appropriate reference to the description of the subject-matter set out as an introduction to the first undertaking is sufficient for all purposes.

The judgment is reversed, and the cause remanded for a new trial.

Reversed and remanded.

SMITH and HOLLOWAY, JJ., concur.

(42 Mont. 329)

STATE v. COOK.

(Supreme Court of Montana. Dec. 6, 1910.)

CRIMINAL LAW (§ 1090*)—BILL OF EXCEPTIONS—INSTRUCTIONS—NECESSITY.

Rev. Codes, § 9271, par. 4, prohibiting reversal by the Supreme Court for error in instructions where such error was not specifically pointed out and excepted to at the settlement of the instructions and the error and exception by bill of exceptions, is mandatory, so that error in instructions cannot be considered on appeal in a criminal case where the record does not contain a bill of exceptions.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2818; Dec. Dig. § 1090.*]

Appeal from District Court, Fergus County; E. K. Cheadle, Judge.

John R. Cook was convicted of conducting a game of chance in a saloon, and he appeals. Affirmed.

Ayers & Marshall, for appellant. Albert J. Galen, Atty. Gen., J. A. Poore, Asst. Atty. Gen., for the State.

SMITH, J. The county attorney of Fergus county filed an information against the defendant charging that he "did wrongfully, willfully, unlawfully, and knowingly play, conduct, and cause to be conducted, open, and cause to be opened, operate, and run as principal and agent, and knowingly permit in and about a certain saloon in the town of Kendall, of which said saloon he was then and there part owner and in charge, the same being a place where drinks were sold and served, a certain game of solo, the same being a game of chance played with cards and which was then and there played for money, checks, credits, and representatives of value." The defendant was con-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

victed by a jury and sentenced by the court to pay a fine. He appeals from the judgment.

No claim is made that the information does not state a public offense, and the only contention of counsel is that the court erred in giving three certain instructions to the jury. Paragraph 4 of section 9271, Rev. Codes, under the head of "Criminal Procedure," provides, in part, as follows: " * * * The court stenographer shall be present at such settlement and shall take down all the objections and exceptions of the respective counsel to all or any of the instructions given or refused by the court together with the modifications made therein, and the ruling of the court thereon, and at the close of the trial such objections and exceptions taken during the settlement, together with the ruling of the court thereon, must be written out at length or printed in type by the stenographer and filed with the clerk forthwith, and thereafter such exceptions may be settled in a bill of exceptions as provided in section 9340 of the Revised Codes and section 2171 of the Penal Code of Montana, or an act of the Eighth Legislative Assembly of the State of Montana entitled 'An act to provide for the settlement of bills of exception taken before or after trial in criminal cases and to provide for the review by the Supreme Court on appeal of proceedings, evidence and matters contained in such bills of exceptions,' approved February 26th, 1903 [Laws 1903, c. 34]. No motion for new trial on the ground of errors in the instructions given shall be granted by the district court unless the error, so assigned was specifically pointed out and excepted to at the settlement of the instructions, as herein provided; and no cause shall be reversed by the Supreme Court for any error in instructions which was not specifically pointed out and excepted to at the settlement of the instructions herein specified, and such error, and exception incorporated in and settled in the bill of exceptions as herein provided."

This statute is mandatory. It declares that no criminal cause shall be reversed by the Supreme Court for any error in instructions which was not incorporated and settled in a bill of exceptions. The record of this case contains no bill of exceptions, and we are therefore powerless to consider the assignments of error. Section 6746, Rev. Codes, relating to civil procedure, is substantially the same as section 9271, supra. The two statutes were passed at the same session. That section was construed by this court in *Robinson v. Helena Light & Ry. Co.*, 38 Mont. 222, 99 Pac. 837, and it was there held that by its express provisions the instructions may not be reviewed without a bill of exceptions specifically pointing out the particular objection made at the time of the settlement of the instructions. The statute is

binding upon this court. *Yergy v. Helena Light & Ry. Co.*, 39 Mont. 213, 102 Pac. 810. The judgment is affirmed. Affirmed.

BRANTLY, C. J., and HOLLOWAY, J., concur.

(49 Colo. 289)

LINDSLEY v. LEWIS.

(Supreme Court of Colorado. Jan. 8, 1911.)

1. APPEAL AND ERROR (§ 548*)—REVIEW.

The insufficiency of the evidence, and rulings thereon at the trial, and a variance, can only be reviewed by a bill of exceptions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2433-2440; Dec. Dig. § 548.*]

2. EXCEPTIONS, BILL OF (§ 56*)—SEAL.

A bill of exceptions, signed by the trial judge, but not sealed, cannot be considered on appeal.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. §§ 94-96; Dec. Dig. § 56.*]

3. APPEAL AND ERROR (§ 267*)—PRESENTATION OF QUESTION BELOW.

An exception to the judgment is essential to a review of the evidence to determine its sufficiency.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1572-1581; Dec. Dig. § 267.*]

Error to County Court, City and County of Denver; Ben B. Lindsley, Judge.

Action by Nellie E. Lewis against Grace P. Lindsley. From a judgment of the county court, affirming a judgment of a justice of the peace in favor of plaintiff, defendant brings error. Affirmed.

Lyndon S. Smith, Thomas H. Hardcastle, and Edward C. Stimson, for plaintiff in error.

CAMPBELL, J. The plaintiff, Nellie E. Lewis, brought this action against defendant, Grace P. Lindsley, to recover the sum of \$50 for one month's wage. There have been two trials of the action, one before a justice of the peace, the other, on appeal, in the county court, each resulting in a judgment for plaintiff in the amount sued for. All of the errors assigned and argued here are predicated upon the insufficiency of the evidence, to rulings thereon at the trial, and to an alleged variance between the cause of action stated and the evidence produced to sustain it. That a review thereof can be had only if a bill of exceptions is brought up with the record proper is obvious. What purports to be a bill of exceptions is included in the transcript; but it is not sealed, though it is signed, by the trial judge. Repeated decisions of this court preclude our consideration of it for any purpose.

Besides, the alleged bill does not show that any exception was taken to the judgment. Such exception, so preserved, is essential to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

a review of the evidence to determine its sufficiency. Defendant's case has been in charge of at least four different counsel during its progress through the three courts; each one appearing at different stages therein. This may account in some measure for the unsatisfactory and incomplete state of the bill and the record proper. We do not say that, if the questions raised were properly before us, the case should be reversed. It is enough to say that the judgment must be, and is, affirmed, because defendant is not in a position here to be heard upon her objections.

Judgment affirmed.

MUSSER and WHITE, JJ., concur.

(49 Colo. 234)

PEOPLE v. TURPIN et al.

(Supreme Court of Colorado. Dec. 5, 1910.)

1. ELECTIONS (§ 73*) — QUALIFICATIONS OF VOTERS—CHANGE OF RESIDENCE.

Voters at an election to consolidate school districts came to the state in August, 1908, and bought a farm in one of the districts with the intention of making it their home, but the farm being occupied they returned to their former home in another state until March, 1909, when they removed to the farm purchased and resided there, voting at said election in November, 1909. *Held*, that they were not qualified voters, not having resided within the state for one year.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 69, 70; Dec. Dig. § 73.*]

2. ELECTIONS (§ 73*) — QUALIFICATIONS OF VOTERS—RESIDENCE.

To effect a change of residence from one state to another qualifying one as a voter, there must be an actual removal, an actual change of domicile, and a bona fide intention of abandoning the former place of residence and establishing a new one, and the acts of the parties must correspond with such purpose. This intention to make the state they removed to the place of their permanent residence is to be gathered from their acts, declarations, and other circumstances.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 69, 70; Dec. Dig. § 73.*]

3. ELECTIONS (§ 73*) — QUALIFICATIONS OF VOTERS—RESIDENCE.

To constitute a change of residence qualifying one to vote the abandonment of the old residence must be actual, and the mere intention to change the domicile, unaccompanied by an actual removal, avails nothing.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 69, 70; Dec. Dig. § 73.*]

4. ELECTIONS (§ 293*)—CONTESTS—EVIDENCE—COMPELLING VOTERS TO TESTIFY.

In the contest of an election not held under a system in which the ballots could be identified, certain persons who voted having been declared unqualified, they could be compelled to testify as to how they voted, and other evidence could be taken for the same purpose, as the secrecy of the ballot applies only to qualified voters.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 291-293; Dec. Dig. § 293.*]

5. APPEAL AND ERROR (§ 843*) — REVIEW — QUESTIONS NOT NECESSARY.

On appeal from a decision sustaining the validity of an election, the appellate court having decided against the qualifications of two persons who voted, and this necessitating a reversal, it would not consider other questions pertaining to the regularity of the election, qualification of voters and constitutional questions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3331-3341; Dec. Dig. § 843.*]

En banc. Error to District Court, Mesa County; Sprigg Shackleford, Judge.

Proceedings by the People by R. M. Logan, District Attorney, against R. E. Turpin, as president and others as officers of a school district. From a judgment in favor of defendants, plaintiff brings error. Reversed.

R. M. Logan, Dist. Atty., Wheeler & Weiser, and R. D. Thompson, for the People. Straud M. Logan and N. C. Miller (Henry J. Hersey, of counsel), for defendants in error.

HILL, J. This action was brought under section 289 of Mills' Annotated Code to determine the right of the defendants in error to hold certain offices, the existence of which depends upon the validity of an election for the consolidation of certain school districts in Mesa County. Elections were held in three school districts under an act of the Legislature approved May 5, 1909 (Laws 1909, c. 204), entitled, "For the consolidation of adjoining school districts," etc. This proceeding pertains, in part, to the election upon this question in district No. 32, known as "Pomona School District in Mesa County" in which the judges of election canvassed the votes and declared that 62 had been cast for, and that 60 had been cast against such consolidation. After the results of these elections were announced (all of which were for consolidation), the defendants in error, at their union meeting (called as provided for by the act) were elected as the president, secretary and treasurer of the consolidated district to be known as "District No. 38," and they entered upon their duties as such.

The prayer of the complaint is that judgment be entered decreeing that the defendants and each of them are unlawfully and illegally usurping the office of school directors of said consolidated school district No. 38, and that they and each of them be ousted therefrom and ordered to desist from further attempting to exercise such offices; that the organization of the so-called consolidated school district be declared illegal; that the defendants be enjoined from further acting as a school board for said so-called school district No. 38, etc. Among other reasons alleged why this prayer should be granted is the claim that at said

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

election in district No. 32 there were 5 illegal votes or ballots cast, received and counted for consolidation, which were included in the 62 votes declared by the judges to have been cast in favor of consolidation; that a majority of said qualified electors of said school district did not cast their ballots for consolidation; that it did not carry at said election by a majority of the votes cast, etc.; that on account thereof said consolidated school district No. 38 had not been organized and created according to law, etc. The answer denied in detail the allegations concerning the illegal votes. Trial was to the court. At the conclusion of plaintiff's testimony, a motion for a nonsuit was granted and the case dismissed. Numerous errors have been assigned. We will only consider those pertaining to the validity of the votes cast by a Mr. and Mrs. Wooliston, as the court's ruling thereon will necessitate a reversal of the judgment.

This election was held upon November 16, 1909. The substance of the Woolistons' testimony given at the trial (upon May 5, 1910) is to the effect that they moved from Phillips, Neb., to a fruit farm in this school district between the 7th and 10th of March, 1909, when they shipped their household goods and other effects from Nebraska to Grand Junction and at once moved them out to this place. Until they moved their effects direct to Grand Junction in March, 1909, they had not lived at any other place in this state, but had lived at Phillips, Neb.

Upon cross-examination it was shown that they first came to Colorado in August, 1908, stopped in Denver a few days; from there went to Colorado Springs; thence to Grand Junction, where they stayed four or five days, during which period they bought this farm. It being occupied, they did not get possession of it at that time, and after their four or five days' sojourn at Grand Junction, they returned to their home in Nebraska where they continued to reside between six and seven months. In cross-examination it was shown that prior to coming here in August, 1908, they had decided to locate in Colorado in the future and came here in August, 1908, for the purpose of looking up a location; with that object in view they, at that time, purchased this farm in the Pomona district for the purpose of making it their future home; but they both testified that after this purchase they went back to Nebraska and lived there until they came here in March, 1909; that at the time of the purchase of the farm they left no personal effects in Colorado. Mr. Wooliston was asked, "Did you live in Phillips, Neb., until you moved direct to Grand Junction in March, 1909?" He answered, "Yes, sir; I did." Referring to this question he was further asked, "Had you lived in Colorado previous to coming here at that time—had you resided in Colorado previous to moving here in March?" His answer was, "No,

sir; I had lived in Nebraska, but I had intended to buy here. I had come out here and bought a place in August before." Upon cross-examination he stated he bought this place to make it his home, and that when he bought it he did elect to make that his home; that at that time he had no home except his rented home in Nebraska. Upon redirect examination he stated that he first made his home here about the 7th of March; that he did not become a resident here until 1909, but that he had the place and was intending to come here; that between the date of the purchase in August, 1908, and March, 1909, he resided back in Nebraska, and that he did not reside here until he moved here in March, 1909. He further stated that after his purchase here, his purpose in returning to Nebraska was to prepare to return to Colorado.

Upon the question of intention, in response to the question, "Had you been advised by any one that you was a qualified voter at that election?" Mrs. Wooliston answered, "I was given the impression by people whom I thought knew. I had never read up on the state law of Colorado, but it was my impression that had we had the intention of residing in the state for a year, that we were entitled to vote at a school election at any rate." From this undisputed testimony, we conclude that Mr. and Mrs. Wooliston, who were husband and wife, did not become residents of this state until they moved here (in March, 1909) for the purpose of making this their permanent home, for which reasons at the time of the election they had not resided within the state a year, as required by our Constitution. In the case of Jain v. Bossen, 27 Colo. 427, 62 Pac. 195, this court said: "The requirements of the law on the qualification of electors are mandatory, and must be strictly observed."

All the authorities point to the fact that, to effect a change of residence from one state to another, there must be an actual removal, an actual change of domicile, and a bona fide intention of abandoning the former place of residence, and establishing a new one and the acts of the parties must correspond with such purpose. This intention of the parties to, at that time, make the state they removed to the place of their permanent residence is to be gathered from their acts, declarations, and from a variety of other circumstances. If a citizen of one state, in good faith, gives up his residence there, goes to another state, and takes up a permanent residence therein, he at once loses his former residence and acquires a residence in the new domicile, but it must appear that he has left the former state with the intention of then giving up his residence there.

In the case of Sharp v. McIntire, 23 Colo. 99, 46 Pac. 115, referring to the construction to be given the residence qualification provided by our Constitution, as it then read,

this court said: "We think the residence therein contemplated is synonymous with 'home' or 'domicile,' and means an actual settlement within the state, and its adoption as a fixed and permanent habitation; and requires not only a personal presence for the requisite time, but a concurrence therewith of an intention to make the place of inhabitation the true home; and that one who has made a home or domicile in some other state or territory where his family reside cannot, by a sojourn here on business or pleasure, however long, without abandoning such former domicile, acquire a residence in the constitutional and statutory sense."

It is earnestly urged by the defendants in error that the facts pertaining to the voters Jones and Laffaty in the case of *Kellogg v. Hickman*, 12 Colo. 256, 21 Pac. 325, are similar to those here, and hence that case is decisive of this one. We cannot agree with this contention. Pertaining to the voter Jones, the court said: "The domicile or residence, in a legal sense, is determined by the intention of the party. He cannot have two domiciles at the same time. When he acquires the new home he loses the old one. But to effect this change there must be both act and intention. * * * There must be the act of severance from the old place, with the intention of uniting with the new place. The intention should be gathered from the acts of the party." Referring to the voter Laffaty, the court said: "The act of changing from Illinois to Colorado was consummated May 3d. That such was the intention is verified by every act thenceforward. This voter had no family." Referring to which it was further stated: "The domicile or residence in the state may commence before a definite county or precinct is fixed for a permanent residence. * * * As to the six months' residence required by statute, if the purpose of remaining in the state be clearly proved, a particular home is not necessary."

In the case under consideration the particular home to be secured in the future was decided upon; it was purchased in August, 1908, but it was understood that possession could not be secured at that time. It is true, these people intended to make it their home in the future, to establish their residence there at a later period. The fact was then settled in their minds as to where their home in Colorado would be when it became established, to wit, when they gave up their home in Nebraska and located here. This could not be done so long as they were maintaining a home in Nebraska, which they had not yet abandoned. Neither the intent nor the act of doing so was perfected because the intent in this case referred to a future date, and the physical act itself was not accomplished until some future date, so that the facts urged in the case of *Kellogg v. Hickman*, supra, are not applicable here. This is further demonstrated by the questions

asked both Mr. and Mrs. Woolliston as to when they did establish their residence in Colorado, and as to when they moved here, to both of which they frankly answered, in March, 1909.

The facts pertaining to the voter Herne in the case of *Kellogg v. Hickman*, supra, are more in harmony with the facts here. In speaking of this the court said: "The evidence does not make it clear as to the time this voter terminated his residence in Kansas. It appears from his testimony that he was a man with a family, residing in Abilene, Kan., and was interested in a drug store there; that he came to Colorado May 1st, and looked around a couple of weeks for a location. About the middle of May he went back to Kansas to close out his interest in the drug store there. He did so then, and broke up housekeeping there, when the drug store was sold. He returned to Colorado, and his wife went visiting until he could send for her. It does not appear that the act of terminating his residence in Kansas had occurred until after the 8th day of May. He could not have his residence in Colorado while he had one in Kansas. The residence there must terminate before the residence here can commence. The evidence tends to show that he did not terminate his residence there until he sold his drug-store interest there, which was after May 8th."

It stands undisputed that at the time the Woollistons first came to Colorado they had not abandoned their residence in Nebraska and after staying here but a few days while making the purchase of the farm, they again returned to the state of Nebraska where they continued to occupy their home there for a period of about seven months, at the expiration of which time they abandoned it, shipped their goods to Colorado, and came themselves, which was in March, 1909, when they moved out upon this property, at which time, and not before, both the act and intent were consummated by which they became residents of the precinct as well as of the state. When one has a residence either of origin or of choice he must abandon it before he can acquire another, and to effect this there must be both act and intention. There must be the act of severance from the old place with the intention of uniting with the new place, and these must concur. 10 Am. & Eng. Enc. of Law (2d Ed.) p. 599. The abandonment of the old residence must be actual. The mere intention to change the domicile, unaccompanied by an actual removal, avails nothing. *State v. Hallett*, 8 Ala. 159; *Smith v. Croom*, 7 Fla. 81.

A very recent case where the facts were similar to those under consideration is that of *Welsh v. Shumway*, 232 Ill. 54, 83 N. E. 549, where numerous cases are cited, all of which are in harmony with our conclusions here.

The case of *State v. Hallett*, supra, is directly in point. At page 161 of 8 Ala., in

speaking to this point, the court said: "Here the facts were that the defendant, being domiciled in Georgia, came to this state with the design of settling here, and manifested his intention of making this state his permanent residence, by leasing a piece of land, procuring materials for the erection of a foundry, and going to Georgia to bring his family. These acts all mark, unequivocally, his intention to change his residence from Georgia to this state. These facts, however, are not sufficient to cause a loss of the domicile he previously had. If, on his return to Georgia, he had died before being able to carry his purpose into effect, it can admit of no doubt, the courts of Georgia, and not of this state, would have been entitled to distribute his estate."

The above conclusions are applicable here. In case Mr. Woolston, after returning to his home in Nebraska had changed his mind and decided that he would not return to Colorado, would any one have questioned his right to vote there? Likewise, had he died before returning, the courts of Nebraska, and not of this state, would have been entitled to distribute his personal estate. The evidence having established that Mr. and Mrs. Woolston were not entitled to vote, it follows that the trial court misconceived the legal effect of their testimony and erred in not requiring them to answer how they voted. By our present system of voting at general elections under what is commonly called the Australian ballot system, in cases of this kind the ballots cast by these voters could have been secured, identified, and rejected; but as our school laws do not so provide, and the evidence showing that no record was kept by which any ballots cast at this election could be identified, the testimony of the voter was then competent. The law protecting the secrecy of the ballot is only intended for lawful voters, and does not apply to or protect illegal voters, who, when that fact is shown, can be forced to testify as to how they voted. Article 7, § 9, Const. Colo.; *Black v. Pate*, 130 Ala. 514, 30 South. 434; *Montgomery v. Dormer*, 181 Mo. 5, 79 S. W. 913; *Van Winkle v. Crabtree*, 34 Or. 462, 56 Pac. 831, 56 Pac. 74; *Vallier v. Brakke*, 7 S. D. 343, 64 N. W. 180; *State ex rel. v. Kraft*, 18 Or. 550, 23 Pac. 663; *Lane v. Bailey*, 29 Mont. 548, 75 Pac. 191.

It is true, if it is not shown that the vote was illegal, the voter cannot be compelled to answer how he voted; but if illegal, in addition to compelling him to answer, other evidence may be received and considered on the subject. *Black v. Pate*, 130 Ala. 514, 30 South. 434; *Rexroth v. Schein*, 206 Ill. 80, 69 N. E. 240; *Welsh v. Shumway*, 232 Ill. 85, 83 N. E. 549; *Sorenson v. Sorenson*, 189 Ill. 179, 59 N. E. 555; *People ex rel. v. Pease*, 27 N. Y. 45, 84 Am. Dec. 242; *People ex rel. v. Teague*, 106 N. C. 576, 11 S. E. 330.

Other errors are assigned, some pertain to the validity of other votes, others urge constitutional questions, while others pertain to the regularity of this election in other respects, etc.; but inasmuch as the ruling upon the two votes heretofore considered compels a reversal of the judgment, and, if they were cast as counsel claim they were, and the way the record as a whole appears to indicate, it makes unnecessary the consideration of any of the other questions urged.

For the reasons stated, the judgment is reversed and the cause remanded.

Reversed.

(49 Colo. 197)

CLARK et al. v. HUFF.

(Supreme Court of Colorado. Dec. 5, 1910.)

1. TAXATION (§ 761*)—TAX SALE—SALE OF NONCONTIGUOUS TRACTS EN MASSE.

A tax deed recited that the following described property—describing a number of noncontiguous tracts—was subject to taxation for the year 1892, and that the county treasurer did expose to public sale in substantial compliance with the statute the property above described, and Y. having offered a certain sum, being the whole amount of tax, interest, etc., then due on said property for the whole of each tract or parcel, of the above described property, which was the least quantity bid for, and payment having been made, the property was stricken off to him. Held, that the deed showed a sale en masse for a gross sum of noncontiguous tracts separately assessed, and was void.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1510-1513; Dec. Dig. § 761.*]

2. TAXATION (§ 804*)—ACTION BY PURCHASER—LIMITATIONS.

A tax deed, void on its face, is not entitled to the limitation of five years under the statute relating to the recording of tax deeds.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1591, 1592; Dec. Dig. § 804.*]

3. QUIETING TITLE (§ 10*)—PLAINTIFF'S TITLE—EVIDENCE TO SUSTAIN ACTION.

Where, in an action to quiet title, plaintiff's title is put in issue by the answer, he must prove title in himself.

[Ed. Note.—For other cases, see Quieting Title, Dec. Dig. § 10.*]

4. QUIETING TITLE (§ 47*)—PLAINTIFF'S TITLE—NONSUIT.

If plaintiff, in action to quiet title, does not prove title in himself, motion for nonsuit should prevail.

[Ed. Note.—For other cases, see Quieting Title, Dec. Dig. § 47.*]

5. QUIETING TITLE (§ 37*)—ANSWER PLEADING TITLE.

In an action to quiet title, an answer that defendants were the owners in fee simple by title from the United States was a sufficient plea of the nature of their interest to put plaintiff to proof of his title; it not being necessary to plead the evidence.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 78; Dec. Dig. § 37.*]

6. QUIETING TITLE (§ 10*)—TITLE OF PLAINTIFF—POSSESSION.

Where, in an action to quiet title, the answer is sufficient to put plaintiff to proof of his title, he must prove possession, coupled with title, and proof of possession alone, unless ad-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

verse, does not entitle him to relief or put defendant to proof of title.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 36-42; Dec. Dig. § 10.*]

7. PLEADING (§ 409*) — ANSWER WITHOUT LEAVE—WAIVER.

The objection that certain defendants were not regularly in court because an order was not obtained permitting them to answer was waived by plaintiff treating the answer as regular, and going to trial without objection.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 409.*]

Appeal from District Court, Kiowa County; John H. Voorhees, Judge.

Suit to quiet title by J. D. Huff against A. M. Clark and another. From a judgment for plaintiff, defendants appeal. Reversed and remanded.

John F. Mall and W. F. Zumbrunn, for appellants. John H. Voorhees, Crane & Patrick, and Robert W. Cowles, for appellee.

GABBERT, J. Appellee, Huff, plaintiff below, brought suit against one Cones, as defendant, to quiet title to a quarter section of land. The complaint was the ordinary one under section 255 of the Civil Code. Before answer, Clark and Morey were made defendants, as successors to the right and interest of the original defendant, Cones. Thereafter they filed their answer, in which they denied the possession and ownership of plaintiff, and alleged that they were the owners in fee by title from the United States. They also alleged that plaintiff claimed under a tax deed issued to the estate of Robert Young, and that this deed was void on its face. To this answer plaintiff filed a replication, denying its affirmative averments, and alleging that the tax title under which he claimed was purchased from the heirs of Robert Young. He also alleged that this deed had been of record more than five years, and pleaded the statute of limitations on the subject of recording tax deeds. At the trial plaintiff proved possession, and offered in evidence the tax deed mentioned in the pleadings of the parties, which was admitted over the objection of the defendants. Other evidence of title was also admitted against the objection of defendants, which is not material, if the court erred in admitting the tax deed, as such evidence was merely for the purpose of establishing the chain of title, which had its inception in the tax deed. Plaintiff then rested, and defendants moved for a nonsuit, and that the complaint be dismissed, because plaintiff had not shown title to the land in controversy. This was denied, and, defendants not offering any testimony, judgment was rendered for plaintiff quieting title in him, from which the defendants have appealed.

One objection urged to the tax deed is that it shows a sale en masse of a number of noncontiguous tracts of land for a gross

sum. This deed recites: "That whereas, the following described real property, viz." Then follows a description of a great number of noncontiguous tracts embracing the one in controversy, interspersed in an area 25 by 50 miles in dimensions, and continues (so far as material to consider) "situated in the county of Kiowa, and state of Colorado, was subject to taxation for the year A. D. 1892; and whereas, the taxes assessed upon said real property for the year aforesaid remained due and unpaid at the date of sale hereinafter named; and whereas, the treasurer of said county did, on the second day of October, A. D. 1893, by virtue of the authority vested in him by law at (an adjourned sale) the sale begun and publicly held on the second day of October, A. D. 1893, expose to public sale, at the office of the treasurer, in the county aforesaid, in substantial conformity with the requirements of the statute in such case made and provided, the real property above described, for the payment of taxes, interest and costs then due and remaining unpaid on said property; and whereas, at the time and place aforesaid, Robert Young, of the county of Douglas, and state of Kansas, having offered to pay the sum of thirteen hundred and twenty-six dollars and forty-seven cents, being the whole amount of tax, interest and costs then due and remaining unpaid on said property for the whole of each tract or parcel of the above described property, which was the least quantity bid for, and payment of said sum having been made by him to the said treasurer, the said property was stricken off to him at that price." We think it clear from these recitals that each tract was assessed separately; that the aggregate of such taxes was the sum of \$1,326.47; and that all the property upon which this aggregate sum was assessed, as described in the deed, was offered for sale and sold en masse for the gross sum made up of the several amounts assessed against each place separately.

This court has repeatedly decided in circumstances similar to those in the case at bar that a tax deed the recitals of which show a sale en masse for a gross sum of noncontiguous tracts of acre land separately assessed is void. *Emerson v. Shannon*, 23 Colo. 274, 47 Pac. 302, 58 Am. St. Rep. 232; *Webber v. Wannemaker*, 39 Colo. 425, 89 Pac. 780; *Whitehead v. Callahan*, 44 Colo. 396, 99 Pac. 57; *Page v. Gillett*, 47 Colo. 289, 107 Pac. 290. The tax deed being void upon its face, the statute of limitations set up by plaintiff was of no avail. *Page v. Gillett*, supra; *Sayre v. Sage*, 47 Colo. 559, 108 Pac. 160. The motion of defendants should, therefore, have been sustained, unless for other reasons, which will now be considered, the court ruled correctly in denying it. In an action to quiet title the plaintiff, when his

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

title is put in issue by the answer, must prove by competent evidence a title in himself. *Wall v. Magnes*, 17 Colo. 476, 30 Pac. 56; *McCauley v. Ohenstein*, 44 Neb. 89, 62 N. W. 232; 32 Cyc. 1366. If he fails to do so, a motion by the defendant for nonsuit and dismissal should prevail. 32 Cyc. 1375.

On behalf of the plaintiff, it is urged that the answer of defendants, to the effect that they are the owners in fee by title from the United States, is not a compliance with the decisions of this court, to the effect that a defendant in an action to quiet title must plead the nature of his interest in the property in controversy before he can put plaintiff upon proof touching his possession and title. This question was not raised below; but it is clearly without merit. The allegation that defendants are the owners in fee simple is the averment of an ultimate fact. This pleads the character and nature of their interest in the property, viz., that they are the owners in fee. To plead the facts upon which such title rested would be stating evidentiary facts which might be proper to introduce in evidence to establish title, but it is not necessary to plead them. 17 Ency. Pl. & Pr. 328.

The sufficiency of the answer and cross-complaint of defendants is also questioned, because, in the attack upon the tax deed thereby made, it is alleged that it is void, but does not plead facts upon which this averment is based. It is unnecessary to pass upon this question. The answer of the defendants above referred to put plaintiff upon proof of his title.

It was also suggested on oral argument that plaintiff having proved possession, and defendants not having offered any evidence, they were not entitled to nonsuit the plaintiff. That contention is contrary to the holding in the *Magnes Case*, which, in effect, decides that where, as in the present instance, the defendants' answer put plaintiff upon proof of his title, he must prove possession, coupled with title, legal or equitable. Possession under the Code is a condition precedent which a plaintiff, in order to maintain an action to quiet title, must establish when a proper answer has been filed, but possession is not sufficient to entitle him to relief when his title is put in issue, for the very obvious reason that, if he fails to prove title, he has not shown a right to a decree quieting title in him. The rule might be different if title by adverse possession was relied upon, but that question is not involved.

It was also suggested at the oral argument that defendants were not properly in court because an order was not obtained permitting them to answer. It is too late to raise that question. The plaintiff treated their answer as regular, and went to trial without objection, and whatever merit there might be in the claim that defendants should not

have been permitted to file their answer without formal leave of court has been waived.

At the trial the will of Robert Young and the probate thereof was admitted in evidence over the objection of defendants. It did not appear that it was probated in this state. We call the attention of counsel, in the event of another trial, to the recent case of *Sayre v. Sage*, supra, 47 Colo. 559, 108 Pac. 160.

The judgment of the district court is reversed and the cause remanded for a new trial, and such further proceedings as will be in harmony with the views expressed in this opinion.

Reversed and remanded.

CAMPBELL, C. J., and HILL, J., concur.

(158 Cal. 750,

FOLLMER et al. v. ROHRER et al.
(L. A. 2,759.)

(Supreme Court of California. Dec. 14, 1910.)

1. APPEAL AND ERROR (§ 1011*)—FINDINGS—CONCLUSIVENESS.

A conflict in the evidence must be settled by the trial court, and its findings will not be disturbed on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3983; Dec. Dig. § 1011.*]

2. DEEDS (§ 56*)—DELIVERY—ACTS CONSTITUTING.

A valid delivery of a deed is accomplished when the conduct and acts of the grantor manifest a present intent to dispose of the title conveyed without any right of recall, and any act manifesting such intent establishes a delivery.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. § 118; Dec. Dig. § 56.*]

3. DEEDS (§ 56*)—DELIVERY—ACTS CONSTITUTING.

Whether an act of a grantor manifested a present intent to dispose of the title conveyed by a deed so as to make a valid delivery must be determined by the circumstances of each transaction, and is a question of fact.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 127, 633; Dec. Dig. § 56.*]

4. DEEDS (§ 56*)—DELIVERY—ACTS CONSTITUTING.

The act of a grantor delivering a deed to the grantee with the statement, "Here is a deed of gift in favor of yourself and wife; take it and take care of it," and the act of the grantee in taking and accepting the deed and thanking the grantor, show a valid delivery, whereby the grantor parted absolutely with the control thereof, notwithstanding any contradictory evidence, such as the continuance of the grantor's residence on the premises, payment of taxes, the failure of the grantee to list the property as his own for taxation, the want of any transfer or request for a transfer of insurance, and the declaration of the grantee that he had known nothing of the deed.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. § 117; Dec. Dig. § 56.*]

5. APPEAL AND ERROR (§ 1073*)—HARMLESS ERROR—ERRORS IN JUDGMENT—"INSTRUMENT ENTITLED TO BE PROVED FOR RECORD."

The validity of the part of a judgment which adjudges plaintiff's ownership of the property in controversy and the want of interest

therein by defendants is unaffected by the part which adjudges that a deed of the property to plaintiff, not acknowledged nor witnessed, is an instrument entitled to be proved for record within Civ. Code, § 1203; for the elimination of the latter part of the judgment does not affect the rights of defendants.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1073.*]

6. ACKNOWLEDGMENT (§ 46*) — PROOF—JUDGMENT.

Under Civ. Code, §§ 1198, 1203, providing that the execution of an instrument may be established by proof of the handwriting of the party and of a subscribing witness, if there is one, where the parties and the subscribing witnesses are dead, and providing that one interested under an instrument entitled to be proved and recorded may sue to obtain a judgment proving the instrument, the subscription of a witness is not necessary to the validity of a deed, and a grantee in a deed not acknowledged nor witnessed may, after the grantor's death, sue for judgment proving it.

[Ed. Note.—For other cases, see Acknowledgment, Dec. Dig. § 46.*]

Department 1. Appeal from Superior Court, Los Angeles County; George R. Davis, Judge.

Action by Raymond I. Follmer and another against Mary Rohrer and others. From a judgment for plaintiffs and from an order denying a new trial, defendants appeal. Affirmed.

Porter, Sutton & Cruickshank, for appellants. Jones & Weller, for respondents.

SLOSS, J. The defendants are the heirs and devisees of John B. Rohrer, who died in July, 1908. On October 1, 1907, said decedent was the owner of a lot of land in the city of Los Angeles. He signed a deed of gift bearing said last-named date and purporting to convey the lot to the plaintiffs. The instrument was never acknowledged or recorded, and this action was brought to obtain a decree that the plaintiffs are the owners of the land, and that the deed be proved, so as to entitle the same to be recorded. The complaint alleges that the deed was executed and delivered to the plaintiffs on the day of its date. The answer denies the delivery. The court found in favor of the allegations of the complaint, and gave judgment accordingly. The defendants appeal from this judgment and from an order denying their motion for a new trial.

The main question presented is whether the evidence sustains the finding that the deed had been delivered by John B. Rohrer to the plaintiffs. Raymond I. Follmer, one of the plaintiffs, was a nephew of the decedent. He and the coplaintiff, his wife, occupied, together with the decedent, a house situated on the lot in controversy. Follmer testified as follows: "In the latter part of November, 1907, I came home from my office * * * and in passing through the hall my uncle called me, and I went into the sitting room where he was. He was sit-

ting at his desk. He got up and gave me this deed and said, 'Here is a deed of gift in favor of yourself and wife; take it and take care of it.' I looked at the instrument and returned it to him, and he took an envelope from his desk and inserted it and gave it to me. I sealed it up and put it in my pocket, and thanked him very much, as a matter of course. That is all that was said at that time that I remember." The witness testified further that he kept the paper until May, 1908. During a part of this period he had it on his person, and at other times in a safe at the city hall, or in a safe deposit box. In May his uncle suggested that he had made his will and that it would be a good thing to put the deed with the will. Follmer made no objection to this, and returned the instrument to Rohrer. The latter subsequently handed it to Mrs. Follmer, under circumstances that need not be detailed. It appeared, further, that the alleged grantor, Rohrer, paid the taxes on the lot for the year 1907-08; that a sworn statement of his property, including the lot in question, bore the initials of the plaintiff, Augusta H. Follmer, and was filed with the city assessor; that a similar statement of property owned by plaintiff Raymond I. Follmer, and sworn to by him on August 2, 1908, did not include the lot in question; that said plaintiff Raymond was named as executor in the will of John B. Rohrer; and that in his petition for letters testamentary he described, as real property left by the decedent, the lot in question, "subject to a partially executed conveyance of said real property by John B. Rohrer, deceased, to Raymond I. Follmer and Augusta H. Follmer." There was also testimony that Follmer never asked or obtained any assignment of the fire insurance policies covering the house, that he did not during the life of the decedent mention to his wife the fact that he and she had received a gift of the property, and that, after the decedent's death, he had stated that he had no previous knowledge of the deed.

The foregoing statement includes virtually all of the testimony on the disputed issue of delivery. It will be noted that there are circumstances tending to contradict the claim of the respondents that the deed had been delivered. The continuance of the alleged grantor's residence in the house, his payment of taxes, the failure of Follmer to list the property as his for purposes of taxation, the want of any transfer or request for a transfer of insurance, the declaration of Follmer that he had known nothing of the deed—all these were facts which the trial court might well have regarded as tending to show that there had been no delivery of the deed, although some of them, at least, were not inconsistent with delivery. But, if there was also testimony which would justify an in-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ference that a delivery had taken place, the testimony to the contrary did no more than to raise a conflict which was, under the established rule of this court, to be finally settled in the trial court. Follmer's statement regarding the handing of the deed to him, and the attending conversation, may well have been true, notwithstanding the admissions made by him on cross-examination. If true, it clearly supports the finding of delivery. The legal requisites of a delivery have often been stated by this court. "A valid delivery is accomplished when the conduct and acts of a grantor manifest a present intent to dispose of the title conveyed by the deed. No particular form of delivery is necessary; but any act or thing which manifests such an intent is sufficient to establish it. It is always a question of fact, and must be determined by the circumstances surrounding each transaction." *Kenniff v. Caulfield*, 140 Cal. 34, 40, 73 Pac. 803, 804. See, also, *Hibberd v. Smith*, 67 Cal. 547, 4 Pac. 473, 8 Pac. 46, 56 Am. Rep. 726; *Denis v. Velati*, 96 Cal. 223, 31 Pac. 1; *Bury v. Young*, 98 Cal. 446, 33 Pac. 338, 35 Am. St. Rep. 186; *Black v. Sharkey*, 104 Cal. 279, 37 Pac. 939; *Reed v. Smith*, 125 Cal. 491, 58 Pac. 139. Manual tradition of the instrument is not enough; the transfer of possession must be with the intent of presently passing title, and must not be hampered by the reservation of any right of revocation or recall. As has been said, the intent of the parties is to be determined, as matter of fact, by the trial court or the jury. We entertain no doubt whatever that the testimony of Follmer justified the inference that when Rohrer handed him the deed, he did so with the intention that the title to the property, at that very moment, should pass finally and irrevocably from him to the grantees named. The appellants lay stress on the words "take care of it," and argue that they show a transfer for safe-keeping only. But this is by no means a necessary construction. Taking all of the language together, the phrase in question may well be interpreted as a mere caution to exercise care with regard to an important document. The grantor said, "Here is a deed of gift; take it and take care of it," and the recipient "thanked him very much." This is not the conduct of people who are arranging for the mere custody of a paper.

Nor was there anything in the transaction to compel the conclusion that the grantor undertook or intended to retain the right to recall the deed. "In every case where the deed has been declared invalid by reason of failure of delivery, it will be found that the grantor reserved some rights over the instrument; that he failed to part with all control and dominion over it; that upon the happening of some event, or contingency or condition, he had the right, if so disposed,

to reach out and take it from the possession of the depository." *Bury v. Young*, supra. Such a case is *Moore v. Trott*, 156 Cal. 353, 104 Pac. 578, 134 Am. St. Rep. 131, recently decided by this court, where the grantor's retention of the right to recall the deeds in a certain event was plainly evidenced, and for this reason it was held that no effective delivery had taken place. But the facts here are very different. So far as the testimony goes, the grantor parted absolutely with the control of the instrument.

In their closing brief, the appellants make, for the first time, the suggestion that the deed in question, being neither acknowledged nor witnessed, is not an instrument "entitled to be proved for record," and that the plaintiffs have not, therefore, shown their right, under Civ. Code, § 1203, to a "judgment proving such instrument." This point would not affect the validity of that part of the judgment which adjudicates the plaintiffs' ownership of the property, and the defendants' want of interest therein. If this part of the judgment stands, the defendants would not be helped by the elimination of the part decreeing that the deed be "adjudged to be proved, so as to entitle the same to be recorded." But, apart from this, we think the case is one coming properly within the terms of section 1203. Under section 1198, "the execution of an instrument may be established by proof of the handwriting of the party and of a subscribing witness, if there is one, in the following cases: (1) Where the parties and all the subscribing witnesses are dead. * * * " The subscription of a witness is not necessary to the validity of a deed, and the language of the section last quoted carries the clear implication that where there is no such witness, proof of the handwriting of the party executing is sufficient.

The judgment and the order appealed from are affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.

(158 Cal. 760)

FOUNTAIN et al. v. CONNECTICUT FIRE INS. CO. (S. F. 5,542.)

(Supreme Court of California. Dec. 14, 1910.)

1. INSURANCE (§ 324*) — FIRE INSURANCE — DAMAGE.

The policy provided that if a building or any part thereof fall, except as a result of fire, all insurance on such building or its contents shall immediately cease. The company claimed that the building was caused to partially fall by an earthquake before the fire started, and its evidence showed that, before the fire started, the front wall of the building from the roof to the second floor had fallen down, leaving the roof unsupported in front, so that the front part of it rested upon the second floor. Insured's evidence was that the upper stories had "great chunks out of them," and that the building could not be occupied until repaired. *Held*,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

that the evidence both of insured and the company showed that a substantial part of the building had fallen when the fire started, so as to avoid the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 749; Dec. Dig. § 324.*]

2. INSURANCE (§ 665*)—FIRE INSURANCE—ACTIONS—SUFFICIENCY OF EVIDENCE.

In an action on a fire policy which provided that if any part of the building fall, except from the fire, all insurance shall immediately cease, evidence *held* not to show that the fire started in the building before the front wall fell from an earthquake shock.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 665.*]

3. INSURANCE (§ 324*)—FIRE INSURANCE.

Civ. Code, § 2611, provides that a policy may declare that a violation of specified provisions thereof shall avoid it, but otherwise the breach of an immaterial provision does not avoid the policy. A fire policy provided that if any part of the insured building fall, except from the fire, all insurance on the building or its contents shall immediately cease. *Held*, that the falling of a material part of the building before the fire started immediately avoided the policy, whether it increased the fire risk or not.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 749; Dec. Dig. § 324.*]

4. TRIAL (§ 296*)—INSTRUCTIONS—CURE BY OTHER INSTRUCTION.

Error in instructing in an action on the policy that the company must establish that such a material part of the building had fallen before the fire started as would have increased the fire risk in order to make the policy avoided by the falling of the building before the fire was not cured by the giving of other instructions which omitted the element of increase of risk; they merely conflicting with the former instruction.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 296.*]

In Bank. Appeal from Superior Court, Sonoma County; Thos. C. Denny, Judge.

Action by O. Fountain and others against the Connecticut Fire Insurance Company. From an order denying defendant's motion for a new trial after verdict for plaintiffs, defendant appeals. Reversed.

A. B. Ware and T. C. Van Ness, for appellant. Thomas J. Geary, for respondents.

SHAW, J. This is an action to recover upon a policy of insurance issued by the defendant, covering goods of the plaintiff contained in a two-story brick building situated in the city of Santa Rosa, known as the Shea Building. It had two storerooms on the ground floor, one of which was occupied by Fountain. The second floor was divided into rooms used and occupied for offices and one room which was occupied by the society of "Eagles" as a lodgeroom. The defendant appeals from an order denying its motion for a new trial, after a verdict for the plaintiff. The policy contained the following clause: "If a building, or any part thereof, fall, except as a result of fire, all insurance by this policy on such building or its contents shall

immediately cease." The building referred to was the Shea building aforesaid.

Upon the trial it was admitted by the defendant that it was liable to the plaintiffs for the loss to the full amount of the policy (\$1,000) "unless it could make good its defense based upon" the above-quoted clause thereof. The fire was on April 18, 1906, and it immediately followed the earthquake which occurred at 15 minutes after 5 o'clock in the morning of that day. The evidence introduced by the defendant in support of the defense aforesaid showed that, before the fire started, the front wall of the Shea building, from the roof down to the second floor, had fallen down, leaving the roof unsupported in front so that the front part of it dropped and rested upon the second floor at the top of the first story. This was the substance of the testimony of a number of witnesses who saw the building immediately after the earthquake. That this front wall was a substantial and important part of the building, and that the falling thereof would immediately terminate the policy by force of this clause, cannot be seriously disputed. The defense was therefore established, and the order must be reversed, unless other evidence raised a substantial conflict on the subject. We do not think the contention of the plaintiff that there was a conflict on that point can be sustained. The evidence of the defendant's witnesses on the point was clear, direct, positive, and satisfactory. That on behalf of the plaintiff, which it is claimed creates a conflict, is in substance as follows: The witness Burris said that he made an examination of the front and rear of the Shea building, that the rear did not seem to be damaged, and that he did not see any break in the structure of the lower walls, nor any breaks in the structure of the Fountain storeroom. On cross-examination he said that the "upper story seemed to be shook up quite a little; the windows were thrown out into the street in the débris." Referring to that and the other buildings included in the same row, he said that the upper stories were "shot up pretty badly and a great deal of brick and awnings and other things thrown down on the sidewalk and out on the street," and that he did not think any of them were clear out and down, but "there would be great chunks out of them," and that they could not have been occupied until repaired. He said nothing about the position of the roof, and apparently was not questioned concerning it. Hahman was in his own storeroom in the lower story of the adjoining building half an hour after the earthquake. He entered from the rear. He said the back walls of the Shea building were intact, but he said nothing about the front wall. He said the Shea building was burning at that time. King, another witness, occupied a storeroom in the adjoining building, and he

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

entered it from the rear. The front and side of that building were down. He said nothing about the walls of the Shea building. Hoffer had an office in the Shea building over the storeroom adjoining that occupied by Fountain. He went into his office 10 or 15 minutes after the earthquake. He said the side walls of the second story were standing on each side of his office, that the east wall of the Shea building was up as far as the roof, and the roof had slid over onto the front—"it kind of fell out that way and sort of dropped down in front" over his office. On cross-examination he said the front walls where he occupied were out, that Dr. Mallory's office was over Fountain's store, and that Mallory's office was out just like his. This evidence is wholly insufficient to disprove the contention that the part of the wall which had fallen was not an important and material part of the building. The witness most favorable to the plaintiff was Mr. Burris, and his testimony alone shows that a material part of the building had fallen. Other evidence established the fact that the second story had rather large bay windows in front, and these windows, he says, had fallen out into the street. And, while he did not think that any of the upper stories in that row were clear out and down, they had "great chunks out of them," and the buildings could not be occupied until repaired. Clearly this was sufficient to constitute the falling of a material and substantial part of the building.

With regard to the time when the fire started, the theory advanced is that, although there was no direct evidence on the subject, there were circumstances sufficient to justify the inference that the first effect of the earthquake may possibly have been to break some charged electric light wire in the building, so as to cause fire therefrom to begin before the shake had caused the wall or window to fall. We have not given the defendant's evidence on this point in detail, but, in substance, it satisfactorily established the fact that the fire in the Shea building was caused after the earthquake, by fire which originated in some other building or buildings in the same row and did not reach the Shea building until from 15 to 30 minutes afterwards. There was clear proof that very soon afterward fires were observed in two of these nearby buildings, and that there was none at that time in the Shea building. A witness for plaintiff said that about a minute after the earthquake, from his house seven blocks away, he saw a column of smoke 75 to 100 feet high and half as large as the courtroom at Santa Rosa arising from the neighborhood of the Fountain store; that, when he came downtown, he located that fire, and it was somewhere in the rear of the Shea building or another building not adjoining, but that he did not know the exact spot where it was nor within 40 feet of where it was; that he did not look to see

what was burning. This vague and uncertain evidence is not sufficient to constitute a substantial contradiction of the other witnesses, some of them produced by the plaintiffs, who testified either directly that the Shea building was not on fire at the time they reached it, or saw it, after the earthquake, or to circumstances about which they could not well be mistaken and which if true would render it extremely improbable, if not impossible, that the building could have begun to burn until at least 15 minutes after the earthquake, and then only from fire communicated from the adjoining buildings. It thus being established that the building was not on fire immediately after the quake, there is no basis for the supposed inference that the fire therein may have begun before the wall fell. The defense was established, the verdict was contrary to the evidence, and the new trial should have been granted for that reason.

One of the instructions was as follows: "It is not sufficient for defendant, in order to avoid its policy, to establish the fact that the building described in the policy in suit had, before it began to burn, suffered some injury, or that any part of the walls of said building had fallen before the contents of the building were destroyed by fire, to avoid its policy herein; but the defendant must establish by a preponderance of evidence that such a material portion of the building had fallen before the fire started as would have increased the fire risk which defendant assumed by its policy on such building and its contents; that, if the evidence does not establish the falling of such a material portion of the building, then I instruct you to find for the plaintiff." In anticipation of a new trial it is proper to determine whether or not this instruction is correct. Section 2611 of the Civil Code declares that "a policy may declare that a violation of specified provisions thereof shall avoid it, otherwise the breach of an immaterial provision does not avoid the policy." We are bound by this statutory declaration of the law, whether it accords with justice or not. The clause of the policy on this subject is in substance the same as this provision of the Code. To declare that, upon the happening of a given event, "all insurance shall immediately cease," is but another way of saying that, if the event happens, the obligation created by the policy shall become void. The effect of this section of the Code, in connection with the fallen building provision of the policy, is that the question whether the falling of a part of the building increased the fire risk or not, is wholly immaterial, provided the part of the building which had fallen at the time the fire started was a material or important part of it. The instruction was erroneous in so far as it directed the jury that the effect of the falling of the part of the building must have been to increase the fire risk and that, if it did

not, the defendant would be liable. The parties had the legal right to make the contract that in such an event there should be no necessity for any inquiry as to the increase of risk therefrom and that the mere event should at once terminate the insurance, and, having done so, the defendant is lawfully entitled to the advantage thereof. The instruction was imperative in its direction to the jury, and, although other instructions given omitted the element of increase of risk, they merely caused a conflict, and did not cure the error. It is impossible to say which instruction the jury obeyed.

The decision of the court in *Bastian v. British A. A. Co.*, 143 Cal. 287, 77 Pac. 63, 66 L. R. A. 255, was in substance based upon the principles above stated. The doctrine that the breach of an immaterial provision of the policy does not avoid it is not applicable, under the Code, where the policy expressly declares that it shall avoid it. In *Clayburgh v. Agricultural Ins. Co.*, 155 Cal. 708, 102 Pac. 812, we were discussing the question of what was a sufficiently important "part" of a building, under the fallen building clause of a policy, to make the policy void if such part should fall. The instruction there considered was passed as substantially correct in effect, and this was put upon the ground that, although it did refer to the increase of the fire risk as a result of the falling of the part of the building, it did not, when taken as a whole, declare that such increase must occur in order to avoid the policy, but only that the part fallen must be important enough to materially impair the usefulness of the building. In substance, that decision was that to constitute an infraction of the fallen building clause, some material or substantial part of the building, as distinguished from a trivial, minute, and unimportant part thereof, must have fallen. The question of a consequent increase of risk was not held to be essential to the avoidance of the policy, if the part which had fallen was a material and important part of the building.

The question involved in this instruction is of no practical importance upon a new trial, unless the evidence should be more favorable to the plaintiff than that given upon the trial under consideration; for there can be no doubt that the falling of even so much of the building as *Burris* testified had fallen would increase the risk of fire. It is proper to remark, further, that the evidence does not present the question whether or not the defendant would be liable if the fire had started in the building before any part of it fell, and before it reached plaintiff's goods a material part of the building had fallen as a result of the earthquake and not as a result of the fire.

Other questions are discussed in the briefs in this case, but the probability that they

will arise upon a new trial is so remote that we do not deem it necessary to consider them.

The order denying a new trial is reversed.

We concur: ANGELLOTTI, J.; SLOSS, J.; LORIGAN, J.; HENSHAW, J.; MELVIN, J.

(158 Cal. 766)

DAVIS v. CONNECTICUT FIRE INS. CO.
(S. F. 5,558.)

(Supreme Court of California. Dec. 14, 1910.)

1. INSURANCE (§ 609*)—FIRE INSURANCE—INSTRUCTIONS—MISLEADING INSTRUCTIONS.

In an action on a fire policy which provided that the insurance should immediately cease if any part of the building fall except as a result of the fire, an instruction that such a part of the building must have fallen as would destroy its distinctive character as a building in order to avoid the policy was too vague as to what portion of the building must have fallen.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 609.*]

2. APPEAL AND ERROR (§ 1064*)—HARMLESS ERROR — INSTRUCTIONS — PREJUDICIAL EFFECT.

Error in an instruction in an action on a policy which provided that all insurance on the building or its contents should cease if the building or any part thereof fall, except from the fire, as being too vague as to what part of the building must fall, was not prejudicial to defendant, where the uncontradicted evidence showed that the entire upper story was knocked down by an earthquake, and the question in issue was whether the fire had attacked the goods in the insured building before a part of it had fallen.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4219, 4221-4224; Dec. Dig. § 1064.*]

3. INSURANCE (§ 665*)—FIRE INSURANCE—ACTIONS—SUFFICIENCY OF EVIDENCE.

In an action on a fire policy which provided that the insurance on the building or its contents should immediately cease if any part of the building fell except as the result of fire, evidence held to sustain a finding that the goods were on fire before any part of the building had fallen.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 665.*]

4. INSURANCE (§ 324*)—FIRE INSURANCE—CONSTRUCTION OF POLICY.

A provision of a fire policy that all insurance should immediately cease if the building or any part thereof fell, except as the result of fire, does not apply to avoid the policy if the building or any part thereof falls after the fire starts where the insurance is on the building, and perhaps even where it is only on the goods therein, nor does it apply to avoid the policy where the goods had begun to burn before the fall occurred.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 749; Dec. Dig. § 324.*]

5. EVIDENCE (§ 527*)—EXPERT TESTIMONY—SUBJECTS.

A question to a witness in an action on a fire policy as to whether the falling of the building was the result of fire was improper as call-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ing for a conclusion or opinion as to a fact not the subject of expert testimony.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2334, 2335; Dec. Dig. § 527.*]

6. APPEAL AND ERROR (§ 1057*)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

In an action on a fire policy, in which the evidence conclusively showed that the insured building fell because of an earthquake before the fire started, a refusal to allow a question to a witness as to whether the falling of the building was the result of the fire was not prejudicial to defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4194-4199; Dec. Dig. § 1057.*]

7. APPEAL AND ERROR (§ 1057*)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

In an action on a fire policy providing that the insurance should cease if any part of the building fell except as the result of fire, in which the evidence conclusively showed that an earthquake caused a part of all the buildings on a street to fall, the exclusion of a question as to the condition of the buildings on the street after the earthquake was not prejudicial to defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4194-4199; Dec. Dig. § 1057.*]

8. EVIDENCE (§ 129*)—SIMILAR CONDITIONS.

In an action on a fire policy, which provided that all insurance should cease if any part of the insured building fell, except as a result of the fire, in which defendant claimed that the insured building partly fell from an earthquake before the fire started, evidence was not admissible as to the condition of buildings other than the insured building after the earthquake.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 388-393, 395-398; Dec. Dig. § 129.*]

9. WITNESSES (§ 248*)—EXAMINATION—ANSWER.

A question asked in an action on a fire policy as to the condition of all the buildings on the street in which the insured building was situated after an earthquake occurring about the time of the fire was in effect answered where the witness testified that he could not tell one building from another because they were all down.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 861-863; Dec. Dig. § 248.*]

Melvin, J., dissenting.

In Bank. Appeal from Superior Court, Sonoma County; Thos. C. Denny, Judge.

Action by Naomi E. Davis, executrix of the estate of Henry S. Davis, deceased, against the Connecticut Fire Insurance Company. From an order denying a motion for new trial after verdict for plaintiff, defendant appeals. Affirmed.

A. B. Ware and T. C. Van Ness, for appellant. Thomas J. Geary, for respondent.

SHAW, J. This is an appeal from an order denying the defendant's motion for a new trial. The plaintiff sued to recover upon an insurance policy issued by the defendant to Henry S. Davis, in his lifetime, covering a stock of drugs belonging to Davis, contained in a storeroom on the ground floor of a two-story brick building situated

in the city of Santa Rosa. The fire which occasioned the loss took place on the morning of April 18, 1906, immediately after the great earthquake of that day. The policy issued by the defendant contained the following clause: "If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease." Upon the trial the defendant stated that its sole defense was based upon the aforesaid clause, and that, unless that defense was sustained by the evidence, the judgment should be given for the plaintiff.

In addition to the general verdict for the plaintiff, the jury returned answers to a number of interrogatories submitted to them. Some of these were in respect to the question whether the fall of a part of the building was before or after the fire started. The answers of the jury stated, in substance, that no part of the building fell before the insured goods were attacked by fire. The several answers clearly imply, although they do not expressly say it, that a material part of the building fell, and that the falling thereof was caused by the earthquake, and not by the fire. The appellant complains of several instructions relating to the subject of the fall of a part of a building and how much of it must have fallen in order to bring about a cessation of the insurance under the clause above quoted. One of them stated that the jury must find that such a portion had fallen as would destroy its distinctive character as a building; another that the fall must have had the effect of increasing the fire risk. We have considered the latter instruction in our decision in *Fountain v. Connecticut Fire Ins. Co.* (herewith filed) 112 Pac. 546, and held it to be erroneous. The other instruction is too vague to be a safe guide for the jury. Reasonable men might reasonably differ upon the question of its meaning. To destroy a building's distinctive character, as such, might merely refer to a change in its appearance, or to a fall that would require a change of its use, or its practical destruction as a building. But in view of the clear, conclusive and uncontradicted evidence that the entire upper story was shaken down by the earthquake alone, so that the roof fell down upon the second floor, we cannot believe that the instructions on this branch of the subject could have prejudiced the defendant in the least. The proof showed conclusively that the earthquake alone caused the fall of a sufficient part of the building to destroy its distinctive character as a building and to increase the risk from fire. There was, in fact, no real controversy at the trial in regard to this point. The interrogatories and the answers thereto show that this fact was conceded and, indeed, the jury could not have found otherwise upon the evidence, for there was

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

absolutely none to the contrary. The whole defense turned upon the question whether or not the fire attacked the goods before a part of the building had fallen. The jury answered that it did. It is claimed that this finding is not supported by sufficient evidence.

The strongest evidence in favor of the proposition that the fire attacked the goods before the walls fell is the testimony of the witnesses Duncan, Bailey, and Faught. Bailey testified that he was running a livery stable, situated near the Davis building, and that from his stable, not more than three or four minutes after the earthquake, he saw fire in the rear of the Davis building. Faught testified that he was a fireman and slept in the engine house which was situated on a lot fronting on Fifth street and running back toward Fourth street; the rear thereof being about 50 feet from the rear of the Davis store. He said: "It did not take very long that morning to get out of the engine house. I saw the rear of the buildings where the Davis drug store was about three or four minutes after I got out of the engine house. I saw the fire started. I saw a volume of smoke come up right behind the Davis drug store. I saw quite a volume; enough to indicate to me the existence of a good fire there." Duncan was a fireman, and lived in a cottage in the rear of the Davis drug store. At the time of the earthquake he was in the engine house, about 50 feet from his cottage. He got out of the engine house about five minutes after the earthquake and went to the back door of his cottage from which he saw fire in the back end of the Davis building. The back end of it was then burning. The inside of the building was then on fire and the smoke and flames were coming out of the windows and through the roof. Muther, chief of the fire department, a witness for plaintiff, testified that 10 minutes after the shock he climbed to the top of the Davis building and found that the roof had fallen and rested upon the first story; that he saw at once that there was a fire coming fast "eating into" the building, and little blue blazes climbed up all around the brick; and that the fire was of an absolutely unnatural color, a kind of blue color all through the bricks. It was admitted that the building was lighted with electric lights, and, in effect, that the wires were at the time charged with electricity.

It is not improbable that the first effect of the strain caused by the earthquake was to break some wire charged with electricity, thereby instantaneously starting a fierce fire, and that the falling of the wall did not occur until the last severe vibration and after the fire had begun. The earthquake continued for 45 seconds. Even this brief period was long enough for the two events to occur consecutively, with an interval between them of more than half a minute. The evidence does not show the particular

place in the building where the inflammable drugs were kept. The testimony of Muther that the flames were of an unnatural blue color inside the building 10 minutes after the earthquake indicated that some inflammable substance different from the wooden part of the building was then burning. It is common knowledge that the breaking of a charged electric wire will instantly cause a very hot flame, and that if combustible materials are near by such a fire will spread with great rapidity. Under all these circumstances, we cannot say that the finding of the jury on this point was not sustained by the evidence.

The appellant contends that it is immaterial whether the building was on fire or not at the time the wall fell, provided fire did not cause the fall. The court charged the jury that if it found that a material part of the building fell from a cause other than fire, before the insured goods were attacked by fire, the plaintiff could not recover. The case appears to have been tried upon the theory that this was the extent of the burden of proof resting upon the defendant. The jury, as we have said, obviously found that the goods were on fire before any part of the building fell. It appears from the evidence, however, that at the time the walls were thrown down by the earthquake only a small part of the goods could have been consumed or injured by the fire. The claim is that if there was a falling of the wall, not caused by fire, the clause of the policy thereupon immediately became operative, the insurance immediately ceased, and that, although the fire began before the wall fell, the defendant is liable only for so much of the goods as were consumed or injured by fire before the wall fell and for none that were consumed or injured afterward.

The case of *Kiesel v. Ins. Co.*, 88 Fed. 243, 31 C. C. A. 515, is cited in support of this proposition. That was a loss of insured goods in a building. Counsel quotes from the opinion in that case the following: "If it (the building) was on fire, and it would have fallen by the force of the wind if there had been no fire, then its fall could not be said to have been the result of the fire, and the defendant was not liable. * * * The cause of the fall was the test of liability." Wrenched from its context, this passage may seem to support appellant's claim. But a reading of the entire decision shows that the precise question here in issue—the liability where, after a fire has attacked insured goods but before it has done much damage, a material part of the building containing them falls from a cause other than fire—was not under consideration in that case; that, as appears by stipulation in that case, the only questions for decision were whether or not the fire began before the building fell, and if it did whether the fall was caused by the wind or the fire. The discussion shows that the court, in effect,

held that the insurer was liable if the wind blew the wall down, after the fire started, but before it reached the insured goods, and, by implication, at least, that it would not have been liable if the wall had been blown down before the goods were attacked by fire. The trial court in its instructions to the jury had said: "If this building, or any substantial part thereof, fell before the fire, or before any portion of the merchandise insured was injured by fire, and it so fell, not as the result of the fire, but as the result of something else, your verdict should be for the defendant." And further: "If that building fell, even after the fire had originated—if the fall was not caused by the fire—and if at the time it fell the goods had not caught fire, and had not been damaged by fire, the defendant would not be liable. * * * If, on the other hand, those goods had been damaged by fire, or had caught fire prior to the falling of the building, you will find for the plaintiff." This instruction was approved. The judgment in that case was for the company and the plaintiff appealed, and, while the question whether or not the charge was too favorable to the plaintiff was not material, the instruction shows, as also do the comments thereon, that the court did not mean to decide that it was immaterial whether the building was or was not burning at the time the wall fell from the wind and that it did not hold that if a building fell, other than by fire, while goods therein are burning, the loss will be divided by that event, and the company held only for the goods consumed or injured before the fall.

Upon the question last stated, we think the most reasonable interpretation of the fallen building clause is that it does not apply to the case of a building, or part thereof, falling after it has begun to burn, if the insurance is on the building, and perhaps even if it is only on goods therein, and that, where goods only are involved, it does not apply where the goods have begun to burn before, and are burning at the time, the fall occurs. When the fire begins to burn the property insured, the thing insured against has happened, the liability has begun, some loss has become inevitable. It is true that it might happen that a fall occurring during a fire would prevent it from being put out, and thus cause greater loss than would otherwise have been suffered, and the insurer might wish to contract for exemption in such a contingency. But in such a case it would be practically impossible to make an intelligent division, separating the loss occurring before the fall, from that occurring afterward. No person owning goods would be willing to make such a contract and assume the burden of such a division, if he understood its effect. If it was the intention to provide for the case of the falling of a building after a fire had attacked the goods and to exempt the insurer from lia-

bility for the goods burned after the fall took place, while holding him for that which occurred before, surely more explicit language would have been used. Other events which the policy declares shall avoid it, such as a change of interest, an assignment of the policy, or the execution of a mortgage thereon, might occur after the goods began to burn. Would it be contended, in such cases, that an account must be taken and the insurer held only for the goods burned and the injury caused before the event? The division would in most cases necessarily be a mere guess. It is obvious that the parties did not contemplate the application of the fallen building clause in this manner. The better rule is to hold that the liability of the insurer, so far as this clause is concerned, is fixed by the conditions existing at the time the fire and consequent loss begins, and is not affected or changed by the fall of the building, or a part thereof, subsequently but before the destruction is complete.

The witness Muther was asked the question: "Was the falling of the Davis building the result of fire?" An objection to the question was properly sustained. It called for a mere conclusion or opinion as to a fact which was not the subject of expert testimony. If the testimony he had previously given as to the facts was true, the conclusion that the fall was not the result of fire necessarily followed. Moreover, as we have stated before, the entire evidence showed conclusively that the earthquake caused the fall, and there was not even an attempt to show the contrary. The refusal to allow the question was therefore not injurious to the defendant. This also applies to the refusal to allow the witness Wilson to answer a general question as to the condition of all the buildings on Fourth street after the earthquake. Furthermore, the evidence was properly confined to the Davis building, and in addition to that, the witness was afterwards allowed to say that he could not tell one building from another, because they were all down, and thereby he did, in effect, answer the question.

We find no prejudicial error in the record. The order is affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.; LORIGAN, J.; HENSHAW, J.

MELVIN, J. I dissent. I think the conclusion by the jury that the fire attacked the goods before a part of the building had fallen is not supported by sufficient evidence. To hold that the testimony of Duncan, Bailey, and Faught sustains such a finding, is to ignore the rule that the plaintiff's case must be sustained by a preponderance of evidence. All of these men saw the fire some minutes after a material portion of the building had fallen. Their stories comport as well with the theory that combustion followed the greatest and most destructive movement of

the earthquake as with the deduction that the first vibration broke the electric light wire and so caused the fire. Indeed, according to the doctrine of probabilities, it is very likely that the same force which destroyed the upper walls of the building broke the wire and liberated its current. Whether a mass of loosened brick can leave a wall sooner than a vagrant electric current can set fire to a stock of goods is a question too difficult for satisfactory solution even by all the combined wisdom of the members of a trial jury, and, unless we can ignore the necessity of plaintiff's establishing his case by preponderance of evidence, I cannot see how the proof sustained the jury's finding. I think it clear that, the destruction of a portion of the building having been shown, the burden was on the plaintiff to prove the occurrence of the fire in some manner other than from any of the accepted risks. *Beach on Insurance*, § 1329; *Pelican Insurance Co. v. Troy Co-operative Association*, 77 Tex. 225, 13 S. W. 980; *Insurance Co. v. Boren*, 83 Tex. 97, 18 S. W. 484. In California this rule with reference to the burden of proof has, I think, long been established, although at least one learned judge has cited one of our leading cases as announcing the opposite doctrine. In *Western Assurance Co. v. Mohlman Co.*, 83 Fed. 813, 28 C. C. A. 157, 40 L. R. A. 561, the court refers to *Blasingame v. Home Ins. Co.*, 75 Cal. 635, 17 Pac. 925, as authority for the rule that the defendant must by a preponderance of evidence establish the performance on plaintiff's part of prohibited acts or show in like manner that the loss occurred from an accepted risk. An examination of that case, however, shows that a rule of pleading and not of evidence was announced. Broadly speaking, the court in the *Blasingame* case held that in an action on a policy of insurance a condition precedent may be generally pleaded under the provisions of section 457 of the Code of Civil Procedure, and that the complaint need not contain averments intended for the purpose of meeting or cutting off a defense. Yet in that case the learned commissioner wrote: "One seeking to recover on an insurance policy must aver the loss and show that it occurred by reason of a peril insured against." This doctrine was asserted with even greater emphasis in the case of *Rankin v. Amazon Ins. Co.*, 89 Cal. 203, 26 Pac. 872, 23 Am. St. Rep. 460, in which the policy under consideration provided that the plaintiff should keep a watchman on the premises day and night when the mill was not in operation; this court holding that, after the defendant had shown that the mill was idle, the burden of proving compliance with the warranty rested upon plaintiffs. So, in this case, it seems to me, the fall of a material part of the building being shown, it is for the plaintiff to prove by a preponderance of

the evidence that the fire was burning his property while the building was intact. This, I think, he utterly failed to do. I am aware that the opposite rule is adopted in some jurisdictions and the burden of proof held to be on the defendant (see *Trans-Atlantic Fire Ins. Co. v. Bamberger* [Ky.] 11 S. W. 595; *Western Assurance Co. v. Mohlman Co.*, supra), but I think the other, which I believe has been the California rule, is based upon sounder reasoning.

The order should be reversed.

(158 Cal. 748)

GEIMANN v. BOARD OF POLICE COM'RS
et al. (S. F. 5378.)

(Supreme Court of California. Dec. 13, 1910.)

1. MUNICIPAL CORPORATIONS (§§ 1022, 1025*)
— CLAIMS—ACTIONS—LIMITATIONS—VALIDITY.

Provisions requiring a presentation of a demand as a condition precedent to an action thereon against a city, and limiting the time thereafter in which such action may be brought, are valid.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 2193, 2196; Dec. Dig. §§ 1022, 1025.*]

2. CONSTITUTIONAL LAW (§ 308*)—MUNICIPAL CORPORATIONS (§ 1025*)—CLAIMS—ACTIONS—CONDITIONS PRECEDENT—CONSTRUCTION OF STATUTES.

The charter of the city and county of San Francisco, art. 8, c. 4, § 1, providing that any demand under the charter shall be forever barred, unless presented for payment, properly audited, within one month after such payment became payable, in so far as it provides for an audit within 30 days, the effect of which would be that if, upon presentation within the 30 days, the auditor should fail or refuse an audit, the claim would be barred, is invalid; but by eliminating such invalid part the remainder of the provision may be construed as allowing the claimant a reasonable time in which to commence action for enforcement of his demand, which time, in the absence of charter provisions, would be governed by the general statute of limitations applicable to the particular character of the demand, and upheld as fixing a time limit for presentation of claims and a condition precedent to the right of action on them.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. § 925; Dec. Dig. § 308; *Municipal Corporations*, Dec. Dig. § 1025.*]

3. MUNICIPAL CORPORATIONS (§ 1022*) — CLAIMS—PRESENTMENT.

Where a municipal charter provided that claims against it be presented for payment within a certain time to the auditor, and no provision thereof made it the duty of either the chief of police or the board of police commissioners to present demands of members of the police force to the auditor, if such a custom had grown up, their failure to present a claimant's demand would not excuse him from performance thereof, since it would be but the failure of his agent, for which he alone, and not the municipality, would be responsible.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 1022.*]

In Bank. Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by George Gelmann on behalf of himself and others against the Board of Police Commissioners and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Costello & Costello, for appellant. Percy V. Long, City Atty., and John T. Nourse, Asst. City Atty., for respondents.

HENSHAW, J. Plaintiff sued for mandate against the chief of police, board of police commissioners, the auditor, and the treasurer of the city and county of San Francisco, to compel the approval and payment of his salary demand as police officer for the month of July, 1906. Judgment passed for defendants, and plaintiff appeals.

Plaintiff, with other police officers, was compelled by the chief of police to take leave of absence without pay for the month of July, 1906, after the earthquake and fire. His action is to enforce his demand for salary for the month when he was thus upon compulsory leave of absence.

Respondents successfully urged against appellant's claim that it was nonenforceable, for the latter's failure to comply with certain requirements of the charter of the city and county of San Francisco. If respondents' position is sound in this respect, it precludes all consideration of the merits or demerits of the claim. Respondents' contention is that appellant's claim is barred for nonpresentation and nonaudit within the time limited by the charter. Section 1, c. 4, art. 8, of the charter of the city and county of San Francisco provides as follows: "Any demand upon the treasury accruing under this charter shall not be paid, but shall be forever barred by limitation of time, unless the same be presented for payment, properly audited, within one month after such payment became due and payable." Appellant to this makes answer that the charter provisions are unreasonable, unconstitutional, and void, as conferring judicial power upon the auditor, and as depriving claimant of his just demand without due process of law, in that the section requires that his claim, properly audited, must be presented to the treasurer within one month from the date of its becoming due, and that this leaves the enforcement of his demand at the mercy, or whim, or caprice of the auditor, who, by his arbitrary rejection, may make it absolutely impossible for the claimant to present a "properly audited" claim to the treasurer within the 30 days' limitation; that the language of the charter is so plain as to forbid the need of construction; that its language does not import a condition precedent, but in terms declares it to be a statute of limitations, and that to it or from it the court can neither add nor detract. This provision of the present charter of the city and county of San Francisco is, so far as quoted, practically identical with section 90 of the former consolidation act of the city and county of San

Francisco. The earlier provision was upon two occasions considered by this court, and in the first instance it was held that the design of the provision was to prescribe a uniform rule for the presentation of all demands upon the treasury and fix a uniform bar for nonpresentation. *Paxson v. Holt*, 40 Cal. 466. In the other case, the statute under which the claimant demanded his salary provided that he should be entitled to the salary allowed by the board of supervisors, and this court held that even if that relieved from the necessity of presenting the claim to the auditor for audit, still, under section 90 of the consolidation act, it required a presentation to the board of supervisors, which had never been made, and that therefore as it "was never presented for audit at all, it follows that it was not and could not be presented for payment." Section 90 of the earlier consolidation act made provision for an appeal by any person from the decision of the auditor to the board of supervisors upon the former's rejection or refusal to approve any demand. By a singular oversight, neither this nor any equivalent provision is found in the present charter; the unmodified language being that above quoted. It may not be gainsaid that if this provision must be held to mean that a claimant shall present his demand to the treasurer, properly audited by the auditor, within one month after the demand has become due, or otherwise he has no other recourse or redress and his claim is "forever barred by limitation of time," if thus this section contemplates that a claimant's demand, to be paid, must be first audited within 30 days, leaving the question of audit or nonaudit to the whim or caprice of the auditor, then it would require no elaboration of argument to demonstrate that the provision was unreasonable and unconstitutional, as an attempt to deprive, or as putting it within the power of an executive officer to deprive, a claimant of his demand against the city and county of San Francisco without due process of law.

It is to be considered, therefore, whether the charter will bear any other reasonable construction than this. For, if so, such construction will be adopted to save the provision from condemnation. It is proper to say, in approaching this consideration, that we are not unmindful of the rules which courts have imposed upon themselves in dealing with statutes of limitations and conditions precedent to the right to maintain action. *Tynan v. Walker*, 35 Cal. 634, 95 Am. Dec. 152; *Vandall v. Teague*, 142 Cal. 471, 76 Pac. 35. A presentation of a demand as a condition precedent to the beginning of an action against a municipal corporation, and a special provision limiting the time thereafter in which such action may be brought, are measures which, without doubt, the Legislature may ordain. Thus the provision of the Los Angeles charter, which, in slightly varying form, is common to most

charters, is a reasonable and valid provision as a condition precedent. That charter provides (section 222): "No suit shall be brought upon any claim for money or damages against the city of Los Angeles * * * until a demand for the same has been presented as herein provided and rejected in whole or in part." *Bank v. Los Angeles*, 151 Cal. 655, 91 Pac. 795. And so it is said, in *Jones v. City of Albany*, 151 N. Y. 226, 45 N. E. 557: "The Legislature may regulate the right to bring an action against a municipal corporation for a tort or upon contract, by imposing conditions precedent to be observed by the plaintiff, or it may make a special statute of limitations, thereby changing the ordinary rule and restricting the usual remedy in such cases." What, then, may be gathered by fair construction from the provision of the charter of the city and county of San Francisco, which would be legal, conceding the condition that if a properly audited demand be not presented within 30 days, the demand is forever barred, to be invalid? The provision manifestly aims to compel a presentation of all demands within 30 days. The requirement that every demand shall be presented to the auditor for audit within 30 days is reasonable and will be upheld. If the auditor does audit it, it is, within the language of the provision, properly audited, and so its presentation to and payment by the treasurer become matters of course. But if, upon presentation within the 30 days the auditor shall fail or refuse his audit, under circumstances which, as usually would happen, would forbid the possibility of the claimant's presenting his duly audited demand within the time limited, what result would follow? Under the strict terms of this provision the claim would be forever barred. This, however, cannot be, and to this extent the provision is unlawful and void. The necessary result would be that upon such rejection the claimant would have a reasonable time in which to commence action for the enforcement of his demand, and if the charter itself contained no special provision (and this charter does not) touching the matter, such reasonable time would be governed by the general statute of limitations applicable to the particular character of the demand. So construed, the obnoxious part of this provision is regarded as severable from the unobjectionable part, which latter then fixes a time limit for the presentation of claims and a condition precedent to the right of commencing action upon them.

The due presentation of the claim to the auditor being thus held an essential prerequisite to the right of commencing action, appellant insists that by the admissions in the pleadings, such due presentation exists in this case, and that therefore his action is properly brought and may be maintained. Respondent contends against such admission in the pleadings, and asserts that issue was

joined upon the matter, and that the court's finding is against appellant. The pleadings thus involve consideration. But before considering them it is proper to say that where a material allegation has either been expressly admitted, or admitted by failure of denial, no finding upon the matter, since none can properly be made, will countervail against the admission; yet, where any doubt may be fairly said to exist as to the full and complete sufficiency of the admission, the court will not construe such a pleading so as to deprive the party of his right to a contest of the alleged fact, and to a determination of the existence or nonexistence of the alleged fact after hearing.

The plaintiff in this case averred "that before the commencement of this action he duly demanded of and from the chief of police of the city and county of San Francisco, defendant aforesaid, that he, the said defendant, approve the said warrant and demand of said plaintiff for his salary for the month of July, 1906, and that he demanded of and from the said board of police commissioners of the city and county of San Francisco that they sign the said warrant and demand, and that he duly demanded from the said auditor of the city and county of San Francisco, defendant aforesaid, that the said auditor audit the same, but in this connection plaintiff avers that the said defendants and each of them refused and denied, all and singular, his demand as aforesaid." The answer seems to admit that plaintiff demanded of the police commissioners "that the auditor of the city and county of San Francisco audit said demand." But in the same connection it undertakes to aver "that plaintiff failed and neglected, * * * or that the said plaintiff demanded of the said auditor of said city and county of San Francisco that he audit, allow, and approve said demand within six months after said demand became due and payable." The language of this averment is inartificially drawn. Grammatically it is a compound of affirmation and denial. It seems, however, to charge that plaintiff failed and neglected for six months after his claim became due to demand audit from the auditor. Even if this averment be not made as plain as it should be, there was enough to move the court to take evidence upon the question, as though under issue regularly joined. The court did so and found "that plaintiff has not demanded verbally, or otherwise, of the auditor of the city and county of San Francisco that he approve or allow the demand of plaintiff for his salary for the month of July, 1906." This finding is not attacked and is conclusive against appellant.

The determination that the claim was not presented to the auditor for audit within the time limited by the charter renders it unnecessary to consider in detail the law touching the other defendants. Suffice it to say that the treasurer was not bound to pay, ex-

cept upon presentation of an audited demand, or its equivalent—the judgment of a competent court. Neither the chief of police nor the board of police commissioners is required by law, or by any rule cited, to approve the salary demand of plaintiff, and their failure to do so upon the showing here made would not excuse plaintiff's neglect to present it to the auditor. No provision has been pointed out making it the duty of either the chief of police or the board of police commissioners to present plaintiff's demand to the auditor, and if such a custom had grown up, without authority in law, the failure of either of these so to do would not excuse plaintiff, since it would be but the failure of his agent, for which he alone, and not the city, would be responsible.

The judgment appealed from is therefore affirmed.

We concur: LORIGAN, J.; MELVIN, J.; SLOSS, J.; ANGELLOTTI, J.; SHAW, J.

(158 Cal. 742)

HARTER v. BARKLEY et al. (L. A. 2,495.) (Supreme Court of California. Dec. 12, 1910.)

1. MUNICIPAL CORPORATIONS (§ 597*)—POLICE POWERS—CONSTITUTIONAL PROVISIONS.

Under Const. art. 11, § 11, authorizing municipalities to make local, police, and sanitary regulations, a city may under its police power provide by ordinance for the construction, maintenance, and repair of sewers.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1325; Dec. Dig. § 597.*]

2. MUNICIPAL CORPORATIONS (§ 270*) — POWERS—CONSTRUCTION OF SEWERS.

The power of a city to construct sewers and drains is incident to the power to construct and maintain streets.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 725; Dec. Dig. § 270.*]

3. MUNICIPAL CORPORATIONS (§ 712*)—POWERS—CONSTRUCTION OF SEWERS.

The power of a city of the sixth class conferred by Municipal Corporation Act (Gen. Laws 1910, Act 2348) § 862, authorizing the construction, establishment, and maintenance of sewers, carries with it the power to provide reasonable regulations for the tapping of, and connection with, sewers.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1522; Dec. Dig. § 712.*]

4. MUNICIPAL CORPORATIONS (§ 712*)—POWERS—CONSTRUCTION OF SEWERS.

A city ordinance requiring the payment of five dollars for a permit for a sewer connection, to be paid into the sewer fund, is reasonable; the sewer fund being used for the benefit of the property of the city and in the interests of owners of real estate within its limits.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1522; Dec. Dig. § 712.*]

5. MUNICIPAL CORPORATIONS (§ 712*)—POWERS—CONSTRUCTION OF SEWERS.

A city ordinance which reserves to the city the exclusive privilege of building lateral sewers from the property line to the public sewer, and which makes a uniform charge of

\$20 therefor, is not so unreasonable as to be void, merely because the expense to the city is not the same in every case, because some lots are nearer to the sewer than others.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 712.*]

6. MUNICIPAL CORPORATIONS (§ 625*)—POLICE POWER—VALIDITY.

A municipal ordinance enacted under the police power is not invalid as unreasonable, unless it is clearly so, and every intendment will be indulged in favor of its validity.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1378; Dec. Dig. § 625.*]

Department 2. Appeal from Superior Court, Los Angeles County; Leon F. Moss, Judge.

Mandamus by A. M. Harter against S. D. Barkley and others. From a judgment entered on sustaining a demurrer to the petition, petitioner appeals. Affirmed.

Davis, Kemp & Post and Minor Goodrich, for appellant. Frank L. Perry and Williams, Goudge & Chandler, for respondents.

MELVIN, J. Appeal from a judgment entered after a demurrer to a petition for writ of mandate had been sustained, without leave to amend.

The matter involved is the validity or invalidity of a certain ordinance of the city of Redondo Beach. The petitioner alleged the existence of a public sewer in front of his property in said city; and after reciting the pertinent provisions of the ordinance above mentioned, averred that he applied to the trustees of Redondo Beach, and the plumbing inspector of said city offered to make connections between his property and said public sewer in a manner and with materials prescribed by ordinances and regulations of the said city, agreed to pay 50 cents for a permit to do the work, and promised to do all things required by the said trustees, except the payment of \$5 for the sewer fund and \$20 to the city or its agent for doing the work. He further recited in his petition the refusal of the trustees to comply with his request, stated that the charges for sewer fund and construction were unreasonable and without authority of law, and asked for a writ of mandate directing the issuance of the desired permit.

The ordinance which we are here considering, after providing that no connection shall be made with any public sewer of the city of Redondo Beach until a permit has been obtained from the plumbing inspector, and that all connections must be made pursuant to sections 15 and 16 thereof, declares that a fee of \$5.50 shall be collected by the inspector for each permit for a sewer connection, of which 50 cents shall be a fee for the issuance of the said permit and \$5 shall be paid into the sewer fund of the city. It does not appear in the petition what use is made of the sewer fund.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Sections 15 and 16 are as follows:

"The city of Redondo Beach, its duly authorized agents, servants, or employees, shall have exclusive right to make connections with the public sewer of Redondo Beach, and for laying laterals therefrom through the streets and alleys of said city to the property line.

"Upon written request by the owner of any property who has first obtained a permit for a sewer connection, as hereinbefore provided, the city of Redondo Beach, its agents, servants or employees shall forthwith make a connection with said sewer at the nearest Y branch, and place a house connection sewer therefrom to the property line of said owner. For making the connection with said sewer and laying house connection sewer therefrom to the property line of said owner, the said owner of said property shall pay to the authorized agent or collector of the said city of Redondo Beach, the sum of \$20. Such sum shall be payable as follows: One-half ($\frac{1}{2}$) upon making application, and the balance ten (10) days after the completion of the said work."

The remaining sections declare it unlawful for any person to make any connection with a public sewer, except as provided in the ordinance, and prescribe a penalty for a violation of any of the provisions of that by-law.

The regulation of the right of laying sewers in public streets is unquestionably a power conferred upon municipalities, partly by virtue of the provisions of section 11 of article 11 of the Constitution of California. The proper protection of the public health depends very largely upon the maintenance of a thorough and sanitary sewer system, and the restoration of the streets after the laying of pipes is an important subject of police control. In many cities, the carelessness of contractors, both in the work of connecting private residences with public sewers and in the filling of the trenches after the laying of the pipe, has become a matter of great scandal and has in some instances led to the adoption of very stringent rules for the regulation of sewer laying. It has been held, and we think very properly, that ordinances of a municipal corporation providing for the construction, maintenance, and repairs of sewers and drains are to be sustained as a valid exercise of police power. *Taylor v. Crawford*, 72 Ohio St. 560, 74 N. E. 1065, 69 L. R. A. 805. The power of a city to construct sewers and drains is also incident to the power to construct and maintain streets. *Kramer v. Los Angeles*, 147 Cal. 674, 82 Pac. 334.

The city of Redondo Beach is one of the sixth class and as such has power "to construct, establish, and maintain drains and sewers." Municipal Corp. Act (Gen. Laws 1910, p. 847) par. 862.

The power of maintenance of public sewers carries with it the power to provide reasonable regulations for the tapping and connec-

tion with such sewers. Upon this subject, Judge Dillon, in his work on Municipal Corporations, vol. 2, § 805, thus expresses the rule: "Authority to a municipal corporation, by its charter, to repair and keep in order its streets, is sufficient, without special grant, to authorize it to construct drains and sewers; and, when constructed, the corporation will incidentally possess the power to pass ordinances regulating their use and the price at which private persons may tap them, and also to protect them against injury or invasion."

As we have before observed, the use to which the fee for connecting the sewer is applied cannot be learned from the pleadings. We must therefore conclude that the "sewer fund" mentioned in the ordinance is lawfully expended for the benefit of the defendant's property, as well as in the interest of other owners of realty within the city. We know of no case in which such a reasonable charge (and we cannot say that \$5 is an unreasonable imposition) has not been sustained. In many well-considered cases, such power has been upheld. *Van Wagoner v. Paterson*, 67 N. J. Law, 455, 51 Atl. 922; *Patton v. Springfield*, 99 Mass. 632; *Fergus Falls v. D. C. Edison*, 94 Minn. 121, 102 N. W. 218, 70 L. R. A. 238.

We next come to the consideration of the right of the city to reserve to itself the exclusive privilege of building the lateral sewer from the property line to the public sewer and making a uniform charge therefor. The petition shows that some lots are nearer to the sewer than others and that therefore the expense to the city is not the same in every case. We cannot say that this fact alone makes the ordinance so unreasonable as to be void. *Hellman v. Shoulters*, 114 Cal. 146, 44 Pac. 915, 45 Pac. 1057; *In re Zhizhuzza*, 147 Cal. 334, 81 Pac. 955.

It seems to us that the case last cited furnishes an excellent authority both for a uniform charge and for the reservation by the city to itself of the right of laying sewers in its streets from the property lines to the main public sewers. The ordinance considered in that case had reference to the disposal of garbage by the city's agents. Speaking of the alleged unfairness in the difference of rates charged owners of hotels and householders, this court said, as might well be said here: "A municipal ordinance must be very clearly obnoxious to such objection before it will be declared invalid. 'Every intendment is to be indulged in favor of its validity, and all doubts resolved in a way to uphold the law-making power; and a contrary conclusion will never be reached upon light consideration. It is the province and right of the municipality to regulate its local affairs—within the law, of course—and it is the duty of the courts to uphold such regulations, except it manifestly appear that the ordinance or by-law transcends the power of the municipality, and contravenes rights se-

cured to the citizen by the Constitution, or laws made in pursuance thereof.' Ex parte Haskell, 112 Cal. 416, 44 Pac. 725 [32 L. R. A. 527]; Ex parte McKenna, 126 Cal. 432, 58 Pac. 916; Ex parte Lemon, 143 Cal. 563, 77 Pac. 455 [65 L. R. A. 946]." In the majority opinion in that case, signed by six of the justices, the following language is adopted with approval from the case of California Reduction Co. v. Sanitary Reduction Works, 126 Fed. 29, 61 C. C. A. 91: "Laws or ordinances enacted under the police power for the protection of the public health, reasonably adapted to that end, are not unconstitutional, because they may incidentally operate to deprive individuals of their property or its use without compensation, or interfere with their personal liberty, nor because they may give one person a monopoly of a certain business or occupation; private rights being required to yield in such case to the public good." And in the concurring opinion, Mr. Chief Justice Beatty says: "The only objection to the validity of the ordinance which the petitioner is in a position to urge relates to the power of the municipality to reserve to itself the exclusive right, through its own selected agents, to collect and remove those refuse matters which are, or by delay in removal may become, a public nuisance. That the city has this right I think is clear, and so far as the ordinance secures it, no doubt it is valid. The petitioner has therefore violated its valid provisions, and subjected himself to the penalty imposed."

By a parity of reasoning we may well say that in so important a measure for the protection of the public health as the laying of sewers in the public streets, we must construe all ordinances relating to that subject with a view to giving them operation, unless they are clearly obnoxious to reason, and obviously violative of constitutional provisions or general laws; and that in such a matter, in which a city is given a wide discretionary power, the reservation to itself of the right to do the actual work of laying and connecting the lateral sewers is not only lawful, but perhaps laudable. We cannot say that either the charge of \$5 for connecting with a public sewer or that of \$20 for construction is unreasonable.

It follows that the judgment should be affirmed, and it is so ordered.

We concur: HENSHAW, J.; LORIGAN, J.

(14 Cal. App. 502)

PETERSON v. CODY et al. (Civ. No. 764.)
(Court of Appeal, First District, California.
Nov. 16, 1910. Rehearing Denied by
Supreme Court Jan. 9, 1911.)

WATERS AND WATER COURSES (§ 156*)—CONVEYANCES—RESERVATION.

Plaintiff whose land was bordered by a stream conveyed water to his residence by

means of a flume and thereafter he conveyed a strip of land bordering on the stream, and the deed reserved the right to "take and use the water as now taken and used" and the right to repair and maintain flumes "necessary to conduct the amount of water now appropriated and used that are accustomed to flow across the lands conveyed." Held, that plaintiff's rights were limited to the amount of water used by him at the time of conveyance, irrespective of the amount that flowed in the flume.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 178; Dec. Dig. § 156.*]

Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Action by Thomas H. Peterson against F. A. Cody and another. Appeal by plaintiff from an order denying his motion for a new trial. Affirmed.

Cassin & Lucas, for appellant. H. C. Wyckoff and W. M. Gardner, for respondents.

KERRIGAN, J. This is an appeal from an order denying plaintiff's motion for a new trial.

In the year 1885 the plaintiff owned a tract of land in Santa Cruz county consisting of 159 acres, which land for some distance bordered on a stream of water known as Marshall creek. From this creek to his residence, which was some distance back from the creek, plaintiff had a flume by means of which he carried water from the creek to his residence. On February 12, 1885, plaintiff and his wife conveyed to James P. Pierce a portion of said tract which bordered on Marshall creek, but they retained the back portion of the farm on which their residence was situated. Part of plaintiff's flume was built upon lands conveyed to Pierce. The deeds from plaintiff and his wife to Pierce contained the following reservation: "Reserving hereby from the operation of this deed the right to take and use the water as now taken and used by the parties of the first part, and the right to enter upon said land to repair and maintain proper flumes, pipes, or conduits necessary to conduct and lead on to the lands of the parties of the first part, the amount of water now appropriated and used by said parties of the first part that are accustomed to flow on, upon, and across the lands hereby conveyed." In 1889 Pierce conveyed the said land along Marshall creek to the Ben Lomond Land & Lumber Co. This company installed a four-inch pipe by which it carried water from Marshall creek to the town of Ben Lomond, using the water in a logging pond, and also as a supply for people living in Ben Lomond, and for other purposes. In 1892 D. W. Johnston purchased the property from the Ben Lomond Land & Lumber Company, together with the water system for the supply of Ben Lomond. In 1901 the defendant Cody purchased the property and water system from Johnston, and he has owned and operated it

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ever since. The case was tried with an advisory jury, which adopted that view that the plaintiff was entitled to the waters of the creek to the extent of the full carrying capacity of his flume, and rendered a verdict, finding that the plaintiff was entitled to \$700,000 gallons of water per 24 hours; but the court accepting the defendants' theory, namely, that the plaintiff was entitled only to the amount of water actually taken and used by him at the time of the conveyance by him above mentioned, rejected the verdict of the jury, and found that the amount of water taken and used by the plaintiff at said time was 1,000 gallons per 24 hours, and rendered judgment accordingly.

Plaintiff contends here, as he did in the lower court, that under the reservation just quoted he is entitled to the amount of water that was accustomed to flow in the flume. Defendants, on the other hand, have contended throughout the case that the amount of water reserved is not what had been accustomed to flow through plaintiff's flume, but the amount that he actually used for beneficial purposes at the time of the execution of the deed from himself and wife to Pierce.

In his complaint plaintiff alleged that he was entitled to all the waters in said creek. Defendants denied that he was entitled to more than 100 gallons per day. On the issue thus framed the court found, as just seen, that the plaintiff was entitled to 1,000 gallons per 24 hours. Under no theory of the case is plaintiff entitled to the entire flow of Marshall creek, or to the maximum carrying capacity of his flume, nor does he in fact claim to be thus entitled. As before stated, he asserts that the measure of his right is the accustomed flow of water through the flume; but he introduced absolutely no evidence to show what this amount was. The defendants, on the other hand, to support their position, produced evidence showing the amount of water required by plaintiff in the year 1885, considering the size of his family, the number of head of stock he had, and the size of the vegetable garden which he irrigated. Based upon these circumstances one expert witness testified that the plaintiff was entitled to not to exceed 725 gallons per day. Another expert said that 20 gallons of water per day is considered in the engineering profession to be necessary per capita per 24 hours for household and culinary purposes, including all household uses; 15 gallons a day for a horse, and 10 gallons a day for each cow; that 100 gallons a day would be more than enough to irrigate plaintiff's small garden; therefore, that the amount of water probably used by plaintiff in 1885 was 450 gallons per day. The superintendent of the Santa Cruz City Waterworks testified that 250 gallons a day was sufficient for all plaintiff's enumerated purposes. There was other evidence on this subject.

The evidence thus introduced by the de-

fendants showed the amount of water which in all probability was taken and used by the plaintiff at or about the time of the conveyance; and as there is no evidence in the case that a greater amount of water than 1,000 gallons per day flowed through the flume, we are at a loss to understand how the plaintiff at this time can successfully complain. However, we think, under the proper construction of the reservation, that plaintiff was entitled, not to the amount of water that ordinarily flowed through the flume, but to the amount of water that he was accustomed to use at the time of the conveyance.

There are two clauses in the reservation of the water right from which the intentions of the parties to the deed as to the amount of water reserved may be gathered. It is first stated that the grantors reserve "the right to take and use the water as now taken and used by the parties of the first part." Then follows the reservation of the right to maintain "proper flumes, pipes, or conduits necessary to conduct and lead on to the lands of the parties of the first part the amount of water now appropriated and used by said parties of the first part that are accustomed to flow on, upon, and across the lands hereby conveyed."

In both of these clauses the word "used" is employed; and for this court to hold, as plaintiff alleged in his complaint, that the amount of water so reserved was the total flow of Marshall creek, irrespective of whether that quantity was put to a beneficial use or not, would be to put a very extravagant construction upon the deed. The same observation will apply, though with somewhat less force, to the construction at present contended for by plaintiff, namely, that the amount of water, reserved was the quantity accustomed to flow through his flume, for it might be that more was accustomed to flow through it than was used by him. Such a construction would ignore the presence of the word "used." We think that the words "taken and used," and "appropriated and used," found in the two clauses of the reservation above quoted, may well be given the ordinary legal meaning of the word "appropriated," as used in connection with the acquisition of water rights. The authorities hold that an appropriator's rights are measured not by the capacity of his conduit, nor by the amount taken from the stream, but by the amount actually applied to a beneficial use. *Senior v. Anderson*, 115 Cal. 496, 47 Pac. 454. We are therefore of opinion that the court correctly construed the reservation in the deed by limiting the plaintiff's rights (in the absence of evidence of the exact amount of water used by him at the time of the conveyance) to about the amount of water presumably so used; and we think that he cannot be heard to complain of such construction, especially as the court was quite liberal in computing the amount of water on this basis.

It may further be said on this point that the conduct of the plaintiff and the predecessors in interest of the respondents is inconsistent with the claim of plaintiff as set up in the complaint, for the evidence shows that Pierce, the grantee of plaintiff under the deed in question, shortly after its execution took water from the creek through a three-inch pipe from a point above the intake of plaintiff's flume, and no claim was at that time made by plaintiff that he had reserved all the water of the creek.

The order is affirmed.

We concur: COOPER, P. J.; HALL, J.

(14 Cal. App. 551)

INMAN et al. v. L. E. WHITE LUMBER CO. (Civ. 767.)

(Court of Appeal, Third District, California. Nov. 19, 1910. Rehearing Denied by Supreme Court Jan. 12, 1911.)

1. PARTIES (§ 88*)—MISJOINDER.

Where one is improperly joined as a plaintiff, the remedy is by a special demurrer.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 145-147; Dec. Dig. § 88.*]

2. SALES (§ 351*)—ACTION—PARTIES.

Where F. and I. contracted in writing to sell and deliver ties to defendant, and F. was to furnish supplies for the camps and the money to carry on the business which was to be the source of his profit, and I. was to get out of the ties the product of his own timber and to receive the entire profit from the ties themselves, it was proper for them to join in an action for the price.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 993, 994; Dec. Dig. § 351.*]

3. SALES (§ 164*)—EXCESSIVE QUANTITY—LIABILITY.

Where plaintiff contracted to sell and deliver a certain number of ties to defendant, and he accepted and used a number in excess of the amount specified, he was bound to pay for the excess at least their reasonable value, as to which the contract itself was evidence.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 386-390; Dec. Dig. § 164.*]

4. APPEAL AND ERROR (§ 1039*)—HARMLESS ERROR—PLEADING.

Where, in an action for the price of ties sold and delivered, plaintiff alleged that defendant agreed to pay a certain price for the ties, and recovery was had for the reasonable value, if the complaint should have been more specific, defendant was not harmed, there being no evidence of any difference between the reasonable price and the agreed price.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4075-4088; Dec. Dig. § 1039.*]

Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Action by John Inman, Jr., and others against the L. E. White Lumber Company. From a judgment in favor of plaintiffs, defendant appeals. Affirmed.

Campbell, Metson, Drew, Oatman & Mackenzie and McNab & Hirsch, for appellant. Robert Duncan, for respondents.

BURNETT, J. The action was to recover \$2,585, the balance due for the sale and delivery of redwood ties at 50 cents apiece. The court found, upon sufficient evidence, that "said plaintiffs sold and delivered to said defendant at said defendant's special instance and request 24,473 split and hewn merchantable redwood railroad ties; that said ties were 8 feet in length and 6 inches by 8 inches in size; that said ties were delivered to and received and accepted by said defendant at its flume near Rollerville, in the county of Mendocino; that said defendant agreed to pay said plaintiffs 50 cents for each of said ties so delivered; that said defendant became indebted to said plaintiffs in the sum of \$12,236.50 on account of said ties so delivered; that said defendant paid to said plaintiffs for and on account of said ties so delivered the sum of \$9,651.50 and no more." The judgment thereupon followed in favor of plaintiffs for the balance due.

The main reliance of appellant seems to be upon the claim that "The evidence fails to show that the plaintiffs Inman and Foster were jointly entitled to recover any sum whatever from defendant, the evidence showing affirmatively that any sum or amount which might be due was due to the firm of Inman and Foster, a copartnership." But if we concede the soundness of appellant's statement of the legal proposition involved, it cannot avail to overthrow the judgment. This follows from the consideration that there was evidence that the transaction was not with any partnership, but with plaintiffs in their individual capacity. The testimony of Mr. Foster is to the effect that he was to furnish the supplies for the camps and the money necessary to carry on the business and this was to be the source of his profit, but that Mr. Inman was to have charge of the getting out of the ties, that they were the products of his own timber and that Inman was to receive the entire profit from the ties themselves. In this view of the matter the action could have been brought by Inman alone, but since the written contract was made with Inman and Foster as individuals it was at least proper that both should join in the action. It is at least entirely clear that if Foster was improperly joined as a party the remedy was by special demurrer and no possible prejudice has been suffered by defendant. The judgment is certainly a bar to any suit that might be brought by either of the plaintiffs for the same cause of action.

But if the foregoing objection should be considered meritorious its effect is nullified by the assignments introduced in evidence. On January 3, 1908, a communication was addressed to L. E. White Lumber Company in the following language: "Dear Sirs: Please transfer all credits standing to the account

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

of Messrs. Inman & Foster to the account of W. E. Foster and oblige, Yours truly, Inman & Foster, per W. E. Foster, John Inman." Defendant recognized this order as an assignment and acted upon it. Appellant is therefore in no position to question it, although as a matter of fact it was made as a mere matter of convenience to enable Mr. Foster to collect the money due for the ties without being subjected to the trouble of finding Mr. Inman.

But, accepting the theory that the claim was transferred to Foster, then any difficulty in this contingency is obviated by the reassignment of Foster to Inman as follows: "The undersigned W. E. Foster hereby assigns to John Inman, Jr., an undivided half interest in all moneys due to said Foster and Inman, Jr., in that certain contract dated May 23, 1907, between the L. E. White Lumber Company, a corporation, and the said W. E. Foster and John Inman, Jr., for the sale and delivery of certain ties to said L. E. White Lumber Company. W. E. Foster." As to this, the contention is made by appellant that as the contract under which the ties were delivered provided for the delivery of from 10,000 to 20,000 of the kind of ties in question, and as 19,303 had been paid for, this assignment could operate only to transfer a half interest in the balance, to wit, 697 ties. Appellant, however, cannot successfully urge this objection. The court was entirely justified in holding that all the ties were delivered under the contract. Appellant could have declined, of course, to receive any number in excess of 20,000, but after accepting and using them appellant manifestly assumed the corresponding obligation to pay for them. In the case of *Randall v. National Ice Co.*, 19 N. Y. Supp. 633,¹ there was a contract to deliver 800 or 900 tons of ice. The party delivered 1,314 tons, and sued for the excess over the amount named in the contract. The court said: "Having received this ice in excess of the amount called for by the contract the law would hold the defendant liable to pay for the same, and, in the absence of any agreement to the contrary, at the price stipulated in the contract." This case was appealed to the Court of Appeals and the decision affirmed. 138 N. Y. 644, 34 N. E. 513.

In *Hermann v. Littlefield*, 109 Cal. 430, 42 Pac. 443, it is held, as stated in the syllabus, that "when a person performing labor at an agreed price and for a stated time continues in the same employment after the expiration of the term of service agreed without a new agreement, the law presumes, in the absence of proof to the contrary, that the terms of the original contract are continued; and, in an action of assumpsit for work and labor

performed after the agreed period, the original contract is admissible in evidence as showing the terms under which the labor was performed." But, if this were not so, plaintiffs could at least recover the reasonable value of the ties in question. No inquiry was made as to the reasonable value, but the contract itself is evidence of this, and controlling in the absence of all other evidence. *Adams v. Burbank*, 103 Cal. 646, 37 Pac. 640; *Hermann v. Littlefield*, supra; *Donegan v. Houston*, 5 Cal. App. 626, 90 Pac. 1073.

The only plausible objection to this theory is that it is inconsistent with the allegations of the complaint. Therein it is alleged that defendant agreed to pay a definite sum for the ties. Under such a complaint it is held, though, in the *Donegan Case*, supra, that plaintiff may recover debts due upon different contracts. It is stated that "the plaintiff may recover in one count under an executed express contract for grading completed, and also under an implied contract for extra work, as together constituting the whole indebtedness due, and, where an account was stated for the whole indebtedness, the law implies a promise to pay it." But even if the complaint should have been more specific it is clear that defendant suffered no injury, since there was no evidence of any difference between the reasonable value and the agreed price.

The contentions of appellant seem to us destitute of merit, and the judgment and order are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

(14 Cal. App. 496)

DIEHL v. SWETT-DAVENPORT LUMBER CO. (Civ. 834.)

(Court of Appeal, First District, California.
Nov. 12, 1910. Rehearing Denied by
Supreme Court Jan. 9, 1911.)

1. MASTER AND SERVANT (§ 220*)—INJURY TO SERVANT—ASSUMPTION OF RISK.

The general rule is that one who remains in the service of his employer after notice of a defect in the machine operated by him, which increases the danger to which he is exposed, assumes the increased risk; but where the employé, electing not to abandon his employment, gives notice of a defect in the machine operated by him, and the employer promises to remedy the defects, the employé does not assume the increased risk, and unless the employer remedies the defect within a reasonable time, and accident results, the employer is liable.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 641-644; Dec. Dig. § 220.*]

2. MASTER AND SERVANT (§ 220*)—INJURY TO SERVANT—ASSUMPTION OF RISK—TIME TO REMOVE DANGER.

When the employer is notified by the servant of defects in the machine operated by him, the promise of the employer that the danger will be removed, without naming a definite time, is in effect an agreement by the employer that

¹ Reported in full in the New York Supplement; reported as a memorandum decision without opinion in 64 Hun, 636.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

he assumes the risk incident to the danger for a reasonable time.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 641-644; Dec. Dig. § 220.*]

3. MASTER AND SERVANT (§ 220*)—INJURY TO SERVANT—ASSUMPTION OF RISK—TIME TO REMOVE DANGER.

When the promise of the master upon notice by the servant of defects in the machine operated by him is that the repair shall be made upon the happening of a certain event, the master assumes the risk until the event has happened, and a reasonable time thereafter.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 641-644; Dec. Dig. § 220.*]

4. MASTER AND SERVANT (§ 220*)—INJURY TO SERVANT—ASSUMPTION OF RISK—PROMISE TO REPAIR.

In an action by a servant for injuries caused by falling through a hole in a platform against a planing machine, where the testimony showed that the master had made a definite promise to repair the platform upon the completion of a particular job, and that he was still on that job when the accident happened, plaintiff did not assume the risk.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 641-644; Dec. Dig. § 220.*]

5. MASTER AND SERVANT (§ 235*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE—REPAIRS.

Where a person is specially employed by the master to make repairs, it is not the duty of a servant, injured through lack of repair, to make them.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 711, 713; Dec. Dig. § 235.*]

6. MASTER AND SERVANT (§ 274*)—INJURY TO SERVANT—EVIDENCE.

In an action for injuries by servant from falling through a hole in a platform against a planing machine, evidence for plaintiff, that the engine driving the machine was too small for its load, and at times it was necessary to shut down the machine, and that when the machine was again started the increased burden reduced the pressure of the steam, and therefore strict orders had been given not to shut down the machine, unless absolutely necessary, was competent for the purpose of explaining why plaintiff did not stop the machine before attempting its adjustment.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 945, 946; Dec. Dig. § 274.*]

7. TRIAL (§ 237*)—INSTRUCTIONS—WEIGHT OF EVIDENCE.

Where, in an action for personal injuries, the court specifically instructed that if the evidence was evenly balanced, the verdict must be for the defendant, it was not reversible error to instruct that if the evidence tending to prove a fact is of greater weight than all the evidence tending to disprove that fact, and if the evidence tending to prove the facts plaintiff is required to prove is of more weight than the evidence tending to disprove such facts, then the plaintiff has proven such facts by a preponderance of the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 548-551; Dec. Dig. § 237.*]

8. MASTER AND SERVANT (§ 298*)—INJURY TO SERVANT—INSTRUCTIONS.

An instruction requested by defendant, in an action for injuries by a servant in a factory, "that after an accident has occurred it may be easy to see what would have prevented it, but

that of itself does not prove that reasonable or ordinary care would have anticipated and guarded against it. For plaintiff to show what would have prevented the accident complained of is not proof of negligence on the part of the defendant"—has no application to a case where the accident arose from some admitted defect which had been called to defendant's attention.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1150-1154; Dec. Dig. § 293.*]

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Henry N. Diehl against Swett-Davenport Lumber Company. From a judgment for plaintiff, defendant appeals. Affirmed.

C. H. Wilson, for appellant. Bishop, Hoefler & Harwood, for respondent.

KERRIGAN, J. This is an action for damages for personal injuries sustained by plaintiff while in the employ of the defendant corporation in operating a planing machine at defendant's mill. The planing machine was provided with a wooden platform which was necessary for its proper operation. On the day that plaintiff began to operate the machine, one of the surface boards of the platform was broken by a timber falling upon it. This defect was known to the defendant's superintendent. For several weeks plaintiff operated the machine while it was in this condition, during which time he complained on a number of occasions to defendant's foreman regarding this defect. The foreman promised to remedy the same, and plaintiff's testimony is that because of such promise he remained in defendant's employ. On the day of the injury, and while the plaintiff was operating the machine, it became necessary for him to go upon the platform to adjust the gauge, and while so employed, the machine being in motion, his foot slipped into the hole in the platform, causing him to be thrown against the knives connected with the machine, and his right arm was cut off at the elbow. The jury brought in a verdict for \$5,000, upon which judgment was entered. This appeal is from the judgment and from an order denying a motion for a new trial.

The defendant asks for a reversal of the judgment and order upon several grounds, viz., that the trial court erred in the admission of evidence, that it improperly instructed the jury, and erroneously refused to give certain instructions requested by the defendant. It is also contended by defendant that the evidence does not sustain the verdict, and that the amount of the damages given is excessive. We will consider these questions in the order stated.

On the trial of the cause, plaintiff introduced evidence showing that at times during the operation of the machine at which

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the accident occurred it was necessary to shut it down, for the reason that the engine driving the same was too small for its load, and that when the machine was again started the increased burden thereby put upon the engine would reduce the pressure of the steam, and that, for this reason, strict orders had been given that the machine should not be shut down, unless absolutely necessary. Defendant contends that the court committed error in admitting this testimony, for the reason that it was immaterial, and also tended to confuse the jury and to make them believe that the defendant was negligent generally in the conduct of its business. The answer of the plaintiff to this contention is that the evidence in question was offered for the purpose of explaining why he did not stop the machine before attempting its adjustment, and we think it was competent for that purpose.

Defendant next contends that the court erred in giving to the jury that part of instruction numbered 9, to the effect that if the evidence tending to prove a fact "is of greater weight than all the evidence tending to disprove that fact," and also, if the evidence tending to prove the facts plaintiff is required to prove "is of more weight than the evidence tending to disprove such facts," then the plaintiff has proven such facts by a preponderance of evidence. Defendant argues that the words quoted in effect, inform the jury that if the plaintiff produces evidence to prove the facts necessary to confer upon him a right to recover against the defendant, then he shall recover, unless the weight of defendant's evidence in disproof thereof is of more or greater weight, and that such an instruction implies that plaintiff can recover without a preponderance of evidence. We think the instruction contains no such implication. Under this instruction the evidence, which must be of more or greater weight, was the plaintiff's, and not the defendant's. By it the jury was merely instructed that the plaintiff's evidence of the existence of certain facts must be of more weight than the defendant's evidence tending to disprove such facts; which was only another way of instructing that before a plaintiff is entitled to recover he must have produced a preponderance of evidence in his favor. If the evidence were equally balanced, plaintiff's evidence could not be of more weight than the defendant's. Besides this, in the very first portion of the instruction complained of, and repeatedly in other portions of the charge, the court directly stated that in order for the plaintiff to recover he must establish the facts of his case by a preponderance of evidence. Moreover, the court specifically charged the jury that if the evidence was equally balanced, the verdict must be for the defendant. The instruction

in question standing alone was not subject to the objection urged, and certainly was much less so when the instructions are read and considered as a whole.

Defendant also complains of the action of the court in refusing to give a portion of one of its requested instructions. The part rejected was as follows: "After an accident has occurred, it may be easy to see what would have prevented it; but that of itself does not prove that reasonable or ordinary care would have anticipated and guarded against it. For plaintiff to show what would have prevented the accident complained of is not proof of negligence on the part of the defendant." In place of this proposed instruction the court charged as follows: "The defendant in this case cannot be held guilty of negligence, if the evidence shows that he failed to provide against an accident that would not have been foreseen by a reasonably careful person, or against an accident such as reasonable prudence would not have anticipated the need of guarding against." We think the instruction given stated the law applicable to the case, and that the defendant under the evidence in this case was not entitled to the one offered by him. While that instruction might have been applicable in a case where some precaution against accident had been omitted, the advisability of which had been made apparent by the happening of the accident, it was hardly to the point in the case of an accident arising from some admitted defect which had been called to the attention of the party charged. Here the whole cause of action was based upon the defect in the platform, known to the defendant and its superintendent.

Error is also charged to have been committed by the trial court in refusing to charge the jury, in effect, that an employé may rely on the promise of his employer to repair defects existing in a machine which the employé is operating only for so long a time as is reasonably necessary to repair the defect. This proposition is involved in defendant's contention that the evidence is insufficient to justify the verdict, and in our opinion is the principal question involved in the case. Undoubtedly the general rule is that one who remains in the service of his employer after notice of a defect in the machine operated by him, which increases the danger to which he is exposed, assumes the increased risk. Where, however, the employé, electing not to abandon his employment, gives notice of such defect in the appliance used by him, and the employer promises to remedy the defect, the relationship of the parties undergoes a change. The promise of the employer that the danger will be removed, without naming a definite time, is in effect an agreement by him that he assumes the risk incident to the danger for a reasonable time. *Anderson v. Sero-*

plan, 147 Cal. 201, 81 Pac. 521. But when the promise is that the repair shall be made upon the happening of a certain event, the master assumes the risk until the event has happened and for a reasonable time thereafter. In this case the promise to repair was made on several occasions, and during a time that the defendant was engaged upon "rush" orders, which it had not completed at the time of the happening of the accident. But defendant contends that in this case the plaintiff was not justified in relying upon the promise to repair, for the reason that the promise was too indefinite, and for the further reason that the time between the promise and the injury was longer than was reasonably required to make the repairs. From all the testimony it appears that the promise to repair was definite, and referred to the completion of a specific job upon which the defendant was very busy, and that it remained busy upon this particular job from the time of the promise until the accident occurred. The case of *McFarlan Carriage Co. v. Potter*, 153 Ind. 107, 53 N. E. 465, cited in *Anderson v. Seroplan*, supra, is on all fours with the case at bar. In that case it appeared that the table of a machine was defective, and that plaintiff was injured by reason of the defect, operating independently of the saw, after a promise had been made to repair it as soon as the particular work then in hand was completed; and it was held that the employer was liable, although it was not shown how long it would take to finish that work; it appearing, however, that the injury occurred within the time the defect was promised to be remedied. It is unnecessary to review the authorities upon this point. A number are cited in *Anderson v. Seroplan*, supra, where the reason for the rule is clearly stated. Applying these principles to the present case, the instruction was properly refused, and there was sufficient evidence to justify the verdict.

Defendant also contends that the repairs to the platform did not require mechanical skill, and that therefore it was the plaintiff's duty to make them. This point is without merit. Plaintiff claimed that the necessary materials to make the repairs were not on hand, and that, besides, plaintiff was ordered by representatives of the defendant to continue the operation of the machine until the completion of the job. Moreover, he had no authority to make repairs, as there was a person specially employed for such purposes. *Anderson v. Seroplan*, supra.

It is also contended that the trial court erred in refusing to submit to the jury, at defendant's request, the special issue set forth in the thirty-fifth assignment of error. The issue proposed was fully covered by the third issue given by the court, and that being so, was properly refused.

There is no merit in the point that the amount of the verdict was excessive.

The judgment and order are affirmed.

We concur: COOPER, P. J.; HALL, J.

(14 Cal. A. 414)

CLARK v. TULARE LAKE DREDGING CO.
(Civ. 739.)

(Court of Appeal, Third District, California.
Oct. 31, 1910. Rehearing Denied by
Supreme Court Dec. 27, 1910.)

1. APPEAL AND ERROR (§ 999*)—REVIEW—WEIGHT OF EVIDENCE—JURY CASE.

A verdict will not be questioned on appeal, if there be nothing to show that it has been planted on evidence inherently improbable.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3912-3924; Dec. Dig. § 999.*]

2. MASTER AND SERVANT (§ 265*)—INJURY TO SERVANT—BURDEN OF PROOF—CONTRIBUTORY NEGLIGENCE.

In an action for the death of a boy 16½ years of age, employed as a leverman on a dredger, the burden was on defendant to show by a preponderance of the evidence that his contributory negligence was the proximate cause of the accident.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 877-908; Dec. Dig. § 265.*]

3. MASTER AND SERVANT (§§ 101, 102*)—INJURY TO SERVANT—YOUTHFUL EMPLOYEE—WARNING.

Where a boy 16½ years of age, inexperienced with machinery, was employed as a leverman on a dredgeboat, it was negligence to put him in charge of the machinery, even if he was warned that this unusual position was hazardous.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 180-192; Dec. Dig. §§ 101, 102.*]

4. MASTER AND SERVANT (§ 265*)—INJURY TO SERVANT—BURDEN OF PROOF—WARNING.

In an action for the death of a youthful and an inexperienced employé in charge of dangerous machinery, the burden was on defendant to show that those in authority warned deceased of the danger in such a manner that he fully appreciated the danger.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 877-908; Dec. Dig. § 265.*]

5. MASTER AND SERVANT (§ 286*)—INJURIES TO SERVANT—QUESTION FOR JURY.

In an action for the death of an inexperienced servant, injured while in charge of dangerous machinery, it was for the jury to say whether deceased was warned of the danger in a manner to impress on him a full appreciation of the hazard.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1010-1050; Dec. Dig. § 286.*]

6. APPEAL AND ERROR (§ 994*)—REVIEW—WEIGHT OF EVIDENCE—CREDIBILITY OF WITNESSES.

Under Code Civ. Proc. § 1847, declaring that the jury are the exclusive judges of the credibility of the witnesses, section 2061 providing that they are judges of the effect and value of evidence, and section 2061, subd. 2, that they are not bound to decide in conformity with the declarations of any number of witnesses, which do not produce conviction in their minds, against a less number, a verdict that

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

a warning of danger to a youthful and inexperienced servant was not given, or that if given it was insufficient, cannot be reviewed, though no one directly contradicted the testimony of defendant's witnesses that they had given deceased such warning.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3901-3906; Dec. Dig. § 994.*]

7. MASTER AND SERVANT (§ 276*)—INJURY TO SERVANT—SUFFICIENCY OF EVIDENCE.

In an action for death of a servant while in charge of dangerous machinery, evidence held to support a verdict for plaintiff.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 276.*]

8. DEATH (§ 99*)—DAMAGES—LOSS OF MINOR'S SERVICES.

In an action by a mother for the negligent death of her son, 16½ years of age, it appeared that deceased at the time of his death was contributing to plaintiff's support; that his services were reasonably worth the sum of \$85 per month, though he was receiving only \$40 per month; that he was intelligent and apt at learning. Held, that the verdict for \$5,000 was not excessive.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 125-130; Dec. Dig. § 90.*]

9. DEATH (§ 88*)—DAMAGES—LOSS OF SOCIETY.

In an action by a mother for the death of her son, 16½ years of age, the jury may consider as an element affecting the pecuniary value of the services of deceased to plaintiff the fact that plaintiff has been deprived of the comfort, society, and protection of her son.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 116; Dec. Dig. § 88.*]

10. DEATH (§ 87*)—DAMAGES—MEASURE—LOSS OF SERVICES.

In an action by a mother for the death of her minor son, plaintiff can recover an amount which will justly compensate her for the probable value of the services of deceased until he had reached his majority, taking into consideration the cost of his support and maintenance from the time of death until such majority.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 115; Dec. Dig. § 87.*]

11. DEATH (§ 87*)—DAMAGES—SERVICES OF MINOR.

In an action for the death of plaintiff's minor son, plaintiff may recover for the probable value of the services of deceased until majority, regardless of the fact that at the time of his death he was intending to return to school after earning sufficient money therefor.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 115; Dec. Dig. § 87.*]

12. APPEAL AND ERROR (§ 1048*)—HARMLESS ERROR—EXAMINATION OF WITNESS.

Where, in an action for the death of a servant, a witness was asked if he remembered a conversation with deceased, and denied having had such conversation, even if such question called for improper testimony, no harm resulted therefrom.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4140-4160; Dec. Dig. § 1048.*]

13. EVIDENCE (§ 219*)—ADMISSIBILITY—ATTEMPT TO SUPPRESS TESTIMONY.

In an action for the death of a servant while employed on defendant's dredger, evidence was admissible that a machinist employed by plaintiff with a view of becoming a witness, made an effort to go aboard defendant's dredger to inspect the machinery, to enable him to describe the same, and that those in charge of

the dredger refused to allow inspection, as tending to establish an effort to suppress testimony.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 762-770; Dec. Dig. § 219.*]

14. TRIAL (§ 28*)—ORDER FOR INSPECTION OF PREMISES.

Code Civ. Proc. § 128, subd. 5, clothes courts with control over every person connected with a judicial proceeding in so far as such proceeding is concerned. Section 610 authorizes the court to order an inspection of machinery by the jury. Held that, on trial of an action for the death of a servant caused by dangerous machinery, the court was authorized to make an order that a witness for plaintiff be allowed to inspect the machinery.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 77-79; Dec. Dig. § 28.*]

15. MASTER AND SERVANT (§ 153*)—INJURY TO SERVANT—YOUTH AND INEXPERIENCE.

Where a master employs a servant to do dangerous work, who, from youth or inexperience, may fail to appreciate the danger surrounding him, it is a breach of duty for the master to expose such servant, even with his consent, to such danger, without giving him such full instructions as to enable him to fully comprehend them, and to do the work safely, with proper care on the servant's part.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 314-317; Dec. Dig. § 153.*]

Appeal from Superior Court, Kings County; John G. Covert, Judge.

Action by Myra M. Clark against the Tulare Lake Dredging Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Dixon L. Phillips, for appellant. Frank H. Short and H. P. Brown, for respondent.

HART, J. This is an action for damages for the death of a minor son of plaintiff alleged to have been caused through the negligence of the defendant, a corporation. The cause was tried by jury. The plaintiff, in her complaint, claimed damages in the sum of \$10,000. The jury, however, returned a verdict for the sum of \$5,000, for which amount the court entered judgment in favor of plaintiff. This appeal is from the judgment so entered and from the order denying defendant a new trial.

The general points made by appellant are that the evidence does not support the verdict; that the court erred, to the prejudice of defendant, in the admission and rejection of certain testimony, and that the court erred, to defendant's damage, in giving and refusing to give certain instructions, and by the modification of others which were requested by defendant. The specific contention with respect to the specification of the insufficiency of the evidence to uphold the verdict is that the proofs disclose that the proximate cause of the accident by which the deceased received the injuries culminating in his death was his own negligence, and upon this ground a motion for a nonsuit was, upon the close of the case for plaintiff, presented and urged by defendant, said motion having been denied

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

by the court. A similar motion on the same ground was made and denied on the close of the case by both sides. The consideration of this point will, of course, necessitate a careful scrutiny of the testimony, particularly so in view of the fact that a coemployé of deceased was the only other person present—one John Burnett—when the accident occurred, and was, therefore, the only living eyewitness who was or could be produced at the trial.

It appears that the deceased, Ray Clark, at the time of his death, was a minor of the age of 16 years and 6 months, approximately. He had been for a few weeks prior to his death an employé of defendant on its dredger, which was being operated in Tulare Lake, in Kings county. On the 1st day of May, 1907, while thus engaged, according to the averments of the complaint and the undisputed evidence, his foot "was so caught and entangled in a large shaft (connected with said dredger) and the machinery running and operated thereby that his foot and leg were crushed, broken, and mangled," and from the effects of the injuries so received he died on the 2d day of May, 1907. From the evidence it further appears that the deceased was one of three children of the plaintiff, from whom the father of said children had been separated and had lived separate and apart for some eight years prior to the trial of this action, and had during that period contributed nothing toward the support of his family. At the time of the employment of the deceased by the defendant and for some time prior thereto, the plaintiff resided with her children and her aged mother near Merced, although the deceased, at the time he accepted, through his mother, employment with defendant, was and had been for some time attending school in the city of Fresno. The accident causing the death of the deceased happened at about the hour of 2 o'clock in the morning, the deceased and said Burnett, the coemployé to whom we have referred, being at that time on the night "shift."

As stated, the deceased was, through plaintiff, employed by the defendant in the month of April, 1907. As to the circumstances of said employment, the plaintiff testified: "Mr. Lewis (president of defendant) said that he wanted him for a leverman. I asked him if he thought he could do it. He had already seen the boy, and he said yes, he thought he could do it nicely. That he seemed to be a fine looking boy, and he was well pleased with him, and that he would teach him how to do it or have him taught. And that it was a perfectly safe place up in the lever room, and that he was going to put him to work in the lever room. He asked me if the boy—or rather it came up in the conversation—if the boy knew anything about machinery. I told Mr. Lewis no, he did not, and I wanted him to be put in there where there was no danger. Mr. Lewis said there was no danger. That he liked the appearance of the boy and

would teach him. Ray asked me about going to work for Mr. Lewis, I told him yes. He wanted to go and earn some money to finish up his schooling and help me. I told Mr. Lewis that, and he told me that he would take good care of Ray and that his wife would look out for him. I told him the boy hadn't been away from home much."

The witness C. E. Traves gave the details of a conversation with defendant's superintendent, had prior to the time at which negotiations for the employment of deceased were carried on with plaintiff, in which the proposed employment of the boy and the character of the duties which it was proposed that he should perform on the dredger were discussed. The witness testified: "I am 52 years old. My occupation or business is mechanical engineer and machinist. Have had about 25 years' practical experience in mechanical engineering. I know Mr. Lewis, I know Mrs. Clark, and I know the boy that was killed. Mr. Lewis came to my place of business at Fresno and wanted to get a man. I told him I didn't know of any, but I knew a good boy. I asked him what he wanted him for, and he said he wanted him to handle levers, and I said to handle levers on what, and he said on the dredger—down to our dredger. I said this boy has no experience, but he is willing to learn, and he is about the only support of his mother. And he said we don't want experienced hands because the captain would rather have the men and break them in, as he gets better men than we do with some man that is already broke in. So I brought the boy down, or sent the boy down, rather. I told Mr. Lewis that the little boy did not know anything about machinery; that he was inexperienced, but that he wanted to learn, and was ambitious and wanted to learn. Mr. Lewis replied that he wanted a leverman. Mr. Lewis said there was no danger whatever above in the lever room and that it would require but very little skill. He said it was away from the machinery and above, the lever room was."

Burnett, the coemployé of and on duty with deceased when the accident happened, described the dredger as follows: "Its hull is probably 50 or 60 feet long and about 20 or 25 feet wide. There is a bulk heading around it and an open space in the front part, and the engine is on the inside of that, and the shaft just in front of the engine. Forward and on the outside of the bulk heading is the turntable and boom. Above the roof in the forepart is the lever house and cables from the drums running through sheaves at the end of the boom and make-fast to the clam-shell bucket. * * * There are three levers in that lever room, but only two operated, and there is a lever that is operated by the boat. There is no other machinery in this lever room. These levers operated the machinery that is down below; that is, it operates the friction where the drums are, operates the drum that rolls and

reels up the cable to hoist the bucket and to swing the boom around. * * * The levers operate certain machinery that is inside the inclosure, and the machinery consists of drums and spools. * * * In describing to the jury the spools and drums that are operated by these levers I will do so in relation to the location of the engine. The engine is located on the inside in the central part. The engine transmits the power to the cogwheels. I am not much of a machinist and it is pretty hard for me to remember. Just in the fore part of the engine there is a wheel—a cogwheel—as near as I can remember, and connected with that is a larger cogwheel directly in front of it.” Further description of the machinery and its operation will appear from this witness’ testimony respecting the circumstances immediately preceding and attending the accident, from which it will further be observed that as to the precise manner in which the accident happened Burnett was unable to furnish any particular information—that is to say, that the witness could not tell exactly how the foot of the deceased was caught in the spider wheel. This paucity of information may be accounted for in the fact that, when the accident occurred, both deceased and Burnett were engaged in attempting to readjust or restore to its proper place a steel cable which had left its groove on the drum and doubtless their minds and attention were entirely absorbed by that performance. We will, however, present the story of the accident, as far as he was able to describe the circumstances thereof, as related by Burnett himself on the witness stand. After giving his age as 25 years and stating that he worked on the dredger in the capacity of a leverman before and at the time Ray Clark was killed, and declaring that there was very remote danger involved in the operation of the levers, this witness testified, in part, as follows:

“At the time Ray was killed, we were trying to clear a ‘fouled’ cable. It is a steel cable on a drum, and it should run in its proper groove. Each turn of the cable should run alongside of the other preceding turn. But, instead of that, it got outside in some manner of itself and that turn got twisted in some way, became fouled—that is what I mean by being ‘fouled.’ * * * That spool goes around and takes up the cable and this spool by revolving it became fouled, the cable became crossed over and was piling up. * * * In the first place there was a noise, a sort of knocking noise that seemed to come from the end of the boom, and I believe I called Ray, to stand on the fore part of the dredger to see if he could locate what was wrong. I believe that he went aft, I couldn’t say, but I believe when I came down he said that the cable was fouled on the drum, and we went I believe to try to clear it. * * * I don’t remember what we said. I know that we decided that

we would try to clear the cable; don’t remember what words we said, though. * * * Well, we got bars; something to pry the cable over to its proper place. * * * And part of the time I tried to get the slack of the cable in the fore part. I tried to get the slack pulled in of the cable while Ray was trying to clear it with the bars on the drum. And I believe he stepped upon this block (which was located within a few inches of the wheel in which deceased’s foot was caught) and in some manner got his foot in the spider wheel that was revolving just back of him, and was taken over and crushed. * * * The wheel is located directly in front of the engine. * * * It is called a spider wheel; I suppose it is made of cast iron, but in the center the standards or spokes are wider than at the top. I think the diameter is about two and a half feet and it is connected with what we call a friction which jams into the other wheel—it is a friction wheel, but there was no immediate connection between the wheels and the lever. * * * Q. Tell us the dimensions of that wheel or any of those wheels around there, if you can. Ans. Well, I have down here two feet seven and a half inches, the diameter of the wheel. * * * It might not be exact measurement, but quite close, I believe. I took this measurement at the time the wheel was actually revolving. * * * The length of that block that Ray was standing on, the place where he was standing, is 18 inches. That is in the place for him to stand—where he was standing. That is the entire length of the block—that is, from the bearing to the end of the block where he was standing was 18 inches. The block is located between the drum and the wheel, that is what I call the spider wheel, which is about two feet seven and a half inches in diameter. * * * The distance from the block to that wheel in the center is from an inch and a half to three and a half inches. * * * This block was lying, horizontally, alongside of the wheel; that is, fore and aft. * * * The wheel is attached to a shaft, * * * and revolves the long way of the dredger. * * * The block that I have mentioned was also lying the long way of the dredger. * * * The distance from the block to the center of the wheel is an inch and a half—that is, from the center of the wheel—the parts, the ends or rim of the wheel, it would be three and a half inches. * * * At the time Ray was busy unfouling this cable I was bringing down the slack of the cable; that is, pulling from forward—aft toward the drum. I know that I was just about in front of the drum. I was probably two or three feet, maybe four feet, away from him, I was moving around at the time. He was facing the side of the dredger and so was I. I was looking practically in the same direction as he was and pulling on this cable for

this slack so he could pry off the cable and make it move properly. We did not succeed in clearing the cable because the accident occurred. * * * When Ray was caught in this wheel he cried out and as soon as I turned around to my right I saw him going over the wheel, and I jumped around and stopped the lever, and pulled him out and called for help. The time that elapsed between the time that I first heard his cry for help and the time I succeeded in stopping this wheel from rotating was just a few seconds, just as quick as I could get to the engine to stop it; just as soon as the engine stopped the wheel stopped. The engine probably made one or two revolutions after shutting off the distillate, then stopped. This engine makes about 20 revolutions a minute. When I got back to where Ray was I pulled him clear of the wheel. There was no one else there when I got there. His legs were underneath the wheel, and he was lying flat on his back; he was lying back on the deck on his back, and his legs were underneath this wheel—he was lying there. The wheel I think is about three or four inches off of the deck as near as I can remember; that is the outer rim of the wheel is about four inches above the floor of the deck. * * * I think Ray, when endeavoring to release the cable, was standing over here in the fore part of that block. I believe that he had both feet on the fore part of it, but he would be moving around half of the time and maybe at some time he was standing with both or one foot across there, but I am not certain, as I was looking the other way; but at times he was standing with one foot on one side and then shifted one to the other, shifting his position. I don't remember seeing him standing that way. We were moving around, and I was looking the other way at the time." Continuing, Burnett declared that he was not in charge of the machinery of the dredger on the occasion of the fatal accident; that his duties at that time were to operate the levers in the lever room, and that Ray Clark was, on said occasion, the "deck hand," and as such had charge of the machinery. He testified that it was the duty of the deceased to "oil the machinery and watch and see that nothing went wrong—nothing got heated down below there. * * * Ray also run the engine and supervised the machinery and was doing this at that time." He stated that the dredger was lighted fairly well, although he admitted that, being oil lamps, they did not produce a particularly brilliant light. A hand lantern was necessary to be used about the dredger after dark. He admitted that, when the machinery did not work as it should, he, "being older than Ray, assumed the lead. * * * Ray was running the engine on the dredger on that watch, of course. That watch consists of myself and Ray Clark, a deck hand, just two of us, and the watch was

from 12 at night to 6 in the morning—six hours work. * * * This was not the first dredger of that kind that I ever worked on. Previous to working on this dredger, I worked on other dredges near Stockton, where they built dredgers, and then I worked as a fireman on the dredger."

On cross-examination Burnett said that "there was plenty of room on the floor of the deck for him to stand there and do this prying with the bar on this cable," the inference from this statement being that deceased would then have been in a position in which his foot could not have come in contact with the spider wheel. The block on which deceased stood was some 18 inches higher than the deck floor. Burnett had no distinct recollection whether the wheel in which deceased's foot was caught had guards around it or not.

The witness Traves, who is a practical machinist, visited and inspected the dredger during the trial, and, after describing the machinery by which the dredger is operated and the manner of its operation, testified that the wheel in which the deceased's foot was caught had no guards around it. "I examined the machinery carefully this morning," he continued, "and know how it is assembled and put together, and I know the usual practice of guarding and protecting such machinery as I saw there." He further testified that there was no other way in which the deceased could have done the work which it was necessary for him to do to replace the cable in its proper groove than in the very manner in which he did attempt it. He said that he might have gone "clear around the dredger and come back on the other side," but that, had he done so, "he would have to step up on the same place and do the same work on this side. He couldn't do that very well on account of that large gear. There is a number of other gears going there; he couldn't get in there in the first place."

The plaintiff testified, in rebuttal, that, after the death of her son, she held a conversation with Lewis, president of defendant, relative to her son and the manner of his death. She said that Lewis "said he was sorry that the accident occurred, but that wouldn't bring back my boy. He said that he did not intend to keep him there; that the boy wasn't capable of that work, and that he had a man engaged to take that place, and that man had been allowed to go to a picnic, I believe at Laton. He said that if the man had been there that day you would have your boy. It seemed to be fate. I remember his using that particular word; that it seemed to be fate in the way I lost the boy. That this man wanted to go to that particular picnic and he let him go. That he didn't intend to keep Ray at all. He did not consider him competent to do that work, and was not intending to keep him there." In this connec-

tion, it may at this time pertinently be stated that Lewis admitted having in substance said to Mrs. Clark, on the occasion referred to by her, that "he had another man engaged to do the work that Ray was doing the day he met with the accident, but that this man wanted to attend a picnic at Laton, and that if he had not gone down to the picnic her boy would have been living yet."

For the defense, Lewis, president of the corporation defendant, testified, in part, as follows: "A day or two before I saw Ray at Corcoran, I saw Mr. Traves, the witness in this case, at a shop in Fresno. * * * I asked Mr. Traves if he knew of any experienced leverman and he said no. I told him I could use some gas engine men and that they could have an opportunity to learn and that Mr. Huntington (general superintendent of the dredger) had told me I could get better levermen by learning them aboard the machine than by shipping them down from the city. * * * Mr. Traves said he did know some young men and he said one of them had been in the shop that morning. He said he didn't know but what he would see him again probably and send him down. I told him all right, send him down. I told him that we paid \$40 a month and board to beginners—we paid \$60 a month at that time to experienced levermen; that a man qualifying himself as leverman would get a raise in pay. * * * After I saw Ray at Corcoran that I have just spoken about, I saw Mr. Traves that same day in Fresno. I think I went to his shop. He was doing some work for us. At all events he brought Mrs. Clark and introduced her to me in the afternoon at the Santa Fé depot. * * * I liked the looks of the boy, and thought he would make a good subject to make a leverman of, and have an opportunity to learn the levers, and if he got proficient in that he could get leverman's wages, which was \$60 per month. Mr. Huntington was superintendent of construction and had control of things generally under me. Ray was a well set-up youngster; he told me he was about a certain age and he looked it. He was a bright boy, intelligent looking, and his movements were quick, I think he was about 5 feet 4 or 5 inches in height and might have weighed 140 pounds. I thought I would give him an opportunity to learn the work and when Ray went to the dredger to work they put him to running the gasoline engine on the dredger. I did not direct his work on the dredger at all. I did not give any instructions to the men about him. The boy was on watch 12 hours a day. The rate of wages that the defendant was paying were allowing the deceased for his work on the dredger during the time that he worked there was \$40 per month."

C. T. Huntington, general superintendent of the dredger, stated that his business was that of the assembling of machinery for dredger work, and the construction "and

placing in operation dredgers and particularly what is called clam-shell dredgers. * * * In this state I have been working on dredgers of this kind for about 12 years in all capacities, from fireman to captain, and during the last 4 years I have been superintendent of the construction and of the assembling of the machinery itself. * * * When Ray Clark came there to go to work the most of the machinery was to be assembled and this shaft that is spoken of had not been assembled. Ray was there and working from the 10th of April, 1907, and he was helping the crew assemble the machinery. * * * Before I began to try out the machinery to test it, to see whether it would do the dredging, I instructed each man individually to be very careful about getting around any moving portion of the machinery, explaining to him that a gas engine couldn't be stopped instantly, and to get caught in the machinery meant a serious accident. * * * When we went or started to operate the dredger to see whether it would do the work Ray was doing what we call deck work. That is to say, his duties consisted of looking after the gas engine and machinery, and oiling the machinery at regular intervals, and keeping general supervision of things, and to see that everything ran smoothly on deck. I gave instructions to the deck hands and to Ray Clark that in the event that anything should happen or go wrong or serious trouble, they were to call me. * * * I had occasion to say something to Ray Clark about going in and about that machinery. I spoke to him as I spoke to all the rest, cautioning him. * * * After I had given these instructions to Ray and all the others in the first instance, I did not say anything further to Ray about going about the machinery." On cross-examination Huntington said: "If I said on my direct examination that I showed Ray how to start the gas engine, I didn't mean it. I don't remember having said that and if I did say it, I am mistaken. * * * It is dangerous to go near this revolving wheel which is left uncovered; and it is not usual to guard such wheel and it is entirely unnecessary."

T. Wiley, who testified that, after the machinery was assembled and placed on the dredger, "the work that was assigned to me and my duties were nothing in particular and everything in general," said that, "as it was brought to my notice that Ray Clark was inclined to be careless about dangerous machinery, I told him personally, over and above collectively to the crew, that it was dangerous—certain parts of it were dangerous—and especially these wheels that were turning in close proximity to those pedestals. I mean by these wheels the spider wheel, because they were shown to me very distinctly and pointed out, and I carried out my orders to that effect." By cross-examination of this witness, it developed that he had ceased work for defendant, and that at

about the time preparation was being made for the trial of this action he was stopping in Los Angeles. He said, referring to Lewis, president of defendant, "I wrote him about two months ago that I would like to go down on the Colorado river and he wrote me, saying he wanted me to make an affidavit before I left. I wrote him that I would rather take charge of the dredger, so I got a telegram from him about two weeks ago to come and take charge. We started up the dredger just about a week before this suit commenced. I am at present captain of the ship and have the supervision of the whole matter and at nighttime I am not disturbed for minor things that happen, and I am not called when the cable is foul as it was when Ray was killed. *If the cable is fouled those in charge have to disentangle it.* (Italics ours.) * * * I have had about 25 years' experience in running machinery."

Testimony offered by both sides, was received by the court as to the height and weight of deceased. Lewis said that, in his opinion, the deceased was about 5 feet 4 or 5 inches in height and "might have weighed 140 pounds." In this connection, he declared that Ray was a lad of intelligence and appeared from his talk to be familiar in a general way with machinery. Willey expressed the opinion that deceased was about 5 feet 6 or 7 inches and that he would weigh about 150 pounds; that "he was well built, a stout young man." Plaintiff testified that she knew exactly the height and weight of her deceased son at the time of his death, and said that "he was just a fraction of an inch shorter than I am," and that he weighed 138 pounds, and that "he was not fleshy." Francis Cunningham testified: "I measured plaintiff's height this forenoon. She is exactly 5 feet 2¾ inches in height. And I consider that a correct measurement, as I used the same measure as I use in registration."

We have now presented, in substance, a fair statement of the evidence from which the jury reached the conclusion, under the court's instructions containing the law pertinent to the case, that the proximate cause of the death of plaintiff's minor son was the culpable negligence of the defendant. But, as stated, the defendant vigorously protests that the evidence clearly discloses gross negligence upon the part of the deceased, and that but for such negligence he would not have met with the accident which cost him his life. Upon most all the salient facts in the case there is a conflict in the evidence, but it is, of course, the duty of this court to treat all the facts brought out by the evidence which are necessary to support the verdict as having been found to be true by the jury, notwithstanding the fact that there may be evidence in flat contradiction of such facts. Obviously, under our system, the jury are the exclusive judges of the weight of all evidence and the credibility of all witnesses, and it is, as has often been repeated,

peculiarly within their right and province, when considering the evidence, to give to it whatever weight it may in their deliberate judgment be entitled to, or, if it be their judgment that it is entitled to no weight in the determination of the ultimate issue disregard it altogether. And, having done this in a given case, their conclusion cannot be questioned by an appellate court, if there be nothing to show that their verdict has been planted upon evidence which is, on its face, or inherently, improbable and unbelievable. While a verdict returned for defendant on the evidence before us would undoubtedly stand upon a firm foundation, viewed from the standpoint of an appellate court, we, on the other hand, doubt not that a careful examination of the record by the light of the constitutional provision limiting the power of appellate tribunals in this state to the consideration of questions of law only, can lead to no other conclusion than that the evidence displayed before us is sufficient to render the conclusion of the jury immune from successful attack here.

We have before us a case where a lad of tender years, of immature judgment, and without previous experience in dealing with and in handling complicated and dangerous machinery, at an hour of the night when a boy of his age should be conserving by sleep his developing physical power, is put in entire charge, according to the only witness to any of the circumstances attending the accident, of the most dangerous part of the machine or the dredger on which he was employed, after having been expressly engaged to perform other service—that of a leverman—the performance of which was attended by very remote, if any danger, according to Burnett. He had then had, let it be noted, only three weeks' experience of any character on a clam-shell dredger.

Lewis, president of the defendant, himself testified that he employed the boy as a leverman, and the plaintiff testified that Lewis promised her, when the contract of employment was made, to assign the deceased to duties on the dredger in the execution of which he would be free from danger of accidents. Lewis further admitted, at least in effect, that the day the lad lost his life he was engaged in performing the duties of another employé, who had absented himself from the dredger for the purpose of attending a picnic. He said to plaintiff, after the tragic death of her son, that had said other employé remained on duty that day the deceased "would have been living yet." The irresistible inference from this statement is, it seems to us, that the deceased had been assigned to duties on the day of the accident which he was not only not employed to perform, but which he was not in truth qualified to perform. Burnett, who, though called as a witness for the plaintiff, apparently displayed little disposition to squarely and unhesitatingly detail the circumstances of the

accident, said that the deceased was in charge of the deck and the machinery on that night. It is true that this witness stated that, when the cable became disarranged, he and deceased "mutually decided" to attempt restoring it to its proper groove on the drum, the manifest purpose of such statement being to convey the impression to the jury that deceased voluntarily and without suggestion by or directions from the witness, took the part that he (deceased) did in assisting in an attempt to restore the cable to its proper place. But, assuming that the deceased acted in the matter largely, if not entirely, upon his own initiative and volition, it still remained for the jury to say, from a consideration of all the evidence, whether he acted negligently or without due care in the performance of a duty which, it clearly appears, from the fact of having been taken from the service for which he was expressly employed and placed in charge of that part of the dredger where the greatest degree of danger existed, was forced upon him by those in authority.

It must be borne in mind that the burden was upon the defendant to establish by a preponderance of the evidence its defense of contributory negligence by deceased, and that such negligence was the proximate cause of the accident and its direful consequences. There is no direct evidence showing negligence on the part of the deceased. The precise manner in which he received the injuries which produced his death is, as before stated, unknown, so far as this record is concerned. On the other hand, there are circumstances from which the jury could with good reason infer negligence on the part of the defendant, and that the accident would not have occurred and the boy's life forfeited but for such negligence. To begin with, the act of the defendant in putting the deceased in charge of the machinery under the circumstances was negligence, even if it be true that the boy was warned that this, to him, unusual position involved a hazardous undertaking. Then there is the testimony of Burnett to the effect that the lights on the dredger at the time of the accident were not "particularly bright," and the testimony of Traves that the spider wheel in which the deceased's foot was caught was without the guards usually placed about such wheels.

The burden was upon the defendant to show that those in authority over the dredger not only warned the boy of the danger attendant upon the discharge of the duties of a "deck hand" having charge of the principal machinery of the dredger, but it was also incumbent upon it to show that, if such warning were given, it was so given as that the deceased fully appreciated and realized the danger by which he was thus surrounded. And, at last, it was for the jury to say, from a review and consideration of the whole record, whether the deceased was warned by his superiors of the danger or risk to which

he was negligently subjected, and, if so, whether such warning was such as to properly impress upon his judgment a full appreciation of the hazard.

It is very clear, from the verdict, that the jury concluded either that such warning, if given, was not sufficiently explicit and specific to influence the judgment of the deceased in any perceptible degree, or, in other words, not so comprehended by him that he fully realized the danger surrounding him, or that deceased was not cautioned at all by his superiors. It is no answer to say that, no one having been produced to directly contradict the testimony of Huntington and Wiley with regard to cautioning deceased about the danger of the machinery, the jury were not authorized to find that either no caution or insufficient caution was given. How can this court determine how the testimony of Huntington and Wiley on this point impressed the jury? It may be that the very manner of giving their testimony was itself, in the judgment of the jury, a complete contradiction of the truth of their statements. It may be (and who can gainsay their right to have done so?) that the jury felt justified in disregarding in toto the testimony of these witnesses. And, if they did, may an appeal court declare that they were wrong in so doing and in effect say to the jury: "You misinterpreted the manner in which these witnesses testified. You should have given their statements full weight and credit, and, as no other testimony was brought before you directly contradicting them, you should have found that the deceased was sufficiently warned as to the great danger of the machinery to have fully put him on his guard"? And so would this court be compelled to hold if we were to say that the testimony of Huntington and Wiley should have been, in the absence of direct contradictory proof, accepted by the jury as conclusive upon this point. And thus would this court clearly invade the province of the jury by passing upon the weight of testimony and the credibility of witnesses. Our Code explicitly declares that the jury are the exclusive judges of the credibility of witnesses (section 1847, Code Civ. Proc.); that they are the judges of the effect and value of evidence addressed to them, except when it is declared to be conclusive (section 2061, Code Civ. Proc.); and that they "are not bound to decide in conformity with the declarations of any number of witnesses, which do not produce conviction in their minds, against a less number or against a presumption or other evidence satisfying their minds." Code Civ. Proc. § 2061, subd. 2. No one has ever doubted the right of a judge or jury to believe one witness as against another where they have testified in direct opposition to each other, and the power and right of the judge or jury, in dealing with questions of fact, is no different and no less where the witnesses all testify one way, and when a verdict has been returned in op-

position to the testimony of all the witnesses, such verdict, it seems clear to us, must be accepted by appellate courts in this state as a rejection of such testimony on the ground that it is unworthy of belief and weight, unless from the face of the record itself it can be said that the jury's action is inherently unjustifiable. And interference with a verdict by an appeal court because it appears on the face of the record on appeal to be opposed to the testimony of all the witnesses cannot be, logically, any less an invasion of the province of the jury than if there appeared to be a direct substantial conflict in the evidence. It often happens, it may be said as a matter of common knowledge, that the most complete and conclusive contradiction of the truth of a witness' testimony is his own manner on the witness stand when giving it. And it is the very fact that juries and trial judges have the peculiar advantage of determining whether witnesses have contradicted themselves, not in terms, but by their manner of testifying, that has given rise to the familiar rule that appellate courts will not and cannot set aside verdicts of juries or findings of a trial court based upon evidence in which there appears to exist a substantial conflict. It is the duty of this court to conclude that the jury either attached no weight to the testimony of Huntington and Wiley to the effect that they cautioned the deceased, or that, although they might have cautioned him, the deceased was not thus made to clearly realize and appreciate the great danger lurking in the powerful complicated machinery of which he was negligently put in charge.

It was, furthermore, for the jury to determine, from all the facts and circumstances, whether the deceased, in taking the position near the spider wheel for the purpose of prying or attempting to pry the cable back to its groove, acted under the directions of Burnett. The latter, it is true, testified, as we have seen, that he gave deceased no directions, but that they "mutually decided" to act in a certain way; yet, Burnett was older than deceased by about 10 years, and had had some previous experience with dredger machinery, having been employed on other dredgers. This fact, we doubt not, was known to the deceased, who perhaps recognized the former's superior knowledge of such machinery and of how to handle and replace parts which had become disarranged. Burnett admitted that "in these cases (referring to occasions when the machinery became disarranged) being older than Ray, I assumed the lead." From all the circumstances it is not difficult to understand how the jury could have justly come to the conclusion that Burnett "assumed the lead" on the occasion of the accident, and directed the course and movements of deceased in the attempt to rectify the difficulty with the cable. But no useful purpose can be subserved by pursuing this question further. It

must suffice to say that we have examined the testimony with extreme care, and have thus been led to the discovery of no just reason for interfering with the verdict upon the proposition that there is insufficient evidence to justify it.

Nor can we say that the verdict is excessive or beyond what the evidence justifies as fair and just compensatory relief. The boy was, at the time of his unfortunate death, lacking in his majority by $4\frac{1}{2}$ years. Plaintiff testified that he had contributed, and was, when killed, contributing to her support. She was entitled to this during the remaining $4\frac{1}{2}$ years of his minority. The earnings of the lad during these remaining years of minority cannot, as is the assumption, justly be computed alone upon the wages he was receiving at the time of his death. One of the witnesses, Williams, an engineer by occupation, testified that the services which young Clark was performing when killed were reasonably worth the sum of \$85 per month. Besides, it is proper to assume that had he lived and continued in the employment for which he was originally engaged—that of leverman—he would, as he progressed in skill in that capacity, be entitled to an increase in salary from time to time until he would have received the highest rate paid for such services. He was, according to the witnesses, intelligent and apt at learning, and the jury were the sole judges of what, from all the evidence, his probable earnings would be during the remainder of his minority had he lived. Moreover, the jury were authorized, as the court properly instructed them, to consider and take into account, as an element affecting the pecuniary value of the service of deceased to the plaintiff, the fact that plaintiff has, by his death, been deprived of the comfort, society and protection of her son. *Beeson v. Green Mountain, etc., Co.*, 57 Cal. 38; *Lange v. Schoettler*, 115 Cal. 388, 47 Pac. 139; *Harrison v. Sutter Street R. R. Co.*, 116 Cal. 156, 47 Pac. 1019; *Fox v. Oakland Con. St. Ry.*, 118 Cal. 67, 50 Pac. 25, 62 Am. St. Rep. 216; *Dyas v. Southern Pacific Co.*, 140 Cal. 308, 73 Pac. 972. And, obviously, this element of loss of society, comfort and protection of the son to be reckoned in determining the pecuniary value of the service of the deceased to his mother is difficult to measure in mere dollars and cents, and manifestly must, with the whole question of damages, be left to the good sense and sound discretion of the jury to be exercised in the light of all the circumstances of the case. As is said by the authors of *Graham & Waterman on New Trials*, p. 451, "in cases of this class there is no scale by which the damages are to be graduated with certainty. They admit of no other test than the intelligence of a jury, governed by a sense of justice. It is, indeed, one of the principal causes in which the trial by jury has originated.

* * * The law that confers on them this

power and exacts of them the performance of this solemn trust, favors the presumption that they are actuated by pure motives. It, therefore, makes every allowance for different dispositions, capacities, views and even frailties in the examination of heterogeneous matters of fact where no criterion can be supplied; and it is not until the result of the deliberations of the jury appears in a form calculated to shock the understanding and impress no dubious conviction of their prejudice and passion that courts have found themselves compelled to interpose." See *Scally v. W. T. Garratt & Co.*, 11 Cal. App. 147, 104 Pac. 325, and cases therein cited.

It was the duty of the jury in this case, as the court in its charge clearly told them, to award to the plaintiff "an amount which would justly compensate plaintiff for the probable value of the service of deceased until he had attained his majority—the age of 21 years—taking into consideration the cost of his support and maintenance from the time of his death until he would have reached the age of 21 years," and we perceive no just reason arising from the record for holding that the verdict, under all the circumstances appearing, represents anything beyond a fair and reasonable admeasurement of the compensation to which plaintiff is entitled for the damage she has sustained.

There is very clearly nothing in the argument that, because the boy, prior to his employment by defendant, had been attending school, and that the purpose he had in view in seeking and securing employment was to earn means by which he might be able to give himself the advantages of an education, the time served in his attendance at school and the service he rendered to further his purpose in that laudable direction could not be considered as service of the minor to the plaintiff. No more important and imperative duty rests upon parents than that of giving their offspring the advantages of a sound educational foundation, and the earnings of a minor dedicated to such purpose become for that reason no less the result of service to the parents than if he should turn them over directly to those naturally responsible for his custody, care, maintenance and education to be used for some other purpose within the scope of the duties of the parents as such.

2. There are 41 assignments of error involving the court's rulings upon the evidence. We cannot give, nor is it necessary to give, all these special attention in this opinion. We shall, however, notice some of the exceptions on this score, and as to the others—indeed, as to all—it may be said generally that we have discovered nothing prejudicial to the rights of the defendant.

The motions for a nonsuit were based upon the alleged ground that the evidence shows that the accident in which the deceased lost his life was proximately occasioned by his own negligence. The view which we

have expressed respecting the point that the evidence does not justify the verdict is a sufficient answer to the contention that the exceptions to the court's adverse rulings on said motions are well taken.

Exception No. 2 is addressed to the ruling of the court allowing the witness Burnett to answer the following question over the objection of defendant: "You remember having a conversation with Ray Clark, just a short time before the accident occurred, and saying that the reason they didn't have more lights there (referring to the dredger) was because they were afraid of an explosion?" The witness denied having had such a conversation with the deceased at the time mentioned, and, even if the question called for testimony which was for any reason improper, manifestly no harm could have resulted to the defendant either by the question or the answer.

The witness Williams, with a view of becoming a witness for plaintiff, made an effort to go aboard the dredger for the purpose of inspecting the machinery, and thus equipping himself with such knowledge as would enable him to describe to the jury the dredger and the operation of its machinery. He was accompanied by counsel for plaintiff and one of the latter's surviving sons. The parties in charge of the dredger at the time would not permit them to go upon the dredger. Plaintiff introduced Williams to show the attitude of the employés of defendant in this matter, and the court, over an objection by defendant, permitted the witness to testify that the officers in charge of the dredger had flatly refused to allow him to inspect and examine its machinery while in motion or at all. It is claimed that the allowance of said testimony was prejudicial error. We do not think so. Williams is a machinist and a stationary engineer, and it was proper to admit testimony which would bring clearly before the minds of the jury a description of the character of the machinery which the defendant had put the deceased in charge of and the nature of the operation of said machinery for the purpose of illustrating the probable manner in which the accident occurred. The refusal by the defendant's employés to permit this inspection, knowing, as they did, the purpose for which it was to be made, was a circumstance—whether of much weight or little weight it mattered not—tending to disclose a disposition on the part of the superintendent or captain to prevent plaintiff from presenting as complete a case as the circumstances would permit. It was, in other words, a circumstance having a direct tendency to establish an effort on the part of the defendant to suppress testimony, and there has never been any doubt that testimony showing or tending to show an attempt upon the part of a party to a suit to cover up, conceal, or otherwise prevent pertinent facts from being presented to the court or jury is competent and proper.

Exception No. 16 involves the action of the court in making an order that a witness for plaintiff be allowed to inspect or examine the machinery. It is contended that the court acted in excess of its authority in making this order, and thus committed error which was damaging to the defendant's rights. There is, so far as we know, no express provision of law authorizing the course adopted by the court. But every court has certain inherent power—power which, exercised within reasonable and proper limits, authorizes it to go beyond its express powers where the interest of justice imperatively demands such a course. Moreover, by section 128, subd. 5, of the Code of Civil Procedure, every court is in general language clothed with full control and power over every person connected with a judicial proceeding before it, in so far as said proceeding is concerned, and we fail to see in the action of a court compelling the production of any relevant and competent testimony which will make clear or tend to make clear the truth as to a disputed question of fact anything in contravention of either the letter or spirit of subdivision 5 of that section of our Code. We perceive no distinction between the proposition here and the one presented and discussed in the case of *Johnston v. Southern Pacific Co.*, 150 Cal. 536, 540, 89 Pac. 348, 351, where, in an action for personal injuries, the trial court was appealed to by the defendant for an order allowing the plaintiff to be examined as to her injuries and the effect thereof by physicians of the defendant's own choosing, testimony bearing upon that subject having been given by physicians who had been employed by and were introduced as witnesses for plaintiff. The court denied this application upon the ground that it had no power to make the order, and on appeal the Supreme Court held that the ruling was erroneous; that the court was authorized to make said order by virtue of the provisions of subdivision 5 of section 128 of the Code of Civil Procedure, *supra*, and quotes, approvingly, the following from the case of *Wanek v. City of Winona*, 78 Minn. 98, 80 N. W. 851, 46 L. R. A. 448, 79 Am. St. Rep. 354: "To allow the plaintiff in such cases to call in as many friendly physicians as he pleases, and have them examine his person and leave him wholly at the mercy of such witnesses as the plaintiff sees fit to call constitutes a denial of justice too gross in our judgment to be tolerated for one moment." See the innumerable cases in *Johnston v. Southern Pacific Co.*, *supra*, cited to this point and in confirmation of the rule laid down in the *Minnesota* case.

In the case at bar, the only eyewitness to the accident was an employé of defendant. In fact, as counsel for plaintiff suggested at the trial, the plaintiff was compelled to secure her witnesses "from the ranks of the defendant." As stated, we see no difference in principle between the action of the court

in the case at bar in ordering defendant to permit an expert witness for plaintiff to examine its machinery and the order which the Supreme Court declares that it was prejudicial error for the trial court to have refused to make in *Johnston v. Southern Pacific Co.* Most certainly the same reason exists why the court in this case should have made the order complained of as exists for making an order for the purpose for which the order in the cited case should have been made. If the testimony relative to the nature and character and construction and operation of defendant's machinery had been confined exclusively to that received through defendant's own employés, it is safe to say that the jury would have received an unsatisfactory description of the general and the particular situation on the dredger on the occasion of the accident as to all the important objective or physical facts that might or did tend to reflect some light on the manner and circumstances of the accident. And the testimony of the expert, having been confined to a description of the machinery and the manner of its operation, could no more operate prejudicially against the rights of the defendant than a diagram or a model of the machinery, a familiar method adopted by courts for clarifying testimony otherwise not easily or readily understood. Furthermore, the court could, in the exercise of its discretion, have ordered an inspection of the machine by the jury (section 610, Code Civ. Proc.), and manifestly this course would have involved greater risk of error than that pursued by the court. Our conclusion is that the court in no manner or degree transcended its power or authority in ordering defendant to allow plaintiff's expert to examine the machinery and give testimony relative thereto.

3. Instruction No. 1, given to the jury by the court, and which is objected to as erroneous, reads: "You are instructed that where a master employs a servant to do dangerous work, or to do work that must necessarily require him to move in and about moving machinery of a dangerous nature, who, from youth, inexperience, ignorance, or want of capacity, may fail to appreciate the danger surrounding him at such work, it is a breach of duty for the master to expose such servant, even with his own consent, to such danger, or to place him in a position where it shall become necessary for him to encounter the same without first giving him such full and complete instructions as will enable him to fully and completely comprehend them, and to do the work safely, and with proper care on the servant's part." The foregoing instruction is founded upon language used in the case of *Foley v. California Horseshoeing Co.*, 115 Cal. 184, 47 Pac. 42, 56 Am. St. Rep. 87, and very clearly states the law with regard to the duty imposed upon a master in his relations as such with a minor in his employ as a servant. That

there is a well-defined distinction between the duty resting on a master toward a minor in his employ and the duty he owes to an adult servant, is a proposition thoroughly settled both in principle and by the cases.

In the case just referred to the facts are strikingly similar to those in the case at bar. There the minor, who was of the age of 14 years, was originally "employed by defendant to punch holes in horseshoes by means of a machine known as a horseshoe punching machine." Subsequently the boy was ordered by an assistant foreman of defendant "to adjust a portion of the mechanism operating the punching machine," to adjust which involved a hazardous undertaking. Plaintiff was not "familiar with the mechanism and the manner of adjusting the same, and was ignorant of the hazard." The boy, obeying the order thus given him, was engaged in correcting the defect when the machine, by reason of said defect, was suddenly set in motion and the injuries complained of were thereby sustained. It was contended that plaintiff, according to his own testimony, "knew the special danger and risk which, because of the defective appliance, must have attended the working of the machine, and that, having this knowledge, and his injury having resulted from this known defect, he stood as an adult with respect to his master's liability from any injury arising from it, and cannot recover." In reply to this contention, Mr. Justice Henshaw, in characteristically clear and forceful language, thus states the rule in cases of this character: "The question of the taking of a risk, the question of the assumption of responsibility in a given act, is determined as much upon the matter of judgment as upon the matter of knowledge. * * * Children are taught obedience. They are taught not to oppose their will and their judgment to those in authority over them; but in addition to this, and more important than all, the judgment of the child is the last faculty developed. * * * Knowledge he may have; facts he may acquire; but the ability to apply his knowledge or reason upon his facts comes to him later in life. The very accidents of childhood come from thoughtlessness and carelessness, which are but other words for absence of judgment. * * * Their conduct is to be judged in accordance with the limited knowledge, experience, and judgment which they possess when called upon to act, and it must, from the nature of the case, be a question of fact for the jury, rather than of law for the court, to say whether or not, in the performance of a given task the child duly exercised such judgment as he possessed, taking into consideration his years, his experience, and his ability." See, also, *O'Connor v. Golden Gate*, 135 Cal. 545, 67 Pac. 966, 87 Am. St. Rep. 127; *Mansfield v. Eagle Co.*, 136 Cal. 622, 69 Pac. 425; *Killelea v. Cal-*

fornia Horseshoe Co., 140 Cal. 605, 74 Pac. 157; *Fries v. American Lead Pencil Co.*, 2 Cal. App. 148, 83 Pac. 173.

Instructions 2, 3, 4, 5, 7, and 15, which are also criticised, involve substantially the statement in different language of identically the same principle that is enunciated in the first instruction, and we need not, therefore, give the assignments as to them further attention.

Against the court's instructions there are other criticisms in which we see no merit.

The entire charge of the court, taken as a whole, stated to the jury the law applicable to the issues fully, fairly, and correctly.

After an exhaustive examination of the record, we have not been able to discover any reason which would justify interference with the judgment and order appealed from.

For the reasons herein given, the judgment and order are affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

(14 Cal. App. 522)

HAMMOND v. HASKELL et al. (Civ. 790.)

(Court of Appeal, Second District, California.
Nov. 17, 1910.)

1. CORPORATIONS (§ 127*)—SURRENDER OF SHARES—AGREEMENT—PERFORMANCE—"WAIVER."

Where a note was executed in consideration of an agreement by the payee to surrender to a corporation its corporate stock owned and held by him, but the manner of the surrender was not prescribed, a delivery of the stock to the president of the corporation with whom and others the agreement was made was proper, and a failure to make objection to the mode of performance was a waiver within Civ. Code, § 1501, and Code Civ. Proc. § 2076, declaring that objections to the mode of an offer of performance which the creditor has an opportunity to state at the time to the person making the offer, and which can be obviated by him, are waived if not then stated, etc.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 448, 476; Dec. Dig. § 127.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7375-7381; vol. 8, pp. 7831, 7832.]

2. CORPORATIONS (§ 127*)—SURRENDER OF SHARES—CONSIDERATION—AGREEMENT—PERFORMANCE.

An indorsement on the certificate of stock surrendered, "Not accepted, no consideration," and a letter from the president and one of the other persons to the agreement reciting that they authorized no one to transfer the stock to them, and, as officers of the corporation, they could not cancel a certificate, were not an objection to the mode in which the payee surrendered the stock.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 448, 476; Dec. Dig. § 127.*]

3. CORPORATIONS (§ 127*)—SURRENDER OF SHARES—CONSIDERATION—AGREEMENT—PERFORMANCE.

Where the payee of a note executed in consideration of his agreement to surrender to a corporation its stock owned by him delivered the stock to the makers, who made no objection, but who, by their silence, led the payee to believe that his act was accepted as a perform-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ance of his agreement, and they retained possession of the stock until after action was brought on the note, the makers were estopped from pleading nonperformance so as to show a failure of consideration, especially where it was not claimed that they sustained any damages by reason of the alleged breach of the agreement.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 448, 476; Dec. Dig. § 127.*]

4. CORPORATIONS (§ 376*)—PURCHASE OF OWN STOCK—VALIDITY OF CONTRACT.

An agreement by the payee of a note to surrender to a corporation its corporate stock owned by him in consideration of the note is susceptible of the construction that the makers were making a purchase of the stock on their own account, and directed the delivery to the corporation for their benefit, and, so construed, the agreement is not invalid as involving a sale and transfer to the corporation of its own stock.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1530; Dec. Dig. § 376.*]

5. CONTRACTS (§ 153*)—CONSTRUCTION.

Where a contract is capable of two constructions, one making it valid and the other void, the first ought to be adopted.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 734; Dec. Dig. § 153.*]

Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by L. F. Hammond against Loring B. Haskell and others. From a judgment for plaintiff, certain defendants appeal. Affirmed.

Roland G. Swaffield, for appellants. John E. Daly, for respondent.

SHAW, J. Action to recover upon a promissory note made and executed by defendants to plaintiff. Judgment went for plaintiff, from which defendants Haskell and Pike appeal upon the judgment roll accompanied by bill of exceptions.

It appears from the findings that the note was made and delivered in consideration of an agreement whereby plaintiff promised defendant to return and surrender to a corporation known as the Home Bond & Building Association certain shares of stock which he owned and held in said corporation. Contending that they are not supported by the evidence, appellants attack certain findings to the effect that plaintiff indorsed the certificate for the said shares of stock so owned by him, and surrendered and delivered the same to defendant Loring B. Haskell on behalf of the said Home Bond & Building Association, who received and accepted the same from the plaintiff for and on behalf of the association; that at said time Haskell did not make any objection whatever to the mode of delivery so made by plaintiff to him on behalf of said corporation.

The note was delivered on November 19, 1907, and payable December 1, 1907. The testimony of Haskell is to the effect that he was elected president of the corporation on the date of the delivery of the note, and that

about December 7th one Redburn handed him an envelope containing the certificate of the shares of stock of said corporation so owned by plaintiff, which certificate was indorsed to Loring B. Haskell and M. Pike; that upon receipt of same Haskell and Pike indorsed upon the certificate, "Not accepted, no consideration, L. B. Haskell, M. Pike," and, as thus indorsed, returned it to plaintiff with a letter, wherein, among other things, it was stated: "We authorized no one to transfer this stock to us, and as officers of the company we cannot cancel a stock certificate. We have also had notice from our principal creditor not to transfer a share of this stock at our peril. * * * We are trying to adjust matters and conserve the assets of the company for the benefit of all concerned. Mr. Pike and myself have put more cash into stock than any one else. We have also spent some of our personal cash, as well as our time, with no money in the treasury at present to pay us for a very trying, annoying service, since the company stopped active business. We feel that every one should stand up and share the loss, especially the officers and stockholders, and not try to put the burden on any few men." The agreement did not specify how or in what manner the stock should be surrendered to the corporation, and, in the absence of such specification, plaintiff very properly delivered the shares to Haskell, who was president of the company, and with whom and other defendants advancing the consideration therefor the contract was made. When the shares of stock were delivered to appellants they knew that such delivery was in performance of plaintiff's agreement to return and surrender the stock to the company. If they objected to the mode of performance, they should have stated such objections, thus enabling plaintiff to obviate the same; otherwise, the objections must be deemed to have been waived. Section 1501, Civ. Code; section 2076, Code Civ. Proc.; *Kofoed v. Gordon*, 122 Cal. 314, 54 Pac. 1115. The words indorsed on the certificate, "Not accepted, no consideration," could not be regarded as an objection to the mode or manner in which plaintiff offered to surrender the stock to the corporation. Neither is there anything in the letter showing that appellants objected either to the manner or time of the surrender of the stock. On the contrary, the letter indicates a desire on the part of appellants to repudiate the agreement and refuse to accept the surrender on behalf of the corporation, not on account of objections to the manner of performance, but because of the fact that they felt plaintiff should continue in the enterprise and share the loss, which appellants deemed inevitable. A further objection was that one of the principal creditors objected to the carrying out of the transaction.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Moreover, when plaintiff, shortly after December 7th, again delivered the shares of stock to appellants they made no objection to the mode of performance, but, on the contrary, so far as disclosed by the record, by their silence led plaintiff to believe that such renewed act on his part was accepted as a full and complete performance. They retained possession of the shares of stock, and not until they filed their answer was he apprised of the fact that they claimed nonperformance by reason of his failure either to deliver the stock in time or to the proper parties for and on behalf of the company. Such circumstances, even in the absence of a complete technical performance, should, in our judgment, estop defendants from pleading want of performance, especially where it is not claimed that defendants sustained any damage by reason of the alleged breach. *Herberger v. Husman*, 90 Cal. 583, 27 Pac. 428.

The validity of the agreement construed as a contract involving the sale and transfer to the corporation of its own shares of stock is not argued or presented. Conceding that such interpretation would render the contract invalid, nevertheless, this contract is susceptible of the construction that under its terms the defendants were making a purchase of the stock upon their own account and directing the delivery to the corporation for their benefit. "Where a contract is capable of two constructions, the one making it valid and the other void, * * * the first ought to be adopted." *McVicer v. McKenzie*, 136 Cal. 660, 69 Pac. 496.

The judgment is affirmed.

We concur: ALLEN, P. J.; JAMES, J.

(14 Cal. A. 507)

PEOPLE v. DRIGGS. (Cr. 180.)

(Court of Appeal, Second District, California.
Nov. 16, 1910.)

1. FORGERY (§ 44*)—EVIDENCE—SUFFICIENCY.
On a prosecution for forgery, evidence held sufficient to sustain a conviction.

[Ed. Note.—For other cases, see *Forgery*, Cent. Dig. §§ 117-121; Dec. Dig. § 44.*]

2. FORGERY (§ 16*)—EVIDENCE.

Where a forged lease was filed for record in the recorder's office at the instance of defendant and she paid the fees, it amounted to the uttering of the forged instrument.

[Ed. Note.—For other cases, see *Forgery*, Cent. Dig. §§ 51-53; Dec. Dig. § 16.*]

3. INDICTMENT AND INFORMATION (§ 125*)—INFORMATION.

An information charging defendant with forgery by feloniously, etc., making a certain lease and, at a subsequent date, of uttering the same, charged but a single crime, the offense defined by Pen. Code, § 470.

[Ed. Note.—For other cases, see *Indictment and Information*, Cent. Dig. § 339; Dec. Dig. § 125.*]

4. CRIMINAL LAW (§ 681*)—EXPERT EVIDENCE.

That certain exemplars submitted to experts had not theretofore been established as genuine signatures was not error, where their validity was subsequently established.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1611-1612; Dec. Dig. § 681.*]

5. CRIMINAL LAW (§§ 404, 491*)—EXPERT EVIDENCE.

Under Code Civ. Proc. § 1944, when the court was satisfied that exemplars offered were genuine, it was proper to submit the same to an expert witness or to the jury for comparison with the signature in question, and a comparison might be made by the jury without the aid of experts.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 892, 1080; Dec. Dig. §§ 404, 491.*]

6. CRIMINAL LAW (§ 741*)—QUESTION FOR JURY.

The weight of opinion of experts or the result of comparisons between exemplars and the signature in question was for the jury.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1713; Dec. Dig. § 741.*]

7. WITNESSES (§ 269*)—CROSS-EXAMINATION.

Where, on a prosecution for forgery, witnesses called by the people testified not as experts from comparison, but based their opinions solely upon familiarity with the signature of the person whose name was claimed to have been forged, and they were not examined in chief as to the exemplars, and no foundation was laid qualifying them as experts, cross-examination testing their qualifications in that regard was not permissible.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 949-954; Dec. Dig. § 269.*]

8. WITNESSES (§ 216*)—COMPETENCY.

On a prosecution for the forgery of a lease, communications made by defendant to the notary who took the acknowledgment relating only to the acknowledgment and made to him merely in his capacity as notary were not privileged.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 779; Dec. Dig. § 216.*]

9. CRIMINAL LAW (§ 742*)—QUESTIONS FOR JURY.

Where a witness admitted that he had testified falsely on former occasions and the transcript of his evidence abounded with admitted falsehoods, and he sought to explain why he had falsely testified, his credibility was for the jury.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1138, 1719-1721; Dec. Dig. § 742.*]

10. WITNESSES (§ 396*)—IMPEACHMENT.

It was proper to permit the whole of his testimony to be read to him that he might, as he desired, make corrections.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1261-1264; Dec. Dig. § 396.*]

Appeal from Superior Court, Los Angeles County; George R. Davis, Judge.

Gertrude Driggs was convicted of forgery, and she appeals. Affirmed.

See, also, 12 Cal. App. 240, 108 Pac. 64.

Paul W. Schenck and Geo. L. McKeeby, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

ALLEN, P. J. Defendant was found guilty under an information charging her with

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the crime of forgery by willfully, unlawfully, falsely, fraudulently, and feloniously making, forging, and counterfeiting a certain lease, a copy of which is set forth; and, at a subsequent date, of uttering, publishing, and passing as true the same, with full knowledge, etc. From the judgment pronounced, and from an order denying a new trial, this appeal is taken.

Defendant offered no evidence and the verdict was based upon that given on behalf of the people. It is insisted that the evidence is insufficient, either to establish the forgery in the first instance or the subsequent utterance. We find competent evidence in the record to the effect that the signature to the lease was not that of Charnock, the purported lessor, and other evidence—by experts, it is true, but competent—to the effect that, by comparison of the signature to the lease with the admitted handwriting of defendant, employed as exemplars, the defendant attached the forged signature. The notary who made the acknowledgment testified that Charnock never acknowledged the signature and that his certificate to that effect was false, and that he attached his certificate of acknowledgment solely because defendant had stated to him that Charnock had signed the lease. The circumstance that the party who signed Charnock's name had attempted to make the signature appear as that of the lessor; in addition, that defendant represented that in fact the lessor had attached his signature, together with many other circumstances, all tend to show want of authority and were inconsistent with any other hypothesis. The evidence tends to show that defendant signed the name of the lessor, and that she had no authority so to do. There is evidence in the transcript tending to show that the lease, the subject of the forgery, was filed for record in the recorder's office at the instance and request of defendant, and that she paid the filing and recording fees. This was a sufficient uttering of the alleged forged instrument. *People v. Baker*, 100 Cal. 190, 34 Pac. 649, 38 Am. St. Rep. 276. The allegations of the information stated but a single crime. The offense charged was that defined by section 470, Pen. Code. No other offense was attempted to be charged. *People v. Driggs*, 12 Cal. App. 240, 108 Pac. 62, 64, and authorities there cited. Upon the whole record, we are of opinion that there is evidence embraced therein tending to support every material allegation of the information, and as a consequence no question of law in connection therewith is presented.

The fact that certain exemplars submitted to experts had not theretofore been established as genuine signatures is of no consequence, where, as in this case, their genuineness was subsequently established by uncontradicted testimony. *Estate of Marcuall*, 126 Cal. 96, 58 Pac. 449. When the court was satisfied that the exemplars offer-

ed were genuine, it was proper to submit the same to the witness or jury for comparison. Section 1944, Code Civ. Proc. When so submitted and in evidence, a comparison may be made by the jury with or without the aid of experts. *Castor v. Bernstein*, 2 Cal. App. 706, 84 Pac. 244. The weight and effect of the opinion of experts, or the result of comparisons, was a matter for the jury. The admission in evidence of photographs of signatures and papers was within the discretion of the court, and no abuse in connection therewith is shown. *People v. Crandall*, 125 Cal. 132, 57 Pac. 785. After an examination of the various exhibits which are on file in this court, we feel able to say that no reasonable doubt can exist as to who wrote the signature upon the lease.

We find no error in the action of the court sustaining objections to certain questions propounded to witnesses called by the people, and who testified not as experts from comparison, but based their opinions solely upon familiarity and acquaintance with Charnock's signature. They were not examined in chief as to the exemplars, no foundation was laid qualifying these witnesses as experts, and the cross-examination testing their qualifications in that regard was not permissible.

We find nothing in the record supporting the contention that privileged communications were improperly admitted. The communications made by appellant to Ackerman, admitted in evidence, were only such as related to the matter of the acknowledgment and were made to the witness in his capacity as a notary, and we think properly admitted. The record discloses that Ackerman, the notary, admitted upon this trial that he had testified falsely upon former occasions, and the transcript of the evidence upon such former hearing abounded with admitted false statements. He sought upon this trial to correct the same and to attempt an assignment of the reasons why he had falsely testified upon previous examinations. His credibility and the effect which should be given his testimony was a matter for the jury, and, under the peculiar circumstances presented by this record, we see no error in the action of the court permitting the whole of his testimony, permeated, as it was, with admitted false statements, to be read to him that he might in such instances as he desired make the corrections; and it is a well-recognized proposition that under such circumstances an opportunity is afforded the witness to give reasons, if such he may have, why former statements were made.

The claimed error in relation to the giving and refusing of instructions is not supported by any reason why appellant thinks the action of the court in reference thereto was error prejudicial in its character, which, in *People v. Fossett*, 7 Cal. App. 629, 95 Pac. 384, is said to be necessary. We have, how-

ever, examined the record in relation thereto and see no error in connection with the giving or refusing of instructions, nor any misconduct during the progress of the trial, either upon the part of the court or the district attorney, warranting a reversal.

The very voluminous record in this case is full of other exceptions taken during the progress of the trial, and some of which are presented by appellant in her points and authorities; but aside from those heretofore noticed, we find nothing meriting extended comment, nor any error in the record which can be said to have a prejudicial tendency, the onus of establishing which upon appeal is cast upon appellant. *People v. Cain*, 7 Cal. App. 168, 93 Pac. 1037. The verdict in this case seems to us to be the only one which a rational jury could return, and the denial by the court of a new trial proper.

Judgment and order affirmed.

We concur: SHAW, J.; JAMES, J.

(14 Cal. App. 515)

PEOPLE v. WILSON. (Cr. 261.)

(Court of Appeal, First District, California.
Nov. 17, 1910. Rehearing Denied by
Supreme Court Jan. 12, 1911.)

1. HOMICIDE (§ 177*)—SUICIDE THEORY—EVIDENCE.

The evidence that defendant sent to deceased the letter, signed in the name of an unknown person, containing powders recommended for his stomach trouble, and which being taken caused his death, the substance being strychnine, being dependent almost entirely on opinions of handwriting experts, and deceased having taken the powders without any steps to test their character, though he was cautioned that they might be poisonous, and reminded of a notorious poisoning case, defendant, whose theory was that deceased committed suicide, was entitled to introduce evidence that deceased was erratic at times, wrote letters to himself, and was able to write several kinds of writing, as this, in connection with the other facts, might reasonably aid the jury in determining whether deceased wrote, or might have written, the letter, and who caused the death; liberality in admission of evidence, which might in any way so aid, being required by the circumstances.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 306; Dec. Dig. § 177.*]

2. CRIMINAL LAW (§ 452*)—EVIDENCE—OPINIONS.

A witness, who has for a long time been a post office inspector, being shown an envelope purporting to be postmarked at station H, Philadelphia, and to have a cancellation mark of the postage stamp, is properly allowed to give his opinion that the postal mark is not genuine, in connection with his testimony that he knew that three years before the purported date there was no station H at Philadelphia, and his pointing out in detail the differences between a reproduction of the cancellation stamp in use at Philadelphia and the cancellation stamp on the envelope in question.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1053-1055; Dec. Dig. § 452.*]

3. CRIMINAL LAW (§ 369*)—EVIDENCE—CONNECTION WITH ANOTHER CRIME.

Evidence, if otherwise relevant to an issue in the case being tried, is not inadmissible because tending to connect defendant with another crime.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 822-824; Dec. Dig. § 369.*]

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

John Walter Wilson was convicted of murder, and he appeals. Reversed and remanded for new trial.

C. H. Wilson, Samuel M. Shortridge, A. M. Cunning, M. H. Farrar, and T. N. Harvey, for appellant. Attorney General Webb, C. M. Fickert, Dist. Atty., and Maxwell McNutt, Asst. Dist. Atty., for the People.

HALL, J. The defendant was charged by information filed by the district attorney with the crime of murder for the killing of one Henry Bose, and upon his trial the jury returned a verdict, finding him guilty of murder in the first degree, and fixing the punishment at imprisonment for life. After the rendition of the verdict a change of attorneys for defendant took place, a motion for a new trial was made and denied. Upon the rendition of judgment in accordance with the verdict, defendant appealed to this court from the judgment and order denying his motion for a new trial.

Harry Bose conducted in the city and county of San Francisco a small business in the way of supplying globes for electric lights. The defendant was engaged in this business with Bose, either as an employé of Bose, or as his partner. Harry Bose at times suffered from stomach trouble. On the 2d day of December, 1908, he received through the United States mail by special delivery a letter addressed to him, signed "Charles M. Hawer, M. D.," and enclosing two powders, which by the terms of the letter were recommended as a cure for stomach trouble. The writer of the letter claimed to have learned from an unnamed friend of Bose that he suffered from stomach trouble, and represented that he, the writer, was sending the powders at the request of the friend. Harry Bose exhibited the letter and powders to several persons, including his mother and sister, and before retiring for the night, on December 2, 1908, took the powders as directed by the letter, and shortly afterwards died with the usual symptoms of strychnine poisoning. The powders contained a fatal dose of strychnine. There appears to have been no such person as "Chas. M. Hawer, M. D.," and certainly the evidence shows that Bose knew no such person. The theory of the prosecution was and is that the letter containing the two powders was written and sent to Bose by the defendant. There was no evidence

that defendant and Bose were upon unfriendly terms, and the only motive suggested for defendant killing Bose was that defendant might upon the death of Bose acquire the business that Bose alone, or Bose and defendant, had been conducting.

Each of three experts in handwriting testified that the letter containing the two powders was in his opinion written by the same person who wrote various exemplars, including a dictated copy of the "poison" letter, proven to have been written by defendant. Besides this opinion evidence there was little that tended to prove that defendant wrote or sent the "poison" letter. In the "poison" letter the words "until" and "already" were both misspelled, thus, "untill" and "allready," and the same errors appear in the copy written by defendant at dictation. These errors, however, are common, and such as are made by many people. Some other circumstances are relied on as indicating guilt on the part of defendant, but it is clear that the backbone of the case for the people was the opinion evidence of the experts. Certain it is that upon the theory of the prosecution, Bose administered the powders with his own hand, and that the powders came into his possession under circumstances that would have excited the suspicions of a prudent person, and ought to have suggested caution in the use of the powders by the recipient. In this connection it may be noted that one witness, to whom Bose exhibited the letter and powders, cautioned him against using the latter, reminding him of the Botkin poisoning case, and tossed the powders into a waste basket, from whence Bose recovered them.

It is not claimed that the verdict is not supported by the evidence; and we have thus adverted to the salient features of the evidence as showing a case which we think demands of this court careful scrutiny of the rulings of the trial court attacked by appellant, and which rulings the counsel for the appellant earnestly contend deprived him of the benefit of material testimony.

Defendant advanced the theory that Bose committed suicide, and himself wrote the "poison" letter, and in support of this theory offered certain testimony which appellant contends tended to support such theory. It is the action of the court in excluding this evidence that appellant in part relies upon as grounds for a reversal of the judgment and order.

Where the deceased, with his own hands, administered the poison that caused his death, and the theory of the defense is that the deceased committed suicide, any evidence which tends to support such theory, or that tends to show that it may be true, is admissible. In such case the deceased, as well as the defendant, is, in a certain sense, upon trial, and evidence of any acts, conduct, or declarations of deceased tending to prove that he may have committed suicide is relevant and material. *Nordan v. State*, 143 Ala.

13, 39 South. 406; *People v. Gehmele*, Sheld. (N. Y.) 251. In the case at bar the crucial test as to whether or not deceased committed suicide is presented by the question, Did he write the "poison" letter? It is thus apparent that any evidence that would reasonably tend to prove that he wrote or may have written the "poison" letter was relevant and material to the issues involved in the case.

We now come to the particular rulings of the court claimed by appellant to have resulted in depriving defendant of the benefit of material evidence. Counsel for defendant asked a witness called for the defense, "Did you ever see deceased write any letters to himself?" and the witness answered, "I have." Of another witness he asked, "And, in your opinion, what was the character of deceased?" and the witness answered, "I think—I should say that he was rather erratic." In each case the district attorney, after the answer had been given, objected to the question, and the court after some discussion, in which both attorneys and the court took part, sustained the objection. The court did not in either case in express terms strike out the answer, but the discussion and ruling were such in each case as to indicate to the jury that the court did not regard the evidence as relevant or proper, and intended that the answer should be disregarded. Of another witness counsel for appellant asked the question: "Did you ever have any conversation with the deceased?" and the witness answered, "I did." Counsel then asked, "Relative to handwriting?" whereupon the district attorney asked, "What is the purpose of that question?" to which counsel for defendant replied, "We want to show by this witness that he boasted of doing several kinds of writing." A discussion between the court and attorneys followed, from which it is apparent that all concerned treated the question and offer as having been objected to by the district attorney. The matter ended by the court saying, "The objection is sustained." By these rulings we think the court deprived the defendant of the benefit of evidence relevant and material to the vital issue in the case.

Evidence that deceased was erratic, at times wrote letters to himself, and was able to write several kinds of writing, though when considered apart from all other facts and circumstances in the case might be of little weight as tending to prove that deceased wrote or may have written the "poison" letter, yet in connection with other facts in evidence we think this evidence might reasonably aid the jury in determining the question whether or not deceased wrote or may have written the "poison" letter. Confessedly deceased took two powders which upon the theory of the prosecution came from an unknown source. He took these powders without taking steps to test their character, although he was cautioned by at least one

person that they might be poisonous. The danger was impressed on him by a reminder of the notorious Botkin poisoning case. The theory that defendant wrote the "poison" letter depended almost entirely upon the opinion evidence of experts in handwriting, which is a class of evidence which is subject to some infirmities, to say the least. The circumstances surrounding the death of Bose were such as to require the court, in the interest of justice, to be liberal in permitting evidence offered by the defendant that might in any way aid the jury in determining who caused the death of deceased. We think the excluded evidence was of this character, and should have been allowed.

For the purpose of supporting the theory that the "poison" letter came from defendant, the prosecution produced several envelopes that were found in the possession of defendant shortly after the death of Bose, and which appeared to be the same kind in all respects as the envelope containing the "poison" letter. These envelopes, however, appeared to be addressed to defendant, and bore what appeared to be the post and cancellation mark of the United States post office at divers places outside the state of California. It thus was necessary, in order to give the envelopes any evidentiary value against defendant, as tending to show that he had had in his possession a supply of envelopes similar to the one containing the "poison" letter, to prove that the post and cancellation marks on these envelopes were not the genuine marks of the United States postal department. For this purpose the prosecution examined as a witness one James O'Connell, who testified that he had been for nine years a United States post office inspector employed at San Francisco, and was able to tell whether a postmark was genuine or not. He was shown by the district attorney one of the envelopes above referred to, bearing what purported to be a postmark of the United States postoffice at station H, Philadelphia, Pa., dated March 3, 9:30 p. m., 1908, and also a cancellation mark of the postage stamp, and was asked if the postmark and cancellation mark on the envelope were the genuine postmark and cancellation mark of the United States post office. To this question the defendant objected as calling for a conclusion of the witness. The objection was overruled, and the witness answered that "The postmark is not genuine." Similar questions were asked of the witness and similar answers made concerning the post and cancellation marks on five other envelopes, without repetition of the objection.

It is now claimed that the court committed reversible error in overruling the objection. While the question is probably close to the border line, we do not think that the court erred in overruling the objection. The witness upon cross-examination stated in detail

the facts and reasons why he was of the opinion that the postmark was not genuine. In such a case, even though the question should not have been allowed, a case will not always be reversed for the erroneous ruling, for the opinion usually has but little or no weight independently of the facts upon which it rests. *Sampson v. Hughes*, 147 Cal. 62, 81 Pac. 292. In the case at bar the witness had been at Philadelphia four years before the date of the trial, which would be three years before the date of the postmark, and testified that he knew that at that time there was no station H in Philadelphia. He also had in his possession a reproduction of the cancellation stamp in use at Philadelphia, and pointed out in detail the differences between such cancellation stamp and the cancellation stamp upon the envelope in question. "The general rule is that the testimony of a witness shall be limited to the facts of which he has personal knowledge, and that he shall not give his individual opinion thereon; but in many instances the opinion of a witness may be received in connection with his statement of the facts upon which it is based. The border line between fact and an opinion is often very indistinct, and the statement of a fact is frequently only the opinion of the witness." *Healy v. Visalia, etc., R. R. Co.*, 101 Cal. 585, 36 Pac. 125. We think it was proper for the witness to give his opinion as to the genuineness of the postal mark in connection with his statement of the facts upon which it was based.

Neither was the testimony objectionable as tending to connect the defendant with the commission of a crime not charged. If otherwise relevant to any issue involved in the charge before the court, the mere fact that the evidence may tend to connect the defendant with some other crime is not ground for rejecting such evidence. The evidence in question was relevant to an issue involved in the case on trial.

Inasmuch as the judgment and order must be reversed for the errors committed by the court in excluding testimony as hereinbefore indicated, we do not find it necessary to pass upon the questions raised by the affidavits concerning newly discovered evidence, and the failure of the court to render judgment within the time required by section 1191 as amended in 1909. Upon a retrial, the defendant will have an opportunity to introduce the testimony of experts upon handwriting, and any other relevant and material testimony, and if he shall be again convicted the court will no doubt strictly follow the provisions of section 1191 of the Penal Code in the matter of rendering judgment.

The judgment and order are reversed, and the cause remanded for a new trial.

We concur: COOPER, P. J.; KERRIGAN, J.

(14 Cal. App. 512)

Ex parte MILLS SING. (Cr. 181.)

(Court of Appeal, Second District, California.
Nov. 16, 1910.)

1. STATUTES (§ 183*)—CONSTRUCTION—LEGISLATIVE INTENT.

In construing a statute to ascertain the legislative intent, regard must be had not so much to the exact phraseology as to the general tenor and scope of the legislative scheme embodied in the statute.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 261; Dec. Dig. § 183.*]

2. STATUTES (§ 195*)—CONSTRUCTION—DOCTRINE OF EJUSDEM GENERIS.

The doctrine of ejusdem generis is but a rule of construction to aid in ascertaining the meaning of the Legislature, but does not warrant the court in confining the operation of a statute within narrower limits than was intended by the Legislature.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 273; Dec. Dig. § 195.*]

3. INFANTS (§ 16*)—"DEPENDENT CHILD"—OFFENSES—STATUTES—"ANY OTHER PERSON."

Under the juvenile court law (St. 1909, c. 133) defining, in section 1, a "dependent child" as any child found wandering and not having any home or proper guardianship, or who has no parent or guardian capable of exercising proper parental control, or whose home, by reason of neglect of his parents or guardian or person in whose custody he may be, is an unfit place, and providing in section 26 that in all cases where any child shall be dependent or delinquent, the parent or parents, guardian or person having the custody of such child "or any other person" who shall, by any act, contribute to the dependency or delinquency of the child, shall be guilty of a misdemeanor, any one who contributes to the dependency of a child, whatever may be his relation thereto, becomes subject to punishment, the words "any other person" including all persons committing the acts specified.

[Ed. Note.—For other cases, see Infants, Cent. Dig. § 16; Dec. Dig. § 16.*]

For other definitions, see Words and Phrases, vol. 1, pp. 434-437; vol. 8, p. 7577; vol. 2, pp. 1991-1993.]

4. STATUTES (§ 205*)—CONSTRUCTION—MEANING OF WORDS.

The court, in construing a statute, must consider together all its provisions, and they must be reconciled as far as possible, and particular provisions must be so construed as to promote the general purposes of the law.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 282; Dec. Dig. § 205.*]

Application for a writ of habeas corpus by Mills Sing. Writ discharged, and petitioner remanded.

Geo. L. McKeeby and Paul W. Schenck, for petitioner. J. D. Fredericks, Dist. Atty., and J. A. Donnell, Deputy Dist. Atty., for respondent.

ALLEN, P. J. Whether or not the writ shall issue in this case depends upon the construction which should be given section 26 of the juvenile court law. St. 1909, p. 225. That section provides: "In all cases where any child shall be dependent or delinquent under the terms of this act, the parent or

parents, legal guardian or person having the custody of such child, or any other person who shall, by any act or omission, encourage, cause or contribute to the dependency or delinquency of such child shall be guilty of a misdemeanor," etc.

Petitioner's contention is that, applying the doctrine of ejusdem generis to the act in question, the words "any other person" are limited in their application to those who stand in loco parentis, and it being conceded that petitioner stands in no such relation he cannot be charged with the crime as defined by such section. "In the construction of statutes for the purpose of ascertaining the legislative intent, regard is to be had not so much to the exact phraseology in which that intent has been expressed as to the general tenor and scope of the entire legislative scheme embodied in the statute." Palache v. Pacific Ins. Co., 42 Cal. 418. An examination of the entire act discloses that section 1 of the act provides that the words "dependent child" shall mean, any child "(4) who is found wandering and not having any home, or any settled place of abode, or any proper guardianship; (5) who has no parent or guardian willing to exercise, or capable of exercising, proper parental control; * * *

(7) whose home by reason of neglect," etc., "of his parents or either of them, or on the part of his guardian, or on the part of the person in whose custody or care he may be, is an unfit place for such child." It will be observed that dependent children may be of a class who have parents, guardians, or custodians, while others may be of a class with neither. It is apparent from a reading of the entire act that the Legislature was intending to provide protection to all children who, by the terms of the act, were either dependent or delinquent, by attaching a penalty to any act contributing to such delinquency or dependency. "The doctrine of ejusdem generis is but a rule of construction to aid in ascertaining the meaning of the Legislature, and does not warrant a court in confining the operation of a statute within narrower limits than was intended by the lawmakers." Black on Interpretation of Laws, p. 143. To give the narrow construction claimed by petitioner would be to say that the Legislature intended to confer a benefit by protecting one class of dependents with whom some one was standing in loco parentis, while at the same time those dependents with whom no one stood in such relation should be unprotected. To give the words "any other person" a broader and more comprehensive interpretation, by saying that it was intended to include all persons committing the acts specified, would make the act applicable to all who are so unfortunate as to be included in the term "dependent." As said by our Supreme Court in Welch v. Williams, 96 Cal.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

365, 31 Pac. 222: "In the construction of a statute, all its provisions must be considered together, and must be reconciled as far as possible, and particular provisions must be so construed as to promote and not to defeat the general purposes and policy of the law." We are of opinion, therefore, that any one who contributes to the dependency of a child, whatever may be his relation thereto, becomes amenable to punishment under the provisions of section 26.

The writ is therefore discharged and petition remanded.

We concur: SHAW, J.; JAMES, J.

(14 Cal. App. 468)

HUNTINGTON et al. v. CURRY, Secretary of State. (Civ. 789.)

(Court of Appeal, Third District, California. Nov. 7, 1910.)

1. STREET RAILROADS (§ 14*)—INCORPORATIONS—STATUTES—"RAILROAD."

Civ. Code, § 291, providing that the articles of incorporation of any "railroad" must state the kind of road intended to be constructed, the places from and to which it is intended to be run, its estimated length, and that 10 per cent. of the capital stock subscribed has been paid in; section 293 providing that such a proposed corporation before filing articles must have subscribed to its capital stock \$1,000 for each mile of contemplated work; section 294 providing that before the articles are filed there must have been paid for the benefit of the corporation, 10 per cent. of the amount subscribed; and section 295 providing that before the Secretary of State issues to such a corporation a certificate of filing of articles of incorporation, there must be filed in his office an affidavit that the required amount of stock has been subscribed, and 10 per cent. thereof paid in—have no application to street railroad corporations.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 22-28; Dec. Dig. § 14.*

For other definitions, see Words and Phrases, vol. 7, pp. 5899-5908; vol. 8, pp. 7777, 7778.]

2. STREET RAILROADS (§ 18*)—ARTICLES OF INCORPORATION—MOTIVE POWER.

The provision in articles of incorporation authorizing the operation of "street railroads" by electricity "or other motive power" does not authorize the conducting of an ordinary commercial railroad; but such reference to "other motive power" relates only to the provision of Civ. Code, § 497, that permission may not be granted to propel street cars otherwise than by electricity, horses, mules, or cable, "unless for special reason in this title hereafter mentioned," and to section 509, authorizing permission to a street railroad to lay a track for grading, and to use steam or any other power in propelling cars thereon, when public convenience demands it.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 39; Dec. Dig. § 18.*]

3. STREET RAILROADS (§ 18*)—ARTICLES OF INCORPORATION—FIELD OF OPERATION.

The provision in articles of incorporation authorizing the operation of street railroads in the city of L. "and in the territory immediately adjacent thereto in the county of L." does not take from the corporation the essential characteristics of a street railroad; a street railroad not becoming an ordinary commercial railroad

by its road being extended, under the authority of its articles of incorporation and the franchises granted by local authorities, beyond the limits of the city in which its principal business is conducted, for no other purpose than to extend its local street car traffic.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 18.*]

Petition by Howard Huntington and others for mandamus to C. F. Curry, Secretary of State. Granted.

White, Miller & McLaughlin, for petitioners. Malcolm Glenn, Asst. Atty. Gen., for respondent.

HART, J. This is a petition for a writ of mandate to compel the respondent, as Secretary of State, to file certain articles of incorporation, to issue the certificate of incorporation, and "do all other acts and things which are necessary or proper to be done in the matter of filing, certifying and issuing articles of incorporation," etc. The articles of incorporation which respondent has refused to file in his office are annexed to and made a part of the petition.

From the allegations of the petition it appears that the petitioners, at some time prior to the 19th day of October, 1910, associated themselves together for the purpose of forming a corporation under the laws of this state, to be known as the "Los Angeles Railway Corporation"; that, pursuant to said purpose, there were prepared, in alleged compliance with the requirements of the law, articles of incorporation of said railway corporation, and said articles, so prepared, and "duly subscribed and executed," were filed in the office of the county clerk of the county of Los Angeles, who, upon the filing of said articles, made and delivered to petitioners a copy thereof, duly certified and attested by him as county clerk, under the seal of his office.

The petition further alleges that, on the 20th day of October, 1910, the petitioners presented said certified copy of articles of incorporation to the respondent for filing in his office, and requested him to file the same therein, but that, notwithstanding that at the time of said request and demand so made of and on respondent the sum of \$2,000, the filing fee required by law, together with the sum of \$187.50, the license fee for said corporation for one year, and the further sum of \$7.50 for recording the articles of incorporation, issuing his certificate of incorporation, and issuing a certified copy of said articles of incorporation, were tendered to said respondent, as such Secretary of State, he refused and still refuses to accept said fees and to file said articles of incorporation, or to perform the other acts mentioned and required of him in his official capacity in such case.

It is averred that the refusal by the respondent to file said articles of incorpora-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

tion is founded solely upon the ground that said articles of incorporation were not prepared in obedience to, and are therefore not in accord with, the requirements of sections 291, 293, 294, and 295 of the Civil Code of this state. The Attorney General has appeared here for the respondent, and vigorously insists upon the impregnability of the Secretary's construction of the sections of the Civil Code mentioned. The question to be decided is raised by demurrer to the petition.

Section 291 of said Code reads as follows:

"The articles of incorporation of any railroad, wagon road, or telegraph organization must also state:

"1. The kind of road or telegraph intended to be constructed;

"2. The place from and to which it is intended to be run, and all the intermediate branches;

"3. The estimated length of the road or telegraph line;

"4. That at least ten per cent. of the capital stock subscribed has been paid in to the treasurer of the intended corporation."

Section 293 provides that each proposed corporation mentioned in section 291, "before filing articles of incorporation, must have actually subscribed to its capital stock, for each mile of the contemplated work, the following amounts, to wit:

"1. One thousand dollars per mile of railroads. * * *

By the terms of section 294, before the articles of incorporation referred to in the "preceding section" are filed, "there must be paid for the benefit of the corporation, to a treasurer elected by the subscribers, ten per cent. of the amount subscribed."

Section 295 reads: "Before the Secretary of State issues to any such corporation a certificate of the filing of articles of incorporation, there must be filed in his office an affidavit of the president, secretary, or treasurer named in the articles, that the required amount of the capital stock thereof has been actually subscribed, and ten per cent. thereof actually paid to a treasurer for the benefit of the corporation."

The petitioners here did not, at the time of requesting and demanding the filing of the articles of incorporation involved in this proceeding, present therewith for filing the affidavit required by section 295, nor do their articles of incorporation contain the statement required by section 291, their contention being that the sections of the Civil Code referred to have no application to street railroad corporations; and after a careful examination and analysis of the Code sections pertaining to railroad corporations of both kinds, the ordinary commercial railroads and street railroads, we are persuaded that the position of petitioners is sound.

But the Attorney General first takes the position that the articles of incorporation concerned here themselves disclose that the proposed corporation is not thus confined

to the operation of a street railroad, but that, should the organization be consummated according to law, it would be authorized, by a certain provision of the articles, to conduct and operate an ordinary commercial railroad. This contention proceeds from the following language in said articles enumerating the powers of the proposed corporation: "To construct, or acquire by purchase or lease, or otherwise, and to operate, control, maintain, improve, and extend street railroads propelled or operated by electricity or other motive power, within the city of Los Angeles, California, and within the territory immediately adjacent thereto in the county of Los Angeles."

It is claimed that the authority thus vested in the corporation to propel or operate street railroads by means of "other motive power" than electricity, etc., is evidence of an intention or purpose on the part of and will authorize petitioners to operate, under said articles of incorporation, a regular commercial, and not a street, railroad; that such intention or purpose is further disclosed by the fact that the laying of the tracks of the railroad proposed to be constructed or acquired and operated by said intended corporation is not, as is required of street railroad corporations by section 497 of the Civil Code, limited to the use of the streets of the city of Los Angeles for that purpose, since it is also provided that the tracks of such railroad may be extended to any point "within the territory immediately adjacent" to said city in the county of Los Angeles.

The argument in effect appears to be, as to the first of these two propositions, that had the petitioners intended to construct and operate, under their articles, a street railroad only, they would not have authorized themselves by their charter to operate such a road by means of any other motive power than those to the use of which section 497 limits street railroad corporations. By that section it is provided that in no case shall permission be granted by the governing board of any municipality to any street railroad corporation to propel cars upon railroad tracks laid for street railroad purposes "otherwise than by electricity, horses, mules, or by wire ropes running under the streets and moved by stationary engines, *unless for special reasons in this title hereinafter mentioned.*" (Italics ours.)

We think that a sufficient answer to this contention may be found in the fact that the articles of incorporation expressly declare that the purpose of the corporation is "to construct or acquire * * * and to operate, control, maintain, improve and extend street railroads," and if the language in said articles to which the Attorney General objects clothes the corporation with more power as to the means of propelling its cars than it is entitled to under the law, it must be presumed that the local authorities through whom its franchises must be secured,

if at all, will not override the law, but will require the corporation, by appropriate and legal conditions and restrictions, to conduct the business for which it has been given existence in all respects strictly according to the mandates of the statutes. But we are not prepared to say, in view of the language of section 509 of the Civil Code, that it is not proper to make provision in the articles of incorporation for propelling and operating street railroads by "other motive power" than by electricity, horses, mules, etc. Said section reads, in part, as follows: "The corporate authorities of any city or town, or city and county, may grant the right to use steam or any other motive power in propelling the cars used on such grading-track, when public convenience or utility demands it, but the reasons therefor must be set forth in the ordinance, and the right to rescind the ordinance at any time reserved." Of course, it is the policy of the law, founded on excellent reasons, that street railroads shall not be customarily operated by means of steam power, and it is clear that, under the section from which we have just quoted, such motive power may be used only on the happening of the contingency provided for by said section; yet we can perceive no harm, even if it is not required, in inserting in the articles of incorporation a provision authorizing the use of steam power when the occasion for its use, as contemplated by said section 509, arises. It is not to be assumed that the provision in the articles for "other motive power" than those means of propelling street cars expressly enumerated by section 497 is intended to invest the corporation with power in that respect, in any measure in excess of that prescribed by the several Code sections on that subject.

The fact that the articles of incorporation contain authority for the extension of the street railroads proposed to be operated by the intended corporation beyond the territorial limits of the municipality of Los Angeles to points within the limits of the county in which said municipality is situated does not take from it the essential characteristics of a "street railroad." There is a clear and well-defined distinction, in the contemplation of our law upon the subject of railroads, between street railroads and those other railroads, which may, for convenience, be designated "commercial" railroads, whose termini may be situated many hundreds of miles apart. Our Supreme Court has pointed out this distinction in many cases, notably in *San Francisco, etc., Ry. v. Scott*, 142 Cal. 222, 75 Pac. 575, wherein it is established that, for purposes of taxation, the term "railroads," as employed in section 10 of article 13 of the Constitution, is not to be interpreted to include street railroads, although the latter may be extended beyond the limits of one county and into another. It is perhaps true, as the Attorney General suggests, that, while the term "railroads" may

not, for a certain purpose, include street railroads, for other purposes such railroads may come within the generic term "railroads." And, while the *Scott Case* is not an authority directly in point here, it is, nevertheless, valuable in the case at bar, in that it demonstrates that there is essentially a difference between the two classes of railroads following from the different sources from which they respectively derive their authority to construct, maintain, and operate railroads and the difference in the specific objects and purposes of the two.

In the *Scott Case*, *supra*, it is said: "The franchise of an ordinary railroad is obtained upon terms and conditions equally applicable to all roads of its class by a compliance with the general law, which empowers corporations to construct and operate a railroad between the designated termini, located, it may be, in counties widely separated. Civ. Code, § 291. At the time the Constitution was adopted, the law provided that franchises for the construction and operation of street railroads along the streets and public highways could be obtained only from the governing body of the city or town in which it was situated. Civ. Code, § 497. The law has been changed in some respects since that time, but the substantial provision still remains that the franchise can only be obtained through the action of the council or governing body of the municipality. Civ. Code, § 497; St. 1901, p. 265; St. 1903, p. 90. * * *

The only way by which a company can operate a street railroad in more than one county is by obtaining separate franchises from the local authorities of the respective counties, so located that the ends of the two roads coincide at the county line, so that the two can be in fact operated as a continuous line running from one county into another. But the franchises must remain separate and distinct, and *local in origin, situation and character*. (Italics ours.) * * *

In the case of an ordinary railroad, the right which it may acquire to operate its roads along a public street is, strictly speaking, a mere right of way, similar to the right it may acquire from landowners along the route. It is a part of its roadway, and not a part of the franchise, within the meaning of the word in the phrase in question. It imposes no implied obligation upon the grantee or donee to facilitate the local public use of the street by carrying persons from place to place thereon. The right which a street railroad obtains from the city to lay its track and operate its road on a street, on the contrary, is the most valuable part of its franchise. It carries the obligation to serve the public in the use of the street, and is in furtherance of the original use. It does not receive this franchise by becoming incorporated, as an ordinary road receives its franchise to operate its road between its termini, but obtains it afterward by special grant

from the municipality, and the thing thus obtained includes both the roadway and the franchise." See *Railroad Com. v. Market St. Ry.*, 132 Cal. 677, 64 Pac. 1065; *Ferguson v. Sherman*, 116 Cal. 169, 47 Pac. 1023, 37 L. R. A. 622; *U. R. Co. v. Colgan*, 153 Cal. 53, 94 Pac. 245.

Thus it will be observed that there is a marked distinction between the two classes of railroads, both as to the mode and manner in which they are authorized to do business and their objects and purposes. And we think that this distinction has been observed and recognized by the Legislature in its varying legislation with regard to the two classes of roads, as we shall later on more particularly undertake to show.

Aside from the proposition that a street railroad corporation must, after it has become such, under our law, consummate the purposes of its organization in a distinctly different manner from that by which an ordinary railroad corporation may, after establishing its legal entity, carry on the business for which it is organized, the important feature which, in our opinion, differentiates the two, and upon which line of differentiation the Legislature has framed our system of laws with respect to railroad corporations, is to be found in the fact that the street railroad is designed to solely and exclusively transact a purely local traffic; a traffic which it would be impracticable for the ordinary railroad to carry on, even in those cases where its road runs through certain streets of a city as a necessary part of its main road. But we think the phrase "street railroad," as used in our Civil Code, has acquired and imports a much broader signification than the word "street," taken alone, would imply. Instances are numerous where street railroads are extended a considerable distance beyond the limits of the city or town to points where there are maintained pleasure parks and gardens for recreation and amusement (which is asserted to be a part of the scheme of the proposed corporation), and, necessarily, in such cases, there will generally be found long stretches of country which such roads must lay their tracks upon which are not within the city limits and over and through which streets are not laid out. May it be said that, merely because the road leaves the city limits for that purpose, it then, *ipso facto*, ceases to be a street railroad, but takes on the character of an ordinary railroad, subject to the regulations prescribed by the Legislature for the incorporation, organization and operation of such roads? We think the answer is obvious; for we do not think that any court can be found that will sanction the proposition that, where a corporation is legally formed solely for the operation of a street railroad business and the road is extended, under authority of its articles of incorporation and the franchises granted by the local

authorities, beyond the limits of the city in which its principal business is conducted for no other purpose than to extend its local street car traffic, such road for that reason becomes in fact an ordinary railroad. No one would say or for a moment contend that because the street railroad company of Sacramento (if it be true) has extended its road to Oak Park or East Sacramento, suburbs of said city, situated outside its municipal limits, thus accommodating a large number of people, many of whom no doubt transact business in said city, becomes any less a street railroad. It in no manner or sense thus becomes a competitor of the ordinary railroads; its purpose and mission being, as are the purpose and mission of all street railroads, to meet a demand which the ordinary railroad, in the very nature of things, cannot meet. The purposes and objects of the two classes of roads may, by way of illustration, be likened to the relative positions of the wholesale and the retail merchant dealing in the same kind of commodities. In a general sense there is, of course, an analogy between them as merchants, but their special objects and purposes are essentially and distinctively different; the one supplying the trade, the other directly supplying the consumer.

But the most important contention of the Attorney General is that the provisions of sections 291, 293, 294, and 295 of the Civil Code apply to *all* railroads, regardless of their character or the particular purpose for which they are designed. We do not assent to this contention.

In addition to what we have already said in support of our view that there is of necessity, in many material respects, a marked distinction—one that is recognized by the Legislature throughout all its legislation with respect to railroads—between street railroads and ordinary railroads, there are other considerations which, in our opinion, confirm the proposition in its application to the present question. In the first place, it is as clear and unquestionable as any proposition can be that it would be absolutely impossible for proposed street railroad corporations to comply with all the requirements of section 291 of the Civil Code, unless the argument goes to the extent of maintaining that on every occasion that such a corporation, having designated the termini of its road in its articles, desired or found it necessary to extend its road to meet new conditions, which are, with respect to street railroads, constantly arising in growing cities, it would, for that purpose, be compelled to file additional or other articles of incorporation. Of course, the Legislature intended to impose upon a street railroad company no such obligation as one of the prerequisites to its right to establish itself as a corporation. And no less impossible would it be for the average street railroad corporation to embrace in its ar-

ticles of incorporation a statement of the "estimated length of the road" it intended to construct and operate. This would be especially true in large and growing cities. For illustration, we may say that it is known, as a matter of common knowledge, that there are ordinarily large portions of the territory of the larger cities which are slow to build up or to increase in population, and that it is only where such outlying districts grow in population to that extent that there is a demand for street car accommodations, remunerative to the company, that street railroad corporations are justified in extending or will extend their service to such districts. New streets are often opened up and old ones extended or lengthened and thus new conditions arise which necessitate the extension of the local car service. It must therefore be plainly manifest that no street railroad corporation could insert in its articles of incorporation a statement of the probable length of its road. But there is another and more potent reason than any that has yet been suggested which would render it impossible for a street railroad company to give an estimate of the length of its road, and that reason grows out of the fact that municipalities themselves have full and complete control of and power over their streets, and whether such streets may or may not be used by street car companies rests entirely in the discretion of the governing bodies of such municipalities. If, therefore, a street railroad company should, in its articles of incorporation, either designate the termini of their road or give an estimate of the length thereof, or do both, it would still remain with the local authorities to say whether the termini should be as designated or the length of the road as estimated. In other words, the termini and the length of a street railroad are subject to the determination of the local authorities by the franchises which the law provides must come, after the company has been incorporated. Thus it must appear to be very plain that it is impossible for such corporations to designate in their articles of incorporation the termini of their road or roads, or to insert therein even an approximate estimate of the length of such road, or anything like such an estimate as is clearly intended shall be given, and which undoubtedly can accurately be given, by the ordinary railroads.

If, then, for the reasons suggested, these provisions of section 291 are not applicable to street railroads, may it still be held that the other provisions of said section and of the other sections mentioned are, nevertheless, applicable to such railroads? A negative reply to this question will, we think, be found in a further examination of the several titles and sections of the Civil Code bearing upon corporations and their formation.

That the Legislature recognized and in-

tended to classify street railroad corporations as distinct from the ordinary railroad corporations, we think is a proposition which offers little, if any, ground for serious controversy. While there is no provision of the Code expressly classifying corporations, it is, nevertheless, to be observed that the Legislature has practically classified them. There are provided for in the Code 22 different classes of corporations, as to which there is specific legislation, each of said corporations being treated under a separate title; and it is to be remarked that, in the determination of the proposition whether the Legislature recognized and intended to treat as different and distinct ordinary railroad and street railroad corporations, it is a fact of cogent and persuasive significance that the specific provisions relating to said corporations are, respectively, to be found under separate and distinct titles. This circumstance, in connection with the legislation respecting railroad corporations as found in our Civil Code, is, itself, it seems to us, conclusive of the intention of the Legislature to treat the two classes of railroads as different and distinct from each other. This is manifestly not a strained or unnatural interpretation of the intention of the Legislature, but an interpretation which fully harmonizes with the essential distinction in the manner or mode in which the two corporations obtain their right to lay their tracks and operate their roads. Thus it will be noted that we have before us, as a guide to reaching the intention of the Legislature with respect to the meaning and scope of the sections of the Civil Code under consideration, these significant propositions: (1) That it is impracticable to apply subdivisions 2 and 3 of section 291 to street railroad corporations; (2) that street railroads are treated in said Code under the title "Street Railroads," whereas, the specific provisions as to ordinary commercial railroads are presented in the Code under the title "Railroad Corporations." In addition to the foregoing considerations, there is the mandate of section 510 which reads: "Street railroads are governed by the provisions of title three of this part, so far as they are applicable, unless such railroads are therein specially excepted." By the foregoing language, the Legislature very plainly emphasizes its intention to segregate railroads into two distinct classes, and as so segregated to enact as to each legislation peculiarly applicable thereto. If this does not necessarily follow from the terms of section 510, or if both classes of roads were to be governed by all the provisions of the Code relative to railroads, so far as they are applicable, why enact section 510? And if it was intended that, so far as applicable, all said provisions should apply to street railroads, would not the Legislature have expressly and specially so declared, as it has done with respect to the provisions of

title 3? There is but one answer to these questions, it seems clear to us.

It is, however, argued that the reason for requiring that it be disclosed by the articles of incorporation and the affidavit that 10 per cent. of the required amount of the capital stock subscribed has actually been "paid to a treasurer for the benefit of the corporation" applies with equal force to street railroad, as well as ordinary railroad, corporations. This may be conceded; but the reply is that the right to incorporate and the prerequisites to the formation of corporations come from the Legislature, and if that body has not seen fit to require one class of corporations, in order to become such, to do things which are required of other classes, it is not for the courts to supply the omission, however weighty and forceful the reasons may be that such omission should be supplied.

Our conclusion is that sections 291, 293, 294, and 295 have no application to street railroad corporations, and that it is therefore unnecessary for petitioners to insert in their articles of incorporation the matters set forth in subdivisions 2, 3, and 4 of section 291 of the Civil Code, or to file with the Secretary of State the affidavit provided for by section 295 of said Code. In other words, we think the articles of incorporation presented for filing to respondent, and of which a copy is annexed to the petition herein, are sufficient in all particulars, and that it is the duty of the Secretary of State to file the same upon the receipt of the proper fee therefor.

The demurrer to the petition will be overruled, and in accordance with this order let a writ of mandate issue out of this court to the respondent, Hon. Charles F. Curry, as Secretary of State, requiring and compelling him to file said articles of incorporation in his said office of Secretary of State.

We concur: CHIPMAN, P. J.; BURNETT, J.

(83 Kan. 782)

WENDORFF v. DILL

(Supreme Court of Kansas. Jan. 7, 1911.)

(Syllabus by the Court.)

JUDGES (§ 8*)—VACANCY—ELECTION—"REGULAR ELECTION."

An election at which judges of the district court are to be chosen for a full term in any of the judicial districts of the state is as to that office in every district a regular election within the meaning of the constitutional provision that, "in case of vacancy in any judicial office, it shall be filled, by appointment of the Governor until the next regular election that shall occur more than thirty days after such vacancy shall have happened."

[Ed. Note.—For other cases, see Judges, Dec. Dig. § 8.*

For other definitions, see Words and Phrases, vol. 7, pp. 6036, 6037.]

Quo warranto by J. H. Wendorff against William Dill. Judgment for plaintiff.

See, also, 112 Pac. 166.

L. S. Ferry, T. F. Doran, and C. A. Magaw, for plaintiff. F. B. Dawes, for defendant.

MASON, J. In November, 1908, James H. Gillpatrick was elected judge of the district court of Leavenworth county, constituting the First judicial district, for the full term of four years. In October, 1909, he resigned, and William Dill was appointed to fill the vacancy. At the election of November, 1910, candidates for the place were voted for; J. H. Wendorff receiving a majority of the votes. He brings action in this court for the possession of the office. The question involved is whether the title of Judge Dill under the appointment lasts until the election of November, 1912, or expired with the qualification of a successor elected in 1910. The decision depends upon the meaning of the phrase "next regular election" in the provision of the Constitution (article 3, § 11) that, "in case of vacancy in any judicial office, it shall be filled by appointment of the governor until the next regular election that shall occur more than thirty days after such vacancy shall have happened." Originally there was room for the contention that "regular" was used merely in distinction from "special," and designated any election, held under the general law, that provided machinery for receiving and canvassing votes for the office involved. However, in *McIntyre v. Illiff*, 64 Kan. 747, 68 Pac. 633, its meaning was restricted to "the next election regularly held conformable to law at which the particular class of judicial officers in question is to be chosen." The defendant maintains that for the purposes of applying this rule the class of officers to which he belongs does not include judges of all the district courts in the state, but only those normally elected at the same time. The Constitution (article 3, §§ 5, 18) created five judicial districts, the judges of which were to be elected in 1860 and quadrennially thereafter. As each new district was formed the regular term of office of its judge was usually made to begin in January after the ensuing general election. *State v. Thoman*, 10 Kan. 191; *Peters v. Board of State Canvassers*, 17 Kan. 305; *Smith v. Holt*, 24 Kan. 771. In 1902 general elections in the odd-numbered years were abolished, and since then a part of the district judges of the state have been chosen at each biennial election. Therefore, by reason of the difference in the time of their selection, it may be said that in a sense there are now two classes of district judges, and, as the First district was created by the Constitution, its judge belongs in the class with those ordinarily to be chosen in 1912. In *State v. Holcomb*, 83 Kan. 253, 111 Pac. 188,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

where the tenure of the appointee to a newly created judgeship was discussed, the court said that his office "should be classified with that of the district judges whose successors are to be chosen at the election to be held in November, 1910"; but this language was used with no purpose to suggest that the two groups resulting from this classification were to be regarded as separate classes in the sense in which the term was employed in the *McIntyre-Iliff* Case.

Under similar constitutional and statutory provisions, it has in other states been held, in substance, that the words "next regular election" refer to an election at which the very office in question would ordinarily be filled. *People of North Carolina ex rel. Cloud v. Wilson*, 72 N. C. 155; *State of Florida ex rel. v. Ansel B. Phillips*, 30 Fla. 579, 591, 11 South. 922; *State ex rel. McGee v. Gardner*, 3 S. D. 553, 54 N. W. 606. Other decisions have a contrary tendency. *People v. Babcock*, 123 Cal. 307, 55 Pac. 1017; *State of Missouri ex rel. Attorney General, Relator, v. Conrades*, 45 Mo. 45. Some of the cases cited, perhaps all of them, might be distinguished from the present one on the ground of differences in the laws interpreted. We deem it unnecessary to discuss them in detail, because we think the decision here must, in any event, be controlled by considerations now to be stated. The words of the Constitution may be open to a construction permitting one appointed to a judicial office to hold until the time when an election would regularly have been held to fill the office, if no vacancy had occurred. But to give them such a meaning would be to defeat the very purpose they were obviously designed to accomplish—that is, to further the policy of filling judicial offices by election rather than by appointment, and to shorten the time for which an appointee may serve. To allow a district judge appointed to fill a vacancy to hold until the election at which that particular office would ordinarily be filled would be much the same as letting him fill out the unexpired term. The interval between the election in November and the taking of the office in January is too small to have been of itself the object of any special solicitude on the part of the framers of the Constitution. If it had seemed advisable to allow the appointee to hold until two months from the end of the term, it would hardly have been thought worth while to dispossess him before the new term began. The Constitution (article 3, § 2) provided for three members of the Supreme Court, a chief justice and two associate justices, one to be elected for six years at each biennial election. The convention can scarcely have intended that,

if the chief justice died in the first few months of his service, the person appointed to fill the vacancy should hold for five years, during which time two elections for state officers should be held without choosing a successor, and then retire two months before the expiration of the regular term. In the section of the Ohio Constitution, from which the provision under consideration was taken, the expression used was "annual election." Const. Ohio 1851, art. 4, § 13. As the provision was originally reported to the Kansas Constitutional Convention and adopted the phrase was "general election." *Proceedings and Debates of the Constitutional Convention*, pp. 67, 73. The change from "annual" to "general" was doubtless occasioned by the fact that justices of the peace were required to be chosen at township elections, to be held in April. The work cited does not disclose at what state of the proceedings the word "general" was changed to "regular," but the change may be thus accounted for. In the original draft the term "general election" was made to embrace township elections. Same, p. 177. Later, on the recommendation of the committee on phraseology, it was restricted to the annual elections in November. Same, p. 388. The November and April elections could not both be covered by either the word "annual" or "general." Some new term was necessary, and "regular" was doubtless adopted without a purpose to change the spirit of the original provision. From the earliest history of the state down to the present time, the practice has been for one appointed as a district judge to hold under the appointment only until the qualification of a successor chosen at a general election whether that particular office would ordinarily be filled at that time or not. So, where a vacancy has been created by the death or resignation of a justice of the Supreme Court who had several years still to serve, at the next election for state officers a successor has been chosen. In several cases in this court it has been assumed that this established practice was in accordance with the requirements of the Constitution. See the cases cited in *State v. Holcomb*, supra; also, *Bawden v. Stewart*, 14 Kan. 355. In view of the history of the constitutional provision, of its manifest purpose, and of the practical interpretation long placed upon it, we conclude that an election at which judges of the district court are to be chosen for a full term in any of the districts of the state is as to that office in every district a regular election within the meaning of that expression as there used.

Upon these considerations, judgment for the plaintiff has already been rendered. All the Justices concurring.

(83 Kan. 665)

HUNT et al. v. REMSBERG et al.†
(Supreme Court of Kansas. Jan. 9, 1911.)

(Syllabus by the Court.)

INSURANCE (§ 795*) — MUTUAL BENEFIT — RIGHT TO PROCEEDS—CONSTRUCTION OF CERTIFICATE—"LEGAL REPRESENTATIVE."

A fraternal insurance association issued a certificate of membership to a man who named his wife as beneficiary. It was provided that in case the wife died before he did, he might name another beneficiary, but if he failed to do so, or if for any reason there was none when the insurance should be payable, the money should be paid to his legal representative. The wife died; he died some years after; an administrator of his estate was appointed, to whom the association paid the money. The insured left three minor children, who commenced an action against the administrator and his sureties to recover the money. *Held*, that they ought not to recover. The administrator was the "legal representative" of the deceased, within the meaning of that term, and was entitled to the money as a part of the estate of the insured.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1973; Dec. Dig. § 795.*

For other definitions, see Words and Phrases, vol. 5, pp. 4070-4079; vol. 8, p. 7704.]

Johnston, C. J., and Smith and Porter, JJ., dissenting.

Appeal from District Court, Allen County.

Action by Charlie Hunt and others against John D. Remsberg and others. Judgment for plaintiffs, and defendants appeal. Reversed.

Chas. H. Apt, for appellants. Ritter & Forrest, for appellees.

GRAVES, J. This is an action upon an administrator's bond to recover insurance money received upon the life of John Hunt, deceased, and used as a part of his estate. The widow is dead; the plaintiffs are all the children of said John Hunt, deceased. It is claimed that this money belongs exclusively to the children of John Hunt, deceased, and is no part of the estate of the insured, and that neither the administrator nor the probate court have any right to assume control of or to exercise any dominion over it.

John Hunt, on the 2d day of December, 1897, at Burlington, Iowa, joined the association known as the Merchant's Life Association, located at that place. He thereby became a member of that association with his life insured in the sum of \$2,000. It was an insurance association organized upon the mutual plan. John Hunt died intestate April 30, 1907, at Gas, Allen county, Kan., leaving three minor children as his sole heirs at law; his wife having died prior thereto. John D. Remsberg was duly appointed as administrator of said estate and was duly qualified and entered upon his duties as such. In May following he collected the \$2,000 insurance money from the association and reported it to the probate court.

When John Hunt received his certificate of membership, he named his wife, Martha Elizabeth Hunt, as beneficiary, who on February 26, 1900, died at their residence in Packwood, Iowa, where they resided when the insurance was obtained. A few years afterward they removed to Allen county, Kan., where they resided until the death of John Hunt. There is a provision in the certificate of membership which reads: "In the event of the death of the beneficiary prior to that of the member, or in case none is named, the benefit then to be payable to the legal representative of the deceased member." No other beneficiary was named by John Hunt after the death of his wife, although he had a right to make such an appointment at any time after her death. The administrator, under the directions and orders of the probate court, paid the proceeds of said insurance certificate to the creditors of said estate to the amount of \$1,500. The defendants, J. S. Christian and T. J. Anderson, are sureties on the administrator's bond. It is contended by the plaintiffs that the proceeds of the certificate belong exclusively to the legal representatives of John Hunt, and that his children are such legal representatives, while it is contended by the defendants that the legal representative is the administrator, John D. Remsberg; and this constitutes the sole question in controversy.

The question as to who constitutes the legal representative of the holder of an insurance policy is not very well settled. The proper interpretation seems to depend upon the context of the instrument where used, and surrounding circumstances.

In the case of *Griswold v. Sawyer*, 125 N. Y. 411, 26 N. E. 464, it is said: "The words 'legal representatives' mean, ordinarily, executors or administrators, and that meaning will be attributed to them in any instance, unless there be facts existing which show that the words were not used in their ordinary sense, but to denote some other and different idea. The facts in this case are not sufficient to change the ordinary meaning of this language, and we therefore must attribute to the insured an intention in conformity to the ordinary meaning given to those words." See, also, *Cox v. Curwen*, 118 Mass. 198, where the syllabus reads: "A. by indenture conveyed all the property inherited from his father to B. in trust, to retain and hold it during the life of A., to convert the real estate into personalty, to render accounts to him annually, and to pay to him from time to time the income, and, if necessary, part of the principal at the discretion of the trustee, for the benefit of A. and his daughter, and after his death to transfer all the estate then remaining to his 'legal representatives.' *Held*, that there was nothing in the indenture to show that the words 'legal representatives' were intended to have

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes
† Rehearing denied.

other than their ordinary meaning, 'executors and administrators,' and, A. having devised the residue of the estate, that the trust estate should be conveyed by B. to A.'s executor to be distributed according to the terms of the will."

The second syllabus in the case of *Johnson v. Van Epps*, 110 Ill. 552, reads: "The words 'legal representatives,' in a policy of insurance, as designating the beneficiaries, when there is nothing in the context or surrounding circumstances to indicate a contrary intention, mean 'executors or administrators.' A policy of insurance payable to the legal representatives of the assured is the same as if made payable to himself."

In the case of *Lodge v. Weld*, 139 Mass. 499, 2 N. E. 95, it is said: "There can be no doubt that the ordinary meaning of the term 'legal representatives' is 'executors and administrators.' *Cox v. Curwen*, 118 Mass. 198; *Price v. Strange*, 6 Madd. 159. In wills, the term may mean whatever the testator intended; but if the meaning is not controlled by the context, it means executors or administrators."

In *Geoffroy v. Gilbert*, 15 Misc. Rep. 60, 36 N. Y. Supp. 884, as follows: "Primarily the words 'legal representatives' signify the executors or administrators of a deceased person. They, however, have been construed to refer to blood relations as heirs or next of kin, and are held to mean that class of persons where the circumstances indicate such intention, and where a father took out a life policy payable to his daughter, four years old, or her legal representatives, and she married and died before her father, her husband is not entitled to the proceeds of the policy."

The ordinary meaning of the words "legal representatives" is "executors and administrators," and they will be given this meaning where there is nothing in the instrument in which they are used to indicate an intention to use them in any other sense. *Cox v. Curwen*, 118 Mass. 198; *Lodge v. Weld*, 139 Mass. 499, 2 N. E. 95; *Johnson v. Van Epps*, 110 Ill. 551.

The insured in this case, J. H. Hunt, named his wife as beneficiary. After she died there remained three small children, and he might at any time, for several years thereafter, have named some other person, but did not do so. It must be assumed that he knew of this condition in his certificate and failed to appoint another beneficiary for some reason satisfactory to himself, but which is not clearly expressed. He evidently thought that a beneficiary and a legal representative were not persons belonging to the same class, or they would not have been mentioned as they were in the certificate, which says, if there be no beneficiary, then the money shall go to the legal representatives of the deceased member. It would have been very easy to change the words "legal representatives" to "children," if that had been

the desire, and then the intent would have been unmistakable. It seems unreasonable to assume that John Hunt was familiar with the narrow margin of difference between these phrases and how by interpretation they could be made to mean the same thing or otherwise. It seems more reasonable to assume that if he so understood, he would have been sufficiently solicitous for his children to have made his meaning clear. We do not know why he neglected to appoint another beneficiary. We only know that he allowed the language to stand unchanged which, in its ordinary meaning, justified the interpretation placed upon it by the insurance company when it paid the money, and by the administrator and probate judge who officially exercised jurisdiction over it. The ordinary meaning of the language used would lead to this conclusion, and we are unable to find anything, either in the instrument where this language is used or elsewhere in the case, which, to our minds, shows any other intent.

The judgment is reversed, with direction to enter costs in favor of defendants.

BURCH and MASON, JJ., concur.

BENSON, J. (concurring specially). Concurring with the opinion of the majority of the court I desire to add: (1) The articles of incorporation of the insurance company which issued the policy in question declare that beneficiaries may be "husband, wife, relative, legal representative, heir, or legatee." It must be presumed that these terms were used in their ordinary sense, and that each represents a distinct class. The Iowa statute set out in the pleadings authorizes insurance for such beneficiaries, using the same terms, and including creditors also. The term "legal representative," as used in the articles referred to and in the statute, clearly applies here, as it does ordinarily to an administrator or executor.

(2) The policy was written in accordance with the power given by the articles of incorporation and the statute naming the wife as the beneficiary, with the proviso that in case she died, and no new beneficiary was designated by the member, the amount of the policy should be paid to his legal representative. The wife did die before the insured; no new beneficiary was named; hence it was payable to the administrator, unless the apparent meaning of the language of the statute, the articles, and the policy, is controlled by some statute or judicial interpretation to the contrary.

(3) The provisions of the Iowa statute relied upon by the appellees do not appear to affect the question. These provisions are: "But a certificate issued for the benefit of the wife or children shall not be thus changed so as to become payable to creditors," and "a policy of life insurance on the life of an individual, in the absence of an agree-

ment or assignment to the contrary, shall inure to the separate use of the husband or wife and children of said individual independently of his creditors." Code Iowa, §§ 1789, 1805. The first provision referring to benefit certificates, if it applies in any case to an ordinary insurance policy like the one under consideration, has no application here, for there was no change attempted. The policy was made payable directly to the legal representative, subject only to the death of the wife before the death of the insured. It was not issued to creditors, but for the benefit of the estate. Whether creditors might ultimately share in it was a contingency which, if contemplated at all, was not prohibited by the statute, nor by public policy, which is not inimical to the payment of debts. The other statutory provision only declares that, in the absence of an agreement or assignment to the contrary, the policy shall inure to wife or children. Here the agreement to the contrary is expressly made in the contract. The statute thus recognizes the right to make insurance available to creditors, if the insured so desires. Both of these statutory provisions, however, relate to insurance payable to creditors directly, and not to any contingent or possible benefits they may receive through the administration of an estate.

(4) The Iowa decision relied upon by the appellees (In re Estate of Conrad, 89 Iowa, 398, 398, 56 N. W. 535, 536, 48 Am. St. Rep. 396), does not sustain their contention. The policy there was made payable to the wife of the insured or to his legal representatives, or if not living at the time of the death of the insured, the sum then to be payable to his children. It will be observed that the beneficiary named was the wife or her legal representative, and that there was an express provision added that her children should receive the money. The court said: "It is expressly provided in the policy that, if the assured be not living at the time the policy becomes payable, the amount thereof shall be payable to her children. There was no authority to make payment to the administrator of her estate in any event. The clause authorizing payment to 'her legal representatives' does not mean payment to their administrator. It contemplates payment to some legal representative appointed by the wife to receive the money for her. There can be no other meaning attached to the expression 'legal representatives,' because it is expressly provided that, if the assured be not then living, payment shall be made to the children or their guardian."

As the policy in the foregoing case required the payment to be made to the children, the term "legal representative," as there used, necessarily meant a person authorized to receive payment for them. No other meaning could be given consistently with the terms of the policy. An earlier case in that

state, *Kelley v. Mann*, 56 Iowa, 625, 10 N. W. 211, held that it was the duty of an administrator to collect a policy payable to personal representatives, but also held that it could not be applied to the payment of debts, because of a statute expressly exempting the proceeds of certain life insurance therefrom. That statute, however, was not pleaded in this case (which was decided upon a motion for judgment on the pleading), but if it had been pleaded, it would not have been controlling here, for exemption laws are not a part of the contract; they are subject to the laws of the forum. Chicago, Rock Island, etc., Ry. v. Sturm, 174 U. S. 710, 17 Sup. Ct. 797, 43 L. Ed. 1144; Freeman on Execution, § 209.

In *Schultz v. Citizens' Mutual Life Ins. Co.*, 59 Minn. 308, 61 N. W. 331, it appeared that the policy was made payable to and for the sole use of the legal representatives of the insured. On the application, made part of the policy, the insured stated that the money should be paid to his "legal heirs"—"wife, if living." Construing the language of the two instruments together, the court held that the policy was payable to the wife and children of the deceased. This decision supports the principal opinion that it is permissible to construe the term "legal representative" with reference to the context.

(5) The answer, admitted by the motion for judgment to be true, alleged that the money was received in May, 1907, and that it had been disbursed in accordance with and under the judgments and order of the probate court, before the commencement of this action (March, 1909); that the administrator had duly performed all the orders and judgments of the court respecting said estate, and had not violated any condition of his bond. There is no averment in the petition that the appellees ever presented their claim in the probate court, although the sum due on this policy appeared on the inventory. A grave question is presented whether, even if the appellees were entitled to the fund, they should not have presented their claim in the probate court. The right of the administrator to collect the money is expressly held in *Kelley v. Mann*, supra. The fund was thus brought within the jurisdiction of the probate court, and the question remains whether there is any breach of the bond, until there is a violation of some order of the court respecting its distribution.

JOHNSTON, C. J. (dissenting). While the technical meaning of the term "legal representative" is an executor or administrator, it is frequently used in insurance policies like the one in this action to mean next of kin or heirs. Looking at the statute and the charter of the association in pursuance of which the contract was made, as well as the surrounding circumstances, it appears quite manifest to me that the term was used here

in the broader sense, and meant a natural representative, like husband, wife, relative, or heir, in connection with whom the term was used. It was so interpreted in *Olmstead v. Benefit Society*, 37 Kan. 93, 14 Pac. 449. The certificate in question was issued by an Iowa association organized under an Iowa statute, and we may look to that statute and the decisions under it in interpreting the contract. The statute provides that the purpose of insuring the lives of the members is to "furnish benefits to the wives, heirs, orphans, or legatees of deceased members." Code Iowa, § 1784. Another provision of the statute indicating that it was not contemplated that creditors could obtain benefits or proceeds of insurance through an executor or administrator is that the beneficiary may be changed at the pleasure of the assured, and it is then provided that "no certificate issued for the benefit of a wife or children shall be thus changed, so as to become payable to the creditors." Iowa Code, § 1789. In this case, the wife was named as beneficiary. Under the statute, it would have been impossible for the assured to have changed the beneficiary, so as to have made the benefits payable to creditors.

In the face of this provision, the benefits ought not to be given to creditors through the technical definition of the term "legal representative." The term being susceptible of interpretation as an heir or child, it should be given that meaning, rather than one that would be in conflict with the statute. "The words 'legal representatives' have a secondary sense well recognized, which harmonizes entirely with the purposes and objects of the association. The instances are not few in which they have been held to mean heirs at law. The terms 'legal representative,' 'personal relatives,' etc., are often used in statutes and instruments of writing in a broader sense, so as to include all persons who stand in the place of or represent the interest of another, either by his act or operation of law." In *re Harton*, 213 Pa. 499, 62 Atl. 1058, 4 L. R. A. (N. S.) 939. Another section of the statute provides that in the absence of an agreement to the contrary a policy "shall inure to the separate use of the husband, wife, and children of said individual independently of his creditors" (Code Iowa, § 1805), and in the same section there is a provision that the proceeds of a policy shall be exempt from liability for any debts, and still other provisions, to the effect that benefits, indemnity, or the avails of policies shall be exempt from liability for debts. It may be mentioned, too, that the charter of the association struck out the term "creditors" from the list of those who, under the statute, might have been named as beneficiaries. It was competent for the association to narrow the classes to whom benefits might go, and the charter of the association named all of those mentioned by the

statute, except creditors. It is provided, too, that a certificate when issued to those designated by statute cannot be assigned to any one else. Code Iowa, § 1789. The Supreme Court of Iowa held that an administrator who obtained money on a policy payable to legal representatives was liable for the avails of the policy, which should have been paid to the wife and children. *Kelley v. Mann*, 56 Iowa, 625, 10 N. W. 211. See, also, *In re Estate of Conrad*, 89 Iowa, 396, 56 N. W. 535, 48 Am. St. Rep. 396. In *Schultz v. Citizens' Mutual Life Ins. Co.*, 59 Minn. 308, 61 N. W. 331, where the term "legal representative" was used in the contract and the application stated that the insurance was taken for the benefit of legal representatives, it was held that the term should be interpreted as meaning heirs or next of kin, and not executors or administrators. In deciding it, the court said: "It is always permissible to construe these words in that way, especially in wills and policies of life insurance, wherever it is apparent from the context or subject-matter that they were used in that sense. They will be construed in that way more readily in policies of life insurance than in almost any other kind of instrument, for the reason that such insurance is very commonly intended for a provision for the family of the insured." If a term in a statute is of doubtful import, it should be construed in connection with the entire statute and the obvious purpose of the lawmakers, and when the whole statute and charter of the association are considered, it seems reasonably clear to me that provision was not being made for the benefit of creditors. The declared purpose of the statute was to provide protection for widows, heirs, orphans, and legatees of deceased members. In cases of doubt, the intention of the insured is an important element in determining the meaning of words used in a certificate.

Now the assured had a widow and children, and he became a member of an association that was organized to provide insurance for wives and children. He designated his wife as a beneficiary, and when his wife died the children still needed protection. He did not, it is true, name another beneficiary after the death of his wife; but it is not to be supposed that he was planning and intending to make provision for the protection of creditors at the expense of his children. It is rather to be inferred that he regarded the term "legal representatives" as broad enough in its meaning to include his children, and so far as intention can go, it would not take much evidence to raise the presumption that he intended the insurance for his children, and not for his creditors.

SMITH, J. I join in the dissenting opinion. PORTER, J. I concur in the foregoing dissent.

(83 Kan. 638)

ELLIS et al. v. SNYDER et al. (two cases).
(Supreme Court of Kansas. Jan. 9, 1911.)

(Syllabus by the Court.)

1. LIMITATION OF ACTIONS (§ 155*) — PART PAYMENT.

A husband and wife executed a note secured by mortgage on their land, and the husband thereafter died, having previously conveyed the title to his wife. The widow rented the farm to her son-in-law, and during such tenancy the widow died. The son-in-law, with his wife, continued in possession of the farm, and before the expiration of five years from the maturity of the note made a small payment on the debt. They continued in possession for a number of years until this action to foreclose the mortgage was brought, with the acquiescence of the brothers and sisters of the wife, and he, with her consent, made several payments upon the indebtedness and paid the taxes on the land, all of which payments were made from the proceeds of crops raised upon the land. No interval of five years elapsed between such payments. He neither paid nor contracted to pay any rent to any of the heirs. *Held*, that such payments prevented the running of the statute of limitation in favor of any of the heirs against the mortgage debt.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 623, 627, 628; Dec. Dig. § 155.*]

2. TENANCY IN COMMON (§ 30*)—DUTIES OF COTENANT IN POSSESSION—PAYMENT OF INTEREST ON MORTGAGE AND TAXES.

A tenant in common in possession of mortgaged real estate, with the acquiescence of the other cotenants, and in the absence of any contract to pay rent, owes a duty to the other cotenants to pay the interest maturing on the mortgage and taxes accruing on the land.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. §§ 95, 96; Dec. Dig. § 30.*]

Appeal from District Court, Sumner County.

Actions by Charles E. Ellis against Elizabeth D. Snyder and others were consolidated on the death of Charles E. Ellis. The actions were revived in the name of the Commonwealth Title Insurance & Trust Company and Franklin L. Lyle, executors. Judgment for defendants, and plaintiffs appeal. Reversed and remanded, with instructions.

James T. Herrick and H. W. Herrick, for appellants. Ed T. Hackney, for appellees.

SMITH, J. February 1, 1889, John W. Gray and Elizabeth A. Gray, his wife, executed a mortgage on the land in question to secure the payment of a note for \$2,000, payable five years after that date, with interest. The Southern Kansas Mortgage Company was the mortgagee, but before the commencement of this action assigned the note and mortgage to Charles E. Ellis, who brought the action to foreclose the same. Both Gray and his wife died before the maturity of the note and mortgage. Before his death the husband conveyed the land to his wife. She died April 10, 1892, leaving as her only heirs at law Elizabeth D. Snyder, who had been theretofore married to one Bert

Snyder, Tina Gray, who together with the said Elizabeth D. Snyder had attained her majority, besides the three sons and two other daughters, who were all minors. At a time prior to the death of Mrs. Gray, Bert Snyder had rented a portion of the land in question and soon after her death he and his wife, Elizabeth, moved upon the land and continued to occupy it until this action was brought. Bert Snyder made an oral contract with the guardian of the minor children for the purchase of their interest in the land, conditioned upon the approval thereof and order of the probate court. No action, however, was taken by the court in relation thereto. Bert Snyder borrowed money of the mortgagee to pay insurance, buy seed wheat, taxes, etc., from September 18, 1895, to February, 1900. He made payments from time to time to the mortgagee from October, 1895, to November, 1901, which were almost entirely from the proceeds of wheat and corn raised on the farm. On November 14, 1896, he paid the mortgagee, by proceeds of wheat, \$44.20, and on December 20, 1896, the proceeds of corn, \$19.25, at neither of which dates was he indebted to the mortgagee on any account other than the mortgage. These two payments, aggregating \$63.45, must be regarded as payments on the interest, and at the time the payments were made neither the principal of the mortgage debt nor any interest thereon had been due five years. Thereafter Bert Snyder borrowed further sums of money from the holder of the mortgage from time to time and repaid certain amounts from the proceeds of the farm until November 16, 1901, when the sum of the payments exceeded the amounts borrowed by over \$700, but at no time paid an amount equal to the interest due on the mortgage. Elizabeth Snyder objected to her husband's plan to buy out the interest of the minors in the land, as he had agreed with the guardian, for \$100 and to pay off the mortgage; but she signed with him chattel mortgages on the growing crops to enable him to carry out the plan and she knew generally of the payments he made and, from the general findings of the court against her, it must be assumed that it found that she acquiesced therein. The evidence, while conflicting, is sufficient to support such finding. There is no evidence of any agreement that she should convey her interest to her husband. The payments were made in her behalf, as well as in his, and were in fact her payments, as well as his. The other adult heir, Tina Gray, lived with the Snyders on the farm some time after the death of the mother and before she married Marks. The undisputed evidence is that she was present when the tentative agreement was made between Bert Snyder and the guardian of the minors and agreed to deed her interest in the land to Bert Snyder, but said they could not pay the mortgage and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

had better let it take the land. Mr. Bishop, the guardian, testified that he thought there was nothing in the land for his wards, never made any effort to get possession for them and agreed, if the probate court would approve it, to sell their interest to Bert Snyder for \$100.

It thus appears that Bert Snyder and his wife continued in possession by the consent or acquiescence of all the other cotenants and made the payments on the interest for the benefit, in part, of each; also it appears that the holder of the mortgage was about to foreclose it at the time this arrangement was made and, relying thereon, forebore such action. Under such circumstances, it would seem very inequitable, if not illegal, to permit the cotenants, who paid nothing, and years after, when changed conditions have greatly augmented the value of the property, to set up the statute of limitations and take their respective interests in the land, free of incumbrance, and thus not only debar the mortgagee from recovering a large portion of his just claim, but also to subject the interest of the cotenant who strove, and paid in part, to be entirely taken for the remainder.

It is said in *Clute v. Clute*, 197 N. Y. 439, 90 N. E. 988, 27 L. R. A. (N. S.) 146, 134 Am. St. Rep. 891: "Interest payments upon the mortgage debt by the son of the mortgagor who, having been let into possession of the property during the lifetime of the mortgagor, under an agreement to work it on shares, continues his possession after the mortgagor's death, with the acquiescence of his brothers and sisters, prevent the running of the statute of limitations in favor of the latter against the mortgage debt. A tenant in common in possession of mortgaged real estate owes the duty to his cotenant to pay the interest maturing on the mortgage." (Syllabus.) See, also, 2 Jones on Mortgages (3d Ed.) § 1198; *Freeman on Cotenancy* (2d Ed.) § 371; *Hollister v. York*, 59 Vt. 1, 9 Atl. 2; *Eads v. Retherford*, 114 Ind. 273, 16 N. E. 587, 5 Am. St. Rep. 611.

We have not been cited to nor do we recall any Kansas case that involves this question. The principle enunciated in *Clute v. Clute*, supra, and in *Lawton v. Adams*, 13 Ohio Cir. Ct. R. 233, to wit: "Where one of the owners of the land comes to him and offers to pay upon the note (in this case one of the heirs), it would seem to be that upon principles of justice and equity, as between the mortgagee and these various persons holding an interest in the land, that payment by one should be held to be the joint act of all, a payment made for the purpose, primarily, of relieving the property from the debt; that is to say, that it is made to reduce the indebtedness upon the land, and is made for the benefit of all, and should be binding upon all," seems entirely just and equitable, ap-

plied to this case. We hold, accordingly, that the action to foreclose the mortgage was not barred as to any one of the defendants in the court below.

The case is therefore remanded, with instructions to render judgment in favor of the holder of the mortgage against all of the defendants. All the Justices concur.

(83 Kan. 646)

TAYLOR v. DANLEY et al.

(Supreme Court of Kansas. Jan. 9, 1911.)

(Syllabus by the Court.)

1. TAXATION (§ 755*)—TAX DEED—VALIDITY—IDENTIFICATION OF GRANTEE.

A tax deed issued to "Wheeler & Motter of Buchanan county, Mo.," is not void for the reason that it does not sufficiently identify the grantee.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1506; Dec. Dig. § 755.*]

2. TAXATION (§ 755*)—TAX DEED—CONVEYANCE BY GRANTEES.

Where, in such case, W. W. Wheeler and Joshua Motter, with two persons designated as their respective wives, after the issuance of such tax deed, join in a conveyance of the land described in the tax deed, it will be presumed, in the absence of any evidence, after the tax deed has been of record more than five years, that W. W. Wheeler and Joshua Motter were the identical persons named as grantees in the deed.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1506; Dec. Dig. § 755.*]

3. EJECTMENT (§ 84*)—PLEADING—SUFFICIENCY—EVIDENCE ADMISSIBLE.

In an action of ejectment, where the petition and answer set forth such facts and make such denials only as are required by sections 619 and 620 of the Code of Civil Procedure (Gen. St. 1909, §§ 6214, 6215), either party under such pleading may prove any fact which would tend to strengthen his own title or to defeat that of his adversary to the same extent as if the facts were fully pleaded, including such as may tend to prove that the rights of either party have been barred by any statute of limitations.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 230, 231; Dec. Dig. § 84.*]

Appeal from District Court, Scott County.

Action by Mary N. Taylor against John T. Danley and J. W. Scott. Judgment for plaintiff, and defendants appeal. Reversed and remanded.

W. M. Glenn and W. B. Lowrance, for appellants. H. O. Trinkle and A. R. Heetzer, for appellee.

SMITH, J.: This is an action in ejectment, brought by the appellee on March 2, 1908, to recover 160 acres of land in Scott county. The plaintiff simply alleged in her petition that she was the owner of the land, was entitled to the immediate possession thereof, and that the defendants unlawfully kept her out of possession. The answer of the appellants to this petition was a general denial only. In another paragraph the defendant

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Danley alleged that he had been the owner of the land and in the actual possession thereof for more than two years before the commencement of the action, that the appellee claimed some interest therein, but such claim had no foundation in law, and she had no legal right, claim, or interest to said real estate, and prayed for the quieting of his title thereto. The appellee replied by a general denial. A jury was waived, and trial was had to the court.

The evidence on the part of the plaintiff was a tax deed, issued and recorded January 9, 1895, from the county clerk of Scott county to "Wheeler & Motter of Buchanan county, Mo.," to the land in controversy for the taxes of the years 1890, 1891, and 1892 under the sale of 1891. The appellants objected to the introduction of the deed for the reason that the deed was void on its face, the grantee not being capable of taking title, and some other objections which need not be considered. The appellee also introduced in evidence a quitclaim deed to the land wherein W. W. Wheeler and wife and Joshua Motter and wife were the grantors, and W. O. Bourne was grantee; also a chain of conveyances from W. O. Bourne to the appellee. It was admitted that the appellee and her grantors had paid all the taxes on the land since the execution of the tax deed; but the appellants objected to this evidence as incompetent and immaterial.

After the overruling of a demurrer to the appellee's evidence on the ground of insufficiency, it was admitted by the appellee that the patent title to the land was in Silas Scott Clugston, and that by deed dated February 1, 1906, and recorded February 17, 1906, he conveyed his interest in the land to the appellant Danley; also, that the records showed a mortgage from Silas Scott Clugston, the then owner of the land, to John D. Knox & Co., which mortgage was assigned to W. B. Lowrance July 22, 1890, and the assignment recorded November 15, 1902. Much other evidence was offered in regard to the possession of the land by Lowrance through tenants, which we regard as immaterial, as there is no evidence that there was any privity between Lowrance and Danley, and all rights Scott had to the possession at the time of the beginning of the action were under Danley.

Another question in the case is as to the validity of the tax deed issued to "Wheeler & Motter"—whether it is void by reason of the lack of identification of the grantees. If the deed be void, there is, of course, no fountain head from which the appellee could derive title. If only voidable, the deed having been recorded more than five years, every reasonable presumption is to be indulged in favor of its validity. Neither the tax deed nor any evidence introduced, unless it be the subsequent conveyance of W. W. Wheeler and wife and Joshua Motter and wife, in any way identifies "Wheeler & Motter," as to

whether the grantees in the deed were two individuals purchasing as tenants in common or whether the name constituted the name of a copartnership. Even if it be assumed that "Wheeler & Motter" was a copartnership, it is said in the case of *Sherry v. Gilmore*, 58 Wis. 324, 17 N. W. 252: "A tax deed issued to partners in the firm name is not void for want of a grantee." (Syllabus.) See, also, *Black on Tax Titles* (2d Ed.) par. 391; 30 Cyc. 432. It is said, substantially, in 13 Cyc. 539, that, where a copartnership is named as a grantee in a deed, it constitutes a latent ambiguity which may be explained by parol. *Murray v. Blackledge*, 71 N. C. 492; *Morse v. Carpenter*, 19 Vt. 613. Assuming that the tax deed in question was issued to two individuals whose Christian names were omitted, there can be no question that the deed would not be void for that reason, but that the grantees could be identified by evidence aliunde. *Webb v. Den*, 17 How. 576, 15 L. Ed. 35; *Aultman v. Richardson*, 7 Neb. 1. If, therefore, the grantee in this tax deed may be identified by evidence aliunde, the tax deed is not void, but, at most, only voidable, and it matters not in the decision of this case that such evidence was not produced at the trial. Under the rule frequently stated by this court, every reasonable presumption will be entertained to sustain the validity of a tax deed which has been of record more than five years, and no presumption will be indulged to invalidate it. See *Cross v. Herman*, 74 Kan. 554, 87 Pac. 686; *Tucker v. Shorb*, 80 Kan. 511, 103 Pac. 79; *Less v. Yeats*, 82 Kan. 105, 107 Pac. 787. The presumption in this case is that "Wheeler & Motter" designated two persons, and that the W. W. Wheeler and Joshua Motter, who afterwards signed a deed of conveyance to the land, were the two individuals named in the deed. It follows that the tax deed should in this respect be held valid. The undisputed evidence is that Danley, through Scott, was in possession of the land from the date of the deed to Danley (February 1, 1906), more than two years before the commencement of this action. It will also be observed that neither the limitation defined in subdivision 3, section 15, of the Code of Civil Procedure (Gen. St. 1909, § 5608), nor any other limitation, was pleaded to the petition. Neither did the petition on its face show that the defendants have been in possession more than two years before the beginning of the action.

The defendant Danley before the final submission of the case to the decision of the court moved to dismiss his cross-petition, which motion was denied by the court. This was error. Section 395, Code.

The only question that remains is whether the appellant Danley could avail himself of the statute of limitations to the plaintiff's cause of action under a general denial and without especially pleading it. Generally it

is a well-established rule that unless a petition shows on its face that it is barred by the statute of limitations, a defendant cannot avail himself of the statute without especially pleading it. In actions of ejectment there is much contrariety of opinion in different states as to whether the general rule applies. Our statute (section 619, Code) provides what it is necessary to plead in the petition, and in section 620 of the Code what shall be necessary in the answer. Where a petition, as in this case, barely alleges, as required by statute, that the plaintiff is the owner of the land in question, is entitled to the possession thereof, and that the defendant unlawfully keeps her out of possession, the defendant cannot, without more fully setting forth the plaintiff's cause of action than is stated in the petition, plead the statute of limitations thereto. For instance, in this case the defendant to interpose this defense would be required to allege that the plaintiff's title is based upon a tax deed, the date it was issued, that she had not been in possession of the land, and that the defendant had been in adverse possession thereof for more than two years. The defendant cannot be presumed to know upon what the plaintiff bases the cause of action except from the petition, and any rule that would require the defendant to set forth the plaintiff's cause of action more fully than does the petition would seem absurd.

This particular question, whether the general rule that the defendant must plead the statute of limitations before it can be interposed as a defense, does not seem to have been decided in this state; but it is said in *Stout v. Hyatt*, 13 Kan. 232, 236: "Either party under such pleadings (referring to the section of the Code above cited) may prove whatever would strengthen his own title, or defeat his adversary's title, in the same manner and to the same extent as he could do if the facts were set out with all the circumstantial minuteness and fullness of detail that they usually are in equitable actions." See, also, *Wicks v. Smith*, 18 Kan. 508. It is expressly held in the following cases that the statute of limitations need not be pleaded in ejectment actions, under statutes similar to ours: *Stubblefield v. Borders*, 92 Ill. 279; *Fairbanks v. Long*, 91 Mo. 628, 4 S. W. 499; *Stocker v. Green*, 94 Mo. 280, 7 S. W. 279, 4 Am. St. Rep. 382; *Lea v. Slatterly*, 7 Baxt. (Tenn.) 235; *Horne v. Carter*, 20 Fla. 45; *Rhodes v. Gunn*, 35 Ohio St. 387; *Warvelle on Ejectment*, § 204. The following authorities seem to be to the contrary: *Custard v. Musgrove*, 47 Tex. 217; *Orton v. Noonan*, 25 Wis. 672; *Hanse v. Mend*, 27 Hun (N. Y.) 162; *Chivington v. Colorado Springs Co.*, 9 Colo. 597, 14 Pac. 212. In accord with what seems to be the weight of authority, and also in accord with good reason based upon the very necessities of the

case, we hold that, where a petition and an answer in an action of ejectment are such only as are required by sections 619 and 620 of the Code, either party under such pleading may prove any fact which would tend to strengthen his own title or to defeat that of his adversary to the same extent as if the facts were fully pleaded.

In actions for the recovery of real property, by the provisions of the Code (section 619), it is sufficient if the plaintiff states in his petition that he has a legal or equitable estate therein and is entitled to the possession thereof, and that the defendant unlawfully keeps him out of such possession; and by the provisions of section 620 it shall be sufficient if the defendant deny generally the title alleged in the petition or that he withholds the possession. It was the clear intentment of the framers of the Code that such pleadings should answer in all cases of this nature. The defendant may not be informed of the nature of the plaintiff's claim of title and is not required to specifically state any defense he may have thereto; he is only limited in this, that if he deny the plaintiff's title he must admit that he has the possession. Under such pleadings either party may prove any fact which tends to establish his own right or defeat the claims of his adversary, and either party may be confronted with proof of facts of which he was wholly unadvised by the pleadings. The court, of course, follows the plain provisions of the Code, resorting only to construction where there is uncertainty of its meaning. The writer, however, is of the opinion that in many cases it would be much better and fairer to litigants had the general provision of the Code been made applicable to actions of this nature as to other actions, to wit, that the plaintiff should make a statement of the facts constituting his cause of action in ordinary and concise language, without repetition, and that the defendant in his answer should make a statement of any new matter constituting a defense or right to relief concerning the subject-matter of the action in ordinary and concise language, without repetition.

There was evidence in this case which tended to prove that the tax deed had been issued more than five years before the commencement of the action, that the appellee had never been in possession of the land thereunder, and that the appellant (Danley) had been in possession of the land for more than two years prior to the commencement of the action. The evidence as to the possession, which tended to show that the plaintiff's cause of action was barred, should be considered as pertinent to the issues raised by the pleadings as if the limitation had been expressly pleaded in the answer.

For the reasons given, the judgment is reversed, and the case is remanded for a new trial. All the Justices concurring.

(S Kan. 757)

DUNLAP v. GIBSON et al.
(Supreme Court of Kansas. Jan. 7, 1911.)

(Syllabus by the Court.)

1. NOTICE (§ 2*)—"ACTUAL NOTICE"—DISTINGUISHED FROM "KNOWLEDGE."

"Actual notice" and "knowledge" are not always synonymous. Upon proof of sufficient facts, the law will presume that a party has information equivalent in its legal effects to actual knowledge.

[Ed. Note.—For other cases, see Notice, Cent. Dig. § 2; Dec. Dig. § 2.*]

For other definitions, see Words and Phrases, vol. 1, p. 158; vol. 8, p. 7564; vol. 5, pp. 3940-3942.]

2. JUDGMENT (§ 142*)—OPENING—WANT OF NOTICE OF ACTION.

A party against whom a judgment has been rendered upon service by publication only cannot have the judgment opened up, under section 83 of the Code of Civil Procedure (Gen. St. 1909, § 5676; section 77 of the old Code), by showing that he had no actual notice of the action in time to defend, where it sufficiently appears by counter affidavits that an agent duly authorized by him to represent him in the subject-matter of the litigation had notice in time to defend.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 253; Dec. Dig. § 142.*]

3. JUDGMENT (§ 162*)—SETTING ASIDE—APPLICATION—SUFFICIENCY OF EVIDENCE.

Where such an application is made and counter affidavits are presented, and it is attempted to bring actual notice to the defendant by showing notice to an agent, the authority of the agent to represent the party in the particular litigation in which the notice was given must be established by clear and satisfactory proof.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 319-322; Dec. Dig. § 162.*]

4. JUDGMENT (§ 162*)—SETTING ASIDE—NOTICE BY AGENT OF ACTION.

The evidence in this case examined and held not sufficient to show authority of the agent to represent the appellant in the subject-matter of the action.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 319-322; Dec. Dig. § 162.*]

Appeal from District Court, Cheyenne County.

Action by H. W. Dunlap against Charles E. Gibson and others. Judgment for plaintiff and from an order refusing to open the judgment, defendant Gibson appeals. Reversed and remanded, with instructions.

Fred Robertson, for appellant. J. L. Finley and J. S. Langmade, for appellee.

PORTER, J. Charles E. Gibson lives at West Newton, Mass. H. W. Dunlap brought suit against him to quiet title to a tract of land in Cheyenne county, and obtained service upon him by publication only. On May 28, 1907, judgment by default was taken in favor of Dunlap. On August 15, 1908, Gibson filed an application to open up the judgment under section 83 of the Code of Civil Procedure (Gen. St. 1909, § 5676) and gave notice to the adverse party of his intention to make the application as provided

by the statute, and filed a full answer to the petition. The affidavits in support of this motion to open up the judgment alleged that he had no actual notice of the pendency of the motion in time to appear and make his defense. The court denied the motion, and he appeals.

On the hearing the plaintiff, by way of counter affidavit, offered in evidence the deposition of Gibson in which he testified that he had been engaged in western land business for 23 years, and, so far as possible, took personal charge of his business. He further testified: "My Kansas interests are quite large and varied, and are in charge of different men. Albert E. King, of McPherson, Kan., has personal charge of my land business with a field force under his authority. My attorneys in different parts of the state have charge of foreclosures and other litigations." He was then asked: "Has Mr. King authority from you to employ counsel to bring a legal action in the event that the same should be necessary? A. If my interests were jeopardized by any legal action, and there was not time for him to consult with, or get written instructions from me, he would have authority to employ counsel in such emergency." Plaintiff then introduced evidence showing that A. E. King knew of the pendency of the suit as early as May 28, 1907, before the default judgment was taken.

In our opinion the court should have opened the judgment. The statute expressly provides that the judgment may be opened up, if it be made to "appear to the satisfaction of the court, by affidavit, that during the pendency of the action he had no actual notice thereof in time to appear in court and make his defense." The statute is remedial and should be liberally construed. In Beckwith v. Douglas, 25 Kan. 229, it was held that by the words "actual notice" it is not necessary that the defendant be fully informed as to the time of commencing suit, the court in which it is commenced, the property attached, the exact amount claimed, nor the date named for the answer. It is further said that "it is enough that he is distinctly and clearly notified that such a suit has been commenced and is pending against him, and notified from such a source, and within such a time, that, by the exercise of ordinary and reasonable care and prudence, he can ascertain all details and make his defense. And where a good and meritorious defense is presented, courts will not scan too closely or technically any omission to pay prompt attention to uncertain and indefinite notices."

There seems to be an irreconcilable conflict in the authorities as to whether actual notice is synonymous with knowledge. 29 Cyc. 1113; 21 A. & E. Enc. of L. 581, note 4. The better rule seems to be that announced

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

in *Cleveland Woolen Mills v. Sibert, Ward & Co.*, 81 Ala. 140, 146, 1 South. 773, 776, where it is said in the opinion: "However closely actual notice may in many instances approximate knowledge, there may be actual notice without knowledge."

In 2 *Pomeroy's Equity Jurisprudence* (3d Ed.) § 594, the author says: "Within the meaning of the rules, notice may, I think, be correctly defined as the information concerning a fact actually communicated to a party by an authorized person, or actually derived by him from a proper source, or else presumed by law to have been acquired by him, which information is regarded as equivalent in its legal effects to full knowledge of the fact, and to which the law attributes the same consequences as would be imputed to knowledge."

No doubt, cases might arise where a party would be held to actual notice under section 83 of the Code by proof of notice to an agent duly authorized to act for him in the matter. In our opinion, the appellee failed to prove by satisfactory evidence that King had authority to represent the appellant in the particular litigation concerning which the notice was given. The provision of the Code authorizing judgments to be opened has always been liberally construed, and, where such an application is resisted, and it is attempted to bring to a party actual notice of the pendency of the action by showing notice to an agent, the authority of the agent to represent him with respect to the subject-matter of the action should be established by clear and satisfactory proof. There must be facts shown from which the law will presume the party to have acquired information equivalent in its legal effects to actual knowledge.

The judgment will be reversed and the cause remanded, with instructions to open up the judgment and allow appellant to defend.

All the Justices concurring.

(83 Kan. 743)

BOARD OF COM'RS OF CHEYENNE COUNTY v. WALTER et al.

(Supreme Court of Kansas. Jan. 7, 1911.)

(Syllabus by the Court.)

1. AFFIDAVITS (§ 16*)—IRREGULAR VERIFICATION—AMENDMENT.

An affidavit of a party who applies to have a judgment opened up and that he be let in to defend verified before his attorney is irregular and voidable, but is not void, and hence it may be amended by a proper verification, and, when the amended affidavit is filed, it will relate back to the original affidavit.

[Ed. Note.—For other cases, see *Affidavits*, Cent. Dig. § 65; Dec. Dig. § 16.*]

2. JUDGMENT (§ 148*)—OPENING DEFAULT—SERVICE BY PUBLICATION.

Any one whose rights are affected by a judgment rendered without other service than

by publication is entitled to have the judgment opened up when he complies with the provisions of section 83 of the Code of Civil Procedure (Gen. St. 1900, § 5676), whether or not he was named as defendant in the action.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 259; Dec. Dig. § 148.*]

3. JUDGMENT (§ 164*)—OPENING DEFAULT—SERVICE BY PUBLICATION.

The fact that he may have challenged the validity of the service and the jurisdiction of the court to render any judgment will not justify the denial of his application to have the judgment opened up and for an opportunity to set up his rights and defenses.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 324; Dec. Dig. § 164.*]

Appeal from District Court, Cheyenne County.

Action by the Board of County Commissioners of Cheyenne County against Solomon Walter and others. Judgment for plaintiff, and defendants appeal. Reversed and remanded.

L. W. Colby, for appellants. Fred Robertson and J. L. Finley, for appellee.

JOHNSTON, C. J. In an action brought by the commissioners of Cheyenne county against Solomon Walter, H. C. Ewing, and others, a judgment was rendered on service by publication foreclosing a tax lien on a quarter section of land. H. C. Ewing had an interest in the land which he assigned to Wallace Robertson before the action was begun, but the assignment was not recorded. Ewing was named as a defendant in the action, but Robertson was not, and no appearance was made by either of them. The judgment was rendered on May 23, 1905, under which a sale of the land was made to R. M. Jaqua on August 16, 1905, and in due time a deed was executed and delivered to the purchaser. On August 14, 1907, Ewing and Robertson filed a verified motion to vacate the judgment and alleged that they had no actual notice of the pendency of the action in time to make a defense. They set forth their defense to the action, and offered to pay any and all charges against them. Notice of the application was given, and on April 7, 1908, Robertson filed his separate affidavit which contained the necessary averments authorizing the opening up of the judgment and letting him in to defend, and on May 9, 1908, filed an answer stating a defense to the action. Within less than three years from the rendition of the judgment of foreclosure Ewing filed a sufficient affidavit and answer under the Code provision for opening up a judgment. On motion of the appellee the trial court struck the affidavit of Robertson from the files upon the ground that it had been verified before his attorney who was a notary public, and at the same time made an order allowing him to file an amended affidavit which was afterwards done. Subse-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

quently the amended affidavit was stricken out, and the application to open up the judgment denied, and of these rulings complaint is made.

The original affidavit of Robertson was irregular, in that it was verified before his attorney (Warner v. Warner, 11 Kan. 121; Tootle, Hanna & Co. v. Smith, 34 Kan. 27, 7 Pac. 577), but it was not void for that reason. It was an irregularity which was subject to be cured by an amendment. Swearing-in v. Howser, 37 Kan. 126, 14 Pac. 436. The amended affidavit was probably ignored because it was filed more than three years after the judgment was rendered, but the amendment which was filed related back to the original affidavit, and it was filed in good time. The provision for opening up a judgment and letting parties in to defend is remedial in its nature and deserves liberal interpretation. Of that section it has been said: "Indeed, in order to do justice to both parties, the provisions of that section should be construed in no technical way, but fairly and reasonably. Every party ought to have his day in court; and while service by publication, which in fact imparts no actual notice, must be sustained, yet a party thus served, and who has in fact no knowledge of the proceedings, ought to be granted a hearing if it can be reasonably done." Albright v. Warkentin, 31 Kan. 442, 2 Pac. 614; Erving v. Windmill Co., 52 Kan. 787, 35 Pac. 800. There is some contention that as Robertson was not a party he was not entitled to the benefits of this section, but in Leslie v. Gibson, 80 Kan. 504, 103 Pac. 115, 26 L. R. A. (N. S.) 1003, 133 Am. St. Rep. 219, it was held that the grantee of a party to the action who was not himself named as a defendant, but who was bound by the judgment, has the same right to have the judgment opened up and to make his defense that his grantor had. The word "party" as used in that section applies not only to those named in the record, but to every one whose property rights are affected by the judgment.

There is a contention that the appellants' application should be treated as one to vacate the judgment rather than to open it up. It is true that the validity of the judgment was challenged because of insufficient notice, but there was a distinct application to have it opened up and to give appellants an opportunity to defend, in which there was a substantial compliance with the statutory requirements. Now, the fact that they ask for more than could be awarded did not justify the refusal of that to which they were entitled. By asking to have the judgment opened up they may have so recognized its validity as to preclude them from insisting that no judgment had ever been rendered, but it would not deprive them of both remedies nor of the benefit of the provision which allows a party who has no actual notice of the ac-

tion an opportunity to come in and set up his rights.

There was error in striking out the affidavits and in denying the application made by appellants, and for this reason the judgment will be reversed, and the cause remanded for a new trial. All the Justices concurring.

(33 Kan. 749)

McMAHAN v. NOBLE et al. †

(Supreme Court of Kansas. Jan. 7, 1911.)

(Syllabus by the Court.)

1. QUIETING TITLE (§ 10*)—WHO MAY MAINTAIN.

An action to quiet title to real estate may be maintained in the name of one who holds merely a naked legal title, without beneficial interest.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 36-42; Dec. Dig. § 10.*]

2. JUDGMENT (§ 17*)—VALIDITY—SERVICE BY PUBLICATION.

A judgment based upon service by publication cannot be held to be absolutely void upon a showing that the affidavit for publication, although good upon its face, and bearing the signature of the purported affiant and the jurat of a notary public, was not in fact sworn to.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 25-33; Dec. Dig. § 17.*]

3. JUDGMENT (§ 682*)—CONCLUSIVENESS—PERSONS BOUND.

Where the buyer of real estate causes the deed to be made to a person having no beneficial interest, who conveys to him after procuring a decree quieting title, he is bound by an order vacating the decree, although made without notice to him, and can claim no rights as an intervening innocent purchaser.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1203-1205; Dec. Dig. § 682.*]

Appeal from District Court, Sedgwick County.

Action by Ella McMahan against S. S. Noble and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Holmes & Yankey, for appellants. Brubacher & Conly, for appellee.

MASON, J. Ella McMahan recovered a judgment in ejectment against S. S. Noble and L. G. Noble, who appeal.

The plaintiff claimed under a tax deed, good upon its face and over 10 years old. The defendants maintain that the action was barred by the two-year statute of limitation. The trial court must have found that there had not been an adverse occupancy for that period, and we cannot say that the evidence on this subject, which was somewhat vague and conflicting, compelled a contrary conclusion.

Apart from the statute of limitation, the rights of the defendants rest wholly upon a decree in favor of their grantor barring the interest of the plaintiff. The plaintiff claims that the decree was void from the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

† Rehearing denied.

beginning, and has procured an order setting it aside. The defendants deny that it was void and maintain that they are not affected by its vacation after their rights had attached. On March 15, 1906, Miss S. E. Knight, who then owned the property, save for the plaintiff's tax title, executed a deed to Miss L. L. McGuire. An action to quiet title was begun April 6, 1906, in the name of L. L. McGuire; service being made upon Ella McMahan, the present plaintiff, by publication. Judgment by default (the decree in question) was rendered May 31, 1906. L. L. McGuire deeded to L. G. Noble June 1, 1906. The judgment was vacated, apparently without notice to the Nobles, January 9, 1908.

Miss McGuire testified that she never had any interest whatever in the property, but that she consented to the use of her name in the litigation, at the solicitation of a neighbor, a Mr. Waterbury; that she signed the affidavit for publication and acknowledged her signature to a notary public over the telephone, but did not in fact swear to it. This testimony does not warrant holding the judgment taken in her name a nullity. Inasmuch as she held the formal legal title, she was competent to maintain the action, although she had no beneficial interest. 80 Cyc. 77-82. The affidavit was good upon its face, and was genuine in the sense that the purported affiant really signed it, and the notary attached his jurat. Its language showed that it was intended to be sworn to and to be used as a sworn statement. It was not wholly without evidential force. It served its purpose of advising the court whether conditions existed which authorized a service by publication; it was found sufficient and acted upon. The fact that no oath was actually administered does not render the judgment absolutely void. See, as bearing upon somewhat similar questions: *James v. Logan*, 82 Kan. 285, 108 Pac. 81; *Davis v. Land Co.*, 76 Kan. 27, 90 Pac. 766; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565.

But, if the judgment itself was not a nullity, neither was the order vacating it. The order was perhaps erroneous, since it was apparently based upon the theory that the judgment was void. But as between the parties there were abundant grounds for setting aside the judgment, either for irregularity because the allegations of the affidavit for publication were untrue, or under the statute authorizing the reopening of a judgment founded only on constructive service. It is said that generally the rights of third persons who have acted in reliance upon a judgment are not affected by its subsequent vacation, unless it was void from the beginning. 8 Cyc. 462; 23 Cyc. 973. This is true as to purchasers at a sale under the judgment, and perhaps holds good wherever a title purports to be created or transferred by the judgment. But, where the judgment merely declares a

status, the effect of its vacation upon intervening rights is disputed, and depends upon the extent to which a stranger is chargeable with notice that it is not absolutely final, but is still open to attack. See *Kremer v. Schutz*, 82 Kan. 175, 107 Pac. 780, 27 L. R. A. (N. S.) 735.

Assuming that in the present instance the Nobles were not affected by the setting aside of the decree, provided they purchased in good faith in reliance upon it, the trial court must be presumed to have found that they were not in fact innocent purchasers, and the evidence warrants such finding. Miss McGuire was obviously only a nominal plaintiff. She merely permitted her name to be used by some one who had a beneficial interest in the property. When the action to quiet title was brought in her name, S. S. Noble had already contracted with Miss Knight for the purchase of the property and made a part payment, as the result of negotiations begun, according to some of the evidence, before the deed to Miss McGuire was executed. Clearly Miss McGuire was acting in behalf either of Miss Knight, the seller, or of the Nobles, the buyers. She herself knew only Mr. Waterbury in the transaction, and the record fails to disclose for which party he was acting. The business was conducted for Miss Knight by her attorney, R. M. Platt. He testified that he had nothing to do with the action to quiet title; that in February or March he told S. S. Noble of the outstanding tax deed, and told an occupant of the property that thereafter he would have to settle with Noble for the rent. To the question, "You contemplated a suit to quiet title at that time, didn't you?" he answered, "I think he (Noble) did." S. S. Noble testified that he had not had "personal knowledge" of the quieting title suit. The attorney who examined the abstract said that Noble mentioned, when he employed him for the purpose, that "it was a title that would go through a quieting suit." Noble paid \$50 at the time he contracted to buy the property. Miss Knight's recollection was that she received some small amount of money at the time she made the deed to Miss McGuire, and it may be reasonably inferred that this was the part payment made by Noble. We think this evidence justified a finding that the Nobles bought the property with knowledge of the outstanding tax title and arranged to have the deed made to Miss McGuire, and to have her convey to them after the title should have been quieted in her name. In that case Miss McGuire was acting, for them, they were the persons beneficially interested in the suit to quiet title—were substantially the plaintiffs therein—and the order setting aside the judgment rendered it unavailable to them as a defense in this action.

The judgment is affirmed. All the Justices concurring.

(83 Kan. 776)

HAWK v. UNITED STATES FIDELITY & GUARANTY CO.

(Supreme Court of Kansas. Jan. 7, 1911.)

*(Syllabus by the Court.)***1. LIMITATION OF ACTIONS (§ 37*)—BY WARD—NATURE.**

An action for a balance claimed to be due from a guardian to his ward at the time the latter reached the age of majority is not an action for relief on the ground of fraud, although the petition contains allegations that certain charges against the ward in the guardian's annual accounts are erroneous and should not be allowed.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 182-186; Dec. Dig. § 37.*]

2. LIMITATION OF ACTIONS (§ 34*)—ACTION ON GUARDIAN'S BOND—LIMITATIONS.

A cause of action against a guardian for a balance of money due to his ward at the time the latter reached the age of majority accrues at that time, and is a liability created by statute, to which the three-year period of limitation prescribed by the second subdivision of section 17 of the Code of Civil Procedure of 1909 (Gen. St. 1909, § 5610) applies, although the action is upon the guardian's bond against the guardian and his surety.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 151-157; Dec. Dig. § 34.*]

Appeal from District Court, Shawnee County.

Action by E. E. Hawk against the United States Fidelity & Guaranty Company. Judgment for plaintiff, and defendant appeals. Affirmed.

W. S. McClintock and A. L. Quant, for appellant. Wheeler & Switzer, for appellee.

BENSON, J. This action is against the principal and surety upon a guardian's bond. The petition shows that the guardian was appointed December 2, 1899, when the minor was 14 years of age, that the bond was given June 22, 1900, and that the guardian was discharged May 1, 1907, at which time he had in his hands \$658 of his ward's money, which he refused to pay. This action was commenced April 8, 1909. On a motion to make the petition more definite and certain, an amendment was filed, stating the dates and amounts of credits claimed by the guardian in various annual accounts filed in the probate court in the years 1901 to 1906, inclusive, for clothing, school supplies, medicine, and other expenses, amounting to over \$600, which items it is alleged were erroneously charged against the minor. It is further alleged that during the time of the guardianship the minor lived in the guardian's family and worked constantly for him, and that such services were worth more than the value of the supplies furnished, but that the probate court was not informed that such services had been rendered, and had no knowledge thereof when the accounts were filed. The appeal was taken by the guaranty company, surety on the bond, from a judg-

ment overruling its demurrer to the petition as amended.

The contention of the appellant is that it appears from the petition that the cause of action is barred by the two-year limitation prescribed by the third subdivision of section 5610 of the General Statutes of 1909 for actions for relief on the ground of fraud. The appellee contends that the limitation to be applied is five years, this action being upon a guardian's bond, and that the fifth subdivision of the section referred to governs. This action is not for relief on the ground of fraud, within the meaning of the statute relied upon by the appellant. It is an action for a balance which became due to the plaintiff when he reached the age of majority, and which it was the duty of the guardian to pay to him at that time. The fact that the guardian withheld it upon a claim that he had made expenditures equal to the amount demanded, as set out in his *ex parte* accounts, does not change the nature of the plaintiff's claim against him. The entry of these items of credit to himself in his own accounts may or may not have been fraudulent, but relief is not sought on that ground. The accounts do not conclude the appellee. They are for the information of the court, and are not adjudications against the minor. *Woerner, American Law of Guardianship*, §§ 96, 97; *Mitchell v. Kelly*, 82 Kan. 1, 107 Pac. 782; *State, to the Use of Koch, v. Roeper*, 82 Mo. 57. Whether credit should be given to the guardian for the sums so charged against his ward will be determined upon the trial of the action. The allegations concerning these entries in the accounts are in the nature of inducement, not essential to a statement of the cause of action, although a part of the history of the transaction. *Logan v. Brown*, 20 Okl. 334, 95 Pac. 441, 20 L. R. A. (N. S.) 298. A final settlement of the guardian's account in the probate court was not necessary. His duty was to account to the ward. *Mitchell v. Kelly*, *supra*. For the reasons stated, the appellant's contention that the two-year limitation governs cannot be sustained.

Neither can the appellee's claim that the five-year statute applies be sustained. It is settled otherwise by decisions of this court, for reasons which need not be restated here. *Ryus v. Gruble*, 31 Kan. 767, 3 Pac. 518; *Com'rs of Graham County v. Van Slyck*, 52 Kan. 622, 35 Pac. 299; *Davis v. Clark*, 58 Kan. 454, 49 Pac. 665. The limitation that does apply is determined in the case last cited. That was an action upon an administrator's bond for a balance due the estate, which was held to be a liability created by statute, and that the period of limitation was three years, as provided in the second subdivision of the section before referred to. The reasoning of the opinion applies to the default of a guardian, as well as to that of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

an administrator. The cause of action accrued when the appellee reached the age of majority, but that date does not appear from the petition to have been more than three years before the action was commenced, and consequently there was no error in overruling the demurrer.

The judgment is affirmed. All the Justices concurring.

(83 Kan. 716)

ROBERTSON v. TARRY.

(Supreme Court of Kansas. Jan. 7, 1911.)

(Syllabus by the Court.)

EXECUTORS AND ADMINISTRATORS (§ 437*)—CLAIMS AGAINST DECEDENT'S ESTATE—LIMITATIONS.

Ann Wiseman executed three notes on the following dates: One September 16, 1904, one December 1, 1904, and one May 1, 1905—each payable to the appellee, and due one day after date. The maker died December 31, 1905, and an administratrix of the estate of the deceased was appointed May 28, 1909. This action was brought against the administratrix July 1, 1909, in the district court of the county. Held, that the action was not barred by section 106 of the executors and administrators act (Gen. St. 1909, § 3541) or by section 17 of the Code (Gen. St. 1909, § 5610).

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1749; Dec. Dig. § 437.*]

Appeal from District Court, Leavenworth County.

Action by J. J. Robertson against Mary A. Tarry, administratrix of Ann Wiseman, deceased. Judgment for plaintiff, and defendant appeals. Affirmed.

W. W. Hooper, for appellant. A. E. Dempsey, for appellee.

SMITH, J. Action brought July 1, 1909, by appellee against the appellant as administratrix of the estate of Ann Wiseman, deceased. The notes sued on were executed by Ann Wiseman September 16, 1904, December 1, 1904, and May 1, 1905, respectively, and each note was due one day after date. Ann Wiseman died December 31, 1905. The administratrix of her estate was appointed May 28, 1909. Judgment was rendered on the notes as prayed for, and the administratrix brings the case here.

It is contended on the part of the appellant that, if no relative or heir of deceased procured the appointment of an administrator of the estate in 50 days after the death of Ann Wiseman, it was the duty of the appellee to secure such appointment, and, as more than 3 years and 50 days had elapsed after such appointment should have been secured by the appellee, that the action was barred by section 106 of the executors and administrators act (Gen. St. 1909, § 3541). Section 106 reads as follows: "No executor or administrator, after having given notice of his appointment as provided in this act,

shall be held to answer to the suit of any creditor of the deceased unless it be commenced within three years from the time of his giving bond." It will be observed that the limitation provided by this section runs expressly from the time the administrator appointed gives bond as such, and not from the time of the death of the debtor, nor from the time when the appointment of an administrator could have been procured on application of the creditor. This action was brought a little more than one month after the appointment of the administratrix, and before the expiration of five years from the maturity of the oldest of the three notes.

It has been repeatedly decided by this court that the creditor was entitled to the full 5 years to bring his action under section 17 of the Code, and that, where the debtor had died during the lapse of the 5 years, 50 days after the death, which must elapse before the creditor is authorized to apply for the appointment of an executor or administrator, and perhaps a reasonable time thereafter, should not be counted within the 5 years, but that during such time the statute would be tolled. In this case, however, the appellee did not need any tolling of the statute to bring the commencement of his action within the 5 years from the time of the maturity of the notes. He brought the action, as we have seen, very shortly after the appointment of the administratrix. By the express provisions of section 86 of the administrators act (Gen. St. 1909, § 3521) he had a right to establish his claim by the judgment of the court in which he brought the action.

The provision of section 12 of the executors and administrators act (Gen. St. 1909, § 3447), which in effect debars the creditor from moving to secure the appointment of an administrator for 50 days, does not impose upon him the duty of securing the appointment of an administrator or affect the limitation provided for in section 106. The limitation provided by section 17 of the Code (Gen. St. 1909, § 5610) is held, in favor of the creditor, to be tolled during such time after the death of the debtor as there existed no one against whom an action could be brought, but at most not exceeding a reasonable time after the lapse of 50 days from the death of the debtor. The tolling of the statute is to the benefit of the creditor. He may move for the appointment of an administrator in 50 days after the death of the debtor. By failing to so move with reasonable promptness, he cannot prolong the tolling of the limitation provided in section 17 of the Code. See *Hanson v. Towle*, Adm'r, 19 Kan. 273; *Bauserman, Adm'r, v. Charlott*, 46 Kan. 480, 26 Pac. 1051; *Andrews v. Morse*, 51 Kan. 33, 32 Pac. 640; *Kulp v. Kulp*, 51 Kan. 341, 32 Pac. 1118, 21 L. R. A. 550; *Wey v. Schofield*, 53 Kan. 248, 36 Pac. 333; *West v.*

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Bank, 66 Kan. 524, 72 Pac. 252, 63 L. R. A. 137, 97 Am. St. Rep. 385.

The judgment of the court, being in accordance with the views herein expressed, is affirmed. All the Justices concurring.

(83 Kan. 787)

MANNING v. CABLE

(Supreme Court of Kansas. Jan. 7, 1911.)

MUNICIPAL CORPORATIONS (§ 536*)—PUBLIC IMPROVEMENTS—SPECIAL TAX—RESTRAINING COLLECTION.

Injunction will not be allowed to restrain collection of a sidewalk tax unless it be void, and so not for irregularity in adding, without authority, to the amount to be extended on the tax roll, an amount as a penalty which could have been avoided if the amount justly due had been first paid.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1253; Dec. Dig. § 536.*]

Appeal from District Court, Greenwood County.

Action by H. W. Manning against A. L. Cable. Judgment for plaintiff, and defendant appeals. Reversed, and injunction vacated.

Howard J. Hodgson and Gordon Badger, for appellant. D. B. Fuller and Robert H. Clogston, for appellee.

PER CURIAM. The city of Eureka caused a sidewalk to be constructed abutting upon the property of the appellee. A special tax was levied against the property and placed upon the county tax roll. The county treasurer was proceeding to collect this tax when the appellee commenced this action in the district court of Greenwood county and obtained a temporary injunction restraining the collection of such tax. Afterward the temporary order was made perpetual. The county treasurer appeals to this court.

It appears from the record that the city had full power and authority to construct the sidewalk in question. There is only one irregularity pointed out in the action of the city. When the city clerk informed the county clerk of the amount of tax to be extended upon the tax roll for this sidewalk, \$18.60 was added thereto as a penalty. This was without authority and void as to such amount. This excess tax might have been avoided if the amount justly due had been first paid.

Very little evidence was given, and in our view the demurrer to it should have been sustained. Nothing has been shown which can be said to be more than a mere slight irregularity, and this court has long held that an injunction will not be allowed to restrain the collection of a sidewalk tax unless it is void. *Parker v. Challiss*, 9 Kan. 155; *City of Lawrence v. Killam*, 11 Kan. 499.

The judgment of the district court is reversed, and the injunction vacated, at the cost of the appellee.

(83 Kan. 732)

ATCHISON, T. & S. F. RY. CO. v. SUPERIOR REFINING CO.

(Supreme Court of Kansas. Jan. 7, 1911.)

(Syllabus by the Court.)

CARRIERS (§ 34*)—EXCESSIVE FREIGHT RATES—INTERSTATE SHIPMENTS—RELIEF.

Relief from excessive freight charges upon interstate shipments, where the charges are made according to established rates fixed and promulgated as required by the interstate commerce act, must be sought through the Interstate Commerce Commission.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 91; Dec. Dig. § 34.*]

Appeal from District Court, Elk County.

Action by the Atchison, Topeka & Santa Fé Railway Company against the Superior Refining Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Chas. H. Apt and A. T. Ayres, for appellant. Wm. R. Smith, O. J. Wood, and A. A. Scott, for appellee.

BENSON, J. The plaintiff sued to recover a balance claimed to be due for transporting oil from Bartlesville, Okl., to Longton, Kan., according to the rates fixed in its freight tariffs on file at the time with the Interstate Commerce Commission and posted and published as required by the federal law. The plaintiff recovered.

The trial was upon an agreed statement from which it appears that the plaintiff's duly established and published rate for the transportation of oil from Bartlesville to Chanute, Humboldt, Erie, and Cherryvale, all on plaintiff's line of railroad, was 7 cents per hundred pounds, while the rate so fixed and established for Longton was 21 cents per hundred pounds, although Longton was in the same general locality, where like conditions existed; and that the rate so fixed and established for Longton was unreasonable and excessive. The plaintiff's authorized agent solicited the business, fixing the rate at 7 cents per hundred pounds, which the defendant paid, and now insists that it ought not to be compelled to pay the unreasonable excess sued for, although it would be due if the rates which were fixed and promulgated according to the requirements of the federal statute are to prevail. On the other hand, the plaintiff contends that the established rate governs, regardless of the contract, and notwithstanding the fact that it is unreasonable; and that redress must be sought from the Interstate Commerce Commission.

The decision must rest upon the interstate commerce law as interpreted by the Supreme Court of the United States. In *Texas & Pacific Railway v. Mugg*, 202 U. S. 242, 26 Sup. Ct. 628, 50 L. Ed. 1011, it appeared that on an interstate shipment a rate was quoted to the shipper less than the lawful schedule rate. On arrival of the goods at their des-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

tion, the schedule rate was exacted; the shipper insisted upon the quoted rate, but paid the excess under protest, and sued for its recovery. Reversing a judgment for the shipper given by the circuit court, it was held that the rate fixed in the schedule filed pursuant to the act to regulate interstate commerce was controlling, and that it was beyond the power of the carrier to depart from such rates in favor of any shipper, and that the erroneous quotation of rates by the agent of the railroad company did not justify a recovery, since to do so would in effect enable the shipper whose duty it was to ascertain the published rate to secure a preference over other shippers, contrary to the act to regulate commerce. That decision is summarized and followed in *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 447, 27 Sup. Ct. 350, 358 (51 L. Ed. 553), where it was held: "The proposition that if the statute be construed as depriving courts generally, at the instance of shippers, of the power to grant redress upon the basis that an established rate was unreasonable without previous action by the commission, great harm will result, is only an argument of inconvenience which assails the wisdom of the legislation or its efficiency and affords no justification for so interpreting the statute as to destroy it." The opinion concludes with a statement to the effect that a shipper seeking reparation predicated upon the unreasonableness of the established rate must primarily invoke redress through the Interstate Commerce Commission, which body alone is vested with power originally to entertain proceedings for the alteration of an established schedule. This was also the conclusion in *Railway Co. v. Milling Co.*, 80 Kan. 141, 101 Pac. 1011, where the rule that must govern this contract is stated. Other cases are there cited.

The principle of these decisions applies here where suit is brought for the excess the same as if the excess had been paid, and an action had been brought to recover it. The established rate must prevail over the quoted rate; otherwise the statute would be ineffectual for the purpose for which it was enacted. The district court did not err in its judgment. Relief for the excessive charge can only be obtained through the proper federal tribunal.

The judgment is affirmed. All the Justices concurring.

(83 Kan. 792)

STATE v. AIKENS et al.

(Supreme Court of Kansas. Jan. 7, 1911.)

MONOPOLIES (§ 24*)—VOLUNTARY ASSOCIATION—TRUSTS—DISSOLUTION—EVIDENCE.

In an action by the state to dissolve a voluntary association organized to further the sale of live stock, evidence held to require a finding that its members so operated its busi-

ness as to impose unlawful restrictions on free trade and commerce and to prevent the full and free pursuit of the business dealings done at the Kansas City stockyards, requiring the association's dissolution under the anti-trust laws.

[Ed. Note.—For other cases, see *Monopolies*, Dec. Dig. § 24.*]

Appeal from District Court, Wyandotte County.

Action by the State against Charles S. Aikens and others constituting a voluntary association known as the Traders' Live Stock Exchange of Kansas City. Judgment for plaintiff, and defendants appeal. Affirmed.

R. E. Ball, J. W. Farrar, and Keplinger & Trickett, for appellants. F. S. Jackson, Atty. Gen., for the State.

PER CURIAM. The action was brought by the state to dissolve the Traders' Live Stock Exchange of Kansas City and to enjoin the exchange and its members from violating the anti-trust laws of the state. Judgment was rendered for the state, and the defendants appeal. The assignments of error are all based upon the insufficiency of the evidence.

There were two sides to this controversy in the district court and much evidence was introduced to support each one. That court has performed its function of ascertaining and declaring the facts. Its findings are abundantly sustained, and they are approved.

The appellants seek to draw too sharp a distinction between the association and its members. The exchange is not a corporation. The members in their associate relation constitute the exchange. It is said that the by-laws, on their face, and interpreted by the preamble, disclose no wrongful purpose and do not have the necessary or direct effect of producing violations of the law, as was held in the case of *Anderson v. United States*, 171 U. S. 604, 19 Sup. Ct. 50, 43 L. Ed. 300, and it is further said that the court cannot look beyond these by-laws to discover the true nature and actual purpose and effect of the organization. All this is to say that the statutes prohibiting trade trusts, combinations, and conspiracies can be foiled with a set of by-laws; that the courts cannot lift the sheep's skin from the wolf's head and know the creature. In practice and in fact rule 10 means that so far as possible no one shall be permitted to pursue the business of trading in stockers and feeders on the Kansas City market who is not a member of the exchange. The monopoly of 90 per cent. of the trade in the largest stocker and feeder market of the world by the members of the exchange, and the wrecked business of practically every man and every company promising to attain prominence as an independent trader, prove the efficiency of the rule. True, the rule has another face, innocent, lawful, and laudable; but the court declines to stultify itself by looking upon

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

that side only. The association did not go outside of its rules to enforce boycotts and the like, nor was such action occasioned by individual misinterpretations of the rules. The rules were the recognized basis and authority for those illegal measures.

The fact that approximately 10 per cent. of the stocker and feeder business done at the stockyards remains in the hands of outsiders does not take the case out of the statute. Perhaps the volume of business done at the stockyards is not seriously reduced because of the existence of the exchange, but free participation in that business is not merely restricted; it is actually suppressed as to every one who seems likely to become formidable and who is not a member. The price of a membership is now fixed at \$1,000. When a partnership engages in trade, all the partners must be members (rule 11), and every person employed by a member to buy or sell cattle must also be a member (rule 12).

It is said that the exchange buys nothing and sells nothing. True, but one of the functions of the association is to impose unlawful restrictions upon the full and free pursuit of the business of dealing in stock at the Kansas City yards. It does this as an organization by employing detectives to scent out transactions with outsiders, to warn against such practices, and to report them, if persisted in, by committee hearings upon such cases, by the discipline of members, by the enforcement of boycotts, by coalition with the commission men's exchange, and by other means.

In the face of the testimony of Philo S. Harris and the testimony relating to the boycott of Joe Baker, not to mention plenty more, the protestation in the brief that there is no evidence whatever sustaining the seventh finding of fact is a mere lashing of language to an impotent fury.

It is said that the members compete among themselves in the purchase and sale of cattle. True, but they stifle all other competition as far as they can. It is said that they trade with none but outsiders. But how? Through commission men who must confine their dealings to the members of the exchange, or be boycotted out of business. The right of an individual to trade or to refuse to trade with whomsoever he pleases, and the right of the members of this exchange to associate themselves in good faith for the purpose stated in the preamble of their by-laws, are not involved in this case or in any way infringed by the judgment. It is a vicious combination, conspiracy, and trust to monopolize trade, restrict the pursuit of business, and prevent competition, which the state has charged and proved and which the statutes and the judgment condemn.

The foregoing observations are all that seem to be necessary to supplement the writ-

ten opinion of Hon. L. C. True, the judge who tried the case.

The district court enjoined the defendants, as individuals and in their associated capacity as the Traders' Live Stock Exchange, from pursuing the illegal practices of which they were found guilty and also dissolved the exchange. A plea is made against the dissolution of the exchange based upon the genuine public service which it is capable of rendering and which it does in fact render at the Kansas City live stock market. The value of this service is not disputed. The trouble is that these traders have never been able to resist the temptation to grasp the reins of the market and sit in the seat of monopoly. If the rules of the exchange, particularly rule 10, were modified and the functions of the organization were confined strictly within their legitimate field, there would be no occasion for a judgment of dissolution. If, however, it cannot operate without curtailing the full, free and fair diffusion of the benefits and opportunities of the Kansas City market, it ought to be dissolved.

The findings of fact are before this court, and it has the power to render such judgment as justice to the state and to the defendants requires. Under the circumstances, the following order will probably best meet the situation.

The judgment of the district court, so far as it enjoins the defendants individually and enjoins the exchange itself from the illegal practices stated in the findings, is affirmed, the state to recover all the costs of the case. The judgment of the district court dissolving the exchange is stayed until the further order of this court. Jurisdiction of this branch of the case is retained for the present. At some future time it may be brought upon the docket by either the plaintiff or the defendants for final disposition. The court will then exercise its discretion in the additional light afforded by any showing which may then be made.

(83 Kan. 698)

WILDIN v. DUCKWORTH.

(Supreme Court of Kansas. Jan. 7, 1911.)

(Syllabus by the Court.)

1. CHATTEL MORTGAGES (§ 283*)—FORECLOSURE—EXECUTION ON GENERAL JUDGMENT FOR DEBT.

An action was brought on promissory notes and to foreclose a chattel mortgage given to secure the payment thereof, judgment was rendered for the amount of the notes and interest, and for the sale of the personal property and the application of the proceeds to the payment of the costs and judgment. Thereafter a general execution was obtained by the judgment creditor, and delivered to the sheriff to collect the amount of the judgment. The sheriff levied upon certain real estate of the judgment debtor for that purpose. An action was brought by the judgment debtor to enjoin the sale of the real estate on the ground that the personal

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

property mortgaged as security should be first sold and applied upon the debt. A temporary injunction was allowed. On motion of the judgment creditor the temporary injunction was set aside and a permanent injunction denied. *Held* not error.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. §§ 569, 572; Dec. Dig. § 283.*]

2. CHATTEL MORTGAGES (§ 283*)—FORECLOSURE OF CHATTEL MORTGAGE—RIGHT TO GENERAL EXECUTION.

In such case the judgment creditor is entitled to a general execution upon the money judgment and is also entitled to an order of sale, or special execution, for the sale of the mortgaged property, and he may, at his option, first proceed to the sale of the personal property and the application of the proceeds to the payment of the judgment and have a general execution for any deficiency, or he may elect to take execution upon the general judgment in the first instance.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. §§ 569, 572; Dec. Dig. § 283.*]

Appeal from District Court, Reno County.

Action by William J. Wildin against G. M. Duckworth. Judgment for defendant, and plaintiff appeals. *Affirmed*.

Taylor & Neeley, for appellant. Prigg & Williams, for appellee.

SMITH, J. The appellant commenced this action against the appellee, as sheriff of Reno county, to enjoin him from selling real estate under execution, and alleges the following facts: A thrasher company had theretofore brought an action against the appellant, praying judgment on certain promissory notes executed by him to the company, and to foreclose certain chattel mortgages given to secure the payment thereof. In that action the company recovered a judgment in the district court of Reno county for the sum of \$923 and costs; also an order that the chattel mortgages be foreclosed and the property therein described sold and the proceeds of the sale applied, first, to the payment of the costs, and, next, to the payment of the judgment; also "that upon order of sale or execution being issued herein that said property be taken by the sheriff of Reno county and notice of sale be advertised," etc. No order of sale, or special execution, was taken out on the judgment; but something over two years and a half after the rendition of the judgment a general execution for the amount specified in the judgment was issued by the clerk of the court and delivered to the sheriff, who levied upon a large number of lots in Park's First addition to the city of Hutchinson, which addition had been vacated since the rendition of the judgment. In his petition in this action the appellant alleged that the personal property mortgaged was of the value of \$555. The petition was presented to the probate judge of the county, who granted a temporary order enjoining the sale.

The thrasher company thereafter filed a motion in the district court to dissolve the temporary injunction for the reasons: (1) Because said probate judge had no authority of law to grant or make such order. (2) Because from the facts stated in the petition of plaintiff he was not entitled to such order. (3) Because upon the facts stated by plaintiff in his petition this court had no jurisdiction to grant an order of injunction of any kind. Upon the hearing of this motion in the district court, the motion to dissolve the injunction was sustained and the action was dismissed, at the costs of the plaintiff.

The appellant contends that, under the judgment in the original action the thrasher company should be compelled to first issue a special execution for the sale of the personal property, and bases his claim upon sections 439 and 506 of the new Code (Gen. St. 1909, §§ 6034, 6101), which provide:

"Sec. 439. Executions are of four kinds: First, against the property of the judgment debtor; second, against his person; third, for the delivery of the possession of real or personal property, with damages for withholding the same, and costs; fourth, executions in special cases."

"Sec. 506. In special cases not hereinbefore provided for the execution shall conform to the judgment or order of the court. When a judgment for any specified amount, and also for the sale of specific real or personal property, shall have been rendered, and an amount sufficient to satisfy the amount of the debt or damages and costs be not made from the sale of property specified, an execution may issue for the balance as in other cases."

The thrasher company, on the other hand, contends that under the original judgment the plaintiff therein was entitled to either of two remedies: First, to procure an order of sale or special execution and sell the personal property and apply the proceeds to the judgment, and if the amount of the judgment were not realized to have general execution issued for the remainder; or, second, at its option, to have a general execution for the amount of the judgment in the first instance, as was done in this case.

It is, of course, conceded that, if a special execution or order of sale was issued for the sale of the personal property, it must conform to the judgment of the court. The only question is whether the plaintiff in the original action was compelled to proceed to the sale of the personal property before it was entitled to a general execution upon the judgment. The appellant cites *Lisle v. Cheney*, 36 Kan. 578, 13 Pac. 816, and *Norton v. Reardon*, 67 Kan. 302, 72 Pac. 861, 100 Am. St. Rep. 459. In neither of those cases was the question now pending involved, and we find nothing in *Norton v. Reardon*, supra.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

bearing upon this issue. In *Lisle v. Cheney*, supra, we find this language: "Under a judgment for any other money demand, the judgment creditor has a lien on the real estate of the debtor within the county. Under a judgment on the money demand secured by a mortgage, a judgment creditor has a lien on the real estate of the debtor within the county, with this condition attached: That the proceeds of the sale of certain specific real property shall be first applied to the satisfaction of such judgment. This we adopt, and declare to be the true construction of the various sections of the Code of Civil Procedure on judgments rendered in actions to foreclose mortgages." Page 583 of 36 Kan., page 819 of 13 Pac. As before said, we do not find that the question apparently decided in the above excerpt, especially the portion beginning "with this condition attached," was involved in that action, and that dictum is disapproved.

In this case the court rendered, first, a general judgment. Under the statute the plaintiff was entitled to a general execution to enforce this judgment against any property of the judgment debtor not exempt by law from execution. To procure such execution requires no order of court. The statute expressly gives the right. The court has no power to direct upon what property an execution thereunder shall be levied. The sale is made according to the provisions of the statute. Such sale should be confirmed or set aside by the court, but can only be set aside for the reason that the provisions of the statute have not been complied with. The sale is made under the law. On the other hand, the foreclosure of the mortgage and sale therein provided for is a judicial sale—a sale made by the court—and, in the absence of a statute directing an execution to be issued therefor, as our statute provides, the court may order any person to make the sale and prescribe the manner of the sale. The person or officer making the same does so practically as the agent of the court. *Norton v. Reardon*, 67 Kan. 302, 72 Pac. 861, 100 Am. St. Rep. 459. No good reason appears why the judgment creditor in this case was not entitled to its choice of remedies under the judgment, and we accordingly hold that it was entitled thereto. *Plugrey on Chattel Mortgages*, § 1036; *Jones on Chattel Mortgages* (5th Ed.) § 764; *Karnes v. Lloyd*, 52 Ill. 113; *Fish v. Glover*, 154 Ill. 86, 39 N. E. 1081. We believe this is in accord with the practice in the state, and the understanding of the bar generally, that where one who is entitled to pursue a specific lien under a judgment, and is also entitled to a general execution to enforce the judgment, he may first exhaust the property covered by the specific lien and apply the proceeds to the discharge of the judgment, or, in the first instance, he may have a gen-

eral execution issued and levied upon any property subject to execution to satisfy the entire judgment. The question may later arise if the sheriff knew or should have known of any personal property subject to execution included or not included in the chattel mortgage in the action, whether he was not required to first levy thereon. Section 6040, Gen. St. 1909 (Code Civ. Proc. § 445). But it seems that this question cannot be raised in this collateral action. 17 Cyc. 1091.

The judgment of the court, being in accordance with the views herein expressed, is affirmed. All the Justices concurring.

(83 Kan. 676)

POTTER et al. v. CONLEY et al.

(Supreme Court of Kansas. Jan. 7, 1911.)

(Syllabus by the Court.)

1. MECHANICS' LIENS (§ 1*) — NATURE OF RIGHT.

A mechanic's lien is purely a creation of statute, and those claiming such a lien must bring themselves clearly within the provisions of the statute authorizing it.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 1; Dec. Dig. § 1.*]

2. MECHANICS' LIENS (§ 73*)—CONTRACT WITH OWNER—LESSEE AS OWNER'S AGENT.

The statute gives a lien to any one contracting with the owner of land or his agent for materials furnished or work done in repairing or improving a building thereon, and where the owner rents his property to another and stipulates in the lease that improvements may be made on the property by the lessee and the expense thereof deducted from the rentals to be paid by him, the lessee may be regarded as the agent of the owner and those doing the work and furnishing the material for improving the property will be entitled to a lien on the interest and estate of the lessee and the owner.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Dec. Dig. § 73.*]

3. MECHANICS' LIENS (§ 73*)—CONTRACT WITH OWNER—LESSEE AS OWNER'S AGENT—"REPAIRS."

Under the circumstances of the case, the term "repairs" as used by the parties in the lease is held to be intended to cover and does cover improvements made by the contractors.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Dec. Dig. § 73.*]

For other definitions, see *Words and Phrases*, vol. 7, pp. 6096-6102; vol. 8, p. 7785.]

Appeal from District Court, Allen County.

Action by B. C. Potter and others against P. J. Conley and others. Judgment for defendants, and plaintiffs appeal. Reversed and remanded, with directions.

Ritter & Forrest, for appellants. A. F. Florence, for appellees.

JOHNSTON, C. J. This was an action to foreclose a mechanic's lien. P. J. Conley, the owner of a theater building, leased it to J. E. Faltys and George M. Gilliam for a period of three years at a stipulated rental of \$75 per month. In the lease was a special pro-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

vision that "second party shall have the right to make reasonable repairs to said building and deduct the actual cost thereof from said rentals." The lease contained the stipulations ordinarily found in such instruments, including one that "no alterations or changes in said building shall be made by said second party without the written consent of said first party." There was another stipulation giving the lessor the option to re-enter in case of the default of the lessees. Shortly after the execution of the lease, the lessees engaged B. C. Potter and Frank Kelley to make certain changes and improvements in the building. These included the making of an orchestra pit which was a lowering of the floor 18 inches in a space 12 feet long and 5 feet wide, the reconstruction of an office lobby in a corner of the building, including a partition between the office and the lobby, the taking out of a glass front and putting in its place drop-siding with two small windows, the ceiling of the inside of this front, the construction of a portal which consisted of a roof projected from the building and supported by two posts, the building of steps at the entrance, and the painting of any new wood put in by the contractors. Within a few weeks after the execution of the lease, the contractors made these improvements, which cost \$163.43. There were no negotiations between the contractors and Conley and they received no direct authority from him as to the improvements, but it is conceded that he was in and about the building when the work was done, slept in the building, and took care of the property during that time. The contractors expected to get their pay from the lessees who directly employed them, but no such payment was made by them nor by the owner of the building; and therefore they filed a mechanic's lien. The lessees defaulted in the payment of rent and abandoned the premises, when Conley declared the lease forfeited and took possession of the building, including the improvements which the contractors had made, and then leased the building to another party. The contractors claimed a lien as against the fee held by the lessor, but this was refused by the court. A lien was adjudged against the leasehold interest of the lessees, but as the lease had been forfeited the lien was, of course, valueless to the contractors, and from the ruling refusing the lien as against the estate of the lessor, the contractors appeal.

The appellee correctly contends that a mechanic's lien is purely a creation of statute, and that those claiming its benefits must bring themselves clearly within its provisions. Our statute gives a lien to "any person who shall under contract with the owner of any tract or piece of land, or with a trustee, agent, husband or wife of such owner, perform labor or furnish material for the erection, alteration or repair of any building, improvement or structure thereon," etc.

Code Civ. Proc. § 649 (Gen. St. 1909, § 6244). The estate of the owner cannot be subjected to a lien for work done or materials furnished at the instance of the lessee, unless the lessee may be regarded as the agent or trustee of the owner. The owner may contract directly or he may do so through an agent, and the contention of appellants is that the lessees of the building in question were in fact the agents of the lessor in contracting for the improvements made upon the building. Now the lessor did not directly contract with appellants for the improvements made on this building, but he did contemplate that improvements and changes were necessary to fit the building for the purpose for which it was leased, and he expressly provided in his lease that the repairs to be made should be paid out of the rentals that would accrue under the lease. The lessees were not in terms designated as the agents for the lessor to contract for the repairs, but the rules of law relating to the creation of an agency and fixing the liability of a principal for the acts of an agent apply to contracts for labor performed and materials furnished for the improvement of a building the same as to other kinds of contracts. Under a Missouri statute which authorized a lien where work was done or material furnished by virtue of a contract with the owner or his agent, it was held that the owner could be bound by virtue of a contract with an agent, and "that such agency may be express, or implied from the conduct and acquiescence of the owner and from all the circumstances which estop him from denying the agency." *Winslow Bros. Co. v. McCully Stone Mason Co.*, 169 Mo. 236, 69 S. W. 304; 27 Cyc. 64. It is not enough, of course, that the lessor should merely know that improvements are being made by the lessee; nor yet that he should have agreed with him that repairs or improvements are to be made by the lessee, as that may be done for the convenience of the lessee, and not because of any benefit to the lessor or his property. If the lessee acts only for himself, no lien will attach to the property of the lessor. Here, however, the lessor specifically agreed that repairs might be made at his expense. The stipulation in the lease that the repairs might be made and the costs taken out of the rentals was the equivalent of saying to the lessees, you may contract for repairs and have them made at my expense. This was not only assent and acquiescence of the lessor in the making of repairs, but it gave express authority to the lessees to act for him in procuring them to be made, and at his cost. It was enough to constitute a contract with the lessor himself for the improvements provided for in the lease. In *Kremer v. Walton*, 11 Wash. 120, 39 Pac. 374, 48 Am. St. Rep. 870, it was in effect held that if a lessee causes a building to be erected on leased premises, under an agreement between himself and the lessor, that the former

is to pay him therefor by allowing him to retain rents, the interest of both lessor and lessee is subject to mechanic's lien growing out of the erection of the building. In 27 Cyc. 58, it is said: "It is usually held that where a lease contains a provision authorizing the lessee to make repairs or improvements at the cost of the lessor, either generally or by deducting the cost from the rent, or where part of the consideration for the lease is the making by the lessee of improvements which become a part of the realty, or that improvements made by the lessee shall revert to the lessor, a mechanic's lien may attach to the property for work done or materials furnished pursuant to a contract with the lessee." See, also, *Dougherty-Moss Lumber Co. v. Churchill*, 114 Mo. App. 578, 90 S. W. 405; *Hardware Co. v. Churchill*, 126 Mo. App. 462, 104 S. W. 476; *Hough v. Collins*, 176 Ill. 188, 52 N. E. 847; *Carey-Lombard Lumber Co. v. Jones*, 187 Ill. 203, 58 N. E. 347; *Burkitt v. Harper et al.*, 79 N. Y. 273; *Boteler v. Espen*, 99 Pa. 313; *Fischer v. Jordan*, 169 N. Y. 615, 62 N. E. 1095; *Id.*, 54 App. Div. 621, 66 N. Y. Supp. 286.

The contention here is that if the lessees are to be treated as agents of the lessor, the agency should be strictly limited to repairs, and that the improvements made on the building were in fact alterations. Most of the improvements contracted for and made probably come within the technical definition of "alterations": but evidently the parties were not drawing nice distinctions between these terms. It seems clear enough that the things done were the improvements or repairs contemplated by the parties and contracted for in the lease. Apparently the building was out of condition and something was necessary to fit it for the lessees' purpose. The lessor, it appears, did not wish to advance the money to put it in condition, and so it was provided that it might be done on the credit of the building; that is, the cost of the repairs might be taken from the rentals coming to him. The writing into the lease of the special provision that certain things were to be provided for by the lessee and paid for by the lessor shows plainly enough that both understood that work and material were necessary to put the building in a rentable condition. It appears that immediately after the execution of the lease the lessee proceeded to put the building in condition and the work was done under the eye of the lessor, and while he was caring for the building. No question was raised by him as to the propriety of making these improvements, although the lease contained the stock phrase that no alterations should be made without the consent of the lessor. The time and circumstances under which these improvements were made satisfies us that they are the repairs mentioned in the lease and which both parties contemplated should

be made at the expense of the lessor. Under the testimony of the lessor himself and the undisputed facts, the lessee was the agent of the lessor within the meaning of the statute giving a lien for labor performed and materials furnished under a contract with the owner, and therefore appellants were entitled to a lien as against the appellee and his building.

The judgment will therefore be reversed and the cause remanded, with the direction to enter judgment in favor of appellants awarding them a lien against the estate of appellee in the property. All the Justices concurring.

(83 Kan. 753)

STINSON v. WOOSTER et al.

(Supreme Court of Kansas. Jan. 7, 1911.)

(Syllabus by the Court.)

LIBEL AND SLANDER (§ 97*)—DEMURRER TO PETITION.

In an action for libel, as in all other cases, allegations of fact in a petition should, as against a general demurrer, be taken as true.

[Ed. Note.—For other cases, see *Libel and Slander*, Cent. Dig. § 235; Dec. Dig. § 97.*]

Appeal from District Court, Neosho County.

Action by John Stinson against Alf Q. Wooster and another. Judgment for defendants, and plaintiff appeals. Reversed and remanded.

J. M. Nation and E. W. Grant, for appellant. W. R. Cline and J. Q. Stratton, for appellees.

SMITH, J. Action for libel, brought by appellant against appellees. The following is a copy of the petition, so far as is necessary to the consideration of the errors complained of:

"Plaintiff says that the defendants in the above-entitled action are, and have been for some time past, the editors, owners, and publishers of the *Erie Sentinel*, a newspaper published in Erie, Neosho county, Kansas, and of general circulation in said county. That on the 27th day of August, A. D. 1909, said defendants caused and procured to be published and published in said newspaper an article in terms and words as follows, to wit:

"Tried to Murder His Entire Family.

"John Stintzen Assaulted Wife and Children Saturday.

"Beat Them over the Head and Face.

"Wife Sought Protection from Husband at the Hands of Strangers.

"Departed for Parts Unknown.

"Saturday evening John Stintzen, living east of town, became possessed of a fit of criminal insanity and assaulted his family, threatening to kill them.

"The cries of his wife were heard by

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

persons returning from the St. Paul Reunion, who interfered. Stintzen was found cursing and threatening his wife and had struck her several times and in addition had vowed that he would kill her with an ax.

"The terrified woman ran out into the road where a passing buggy load of reunionists were standing, attracted by the woman's cries, and begged them to protect her from her husband, who she said was trying to kill her family with a hatchet.

"Bob Short, one of the party, telephoned to the sheriff, who, in company with the deputy, Carwile, started for the scene of the trouble. When they arrived they found that Stintzen had taken to the brush, and had left no clue as to his whereabouts. A search failed to locate him and the officers returned to town.

"After the officers had left the man returned, apologized to his family, said he was sorry he did it, took all the loose cash that he could find, bade his family good-by "forever" and departed for parts unknown.

"Stintzen lives on the Jim Phelps property, near Four Mile bridge, south of the county farm. He was subject to these kind of fits about once a month. A neighbor who knows him well says that it is nothing more than downright cussedness coming to the surface.

"He has several brothers living in this vicinity who are also noted for "fits," but most of these are the result of too much alcohol. Stintzen's family consists of two girls about thirteen years of age, a boy six years old, and a two months old baby. The family bear very little marks of Stintzen's violence, but if the persons returning from St. Paul had not happened to be passing at the time there is no doubt but that the man's violence would have resulted in something more serious than a few bruises and scratches.

"Plaintiff says that defendants, in publishing the aforesaid article, in referring to John Stintzen, meant and intended to refer to William Stinson; that at the time of the publication of the aforesaid article by said defendants, and for some time prior thereto, said William Stinson lived and resided on the property known as the Jim Phelps property, near Four Mile bridge, south of the county farm; that the neighbors of the said William Stinson, and the people generally of said Neosho county, understood and believed, and still understand and believe, that said defendants, in publishing the aforesaid article, in referring to John Stintzen, meant and intended to refer to William Stinson; that plaintiff is a brother of said William Stinson, and at the time of publication of the above set out article by said defendants, and for some time prior thereto, resided in Erie, Neosho county, Kansas, and still resides in said city; that prior to and up until the time of the publication of the above set out article by said defendants this plain-

tiff was of good name, credit, and reputation, and of good social standing in said city of Erie, and in the vicinity thereof, and enjoyed the fellowship, esteem, confidence, and good opinion of the people generally in said community; that at the time of said publication plaintiff was known and recognized as a sober, honest, and law-abiding citizen; that these defendants, as editors, owners, and publishers of the said the Erie Sentinel, wickedly and maliciously intending to injure the plaintiff in his good name, fame, and credit, and to bring him into public scandal, infamy, and disgrace among his neighbors and all other good and worthy citizens of said county, and to cause it to be suspected and believed that plaintiff had been and was guilty of an inordinate and over-indulgent use of alcoholic liquors, and had by such over-indulgence become subject to fits of criminal insanity, and with the further intent to vex, harass, and annoy this plaintiff, did, in publishing the afore set out article, and in referring therein to plaintiff as a brother of the said William Stinson, make false, scandalous, defamatory, and libelous accusations of and concerning this plaintiff, which, with the innuendoes explanatory thereof, was as follows, to wit:

"He (meaning thereby William Stinson) has several brothers (one of whom is this plaintiff), living in this vicinity (meaning in or near Erie, Neosho county, Kansas), who (meaning the brothers, of whom this plaintiff is one) are also noted for "fits" (meaning fits of criminal insanity), but most of these are the result of too much alcohol (meaning thereby that this plaintiff had indulged in the use of alcohol until he had made himself subject to fits of criminal insanity)."

To this petition the appellees filed a general demurrer, which was sustained by the court, and judgment was rendered in favor of the appellees for costs. The order sustaining the demurrer, and the judgment, are the errors complained of.

The appellees contended, in substance, that the libelous article should be interpreted by the court, and it should be determined from its contents whether it was libelous upon the appellant; that, if so construed, it can constitute no libel against the appellant, unless it be in the first six paragraphs of the published article, and the appellant does not claim that he was libeled thereby; that the appellant cannot be injured by the first sentence of the seventh paragraph, as the pronoun "he," the first word of that sentence, refers to John Stinson; and that the appellant cannot be his own brother, and cannot be injured by the statement contained in the sentence. The court also seems to have taken this view of the article. Besides the Christian name, however, the article itself identifies the Stinson referred to as follows: "Stintzen lives on the Jim Phelps property, near Four Mile bridge, south of the county farm."

The appellant alleges in his petition that the "Stintzen" named in the article meant and was intended to refer to William Stinson; that William Stinson lived on the Jim Phelps property, near Four Mile bridge, south of the county farm, and that appellant resided, at and prior to the publication of the article, in the city of Erie, Neosho county, Kansas; that the people of the county of Neosho generally understood and believed, and still understand and believe, that the appellees, in publishing the article, meant and intended to refer to William Stinson; that appellant is a brother of said William Stinson, and is one of the several brothers referred to in the first sentence of the seventh paragraph of the publication.

While it is the province of the court generally to interpret written contracts and instruments which are offered in evidence, and to tell the jury what they mean, in actions for libel the article is to be judged by its effect upon the person alleged to be libeled, as the article is understood by the community or persons to whom the alleged libelous article comes. This is a question of fact, to be determined by a jury, in case of a jury trial, and, as against a demurrer to a petition charging libel, the facts alleged in the petition are, as in all other cases, to be taken as true. This includes the innuendo, used in actions for slander or libel to assert a meaning which, from the circumstances, those who heard or read the alleged slanderous or libelous matter understood therefrom.

We think it fairly appears from the petition that the word "he," being the first word in the seventh paragraph of the article, meant and was understood to mean William Stinson, and not John Stintzen. The petition therefore states a cause of action.

The order sustaining the demurrer is set aside, the judgment is reversed, and the case is remanded for further proceedings in accordance with the views herein expressed. All the Justices concurring.

(83 Kan. 778)

BOARD OF EDUCATION OF CITY OF OTTAWA v. JACOBUS, County Superintendent of Public Instruction.

(Supreme Court of Kansas. Jan. 7, 1911.)

(Syllabus by the Court.)

1. SCHOOLS AND SCHOOL DISTRICTS (§ 42*) — ANNEXATION OF "ADJACENT" TERRITORY.

Under Gen. St. 1909, § 7594, authorizing boards of education of cities of the second class to attach adjacent territory to the city for school purposes, the word "adjacent" means lying near, and territory which does not touch the city limits, but which does adjoin the city school district and is so close to the city that pupils residing thereon can conveniently attend the city schools, may be attached if the boards deem the annexation to be for the best interests of the schools of the city and of the

residents of the territory seeking to be attached (citing 1 Words and Phrases, p. 184).

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 81-85; Dec. Dig. § 42.*]

2. APPEAL AND ERROR (§ 169*)—SCOPE OF REVIEW.

Only such questions as have been presented in the trial court are open for review in the Supreme Court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1018-1034; Dec. Dig. § 169.*]

Appeal from District Court, Franklin County.

Action between Charles A. D. Jacobus, Superintendent of Public Instruction of Franklin County, and the Board of Education of the City of Ottawa. From the judgment, Jacobus appeals. Affirmed.

F. M. Harris, for appellant. F. A. Waddle, for appellee.

JOHNSTON, C. J. This appeal involves the right and power of the board of education of a city of the second class to attach territory to the city for school purposes which adjoins the city school district but does not adjoin the corporate limits of the city. It appears that some time ago territory adjoining the city was attached to and made a part of the city school district, and, when the board of education undertook to attach a small tract of territory lying alongside of that previously annexed, the question of the power of the board was raised. This tract, which adjoined the school district, was only one-fourth of a mile from the city limits, and the trial court made a finding that "the distance from the city is such that pupils of school age residing thereon can easily reach and conveniently attend the public schools in said city."

The statute authorizing the annexation provides that "territory outside the city limits, but adjacent thereto may be attached to such city for school purposes upon application to the board of education of such city by a majority of the electors of such adjacent territory," etc. Gen. St. 1909, § 7594. What does the word "adjacent" mean as used in this statute? In the case of *State ex rel. v. Kansas City*, 50 Kan. 503, 31 Pac. 1100, a statute authorizing the consolidation of adjacent cities was under consideration, and it was held that it was not essential that the cities proposed to be united should adjoin each other, but that "it is enough if they were 'adjacent,'" and that term has been defined as lying near to, but not actually touching. Webster's Unabridged Dictionary. In Cyc. 764 the term is defined as "lying close or near to, neighboring." In 1 Am. & Eng. Encyc. of L. 634, it is said that: "Adjacent has been defined as lying near to but not actually touching, in the vicinity or neighborhood of. The term, however, is

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

sometimes used as synonymous with 'adjoining.'" In an act of Congress giving railroad companies a right of way through public lands, it was provided that they might take timber, stone, and other building material from lands adjacent to their line of road, and the Supreme Court of the United States held that it should be treated as land lying close at hand, but that it need not be adjoining or actually contiguous, and the interpretation of the act by the Secretary of the Interior, to the effect that material might be taken from the tier of sections through which the right of way extends, and also that it might be taken from an additional tier of sections on either side, was approved. It was said: "If the word 'adjoining' had been used instead of 'adjacent,' those sections touching the line of road could be regarded as the adjoining lands, and when the word 'adjacent,' instead of 'adjoining,' is used, it might, not unnaturally, be said to include the next tier of sections away from the line of the road." *United States v. St. Anthony R. R. Co.*, 192 U. S. 524, 24 Sup. Ct. 333, 48 L. Ed. 548. In *C. & N. W. Ry. Co. v. Mechanics' Inst.*, 239 Ill. 197, 87 N. E. 933, the Supreme Court of Illinois held that under a provision giving a railway company power to condemn adjacent land for the enlargement of terminal facilities the word "adjacent" should be construed to mean lying near, neighboring, but not necessarily in contact. In *Camp Hill Borough*, 142 Pa. 511, 21 Atl. 978, there is an interpretation of a statute which provided that adjacent lands might be annexed to a borough, and it was held that the word "adjacent" was used in the sense of adjoining or contiguous. It was also held, however, that a number of contiguous properties might be annexed in a proceeding though some of them did not adjoin the borough. The term has been variously defined by the courts, some of which have held it to be synonymous with adjoining, abutting, contiguous, bordering, neighboring, and close, the meaning determinable principally by the context in which it is used and the facts of each particular case. 1 *Words and Phrases*, 184. It has no arbitrary definition, but its meaning depends largely upon the subject-matter to which it is to be applied and the object which the Legislature is seeking to carry out. The manifest purpose of the Legislature in providing for the annexation of outside territory was that those living beyond the city limits but not sufficiently near to avail themselves of the privileges of the city schools might by paying their proportion of the city taxes have the benefit of the city schools. Upon a majority petition of the electors so situated, the board of education is given authority to annex territory to the district. It is adjacency, instead of contiguity or actual

contact, which constitutes the test, or which determines the right to annexation. It is not nearness alone, but it is in part whether those outside can conveniently attend the schools. That the term was not treated as synonymous with adjoining and contiguous is suggested by the use of the word "contiguous" in the latter part of the act, where it provides that outside territory when annexed shall be attached to a contiguous ward for election purposes. If the territory proposed to be attached had been included with that first attached, no question could have arisen as to the power of the board to make it a part of the city district, and it is hard to see why territory which might have been brought into the district by a single annexation may not be incorporated in two annexations when the conditions warranting it arise. In view of the provision that the added territory shall be attached to the contiguous ward, it is reasonably clear that the Legislature intended that, when the annexations are made, the district shall be of compact territory, but that the board in its discretion might attach territory from time to time upon proper petition, where there are sufficient school facilities, and where the territory upon which those applying to come in is adjacent; that is, sufficiently near to the schools so that those brought within the district may conveniently enjoy the benefits of the city schools.

It is suggested that the application for annexation was insufficient; but apparently that question was not raised nor decided in the district court. It is expressly found by that court to have been conceded that the only question for determination was whether, upon a petition conforming in all respects with the requirements of the law, the board of education had the power to make the territory in question a part of the district. Only such questions as have been raised and decided in the trial court are open for review here. *Byington v. Com'rs of Saline Co.*, 37 Kan. 654, 16 Pac. 105.

The question presented appears to have been correctly decided by the trial court, and its judgment will be affirmed. All the Justices concurring.

(33 Kan. 712)

POTTER v. RORABAUGH-WILEY DRY GOODS CO.

(Supreme Court of Kansas. Jan. 7, 1911.)

(Syllabus by the Court.)

MUNICIPAL CORPORATIONS (§ 817*)—STREETS—MAINTENANCE OF AWNING—LIABILITY OF OWNER—INJURIES TO PEDESTRIAN—BURDEN OF PROOF.

It is the duty of one who projects or maintains an awning over a street to keep it from becoming dangerous to pedestrians lawfully upon the street, and, where it appears that an awning or a part of it fell and injured the

plaintiff while passing along the street, the burden is cast upon the defendant to whose building the awning is attached to prove that all proper and reasonable care had been employed in the construction and maintenance of the awning.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1725; Dec. Dig. § 817.*]

Appeal from District Court, Reno County.

Action by M. W. Potter against the Rorabaugh-Wiley Dry Goods Company. Judgment for defendant, and plaintiff appeals. Reversed.

R. P. B. Wilson, W. H. Lewis, Carr W. Taylor, and Geo. A. Nealy, for appellant. A. C. Malloy and F. Dumont Smith, for appellee.

JOHNSTON, C. J. M. W. Potter brought this action against the Rorabaugh-Wiley Dry Goods Company to recover damages for injuries alleged to have been sustained through the falling of an awning attached to appellee's store building which struck appellant on the head while she was passing along the street. It was averred that it was negligently constructed and insecurely fastened, and also that it was maintained in violation of an ordinance of the city. The trial resulted in favor of the dry goods company, and the appellant complains of rulings in the admission of testimony and in instructing the jury.

The evidence is conflicting as to the exact cause of the accident and the extent of the injury. By some of the testimony a rod of the awning fell and hit appellant on the head. She said it was a hard blow which at the time dazed and affected her vision. A witness said he saw the occurrence, and it appeared to him that a rod loosened from the awning and fell on her head tipping her hat, and he remarked to her, "Pretty hard blow, wasn't it?" Another witness said he was near and saw a part of the awning strike appellant on the head, that she staggered a little, and then passed on in company with her friend. The woman who was walking with appellant testified that she could not tell whether the rod fell on appellant, or whether she ran against it, but that the collision did not stagger her or arrest her progress or even make a break in her conversation. One witness said that there was no exclamation of pain, but that she adjusted her hat and passed on laughing and conversing with the woman who was walking with her. Counsel for appellant asked the court to instruct the jury that "the law casts upon the owner of buildings, abutting upon the street, who attaches thereto structures overhanging the street, the duty of preventing the overhanging structures from becoming, in any way, dangerous to persons passing on the highway, and where the plaintiff shows that while passing on the highway, or on the sidewalk, she is

injured by some part of the structure falling upon her, the burden rests upon the defendant to show that it was blameless in the premises." The instruction was refused, and the court placed the burden of proof wholly upon appellant. The testimony, although conflicting and unsatisfactory, did tend to prove that a part of the awning projecting over the street fell upon and injured appellant. She was entitled to an instruction stating the rule of law applicable to the evidence which her testimony tended to prove. Those who place or project objects over the street upon which persons are passing and repassing take upon themselves the duty of making them secure, and, if the object falls and injures a pedestrian, the maxim of *res ipsa loquitur* applies, and the burden rests upon them to show that the fall and injury did not occur through their negligence. The rule was applied in *Scott v. London Dock Co.*, 3 H. & C. 594, where, in lowering sugar from the warehouse to the pavement below, the dock company dropped a bag of sugar upon a pedestrian who was lawfully passing along the pavement. It was said: "There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care." The New York Court of Appeals announced the same rule in *Breen v. N. Y. C. & H. R. R. Co.*, 109 N. Y. 297, 16 N. E. 60, 4 Am. St. Rep. 450, and in *Griffen v. Manice*, 166 N. Y. 188, 59 N. E. 925, 52 L. R. A. 922, 82 Am. St. Rep. 630, the same court held that it was not the injury itself, but the manner and circumstances of the injury, that justified the application of the maxim and the inference of negligence, and that the maxim is based in part "on the consideration that, where the management and control of the thing which has produced the injury is exclusively vested in the defendant, it is within his power to produce evidence of the actual cause that produced the accident, which the plaintiff is unable to present." The Supreme Court of the United States, in discussing occurrences which of themselves give rise to the inference of negligence, approvingly quoted from an English case in which it was said: "If a person maintains a lamp projecting over the highway for his own purposes, it is his duty to maintain it so as not to be dangerous to persons passing by; and if it causes injuries, owing to a want of repair, it is no answer on his part that he had employed a competent man to repair it." *Gleeson v. Virginia Midland R. Co.*, 140 U. S. 435, 11 Sup. Ct. 859, 35 L. Ed. 458. In *Atchison*

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

v. Plunkett, 8 Kan. App. 308, 55 Pac. 677, the same view is taken. The Supreme Court of Minnesota applied the rule in a case where an awning projecting over a public street of a city fell and injured a person walking along the street. There the plaintiff contended that the owner of the building was an insurer of safety and therefore absolutely liable; but the court denied that claim and held that the case was to be decided upon the principles of negligence in accordance with the theory of *res ipsa loquitur*. *Waller v. Ross*, 100 Minn. 7, 110 N. W. 252, 12 L. R. A. (N. S.) 721, 117 Am. St. Rep. 661. In a note appended to the report of that case in 10 Am. & Eng. Ann. Cas. 715, many authorities are collected relating to the rule in question. A good statement of the rule and its exceptions may be found in 29 Cyc. 590.

The court appointed a commission to make an examination of the physical condition of appellant to which she appears not to have objected; but she did insist that her physician who had treated her for considerable time should be present and assist in making the examination, and this the court refused. No good reason has been suggested why her physician should be added to the commission, nor for permitting him to take any part in the investigation. The court allowed appellant's husband to be with her while they were examining her, and there is no objection to the method of those making the examination nor of the character of the tests that were had. No error was committed by the exclusion.

For the error in charging the jury, the judgment will be reversed, and the cause remanded for a new trial. All the Justices concurring.

(83 Kan. 642)

GORDON v. MUNN et al.

(Supreme Court of Kansas. Jan. 7, 1911.)

(Syllabus by the Court.)

1. COSTS (§ 264*)—COSTS ON APPEAL—AUTHORITY OF SUPREME COURT.

The new Code (sections 574 and 576 [Gen. St. 1909, §§ 6169, 6171]) makes the district court the custodian of the record, and authorizes the court or judge to amend and correct the transcript of the evidence before the same is filed and made a part of the record. In order to recover costs advanced for the transcript, the party ordering it must perfect his appeal. After the appeal is perfected, this is the only court authorized to direct which party shall pay the costs of the transcript.

[Ed. Note.—For other cases, see Costs, Dec. Dig. § 264.*]

2. COSTS (§ 264*)—COSTS ON APPEAL—TAXATION BY SUPREME COURT.

While the new Code (section 583 [Gen. St. 1909, § 6178]) leaves the taxation of costs of appeal in the discretion of the Supreme Court, such costs as a rule follow the judgment and will be taxed to the losing party, subject

to the right of the court to direct otherwise, where it appears for any reason that costs should be apportioned between the parties.

[Ed. Note.—For other cases, see Costs, Dec. Dig. § 264.*]

On motion to retax costs. Denied.

For former opinion, see 83 Kan. 242, 111 Pac. 177.

PORTER, J. After the judgment in this case was reversed (83 Kan. 242, 111 Pac. 177) the appellee filed certain objections to the allowance of costs taxed against her. On the hearing of the motion to retax, it was claimed that it would be inequitable to tax the costs at this time against the appellee, and that by the provisions of the new Code the allowance of costs of appeal rests entirely within the discretion of this court.

The provision of the old Code (section 562) was as follows: "When a judgment or final order is reversed, the plaintiff in error shall recover his costs, including the costs of the transcript of the proceedings or case made filed with the petition in error; and when reversed in part and affirmed in part, costs shall be equally divided between the parties." Gen. St. 1868, c. 80. The provision of the new Code (section 583) is as follows: "The costs of appeal shall be taxed against such party or parties as the court shall direct." Gen. St. 1909, § 6178.

While the new Code leaves the taxing of costs in the discretion of the court, it is hardly to be supposed that in an ordinary case the court would direct the costs to be paid by the prevailing party. The intention evidently was to do away with the arbitrary rule under the old Code requiring the losing party to pay all the costs in every case where the judgment was reversed, and that in cases where the judgment was reversed in part and affirmed in part the costs should be equally divided between the parties. In all cases the court is now permitted to apportion the costs as equity and justice require. As a rule, the costs will follow the judgment, and will be taxed against the losing party, subject to the right of the court to direct otherwise, where it appears for any reason that the costs should be apportioned between the parties. There is nothing peculiar about this case which takes it out of the ordinary rule providing that the costs shall be paid by the losing party.

The principal contention of the appellee arises over the item of \$127.50, being the cost of the transcript of the evidence, for which the receipt of the stenographer of the district court was filed, showing its payment by the appellants. It is urged that this is not an item of costs of appeal, but of costs in making the record in the district court, and therefore not taxable as costs here. It is said that there is no provision under the

new Code for a transcript of the record or case-made, and that, therefore, section 2404, Gen. St. 1909 (chapter 28, § 14, Laws 1909), providing that the party paying for a transcript or case-made may, by attaching thereto the receipt of the official stenographer for the amount paid, have the same taxed as costs in this court, is no longer of any force. It is true there is no provision under the new Code for a transcript of the record or for a case-made, but there is a provision for a transcript of the evidence. Section 574 reads: "Either party to any case tried in a court of record having an official stenographer may direct such stenographer to transcribe and certify to the correctness of all of the stenographer's notes of the testimony and proceedings in the case or any such part as such party may designate, and such transcript shall be made, certified and filed with the clerk of such court on payment to such stenographer by the party ordering the same of the costs of such transcript, and such transcript shall thereupon become a part of the record in the case, subject to amendment and correction by the trial court or judge." Gen. St. 1909, § 6169. The new Code then provides: "In case of a challenge of the correctness of any part of an abstract, the court or any justice thereof may direct that all or any designated part of the original files, transcript of evidence, or other papers in the case, or copies of journal entries, or of other records of the said court, be forwarded by the clerk having custody thereof to the clerk of the Supreme Court, and the costs incident to the determination of any question as to the correctness of any abstract shall be taxed against the party in the wrong by order of the Supreme Court." Section 576 (Gen. St. 1909, § 6171).

These provisions make the district court the custodian of the record. The court or judge is authorized to amend and correct the transcript of the evidence before the same is filed and made a part of the record, and the costs of making such transcript must be paid by the party ordering the same before it is filed and becomes a part of the record. The only purpose of the transcript, however, is to preserve the evidence as part of the record for use in this court. The record itself may never be seen by this court, but the abstracts for the use of the court are to be made from it. In order to recover costs advanced for the transcript of the evidence, the party procuring it must perfect his appeal. After an appeal has been perfected, this is the only court authorized to direct which party shall pay the costs of the transcript. As a general rule, this as well as the other costs will follow the judgment, subject to the right of the court, for sufficient reasons, to direct otherwise.

The motion is denied. All the Justices concurring.

(83 Kan. 738)

HANKE v. HARLOW et al.[†]
(Supreme Court of Kansas. Jan. 7, 1911.)

(Syllabus by the Court.)

INJUNCTION (§ 27*)—TAKING DEPOSITIONS.

Under the circumstances stated in the opinion, it is held that the district court did not abuse its discretion in restraining the plaintiff from taking the depositions of the defendants before the trial, and that, aside from the justifiableness of the order, the plaintiff suffered no injury to her substantial rights in consequence of it.

[Ed. Note.—For other cases, see Injunction, Dec. Dig. § 27.*]

Appeal from District Court, Wyandotte County.

Action by Maggie A. Hanke against Skip D. Harlow and others. Judgment for defendants, and plaintiff appeals. Affirmed.

J. M. Mason, E. E. Chesney and F. E. Lindquist, for appellant. Hale, Dean & Higgins, for appellees.

BURCH, J. The appeal is taken from an order restraining the appellant from taking the depositions of J. H. Peterson and Inez Peterson, who were parties to the suit, and who resided in a county adjoining the one in which the action was pending. There was evidence that the Petersons intended to be present at the trial, that there was nothing in their situation or circumstances to prevent them from attending the trial, and that the appellant had no reason to apprehend that they would not be there to testify. There was further evidence that the appellant was not proceeding in good faith, that she was merely "fishing," and that her purpose was to harass and oppress her adversaries. Under these circumstances the court did not abuse its discretion in issuing the order. The case of *In re Abeles*, 12 Kan. 451, upon which the appellant relies, does not apply. The distinction between the right to the deposition of a party and of a witness not a party is pointed out in the case of *In re Merkle*, Petitioner, 40 Kan. 27, 30, 19 Pac. 401, and the court properly applied the principle recognized in the cases of *In re Cubberly*, Petitioner, 39 Kan. 291, 18 Pac. 173, and *In re Davis*, Petitioner, 38 Kan. 408, 16 Pac. 790. Besides this, the court in which the action is pending always has the power to protect a party whom it restrains in this manner from any injurious consequences of the order, should any result.

Since the appeal was taken the case has been tried. At the time of the trial the Petersons were both living within the jurisdiction of the court and were accessible as witnesses. Consequently their depositions could not have been read. Code Civ. Proc. §§ 337, 358 (Gen. St. 1909, §§ 5931, 5953). J. H. Peterson was a witness at the trial, testified fully, and was examined by the appel-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes
† Rehearing denied January 14, 1911.

lant. Any purpose which the appellant might have entertained to use the testimony of Inez Peterson was abandoned, and she was not called. Therefore, aside from the fact that the restraining order was originally justifiable, the appellant has not been prejudiced.

The appellant says she has moved for a new trial and hopes to obtain one. Should she succeed, her substantial rights have not been infringed.

The judgment of the district court is affirmed. All the Justices concurring.

(33 Kan. 708)

MILLS v. RIGGLE et al.

(Supreme Court of Kansas. Jan. 7, 1911.)

(Syllabus by the Court.)

1. PARTNERSHIP (§ 146*) — LIABILITY — NOTE EXECUTED BY ONE PARTNER.

Negotiable paper made in the name of one partner when his name is not that of the firm is prima facie the individual note of such partner, and ordinarily not binding upon the partnership; but it is not conclusive of that fact, and, upon proof sufficient to warrant a finding that the money was borrowed on the credit of the firm and that the firm received the benefits, the note may be regarded as merely collateral, and the other partner will be held liable in an action to recover upon the original consideration.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 242-255; Dec. Dig. § 146.*]

2. EVIDENCE (§ 317*)—HEARSAY.

Evidence that one who has loaned money to a copartnership had heard that one of the partners was financially responsible is not hearsay, where it is offered for the purpose of establishing the fact that he relied upon what he had heard.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1174-1192; Dec. Dig. § 317.*]

Appeal from District Court, Greenwood County.

Action by C. C. Mills against E. P. Riggle and Charley E. Sullenger. Judgment for plaintiff, and defendant Riggle appeals. Modified.

Howard J. Hodgson and Gordon Badger, for appellant. Geo. R. Stephenson and S. C. Holcomb, for appellee.

PORTER, J. E. P. Riggle appeals from a judgment rendered against him for the amount of a promissory note. The case was tried to the court and findings of fact made from which it appears that Riggle and Charley E. Sullenger were partners as butchers, handling and selling meats of various kinds at Toronto in Woodson county. The business of the firm was carried on under the name of Riggle & Sullenger. Riggle lived in Greenwood county. Sullenger lived at Toronto, and had the management and control of the business. On the 9th day of November, 1907, Sullenger came to the plaintiff and told him that the firm owed a number of bills and needed money, and borrow-

ed from the plaintiff \$60 giving a note for the amount signed by himself and wife and a chattel mortgage on personal property as security. In borrowing the money Sullenger was acting as the manager of the firm, and the plaintiff understood that he was loaning the money to Riggle & Sullenger. The proceeds were applied to the payment of indebtedness of the firm. Two days later, Sullenger procured another loan of \$75 from the plaintiff under the same circumstances. A note for the amount was signed by Sullenger and wife, who gave as security another chattel mortgage. On the 4th day of December the partnership was dissolved, but the business was unsettled, and the firm owed a number of debts. On the 9th day of December Sullenger borrowed \$100 from the plaintiff for the purpose of paying debts of the firm, and the first two notes were canceled and a new note given for \$235, the amount of the three loans. This note and a chattel mortgage on some horses were likewise signed by Sullenger and wife. At the time the several sums were loaned by the plaintiff he knew that Riggle & Sullenger were partners, that Sullenger was in the active control of the business, and he knew from reputation that Riggle was financially responsible. Whether he was aware at the time the last loan was made that the firm had dissolved does not appear. This action was brought against both members of the firm for the amount of the note and to foreclose the chattel mortgage. There were averments in the petition that Riggle had converted the property to his own use. An answer was filed by appellant denying under oath the existence of the partnership and any authority on the part of Sullenger to bind him by executing the notes. The court found that the property covered by the mortgage belonged individually to Riggle and that Sullenger had no authority to mortgage the same, and therefore no judgment was rendered affecting the property; but the court gave judgment against both defendants for the amount due on the note, holding that the debt was a partnership one, and that each member of the firm was liable therefor.

Among the errors assigned is the overruling of a motion to require the plaintiff to set forth the nature of the authority of Sullenger to execute the note. This was rightly overruled for two reasons: (1) The petition alleged that Sullenger was in the active management and control of the business of the firm; (2) the action is not brought alone upon the note, but to recover the money loaned to the firm. The fact of the partnership having been established, it was not necessary to show special authority of one partner to bind the firm by his contract. Partners are principals in every transaction of the firm, and any act done by one partner within the actual scope of the agency conferred upon him is binding upon the firm.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The presumption always is that the partner was intended to have authority to bind the firm by all acts necessary to carry on the business in the usual way. 22 A. & E. Enc. of L. 137. A partner has actual authority to that extent. *Lemon v. Fox*, 21 Kan. 152. In trading and commercial partnerships it is a general principle that each partner is the lawful agent of the partnership in all matters within the scope of the business. *Deitz v. Regnier*, 27 Kan. 94; *Horn v. Newton City Bank*, 32 Kan. 518, 522, 4 Pac. 1022.

It is claimed in the appellee's brief that the action was brought upon the authority of *Fair v. Bank*, 9 Kan. App. 779, 59 Pac. 43, and is not an action upon the note but one to recover the consideration thereof. We think the averments of the petition are broad enough to authorize a recovery upon the consideration of the note. The syllabus in the case relied upon (*Fair v. Bank*, supra) reads as follows: "While negotiable paper made in the name of one partner, when his name is not also that of the firm, is not ordinarily binding upon the partnership, yet such paper, taken when the obligation was incurred by the partnership and upon its credit, will be regarded as merely collateral, and the other partner will be held liable upon the original consideration." This court denied a petition to certify that case on appeal, and it stands as declaratory of the law. The doctrine upon which it rests seems to be firmly established by the great weight of authority. *Hoeflinger v. Wells*, 47 Wis. 628, 3 N. W. 589; *Savings Bank v. Butler Estate*, 98 Mich. 381, 57 N. W. 253; *Beckwith v. Mace*, 140 Mich. 157, 103 N. W. 559; *Carter v. Mitchell*, Assignee, 94 Ky. 261, 22 S. W. 83; *Williams v. Donaghe's Ex'r*, 1 Rand. (Va.) 300; *Maffet v. Leuckel*, 93 Pa. 468; *Smith v. Collins*, 115 Mass. 388; *Folk & Smith v. Wilson*, 21 Md. 538, 83 Am. Dec. 599; *Barcroft, Beaver & Co. et al. v. Snodgrass et al.*, 1 Cold. (Tenn.) 430; *Annis et al. v. Lowes*, 5 U. C. Q. B. R. (O. S.) 198; *Story on Partnership*, § 155; 4 A. & E. Enc. of L. 180. The rule is otherwise where it appears that the money was advanced on the personal credit of the individual partner. *Farmers' Bank of Mo. v. Bayless*, 41 Mo. 274. The mere taking of such note or security from a single partner will not of itself discharge the firm's indebtedness. There must be either an agreement to such effect or facts sufficient to warrant the inference that the parties intended that the partnership debt should be discharged. *Bonnell v. Chamberlin*, 26 Conn. 487; *Eaton & Gilbert on Commercial Paper*, § 30; *Parsons on Partnership* (4th Ed.) § 138.

In order to render the partnership liable in case of an ordinary written contract it is not essential that the name of the firm or partnership be mentioned in the writing. In the recent case of *Marks v. Chumos*, 82 Kan. 562,¹ one of two partners entered into a contract in writing for the lease of a building for the benefit of the firm, and although the

contract was made only in the name of one and signed by him alone as lessee, the partners having entered into the leased property and occupied it for a time, it was held that the lease was the written contract of both partners. Of course, the taking of the individual note of one partner would on its face show that the money was not loaned to the firm and that the sole credit was given to the individual; but it would not be conclusive of that fact, and, upon proof sufficient to warrant a finding that the money in fact was borrowed on the credit of the firm and that the firm received the consideration, the note will be held as merely collateral, and the partnership will be liable in an action to recover the consideration.

Applying these well-recognized principles to the case at bar, the appellee was entitled to recover in this action as for money loaned the partnership. It is apparent, however, that the court actually rendered judgment against appellant upon the \$235 note, allowing interest from the date of the note at the rate of 10 per cent. per annum which was the rate provided for in the note. The appellee was only entitled to interest at the rate of 6 per cent. on the amount borrowed. This slight error in the judgment can readily be corrected.

Since the note was only collateral, and the action can be maintained to recover the consideration, it is of no importance that the note was executed five days after the actual dissolution of the partnership. Although the firm had been dissolved and had ceased to do business it was still a copartnership for the purpose of settling its debts. 22 A. & E. Encyc. of L. 177, and cases cited in note 3. The court finds on sufficient evidence that the proceeds of the note were used by the firm in payment of indebtedness of the copartnership, and every principle of justice requires that both partners be held liable for the money so borrowed and applied upon the debts of the firm.

It is claimed that the court erred in permitting the appellee to testify that at the time he made the loan he had heard that Riggle was financially responsible. It is insisted that this was hearsay. If the question had been asked in proof of the fact that Riggle was financially responsible the evidence would have been hearsay; but such was not the purpose of the question, which was to establish the fact that the appellee relied upon what he had heard as to the financial responsibility of Riggle. The fact to which the witness testified was original evidence, not hearsay. *Kaufman v. Springer*, 38 Kan. 730, 17 Pac. 475; *Bank v. Hutchinson*, 62 Kan. 9, 61 Pac. 443.

Since the evidence fully sustained the findings, the demurrer to the evidence was rightly overruled as well as the motion to vacate certain of the findings. There was no error in refusing to compel appellee to elect upon which cause of action he would rely

¹ 109 Pac. 397.

since only one action was stated, although it was for the recovery of a debt and the foreclosure of a chattel mortgage to secure it.

The judgment will be modified, and the court directed to enter judgment for the plaintiff for the amount of the note together with six per cent. interest. All the Justices concurring.

(83 Kan. 632)

GIRARD TRUST CO. v. OWEN et al.
(Supreme Court of Kansas. Jan. 7, 1911.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 663*)—RECORD.

Where there is conflicting testimony in this court as to whether a case-made was served before the expiration of the time allowed, the certificate of the trial judge that the service was made in due time will control.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2853-2855; Dec. Dig. § 663.*]

2. LIMITATION OF ACTIONS (§ 143*) — NEW PROMISE.

The payee of a note who has assigned it as collateral security has still such an interest therein that a written acknowledgment made to him by the debtor may serve to toll the statute of limitations.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 578-583; Dec. Dig. § 143.*]

3. LIMITATION OF ACTIONS (§ 155*) — PART PAYMENT TO RECORD OWNER OF MORTGAGE.

In virtue of the statute (Gen. St. 1900, §§ 5214, 5215) making payments to the record owner of a mortgage binding upon the real owner, a part payment to a mortgagee who has made an unrecorded assignment is sufficient to toll the statute of limitations.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 623-630; Dec. Dig. § 155.*]

4. BILLS AND NOTES (§ 140*)—REDUCTION OF DEBT—EXTENSION.

Where the parties to an overdue note enter into a written agreement founded upon a sufficient consideration, by the terms of which a part of the debt is forgiven and the time for paying the reduced amount is extended, a provision therein that a default in the payment of interest shall mature the new principal implies that the debtor is not to forfeit the benefit of the reduction by a failure to meet promptly the terms of the readjustment.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 355-359; Dec. Dig. § 140.*]

Appeal from District Court, Cheyenne County.

Action by the Girard Trust Company, trustee, against Thomas Owen, Jr., and others. Judgment for plaintiff, and defendants appeal. Modified.

J. L. Finley and Wheeler & Switzer, for appellants. Dempster Scott and Bowersock & Hall, for appellee.

MASON, J. The Girard Trust Company, trustee, obtained judgment against Thomas Owen upon a note and mortgage, and he appeals. A preliminary question is presented

by a motion to dismiss on the ground that the case-made was not served in time. The judgment was rendered December 8, 1908, and the time then allowed for serving a case expired April 7, 1909. A written acknowledgment of service recited that it was made April 8th and affidavits have been filed here stating such to be the fact. On the other hand, the defendant presents affidavits that service was made at an earlier date. The certificate of the trial judge made at the time of settlement, May 25, 1909, includes a recital that the case-made had been served in due time. This is not ordinarily conclusive (*Gimbel v. Turner*, 36 Kan. 679, 14 Pac. 255), but it is competent evidence (*Jones v. Kellogg*, 51 Kan. 263, 271, 272, 33 Pac. 997, 37 Am. St. Rep. 278). It amounts to a finding made at a hearing of which the adverse party had notice, and will be regarded in this instance as controlling, inasmuch as the conflict of testimony would otherwise leave the fact in doubt. The justice of this solution of the controversy is especially obvious because, if the trial judge had found that the case-made had been served too late, the defendant would still have had abundant time within which to institute an appeal under the new Code. The note sued on was due June 1, 1892. The action was begun April 2, 1907. To toll the statute of limitations the plaintiff relies upon a written acknowledgment in the form of an extension agreement signed June 20, 1901, and upon a payment of interest found to have been made May 27, 1902. The defendant maintains that the acknowledgment and the payment were of no effect because neither was made to the owner of the note. The note and mortgage were made payable to Thomas Frahm, who was the cashier of the McKinley-Lanning Loan & Trust Company, to which he shortly transferred them. According to the evidence they were then turned over to the plaintiff as collateral security. While the plaintiff held them the defendant signed an extension agreement acknowledging the indebtedness, which was described as owned by the McKinley-Lanning Loan & Trust Company. This written agreement was brought about by, and was delivered to, W. H. Lanning, who was the agent of Frahm and the McKinley-Lanning Company, but not of the plaintiff, so far as the record shows. The subsequent payment was likewise made to him.

In *Investment Co. v. Berghthold*, 60 Kan. 813, 58 Pac. 469, it was held that a written acknowledgment incorporated in an extension agreement made with the payee after the assignment of the note does not interrupt the running of the statute. In that case, however, no suggestion seems to have been made regarding the effect of a subsequent adoption by the owner of the acts done by one having no authority at the time to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

represent him. Possibly the ratification might operate retrospectively by relation. See, as having some bearing upon this phase of the matter, *Dresser v. Wood*, 15 Kan. 344; *Service v. Bank*, 62 Kan. 857, 62 Pac. 670; *Haines v. Watts*, 53 N. J. Law, 455, 21 Atl. 1032; 31 Cyc. 1283, 1290. *Moore v. Roper*, 35 Can. Sup. Ct. 533, tends to the contrary. In 19 A. & E. Encycl. of L. 317, 318, it is said that "an acknowledgment made to the assignee [obviously a misprint for assignor], after the assignment is of no effect." Of the two cases cited in support of this text one (*Maxwell v. Reilly*, 79 Tenn. 307) holds that after the death of the owner of a note an acknowledgment made to his widow does not inure to the benefit of an administrator subsequently appointed. The widow claimed to own the note by gift, and the decision was based upon that fact. In the other case (*Stamford Banking Co. v. Smith*, 1 Q. B. D. L. R. 1892, 765) a payment made to a former owner of the note was held not to suspend the statute because the giving of money to a stranger was not a payment upon the note. The principle of ratification was suggested and might have been applied, but it happened that the adoption of one payment would have involved recognizing enough others to have wiped out the debt.

In the present case the acknowledgment was sufficient irrespective of the effect of a subsequent ratification. Although the McKinley-Lanning Company, to whose agent the acknowledgment was made, had previously transferred the note and mortgage, the evidence shows that the transfer was for security. By such a transfer the company lost the right of collection and control, but did not part with all interest in the claim. It was entitled to any surplus over the amount secured, and was itself liable for any deficiency. It had a substantial interest in the payment of the note, and cannot be regarded as a stranger to it. The cases holding that an acknowledgment made to a stranger is without effect have no application to such a situation. This readily appears from an examination of collections in 25 Cyc. 1362, and 19 A. & E. Encycl. of L. 316, and notes in 102 Am. St. Rep. 754, and in 5 Am. & Eng. Ann. Cas. 811. In the note last cited it is said (page 812): "If the relationship between the person to whom the acknowledgment is made and the creditor is such that they have an interest in common in the debt, or that there is privity between them, the acknowledgment will be sufficient to toll the statute."

A situation somewhat analogous to that here presented arises where upon the death of a creditor the debtor admits the indebtedness to an heir, who has no legal title, but is interested in the payment. By the weight of authority such an acknowledgment is as effective as those made to the administrator. These cases tend to support that view: *Haines v. Watts*, 53 N. J. Law, 455,

21 Atl. 1032; *Hodnett v. Gault*, 64 App. Div. 103, 71 N. Y. Supp. 831; *Hill v. Hill*, 51 S. C. 134, 28 S. E. 309; *Robertson v. Burrill*, 22 Ont. App. 356; *Croman v. Stull*, 119 Pa. 91, 12 Atl. 812. The following have a contrary tendency: *Visher v. Wilbur*, 5 Cal. App. 562, 90 Pac. 1065, 91 Pac. 412; *Kisler v. Sanders, Administratrix*, 40 Ind. 78.

Ordinarily a part payment is effective to suspend the running of the statute only when it is made to the creditor or some one authorized to represent him. The reason has already been referred to—the giving of money to a stranger is not in fact a payment on the debt. Here, however, that reason does not apply. Owen was entitled to credit for the payment made in 1902 to Lanning, the agent of the mortgagee, because at that time no assignment of the mortgage had been recorded. The statute (Gen. St. 1909, §§ 5214, 5215) makes payments to the record owner of a mortgage binding upon the real owner; it in effect makes the one the agent of the other for the purpose of receiving payments. As a payment made to such a statutory agent reduces the debt, it gives a new starting point for the period of limitation. Prior to the extension agreement nothing had been paid upon the principal, which was \$500. At that time a payment of \$100 was made, and Owen signed a new contract, which recited that the unpaid balance was \$250, and provided for the payment of half of that amount in one year and the remainder in two years, interest to be paid semi-annually, coupons therefor being attached. Judgment was rendered for the full amount of the original note and interest, less such payments as had actually been made. Owen maintains it should not have been for more than \$250 and interest.

The question for our determination is what contract the parties in fact made. It was of course competent for them to agree either that the execution of the instrument relating to the extension should of itself reduce the amount of the debt by the absolute forgiveness of a portion of it, or that such reduction should result only if the new promise to pay the less amount were fully kept. 1 Enc. L. & P. 637, 642. A witness for the plaintiff undertook to give the transaction the latter color, but his testimony must be regarded as expressing merely his view of the legal effect of the writing signed by Owen, for he stated no facts bearing on the matter. The negotiations leading up to the signing of the new contract were conducted by correspondence, and there was no evidence as to the contents of any communication on the subject. The question must therefore be determined upon the face of that instrument.

The new contract was supported by abundant consideration. For one thing the place of payment was changed, and for another Owen's wife, who had not previously been personally bound, assumed liability for the

debt. The writing described the original note and mortgage, and recited that \$250 of the principal remained unpaid. It contained nothing to suggest the payment under any circumstances of a larger sum than it stated to be still owing on the note. It provided among other things that, in case of default in the payment of the interest coupons attached to it, the mortgagee might declare the "said principal sum" (referring to the \$250) immediately due and payable. This express provision that a failure to meet the interest promptly should mature the new principal fairly implies that the parties did not intend such a default to have a greater effect—that there was no purpose to make a delay in meeting the readjusted payments work a forfeiture of all the benefits to Owen of the readjustment.

The judgment will be modified by reducing the amount to the sum due by the terms of the extension agreement. All the Justices concurring.

(83 Kan. 740)

SICKLY v. BOARD OF COM'RS OF ALLEN COUNTY.

(Supreme Court of Kansas. Jan. 7, 1911.)

(Syllabus by the Court.)

COUNTIES (§ 70*)—OFFICERS—SALARIES.

A statute requiring assessors to make an annual report of the number of inhabitants in their respective districts is not superseded by a later act requiring them once in 10 years to make returns showing among other things the age, sex, color, and nativity of each inhabitant.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 70.*]

Appeal from District Court, Allen County.

Action by M. F. Sickly against the Board of County Commissioners of Allen County. Judgment for defendant, and plaintiff appeals. Affirmed.

Campbell & Goshorn, for appellant. H. A. Ewing, G. A. Gard, and S. A. Gard, for appellee.

MASON, J. M. F. Sickly, as treasurer of Allen county, claimed to be entitled to a salary of \$2,000. The commissioners paid him upon the basis of \$1,800. He sued for the difference, and having failed to recover, appeals. The statute provides that the treasurer's salary shall be \$1,800 in counties having between 25,000 and 30,000 inhabitants, and \$2,000 in those having from 30,000 to 35,000, the number to be determined "from the last returns of the assessors in each year." Gen. St. 1909, §§ 3656, 3679. The assessors' returns for 1908 showed a population of 28,233, and the commissioners acted upon these figures. The plaintiff however maintains that the statute authorizes an enumeration to be made only once in ten years, counting from 1875; and that there-

fore the census of 1908 was void, and the salary should be determined by that of 1905, which showed a population of 30,831. The decision turns upon the soundness of this contention. In 1873 the Legislature passed an act (Laws 1873, c. 75) reading:

"Section 1. That the several township and city assessors, in addition to their duties as heretofore prescribed, shall annually, on or before the 10th day of June, make an enumeration of the persons residing in their respective townships and cities, and make return thereof to the county clerk, with their returns of the valuation of property.

"Sec. 2. That * * * county clerks * * * are hereby required to make return annually to the Auditor of State of the aggregate number of persons residing in their respective counties, as ascertained and returned to them in compliance with the requirements of the preceding section of this act."

At that time a law was in effect requiring certain agricultural and industrial statistics to be gathered and reported to the state board of agriculture. Gen. St. 1868, c. 25, §§ 80-83, amended by Laws 1873, c. 137. An amendment to this in 1875 required these statistics to include schedules showing "the name, age, sex and color of each person; place of birth, and where from to Kansas; number of families, and number of persons in each family." Laws 1875, c. 67, § 3. Section 7 of the amendatory act provided that the enumeration of inhabitants and other statistics should be taken in 1875 and every tenth year thereafter, "unless otherwise provided by law." This section was amended in 1877 (Laws 1877, c. 182) by providing that certain statistical information should be gathered annually, but that the enumeration of inhabitants should be made every tenth year, the words "unless otherwise provided by law" being omitted.

The plaintiff argues that the acts of 1875 and 1877 covered the entire subject-matter of that of 1873 and therefore repealed it by implication. We think the argument unsound. The earlier statute provided for a mere count of the inhabitants to be made each year; the later one provided that once in 10 years a variety of information should be collected, including the age, sex, color, and nativity of each inhabitant. The purposes of the two statutes were not the same. Neither could be an adequate substitute for the other. Moreover, when the act of 1873 was passed there was already in force a law for the taking of the census every 10 years. Gen. St. 1868, c. 17. That law was repealed by the act of 1875 already referred to, which took its place. The Legislature obviously intended in 1873 that the provisions for the annual enumeration and for the decennial census should exist side by side, and nothing in the subsequent legisla-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

tion indicates a change in that purpose. As already shown the present statute refers to the returns regarding population made by the assessors "in each year."

The contention of the plaintiff takes some color of plausibility from the fact that the act of 1873 does not appear in the General Statutes as now published. The act appeared under the title "Census," in connection with that of 1875, in the compilations of 1879, 1885, and 1889. In the Webb statutes of 1897 the second section was omitted, but the first was printed twice. Chapter 22, § 12, and chapter 157, § 9. Since then both sections have been omitted from the compilations, but of course such omission cannot render them obsolete, and since they have not been repealed, either expressly or by implication, they are still in force.

The judgment is affirmed. All the Justices concurring.

(53 Kan. 709)

FLAGEL v. BOARD OF COM'RS OF JACKSON COUNTY et al.

(Supreme Court of Kansas. Jan. 7, 1911.)

(Syllabus by the Court.)

HIGHWAYS (§ 58*)—LAYING OUT—ASSESSMENT OF DAMAGES — APPEAL FROM ESTABLISHMENT OF ROAD—WAIVER.

Where a landowner presented a claim for damages for laying out a road through his land, and appealed from an assessment and allowance thereof made by the board of county commissioners, and at the same time appealed under section 2094 of the General Statutes of 1909 from the order establishing the road, an order of the district court dismissing the latter appeal is not erroneous.

[Ed. Note.—For other cases, see Highways, Dec. Dig. § 58.*]

Appeal from District Court, Jackson County.

Action by F. Flagel against the Board of County Commissioners of Jackson County and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Guy L. Hursh, for appellant. M. A. Bender, for appellees.

BENSON, J. A road was laid out by order of the board of county commissioners upon petition, notice, and view in the usual manner provided by statute. The appellant owned land upon the route of the road, and was given notice as required by section 4 of the road law. Gen. St. 1909, § 7277. He presented a written claim for damages, which was considered by the viewers, and damages were allowed thereon, but not for the amount claimed. The viewers made their report to the board, in favor of the establishment of the road, with their assessment of damages. After hearing the objections of appellant, the board made an order that the road be established and opened, and allowed damages

to the appellant, as recommended by the viewers. The appellant gave notice of an appeal from the decision establishing the road, and also from the allowance of damages. The appeals were perfected and filed in the district court, where a motion was made to dismiss the appeal taken from the order establishing the road. The motion was sustained, and that appeal was dismissed. The appellant asks for a review of that order.

The objection to laying out the road appears to have been based principally upon the claim that it was a "city line road," so called, and should have been laid out under section 9 of the statute (Gen. St. 1909, § 7282), and that viewers should have been appointed from the city. The petition was for the location of a road parallel with the south line of the city of Holton and one inch therefrom. No part of the road was taken from territory within the city. It is argued by the appellee that the provision for the appointment of viewers from the city is for the benefit of property holders therein who might be affected by the road, and does not apply where the road is entirely outside of the city. But it is not necessary to consider that question. The appellant claimed damages before the viewers and before the board, and by his appeal from the award still claims damages to be assessed in the district court. It is fundamental that he cannot be heard to object to the establishment of a road for the opening of which he also claims damages. *Reisner v. Strong*, 24 Kan. 410. The appeal on the allowance of damages limited the further investigation to that matter. *Com'rs of Lyon Co. v. Kiser*, 26 Kan. 279; *Com'rs of Woodson Co. v. Heed*, 33 Kan. 31, 5 Pac. 453; *Briggs v. Com'rs of Labette Co.*, 39 Kan. 90, 17 Pac. 331; *Cowley County v. Hooker*, 70 Kan. 372, 78 Pac. 847; *Russell County v. Sumner*, 71 Kan. 845, 79 Pac. 1132. "When a party takes an appeal in a condemnation proceeding, he really abandons all other remedies until the appeal is disposed of. It would, indeed, be wrong to authorize the prosecution of two remedies for the same thing at the same time. * * *" *Reisner v. Strong*, *supra*.

If it should be conceded that the claim of damages and the appeal from the award did not operate as a waiver of objections to laying out the road, it must still be held that the court was without jurisdiction to try the matters involved in the appeal from the order establishing the road. That appeal was taken under section 2094 of the General Statutes of 1909. While the language of the statute is broad, it is limited in its application. The district court exercises only judicial power, and the establishment of roads involves legislative and administrative power. *Fulkerson v. Com'rs of Harper Co.*, 31 Kan. 125, 1 Pac. 261; *Kent v. Com'rs of Labette Co.*, 42 Kan. 534, 22 Pac. 610. It is

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

true that the jurisdiction of a district court to review and reverse an order of county commissioners establishing a road has been upheld (*Com'rs of Wabaunsee Co. v. Muhlenbacker*, 18 Kan. 129; *Com'rs of Chase Co. v. Carther*, 30 Kan. 531, 1 Pac. 814; *Howell v. Redlon*, 44 Kan. 558, 24 Pac. 1109); but that remedy was not pursued in this instance. An appeal was taken under the statute referred to, which, had it been sustained, would have required a trial de novo of the matters heard and determined by the board in laying out the road (Gen. St. 1903, §§ 2093, 6489). Such functions are beyond the jurisdiction of a district court.

The order appealed from is affirmed. All the Justices concurring.

(83 Kan. 727)

GULDNER v. ORAMM.

(Supreme Court of Kansas. Jan. 7, 1911.)

(*Syllabus by the Court.*)

DAMAGES (§ 43*)—INJURIES TO WIFE—ACTION BY HUSBAND.

A man and his wife were traveling upon the public highway in a top buggy, and were negligently struck by a passing automobile. The wife was injured. She at the time was and had been suffering with abdominal fibroid tumors. She was, in about 10 days after the collision with the automobile, operated upon for the removal of said tumors, and died from the effect of the shock produced by such operation. The husband commenced this action to recover damages from the owner of the automobile for the loss of the services of his wife and expenses incurred on account of the injuries received by her from the automobile. *Held*, that no damages could be recovered in such action on account of the operation.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 242-254; Dec. Dig. § 43.*]

Appeal from District Court, Rice County.

Action by Gustav Guldner against E. W. Oramm. Verdict for plaintiff for less than the amount claimed, and he appeals. Affirmed.

Prigg & Williams, for appellant. Samuel Jones and Foley & Hopkins, for appellee.

GRAVES, J. This is an action for damages for a personal injury, appealed from the district court of Rice county. The appellant and his wife were traveling along the highway in a top buggy when they were struck by an automobile being driven by the appellee. The wife of the appellant was injured by the collision. She was taken to the house of a neighbor and cared for about a week, and then taken to the hospital at Sterling where she was operated upon, from the effects of which she died. The operation was for the removal of fibroid tumors. The appellant is the husband of the deceased, and he commenced this action to recover damages for the loss of the services of his wife and for expenses incurred on account of her injury. The jury returned a verdict in his fa-

vor of \$224. The appellee offered to confess judgment for \$250. The jury returned with their general verdict special findings of fact with answers thereto which read:

"(1) Q. Was plaintiff's wife, on September the 13th, 1908, afflicted with fibroid tumors? Yes.

"(2) Q. If you answer the above question yes, then state how long plaintiff's wife had been afflicted with such fibroid tumors prior to September the 13th, 1908? A. We don't know.

"(3) Q. Was plaintiff's wife operated upon for the removal of fibroid tumors about October 2, 1908, by a Dr. P. P. Trueheart? A. Yes.

"(4) Q. Did Dr. P. P. Trueheart, about October 2, 1908, by a surgical operation, remove from plaintiff's wife three or more fibroid tumors? A. Yes.

"(5) Q. If you answer the above question yes, then state what the weight of such tumors so removed were at the time of the removal. A. Between ten and twenty pounds.

"(6) Q. Did the accident at the time defendant's automobile struck plaintiff's horse cause the fibroid tumors which afflicted plaintiff's wife? A. No.

"(7) Q. How many years do you find that plaintiff's wife would have lived if there had been no accident with the automobile? A. We do not know.

"(11) Q. Was such operation for the removal of fibroid tumors which plaintiff's wife was afflicted with prior to the automobile accident? A. No.

"(12) Q. When was plaintiff first informed that his wife had fibroid tumors? A. Five or six years ago.

"(13) Q. Did Dr. Staats inform plaintiff and his wife on the morning following the accident that plaintiff's wife was afflicted with tumors? A. Yes.

"(14) Q. Was the plaintiff's wife afflicted with heart disease prior to the time of the accident? A. Insufficient evidence.

"(15) Q. If you answer that plaintiff's wife was afflicted with heart trouble prior to the accident, then state if plaintiff knew of such fact at before the time of the accident? (Objected to.) A. Evidence insufficient.

"(16) Q. Was plaintiff's wife under the care of Dr. Bodenheimer for several years prior to the time of the accident? A. Yes.

"(17) Q. If you answer the above question yes, then state how frequent Dr. Bodenheimer treated plaintiff's wife. A. About six times.

"(18) Q. What was the direct and immediate cause of the death of plaintiff's wife? A. Shock of operation.

"(19) Q. If you say the automobile accident was the direct and immediate cause of the death of plaintiff's wife, then state fully and particularly in what way it caused or produced her death. (Objected to.) A. No.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

"(21) Q. Was plaintiff's wife thrown out of the buggy at the time of the collision with the automobile? A. Insufficient evidence.

"(23) Q. Was plaintiff's wife physically injured at the time of the automobile accident on account of such accident? A. Yes.

"(24) Q. If you answer the above question yes, then state fully all of such physical injuries—what part of the body was injured? A. Injured on the back and left lower limb.

"(25) Q. Did not plaintiff's wife die because of the shock following the operation for the removal of fibroid tumors? A. Yes.

"(26) Q. Did plaintiff leave his wife at the time of the accident? A. Yes.

"(27) Q. If you answer the last question yes, then state where he went and for what purpose. A. After his horse and help.

"(28) Q. What amount, if any, do you allow plaintiff for the medical services of Dr. Staats? A. Nothing.

"(29) Q. What amount, if any, do you allow plaintiff for the medical services of Dr. Vermillion? A. Nothing.

"(30) Q. What amount, if any, do you allow plaintiff for the medical services of Dr. Trueheart? A. Ninety dollars.

"(31) Q. What amount, if any, do you allow plaintiff on account of hospital fees? A. Ten dollars.

"(32) Q. What amount, if any, do you allow plaintiff for nurse hire? A. Ten dollars.

"(33) Q. How fast was the automobile going at the time it struck the horse? A. Six miles.

"(34) Q. Where was plaintiff's wife at the time plaintiff was thrown out of the buggy? A. We do not know.

"(35) Q. Where was Mrs. Guldner when first seen by any one, immediately after the collision? A. North of the automobile, standing in the road.

"(36) Q. Was plaintiff's horse struck by the automobile at the time of the collision? A. Yes.

"(37) Q. If you answer the above question yes, then state what part of the horse was struck. A. On the right hip.

"(38) Q. Was plaintiff's horse struck by the automobile on the right or left side of the horse? A. Struck on right side.

"(39) Q. Which side of the road, if either, was the automobile going at the time of the collision? A. On the south side.

"(40) Q. Which side of the road was the horse going at the time of the collision? A. The horse was going south.

"(41) Q. Was the horse on the right or left side of the automobile, or in front of the automobile, at the time of the collision? A. More in front."

It will be seen from these findings that the injuries inflicted by the collision were not at all serious of themselves, being mere bruises on the back and the left lower limb. The fibroid tumors, a long existing affliction, hav-

ing no relation to the collision, was the real cause of the trouble. The operation was performed for the removal of these tumors, and not because of the collision. The injuries occasioned by the collision do not appear to have caused the appellant any serious loss on account of being deprived of the services of his wife. Her sickness was of short duration. Whether she had a cause of action against the appellee for the suffering endured by her on account of the bruises received and otherwise was not presented to the trial court and it is not here. The only question here involved is the loss of services by the appellant because of the injuries to his wife and expenses incurred on account thereof; and his recovery is limited to such damages. In our view the jury confined the award of damages within this limitation. The allowance may be unduly liberal when thus confined, but the appellant has no reason to complain and the appellee seems to be satisfied.

The deceased wife was a sufferer for years and the cause of expense to her husband with no prospects of her recovery. The ability to render valuable services to her husband seems to have been very limited. In fact the jury could not make an estimate. We think the jury under the evidence treated the plaintiff very liberally. He received as much damage as the evidence would warrant. The appellant contends that the finding of the jury that the immediate cause of the death of appellant's wife was shock of the operation and not of the collision, and the award of damages for a part of the expenses accruing on account of the operation are inconsistent and should be fatal to the whole verdict. This deduction seems to be logical, but as the appellant is in no sense injured by such inconsistency, but, if anything, benefited, he is in no position to complain, and we do not think the case should be reversed for this reason, but think that justice will be better subserved by an affirmance.

The judgment is affirmed. All the Justices concurring.

(83 Kan. 746)

MAYSE v. BELT et al.†

(Supreme Court of Kansas. Jan. 7, 1911.)

(Syllabus by the Court.)

PUBLIC LANDS (§ 54*) — SALE OF SCHOOL LANDS — FORFEITURE — ACTION TO RECOVER LAND—LIMITATIONS.

Section 4, c. 373, Laws 1907, limiting the time within which a purchaser of school land, or the assignee of such a purchaser, may bring an action to recover school land, or to enforce his right to or interest in the same when a forfeiture thereof has occurred, was intended to apply only in cases where there has been an attempt to forfeit the right of an original purchaser, and the land has been sold to a new purchaser.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 152-169; Dec. Dig. § 54.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

† Rehearing denied.

Appeal from District Court, Clark County.

Action by H. O. Mayse against Jerome Belt and others. Judgment for defendants, and plaintiff appeals. Reversed and remanded.

W. W. Harvey and Robt. C. Mayse (H. J. Bone, of counsel), for appellant. Jay T. Botts, for appellees.

BURCH, J. This appeal was taken from a judgment adverse to the plaintiff in an action of ejectment. The land in controversy was school land. It was sold in 1885, and a certificate of purchase was duly issued to the purchaser. In 1894 it was sold at tax sale to the county for the delinquent taxes of 1893. In 1895 a notice of forfeiture was issued and returned, and the record of sale was marked "Canceled." After that the land was taken from the tax roll, and it was leased by the state from time to time; the last lease expiring April 5, 1907. On February 26, 1907, the plaintiff took an assignment of the tax sale certificate, took out a tax deed, and paid to the state the entire sum due on the certificate of purchase. The record was indorsed, "Sold to H. C. Mayse," and on July 20, 1907, he received a patent from the state. On April 6, 1907, the defendants settled on the land, and on December 30th of the same year petitioned for its sale. On January 17, 1908, the plaintiff brought his suit.

At the trial the court held that relief was barred by the limitation contained in section 4 of chapter 373 of the Laws of 1907, which took effect on January 25, 1907, and which reads as follows: "No action shall be brought by any purchaser of school land, or by the assignee of such purchaser, in any court of this state, to recover any tract of school land, or to enforce the purchaser's right to or interest in the same, when a forfeiture thereof has been declared, unless such action be commenced within six months after such forfeiture was declared, or, when such time has already elapsed, within six months after this act takes effect." The preamble of the act states that the mischief to be remedied was the prejudice to the rights of new purchasers of school land arising from incomplete, defective, and lost records of forfeitures of the rights of previous purchasers. Whenever in the body of the act, as in sections 1 and 3, the phraseology adopted naturally led to a repetition of the limitations expressed in the preamble, they were inserted. The act closes with an interpretative provision, which, like the preamble, states that its purpose is to afford protection in cases where there has been a forfeiture and a resale. It reads as follows: " * * * It being the intention of this act, as far as legally may be, to protect all purchasers and settlers of school lands from the claims of prior purchasers

whose interests have been declared forfeited and the lands again sold to other persons, and to that end the provisions of this act shall be liberally construed."

True, the word "settlers" appears in this section—for the first and only time in the act—but the subsequent language restricts the application of the term to settlers claiming under a resale. In the case of *Jones v. Hickey*, 80 Kan. 109, 102 Pac. 247, the court was obliged to consider the whole act in order to interpret certain of its provisions. The conclusion was expressed as follows: "A consideration of the entire chapter makes it apparent that it was intended to apply only in cases where there had been an attempt to forfeit the rights of the original purchaser, and the land had been sold to a new purchaser." Taking into account the history of the act, the well-known evils which it was designed to remedy, the preamble, the body of the measure, and the concluding exposition of its purpose, the court is satisfied that this is a correct statement of the legislative intent, and the general language of section 4 must be restrained accordingly.

If the argument of the defendants were sound, the plaintiff would have no remedy whatever against any intruder who might now, or years from now, settle on the land. More than six months having elapsed from the time the statute of 1907 took effect, an action of ejectment could not be supported by title derived through the forfeited certificate of purchase. The act was designed to promote justice, and not to license spoliation. The abstract recites that the parties are able to agree on the amount of the plaintiff's damages, should he recover.

The judgment is reversed, and the cause is remanded, with direction to render judgment for the plaintiff for possession and damages. All the Justices concurring.

(83 Kan. 790)

KLUBER v. SHANNON.

(Supreme Court of Kansas. Jan. 7, 1911.)

Appeal from District Court, Ellsworth County. Action by Tone Kluber against John Shannon. Judgment for plaintiff, and defendant appeals. Affirmed.

Lafferty & Harrison, for appellant. S. E. Bartlett, for appellee.

PER CURIAM. Tone Kluber recovered a judgment against John Shannon for a commission upon a real estate sale, and the defendant appeals.

The sole question presented is whether the evidence warranted a finding in favor of the plaintiff. There was a sharp conflict in the testimony, some of which tended to show that the land was sold by the independent efforts of the owner, while another portion sustained the view that the agent was the procuring cause of the sale, although he did not actually consummate it.

Under these circumstances, the judgment must be affirmed.

(83 Kan. 780)

BRANDT et al. v. LAND CREDIT TRUST CO. et al.

(Supreme Court of Kansas. Jan. 7, 1911.)

Appeal from District Court, Sedgwick County. Action by Peter Brandt and others against the Land Credit Trust Company and others. Judgment for plaintiffs, and defendant Wilson appeals. Affirmed.

Stanley & Stanley, T. W. Sargent, O. A. Keach, and Brown & Brown, for appellant. Richard E. Bird, for appellees.

PER CURIAM. In support of a motion to dismiss it is shown to the court, by documents duly authenticated, that after the judgment of the district court was rendered and before the appeal was taken the powers of a trustee, who was and is a very necessary party, ceased, and a successor in trust to him was appointed. Although more than a year has elapsed, no revivor has been attempted, no notice of appeal was served upon the successor in trust or any attorney of record for him, and the important interests which he represents are without the protection of a party to this appeal. The court is very reluctant to dispose of cases otherwise than upon the merits, and consequently has looked into the merits to ascertain what the situation of the appellant would be if the motion to dismiss were treated as not urged. The result is that in any event the judgment must stand.

The case stood for trial at the term at which it was disposed of, and was regularly called for trial on the day judgment was rendered. Personal notice to the appellant of the hearing was not essential. He was represented on the record by an attorney, whose duty required him to follow the proceedings in court. The appellant's attorney had no agreement with any one to advise him of the time of trial, and consequently the charges of accident and surprise and of misconduct are not established. The court had fair ground for believing that appellant had joined with the other bondholders, and for holding that all of them were duly represented by their trustee. Consequently the court was not guilty of any abuse of discretion. As the matter was finally presented, the formal introduction of evidence was not necessary for the information of the court. Nothing else is asserted against the validity of the judgment. Under the circumstances, it makes no substantial difference whether the appeal be dismissed, or the judgment affirmed.

The order is that the judgment of the district court be affirmed.

(83 Kan. 789)

HARPER v. IOLA PORTLAND CEMENT CO. et al.†

(Supreme Court of Kansas. Jan. 7, 1911.)

Appeal from District Court, Allen County. Action by George Harper against the Iola Portland Cement Company and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Baxter D. McClain, for the appellants. R. H. Bennett, for the appellee.

PER CURIAM. A careful examination of the evidence adduced at the second trial convinces the court that the views expressed upon the former appeal (76 Kan. 612, 93 Pac. 179, 93 Pac. 343) are applicable and controlling. The distinctions which counsel suggest need not be stated and discussed at length. It is enough to say that they are not securely founded.

The special questions stricken out constituted

† Rehearing denied.

a cross-examination of the jury. Those which were not answered to the satisfaction of the defendant are not material to the main, vital issues in the case, except the thirty-fourth, which is fairly answered. The remaining findings are not inconsistent with each other, or with the general verdict. It makes no difference that the plaintiff failed to prove just who drilled and loaded the hole in question, and failed to show that the foreman or any one in authority for the defendant knew of the existence of the loaded and unexploded hole. The defendant should have worked the quarry under a system which would have disclosed it, and would have protected the plaintiff from injury through its agency. The answer that the hole in question was as plainly discernible to plaintiff as to any one referred to the time he was injured does not indicate that he ought to have "discerned" it, and does not relieve the defendant from its previous duty to note the failure to explode, and then either mark the hole or explode it for the plaintiff's protection.

The defendant had no right to have jurors called in a certain order, and an unimpeachable jury was provided to try the case.

The judgment of the district court is affirmed.

(83 Kan. 813)

SMITH v. CITY OF ROSEDALE.

(Supreme Court of Kansas. Jan. 7, 1911.)

Appeal from Court of Common Pleas, Wyandotte County.

Action by Dorthulla Smith, by Peter Smith, her next friend, against the City of Rosedale. Judgment for plaintiff, and defendant appeals. Affirmed.

Rush L. Fisette and Bird & Pope, for appellant. Wm. B. Sutton and David J. Smith, for appellee.

PER CURIAM. The plaintiff recovered judgment against the defendant for \$900 on account of injuries sustained by a fall from a sidewalk. There was sufficient evidence to show negligence on the part of the city to sustain the verdict.

A number of the claims of error are based upon alleged defects in the petition. On the trial the petition was amended by leave of the court, and if there were any defective averments the amendment cured them. In answer to a hypothetical question a physician was permitted to testify as to the probable effect upon a girl of the plaintiff's age in falling a distance from 10 to 15 inches from a sidewalk violently upon her knee. At the time the question was asked, the plaintiff had not testified, and there was no evidence that she had fallen. She so testified, however, within a short time afterwards. There was only one cause of action stated, and the motion to require the plaintiff to elect was properly overruled.

The sixth assignment of error is an unfair statement of what an instruction contains. It omits the balance of the sentence, in which the court used this language: "Or that, by the exercise of reasonable care and prudence upon the part of the plaintiff, she could have known of the condition of said walk." The use of the words "guards or barriers," in instruction No. 12, is complained of, because the petition nowhere alleged as negligence the omission to provide guards or barriers; but the petition does allege that there were no lights or other warnings to prevent the accident. Moreover, the instruction could not have been prejudicial, as there was abundant proof of other negligence upon which plaintiff was entitled to recover.

The instructions given fairly covered the issues, and the instructions requested were properly refused.

The judgment is affirmed.

(61 Wash. 465)

FEIGHAN et al. v. REEVES et ux.

(Supreme Court of Washington. Jan. 4, 1911.)

1. TRUSTS (§ 309*)—ALLOWANCE OF INTEREST ON ACCOUNT—DISCRETION.

In matters of accounting, the allowance of interest is largely a matter of discretion with the trial judge.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 429; Dec. Dig. § 309.*]

2. TRUSTS (§ 219*)—TRUSTEE—INTEREST.

Where, on an accounting by a trustee, it was not shown that he had reaped any personal benefit from the trust fund, or had willfully disobeyed the directions of the cestui que trust, but, on the contrary, it was shown that he had devoted the funds to the payment of interest-bearing obligations of the syndicate of which he was trustee, it was improper to charge him with interest on sums received from the date of their receipt to the time of the commencement of the action.

[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 219.*]

3. TRUSTS (§ 315*)—TRUSTEES—COMPENSATION.

Where a trustee to sell land for a syndicate a short time before the death of one of the members of the syndicate turned over the sale of the property to certain brokers and had nothing more to do with the management thereof, he was not entitled on an accounting to compensation for his services after that time.

[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 315.*]

4. APPEAL AND ERROR (§ 1199*)—REMAND—SUPPLEMENTAL DECREE.

Where no account was taken of a conclusion of law on an accounting that defendants as the heirs of L. were the owners of an undivided one-sixth of the unsold residue of certain trust property, the error could be cured after appeal on remand by the entry of a supplemental decree.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1199.*]

Department 2. Appeal from Superior Court, Spokane County; H. W. Canfield, Judge.

Suit by Mrs. J. W. Feighan and others against R. J. Reeves and wife. Judgment for plaintiffs, and defendants appeal. Remanded for modification.

Danson & Williams and H. J. Hibschan, for appellants. James Z. Moore and Caleb Jones, for respondents.

CHADWICK, J. This suit involves an accounting; the transactions running over a period of approximately 21 years. In 1887 J. W. Feighan, James Z. Moore, Aaron Chandler, and J. A. Loomis became the owners in equal right of a Northern Pacific land contract, covering certain lands which they thereafter platted as an addition to the city of Spokane. The sale of the property was put into the hands of Moore as trustee for his co-owners, and he contracted a part of the property and received some payments therefor. In 1892 appellant R. J. Reeves was made attorney in fact for the several owners, and thereafter became the owner in his own right of an undivided one-half of the Loomis

interest. Reeves sold lots, received payments therefor, and probably pledged his own personal credit to some extent; and, so far as the record shows, honestly, but, after the custom of men, somewhat carelessly, executed his trust. No accounting was ever had between the parties.

The specific finding of the trial judge was: "The defendant R. J. Reeves never at any time rendered an account of his trust, nor was an accounting demanded of him, until the commencement of this action in October, 1907." The greater part of the unsold part of the plat was thereafter lost to the owners through a foreclosure proceeding. The affairs of the syndicate being somewhat involved, on March 3, 1896, Reeves, for reasons which seemed to him to be for the best interests of all concerned, and in good faith, conveyed all the unsold property to his wife, Nina Reeves. This deed was made without consideration, and was held by the trial judge to be absolutely void. The testimony shows, however, and the court found, that the principals were notified of the making of this deed, and the reasons which impelled its execution, and that Reeves thereafter continued in the execution of his trust with the consent of his principals. J. W. Feighan died in 1898, and his widow and heirs brought this suit for an accounting. Chandler disclaimed all interest in the controversy. The heirs of Loomis, who is also deceased, were not made parties, and James Z. Moore, answering, joins in the plaintiffs' prayer for an accounting. Appellant Reeves answering, sets up what purports to be an accounting, asks an affirmative judgment for several thousand dollars, and further demands an accounting on the part of defendant Moore. Further detail of the facts, other than reference to certain figures which we shall presently make, would serve no useful purpose, as this litigation can be of no interest to any one other than the parties immediately concerned, and involves no debatable propositions of law. A valuable memorandum of opinion of the trial judge is made a part of the transcript. A very earnest and persevering effort has been made by him to approximate the true account existing between the parties, and, so far as it is possible to arrive at the truth, we think he has done so. The court found that Reeves was entitled to credits as follows: Cash expended for the benefit of the estate, \$8,778.28; compensation, 72½ months, at \$20, \$1,450; commissions paid McRea & Merryweather, \$747.50; traveling and hotel expenses, \$521.15—\$11,496.93. And that he should be charged for property sold by him \$10,908, to which the trial judge added an arbitrary interest charge on all sums received from the date of the receipt up to the commencement of this action a total of \$1,675.15—\$12,543.15, leaving a balance due from Reeves to the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

syndicate of \$1,086.22. Of this sum he decreed one-fourth to plaintiffs and one-fourth to Moore. The court denied Reeves all credits on account of interest. We understand the rule to be that in matters of accounting the allowance of interest is largely a matter of discretion with the trial judge. Now in this case, while appellant claims to have made some advances out of his own funds, no vouchers were produced to show that he did so, nor was it shown to the satisfaction of the court that the items of indebtedness incurred on behalf of the syndicate were not finally paid out of the syndicate funds. But we think, in the absence of any showing of willful disobedience by defendant Reeves, or that he reaped any personal benefit from the trust funds, but with a showing, on the contrary, that he seems to have devoted them to the payment of the obligations of the syndicate, that he should not be penalized by taxing the interest on all sums received from the date of their receipt up to the time this action was commenced. The theory upon which interest is allowed is to compensate the owners of the fund for the loss of their use, but they have not been so lost in this case. They were, so far as we are able to see, applied to the payment of interest-bearing obligations, and in equity were accounted for when paid out for the benefit of the cestui que trust. As viewed generally, the owners of the fund have lost nothing, but rather gained, by the payment of their obligations, aggregating \$8,778.28. However, there is testimony tending to show that Reeves takes account only of the stated purchase price upon payments made to him, disregarding the accrued interest on contracts. In justice to him it is proper to say that he has endeavored to cover these items by charging himself with interest at 6 per cent. on all sums received, and taking credit for like interest on all sums paid out. This premise is false, but he is notwithstanding chargeable with the interest collected on contracts and unaccounted for. This must be fixed arbitrarily, and we think, if he is charged enough to balance the total credits allowed him, substantial justice will be done. The account will then stand: Dr. For property sold, \$10,908; arbitrary charge for interest, \$588.93. Cr. As itemized above, \$11,496.93. The court allowed appellant compensation at the rate of \$20 per month from the time he took over the business of the syndicate up to the time of the death of Col. Feighan, upon the theory that his agency was terminated by that event. While we cannot agree with the theory of the trial judge in this instance, for there are facts which take the case out of that rule, we can nevertheless approve his finding upon the theory that a short time before the death of Col. Feighan appellant had turned over the selling agency (he was no

more than a selling agent) to McRea & Merryweather, a real estate firm in Spokane, who took entire charge of the property, sold lots, collected the purchase price, and paid the taxes. For this appellant was allowed the commissions charged by McRea & Merryweather, and to allow remuneration beyond that would make a double compensation, which was not within the contemplation of the parties and would not be tolerable in law. In one respect, however, the decree of the court does not follow the findings. After fixing the title to certain property in plaintiffs, the court found that Reeves and the heirs of Loomis were each the owners of an undivided one-sixth of the unsold residue of the property. No account is taken of this finding in the conclusions of law or the decree. A supplemental decree may be entered upon the remand of this case, declaring the appellants to be the owners in their own right of an undivided one-sixth interest in and to the unsold lots in West Grove addition as described in paragraph 2 of the decree heretofore entered.

It is strongly insisted that the court should have required an accounting from defendant Moore. Reeves' interest in the property was acquired long after Moore had surrendered his trusteeship. The court found that there was no privity of contract or relationship between Reeves and Moore, and that there was no profit in the property prior to the year 1892. Up to that time Reeves' only interest was one-half of the net profits of the Loomis interest.

We have gone carefully over the pleadings and testimony in this case. It is likely that the findings of the trial judge have not established the exact truth between the parties. The truth can only be approximated where, as in this case, the transactions run over a period of more than 20 years and through a time when the property was practically valueless, and those most concerned took but little, if any, interest in it. If the one party was careless in accounting, the others were slothful in demanding an accounting. There is no evidence of an attempt on the part of any one of the parties concerned to take a dishonest advantage of another. That appellant thought the balance, if ever struck, would be in his favor, we may well believe, and that respondents for a long time were willing to abandon their interest we may well surmise. So that, barring the penalty put upon appellant Reeves, which is a conclusion of law rather than of fact, we approve and confirm in all things the calculations and findings of the trial judge.

Remanded for modification of the decree as hereinbefore indicated.

RUDKIN, C. J., and DUNBAR, CROW, and MORRIS, JJ., concur.

(61 Wash. 516)

**FIDALGO ISLAND SHINGLE CO. v.
BROWN et al.**

(Supreme Court of Washington. Jan. 6, 1911.)

**1. SALES (§ 479*)—CONDITIONAL SALES—
COMPLAINT—AMENDMENT.**

In conversion, the complaint alleged that plaintiff under a conditional bill of sale turned property over to defendants for a price to be paid in part by delivery of certain lumber by a specified date, and the balance in either lumber or cash during the same year; that the property should be removed to a sawmill and cared for until wholly paid for, title to remain in plaintiff; that such defendants made one payment of lumber, and subsequently sold the sawmill with the property in question to R. & C., the bill of sale reciting the agreement under which defendants held the property, and the amount then due, which R. & C. assumed; that subsequently R. & C. assigned their interest in the conditional bill of sale to defendants M. & G., reciting the amount then due, which M. & G. assumed; that the property had not been properly cared for and a portion of it had been lost; and that several demands had been made of defendants for delivery of the lumber agreed on as part payment or a payment in cash, which had been denied. *Held*, that it was proper upon demurrer to allow an amendment alleging that the several assignments of the conditional bill of sale were without plaintiff's knowledge or consent; that the property had been converted, and damaged at least one-half its value.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 479.*]

**2. SALES (§ 479*)—CONDITIONAL SALES—
PLEADING—SUFFICIENCY OF COMPLAINT.**

A complaint showing title to property conditionally sold in plaintiff, its wrongful taking without plaintiff's consent, the demand for the same, or the agreed price, the refusal, the use, damage, and destruction by defendants, stated a cause of action.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 479.*]

**3. TROVER AND CONVERSION (§ 22*)—DE-
FENSES—RETURN OF PROPERTY.**

Where property has been once converted, the owner may treat it as converted and hold the guilty person to answer therefor, and is under no obligation to receive back the property.

[Ed. Note.—For other cases, see Trover and Conversion, Dec. Dig. § 22.*]

Department 2. Appeal from Superior Court, Whatcom County; John A. Kellogg, Judge.

Action by the Fidalgo Island Shingle Company against J. W. Brown, E. Ruege, and others. Judgment for plaintiff, and defendant Ruege and another appeal. Affirmed.

E. M. Day and J. F. Moore, for appellants. Romaine & Abrams, for respondent.

MORRIS, J. Appellants, being held under a judgment of conversion of certain personal property, appeal.

The errors assigned are the overruling of a demurrer to the complaint, the allowance of an amendment to the complaint, denying motion for judgment, and in the findings establishing the conversion. The complaint alleged that on January 28, 1909, plaintiff under a conditional bill of sale turned the property over to defendants Brown & Nims

at an agreed price of \$3,100, which amount it was agreed might be paid by the delivery to plaintiff of certain sized lumber at prices therein fixed; that 150,000 feet of such lumber should be delivered on or before June 1, 1909, and the balance, payable in either lumber or cash, was to be paid during the year 1909. It was also agreed that the property should be removed to the mill of the Crescent Lumber Company in Whatcom county, and there kept and properly cared for until wholly paid for, and that title should remain in plaintiff until so wholly paid for; that Brown & Nims in March, 1909, delivered to plaintiff lumber of the value of \$138.40, which is the only payment made under the contract; that on April 10, 1909, Brown & Nims sold the mill and plant of the Crescent Lumber Company, together with the property in controversy, to defendants Ruege & Cords, the bill of sale evidencing such sale reciting the agreement under which Brown & Nims held the property, and the amount then due, which Ruege & Cords assumed, Brown & Nims assigning to Ruege & Cords all their interest in the agreement between plaintiff and themselves; that on September 2, 1909, Ruege & Cords assigned their interest in the conditional bill of sale to defendants Mathews & Gilfillan, reciting the amount then due, which Mathews & Gilfillan assumed; that the property has not been properly cared for, and a portion of it has been lost and destroyed; that several demands have been made of the defendants for a delivery of the lumber agreed upon as part payment or a payment in cash, which have been denied. Judgment was demanded against all the defendants for the amount due. Defendants Brown & Nims were not served. The other defendants joined in a demurrer, upon the ground of defect of parties; that the action was prematurely commenced; that the court had no jurisdiction; and the failure to state a cause of action. The respondent then obtained leave to amend, and, by way of amendment, pleaded that the several assignments of the conditional bill of sale were without plaintiff's knowledge or consent, and that the property had been converted by the defendants Ruege, Cords, Mathews and Gilfillan, and that the property had been damaged at least one-half its value. The demurrer was then overruled.

We see no error in the allowance of the amendment, nor in the overruling of the demurrer. The attempted sale of the property, the changing of possession, without the knowledge or consent of plaintiff, the use of the property by Ruege, Cords, Mathews, and Gilfillan, without having acquired any title thereto, was a conversion as against the plaintiff. *Terry v. Bamberger*, 44 Conn. 558, Fed. Cas. No. 13,837; *Hyde v. Noble*, 13 N. H. 494, 38 Am. Dec. 508; *Robinson v. Bird*, 158 Mass. 357, 33 N. E. 391, 35 Am. St. Rep.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

495; *Carter v. Kingman*, 103 Mass. 517; *Morrill v. Moulton*, 40 Vt. 242; *West Jersey Ry. Co. v. Trenton Car Works*, 32 N. J. Law, 517; *Woods v. Nichols*, 21 R. I. 537, 45 Atl. 548, 48 L. R. A. 773. The complaint, showing the title to the property in the plaintiff, its wrongful taking without the consent of plaintiff, the demand for the lumber, or the agreed price, the refusal, the use, damage, and destruction by defendants, stated a cause of action in conversion. *Phillippos v. Mihan*, 38 Wash. 402, 80 Pac. 527.

The evidence was stronger than the complaint in showing that Mathews and Gilfillan, after obtaining the property from Ruege & Cords, removed a portion of the property from the mill plant to where they were conducting a logging camp. There was ample evidence to sustain the finding of a conversion, and there was no error in this respect. What has been said disposes of the questions submitted by appellants. They make some complaint in their brief that the court should have found that the property was reasonably cared for, and could and would have been delivered to respondent at its request. Respondent was under no obligation to receive back the property, after its conversion by appellants, whatever the condition might have been. The use and possession of the property by appellants being in law a conversion, respondent could rightly treat it as such, and hold them to answer for such conversion.

We find no error and the judgment is affirmed.

RUDKIN, C. J., and CHADWICK, DUNBAR, and CROW, JJ., concur.

(61 Wash. 482)

STATE v. FLANNEY.

(Supreme Court of Washington. Jan. 5, 1911.)

1. CRIMINAL LAW (§ 354*)—INSANITY—EVIDENCE.

Where accused relies on the defense of insanity, every fact showing that his mental condition was abnormal at the time of the crime is competent, and all things bearing on the subject of his capacity to distinguish right from wrong at that time must be submitted to the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 760; Dec. Dig. § 354.*]

2. CRIMINAL LAW (§ 337*)—EVIDENCE—ADMISSIBILITY.

One is entitled to the benefit of any competent evidence he may offer bearing on a controverted question of fact under the issues.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 762; Dec. Dig. § 337.*]

3. CRIMINAL LAW (§ 354*)—INSANITY—EVIDENCE—ADMISSIBILITY.

One relying on the defense of insanity may prove irrational and insane acts, and facts accounting for such acts, and show an adequate cause therefor.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 760; Dec. Dig. § 354.*]

4. HOMICIDE (§ 179*)—INSANITY—EVIDENCE—ADMISSIBILITY.

Where accused, charged with the murder of his wife, relied on the defense of insanity at the time of the killing, and gave evidence of mental disorder, consisting of the delusion that his wife was unfaithful to him, evidence that she had become a member of a Society of Shakers, that the man of whom accused was jealous was a Shaker, that the society taught and practiced promiscuous intercourse, and that accused knew of his wife's faith and suspected her of lewd conduct, was admissible to show an adequate cause accounting in some degree for his disordered condition at the time of the offense.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 380; Dec. Dig. § 179.*]

5. CRIMINAL LAW (§ 673*)—PURPOSE OF EVIDENCE—INSTRUCTIONS—INSANITY.

Where accused, relying on insanity, introduced evidence showing an adequate cause accounting for his alleged mental disorder at the time of the offense, the court must limit the evidence to the purpose of accounting for the mental condition, and thereby prevent the jury from considering the evidence as a justification for the crime.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1874; Dec. Dig. § 673.*]

Department 2. Appeal from Superior Court, Yakima County; E. B. Preble, Judge.

Joseph Flanney was convicted of murder in the second degree, and he appeals. Reversed, and new trial awarded.

William M. Thompson and Henry J. Snively, for appellant.

CHADWICK, J. To sustain this appeal, appellant submits three assignments of error, but one of which can be considered by us, owing to the incomplete state of the record. Appellant was charged with the crime of murder, and convicted of murder in the second degree. His defense was insanity at the time of the killing. His victim was his wife, for whom it is asserted he possessed a real affection and with whom he had lived happily for many years. Some time before the killing his wife had left him and had sought a divorce on the grounds of cruelty; it being shown that, although industrious when sober, like most men of mixed blood—he being a half-breed Indian—his conduct was coarse and cruel when under the influence of liquor. The theory of the defense was that he was insanely jealous of his wife, and believed or cherished the delusion, whatever the fact may be, that his wife was unfaithful to him; that nevertheless he constantly importuned her to return to him and to her children, a mission he was about at the time of the killing. When she finally refused to leave her then associates and return to her home and to her children, he shot her dead, and, in attempting suicide, so wounded himself that he lay unconscious for nearly 24 hours. It is unnecessary to go over the positive circumstances relied on to show appellant's mental irresponsibility at the time of the killing. They are not pertinent to our present inquiry, except to say

that they furnished in a degree to be determined by the jury a foundation for certain evidence which we find was erroneously excluded by the court.

Appellant called a witness by whom he attempted to prove that the wife of appellant had taken up with what is known among the Indians as the Shakers; that the man of whom appellant was jealous, and whom he charged with having weaned his wife away, was a Shaker; that the Shaker society is an Indian religious organization which teaches and practices promiscuous, illicit intercourse among its members, and that it is the duty of a member having a spouse who is not one of that faith to secure a divorce; that appellant knew of his wife's faith, and, suspecting her of lewd conduct, was so greatly distressed in mind that for the time his reason was dethroned. The offer to prove these things was rejected by the court. We regret that the state has not seen fit to file a brief, for we deem the question presented to be one of more than usual interest and importance. We have made an earnest research of the authorities, and find that it is a first principle of the law that in all cases involving mental responsibility, whether it be in regard to contracts, wills, etc., or crimes, every fact which tends to show that the mental condition of the subject was abnormal at the time of the execution of the instrument or commission of the crime is competent. Underhill's Criminal Evidence, § 159. For the mind diseased cannot be measured by the mind of another. Neither the moving cause nor the limit of its aberration is to be calculated by any standard fixed by the law or medical science. Each case fixes its own relation to the law. What may unbalance one mind and lead it to act upon its criminal impulses may have no bearing whatever upon another. Therefore it is important that all things which may bear upon the subject of inquiry should be submitted to the jury, that it may say whether, from all the facts and circumstances leading up to the act complained of, the accused was, in fact, capable of distinguishing right from wrong when he committed the act.

The leading case upon this subject, and the one most relied on by appellant, is that of *People v. Wood*, 126 N. Y. 249, 27 N. E. 362. There the court said: "There was evidence tending to show that defendant was exceedingly fond of his wife, who was a young woman 22 or 23 years of age. The defendant was a man about 35 years of age, and was also a small farmer or laboring man. Both the deceased and defendant belonged to a very uneducated, illiterate, and ignorant class, neither having acquired much property, and both spending a portion of their time in hunting and fishing." Counsel for the defendant offered to prove that a short time before the day of the homicide she had told the defendant that her father had

stolen his (defendant's) potatoes some three years before. This was offered for the purpose of showing the effect it had on defendant's mind in connection with other matters, but was rejected as incompetent and immaterial; as was also the offer to prove that in another conversation held the week preceding the homicide she had given the defendant some information as to certain acts which her father had committed upon her person. In passing upon these questions the trial judge said: "It is an issue that does not belong to the case here, and would not be of any value under the circumstances in this case and ought not to be, if it were admitted. The defendant is at liberty to furnish any evidence that he is able to on the subject of the mental condition of this man. That is the defense, and I do not propose, if it is possible to avoid it, to undertake to try the dead man instead of the defendant who is on trial here." In delivering the opinion of the appellate court, Justice Peckham, afterwards justice of the Supreme Court of the United States, said: "The defense is not confined to proof of the condition of the mind of defendant at the moment when he struck the blow or fired the shot. Any material fact which might account for or naturally lead to insanity at that moment may be proved. Why should not the defendant have the right to prove a moral cause which might act upon a brain already diseased and might result in insanity as naturally as blows upon the head? This in connection with evidence tending to show insanity at the time of the act done is proper. I do not say that proof of these facts, any or all of them, is proof of insanity. That is for the jury to decide. But it is competent for the reason that all the facts are material for the purpose of enabling the jury to say what was the condition of mind of defendant when the deed was perpetrated. The defense is entitled to prove more than the fact that after a certain time when something was told defendant he exhibited certain changes of deportment or appearance. He is entitled to have the jury see that there was a cause sufficient to account for and to create such alteration in conduct and appearance. It greatly tends to strengthen the proof of such alteration. It is admissible for the same reason that evidence is competent to show that the party had a fall on his head, or had been a sufferer for years from some kind of physical ailment which had naturally a depressing influence on the mind." This case establishes the principle that "a party is entitled to the benefit of any competent evidence he may offer which bears upon a controverted question of fact embraced in the issue." *People v. Corey*, 148 N. Y. 476, 42 N. E. 1066; *People v. Strait*, 154 N. Y. 165, 47 N. E. 1090. The *Wood Case* is noted by Clevenger in his work on Medical Jurisprudence of Insanity, p. 500, and upon its authority he says: "The

defendant who interposes insanity as a defense may prove not only the irrational and insane acts and conduct, but also facts which may account for such acts and show an adequate cause for the insane conduct, and * * * (page 519) as tending to show what effect the communication had upon his mind at the time of the commission of the act. * * *

The case is also quoted as authoritative by Wharton & Stille, *Medical Jurisprudence*, §§ 326, 327, 328. Mr. Wigmore, whose research of the authorities upon this question has been particularly comprehensive, has no doubt of the rule, saying: "As human conditions of every sort are created or influenced by external environment, so, too, that diseased mental condition which we term insanity may be precipitated, intensified, or otherwise affected by external events coming to the apprehension of the person. Accordingly circumstances calculated to induce this mental condition may always be admitted to evidence the probability of such affection. The only limitation is that the circumstance be in itself capable in some degree of producing such an effect, that it came to the person's knowledge, and that some further foundation for probability be laid by other evidence that there was a diseased mental condition." See, also, Wigmore, *Ev.* § 231; *Underhill's Criminal Evidence*, § 159; 7 *Ency. Ev.* 449; *Bolling v. State*, 54 Ark. 588, 16 S. W. 658; *State v. McGowan*, 36 Mont. 422, 93 Pac. 552; *State v. Porter*, 213 Mo. 43, 111 S. W. 529, 127 Am. St. Rep. 589. In the *McGowan* Case the defendant was charged with the murder of one whom he suspected of having maintained illicit relations with his wife. The state offered a contract of separation, which had been executed by the parties, upon the theory that it would show that the parties had voluntarily severed any tie of affection that might have theretofore existed between them. The contract was admitted over the objection of the defendant. Upon appeal the testimony was held to be competent. The opinion reads: "In overruling defendant's objection to this paper, the court said: 'I think I will let it go to the jury. It shows that they were living under this contract of separation. That might throw some light upon the question to the jury whether or not the defendant was sane or insane. I think, taken with all the other evidence, it is perhaps competent.' It is now contended that the remark of the court, in characterizing the document as a contract of separation, was prejudicial to the defendant. The paper was also objected to as incompetent rebuttal evidence, but we see no force in the objection. The issue being tried was whether the defendant had been rendered insane by the assault of the deceased upon the sanctity of his domestic relations. It was certainly competent to inquire as to how intimate and sacred those relations were in fact, as bearing upon the liability or prob-

ability of defendant's becoming crazed by their destruction. * * *

A delusion of marital infidelity is acknowledged as a type or symptom of homicidal insanity by alienists. Mr. Clevenger, at pages 650, 651, 653, 658, and 1074, cites instances to confirm this theory. So that, whether the accused had a belief grounded in fact or born of imagination, the evidence which was rejected was proper as tending to throw light upon defendant's mental attitude toward the victim of his deliberate physical act. Under all authority, it seems clear that, having laid a foundation by showing some evidence of mental aberration, appellant could show that his wife's conduct had been such as to account for the state of his mind, and that his plea was not feigned. The testimony does not prove or disprove the crime, but it is a circumstance to be considered by the jury as a blow on the head, or a drug habit, etc. Nor does it introduce a collateral issue to be tried out. The inquiry should not go beyond such limit as will disclose the fact to the jury that there was a cause which might have moved the mind of the accused, and which they may consider as evidence tending to sustain his plea. Such testimony should go to the jury under careful instructions. Its purpose and the limit of its application should be carefully guarded; so that the jury will not take it, if true, as in itself a justification or as an excuse for the crime, nor to prove justification for anger, hatred, revenge, or an uncontrolled passion, or the momentary impulse of a sane mind, but for just what it is intended; that is, whether, considering all the facts and circumstances offered to show an insane act, it tends to strengthen the testimony by showing an adequate cause accounting in some degree for the alleged mental condition of the accused at the time the murder was committed.

This case, like all which involve the tragedies of domestic life, is a sad one. We may assume that no man can measure the torment which a doubting husband tells o'er. If in the telling his reason so far fails that he cannot distinguish the right or wrong of his act, he is indeed an object of pity and compassion; but, on the other hand if, with mental power to distinguish right from wrong, he takes the life of his victim, he should be made to feel the heavy and unflinching hand of the law. It is for the jury to say whether appellant is a felon, or the victim of an unfathomed nature. That it may make no mistake, the appellant is entitled to submit such evidence as he may, providing only that it is relevant and competent to sustain his plea.

The judgment of the lower court is reversed, and the cause is remanded for a new trial.

RUDKIN, C. J., and DUNBAR, CROW, and MORRIS, JJ., concur.

(61 Wash. 490)

HUGHES & CO. v. FLINT et al.

(Supreme Court of Washington. Jan. 4, 1911.)

1. PAYMENT (§ 39*)—APPLICATION OF PAYMENT.

Where no direction is made by a debtor who owes several accounts, the creditor may apply a payment as he sees fit.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 104-114; Dec. Dig. § 39.*]

2. PAYMENT (§ 44*)—APPLICATION OF PAYMENT.

Where there is no direction by the debtor or specific application by the creditor, the law will apply the payment to the oldest account.

[Ed. Note.—For other cases, see Payment, Cent. Dig. § 123; Dec. Dig. § 44.*]

3. APPEAL AND ERROR (§ 1011*)—FINDINGS—CONCLUSIVENESS.

Findings of the trial judge, sitting without a jury, will not be disturbed because of a conflict in the testimony.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.*]

4. APPEAL AND ERROR (§ 993*)—REVIEW—NUMBER OF WITNESSES.

Findings of the trial court will not be disturbed because in opposition to the testimony of the greater number of the witnesses.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3900; Dec. Dig. § 993.*]

5. BILLS AND NOTES (§ 342*)—BONA FIDE HOLDER—"HOLDER IN DUE COURSE."

A materialman sold materials to a contractor for several jobs and kept separate accounts for each job. He received from the contractor checks drawn by an owner payable to the contractor "on contract." *Held*, that the materialman was put on notice and was not a holder in due course, within Rem. & Bal. Code, § 3443, defining a "holder in due course" as one taking an instrument complete and regular on its face, and he could not, without notice to the owner, divert the proceeds of the checks, and charge him with a lien for the amount diverted.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 830-841; Dec. Dig. § 342.*]

For other definitions, see Words and Phrases, vol. 5, p. 3320.]

6. MECHANICS' LIENS (§ 115*)—LIENS OF MATERIALMAN—PAYMENT.

Where an owner letting a contract for a building makes payments on the contract, and the amount thereof is passed to the materialman having notice of the contract, and the source of the payments, or payments are made by checks bearing words importing an equity in the owner drawing them so as to exempt them from the Negotiable Instrument Act, equity requires the materialman to apply the money and the proceeds of the checks on the account due for materials furnished for the building of the owner, and the materialman may not divert the same to accounts for materials furnished the contractor for buildings for other persons.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 150-159; Dec. Dig. § 115.*]

7. MECHANICS' LIENS (§ 115*)—LIENS OF MATERIALMAN—PAYMENT.

An owner let a contract for a building to a contractor having several jobs. The contractor bought materials from a materialman who kept separate accounts for each job. The owner gave to the contractor checks containing the words "on contract," and these were

passed to the materialman, who applied the proceeds in part on other accounts. The owner, at the request of the contractor, drew a check in full for the amount due on the contract payable to the materialman, who refused to accept it, though it exceeded the amount the owner was indebted for the materials furnished for his building, if the proceeds of the checks had been applied in payment thereof. *Held*, that the materialman could not claim a lien for more than the amount remaining due after applying all the checks to the payment of the account for materials, notwithstanding the tender of the check in full payment of the contract with the owner.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 150-159; Dec. Dig. § 115.*]

8. MECHANICS' LIENS (§ 310*)—ENFORCEMENT—COSTS AND ATTORNEY'S FEES.

An owner contracting for a building, and the contractor who tendered to a materialman all that could be charged against the property for materials furnished, were not liable for costs or attorney's fees in an action by the materialman to enforce his lien for materials.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 651-654; Dec. Dig. § 310.*]

Department 2. Appeal from Superior Court, Spokane County; J. D. Hinkle, Judge.

Action by Hughes & Co. against Fred Flint and others. From a judgment granting insufficient relief, plaintiff appeals. Affirmed.

J. D. Campbell and J. B. Campbell, for appellant. Wakefield & Witherspoon, for respondents.

CHADWICK, J. Appellant, who is a dealer in plumbers' supplies, furnished respondent James Maxwell, a contractor, materials and supplies for a building then in course of construction. The building belonged to the respondents Flint, and was known as the "Flint job," and was so entered on the books of the appellant, it being the custom of appellant to keep such accounts separate, and sell only with reference to the particular job. Maxwell had several accounts unpaid and overdue on the 20th day of September, 1908. On that day a check was drawn by respondent Fred Flint, payable to the order of Maxwell, for the sum of \$1,500. On the face of the check the words "on contract" were written. This check was indorsed by Maxwell and delivered to appellant, and of the whole sum but \$317.67 was credited on the Flint job, the remainder being credited upon, or used to balance, other accounts. Again, on October 23, 1908, another check for the sum of \$1,000 was drawn by Flint, payable to the order of Maxwell, and by him indorsed over to appellant. The words "on contract" were also written upon this check. The check was cashed by appellant, and \$242.59 was credited upon the Flint job account, the remainder being applied to other and older accounts. Other credits were made upon the account, so that on the 29th day of January, 1909, the books of appellant showed the total debits on the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Flint job to be \$2,747.79, the total credits to be \$1,079.58, leaving a balance due of \$1,668.21, to secure which a lien was filed, and in due time this action was begun to foreclose the same. Respondents, the Flints, answering appellant's complaint, set up the payments hereinbefore alluded to, and, further, that on the 13th day of January, 1909, there was due Maxwell, the contractor, a balance of \$1,022.80 on his contract, and that at the instance and request of Maxwell, they had caused a check to be drawn for that sum, payable to the order of appellant, which check had been tendered to appellant and refused by it. The trial judge found that the Flints were entitled to have the two first checks drawn by them credited in full upon the Flint job account, and these, together with the sum of \$52.06 for goods returned, being so credited, a balance would remain in favor of appellant in the sum of \$195.73. Judgment was rendered against Maxwell for \$195.73, and a provisional lien declared against the property of the Flints for a like sum, conditioned upon the payment of that amount into the registry of the court within two days after the rendition of the judgment. No costs or attorney's fees were allowed appellant.

Appellant attacks the finding of the court that Maxwell directed the entry of the checks to the credit of the Flint job account, the theory of appellant being that, in the absence of any specific direction to apply the proceeds of the checks to any particular account, it could as in other cases satisfy any account standing in the name of Maxwell. A right to apply payments, under the facts as we have detailed them, is the ultimate issue in this case. It is undoubtedly the rule, as is contended by appellant, that, if no direction is made by a debtor who owes several accounts, the creditor may apply a payment as he sees fit; and if there be no direction or specific application by the creditor, the law will apply it to the oldest account. *Frazier v. Miller*, 7 Wash. 521, 35 Pac. 427; *Kelso v. Russell & Co.*, 33 Wash. 474, 74 Pac. 561.

But to bring itself within this rule, appellant assumes that there was no direction on the part of Maxwell. It is true that appellant's witnesses testified, as to one check at least, that Maxwell assented to the application of the payment to any account appellant desired, but this is denied by Maxwell. The finding of the trial judge being thus sustained by competent testimony, we could not overrule it without doing violence to a rule so frequently announced by this court as to need no citation of authority; that is, that the findings of the trial judge, when sitting without a jury, will not be reversed because of a conflict in the testimony, or because the greater number of the witnesses have testified to the contrary. There is a personal equation in all trials which appellate courts cannot measure, and verdicts

and judgments would indeed be insecure should they attempt it. But the facts in this case are such that it clearly falls without the limit of the general rule. Appellant had notice of the Flint contract, and had so entered it on its books. The check drawn by Flint upon which the words "on contract" were written, when presented by the contractor, was sufficient to put appellant upon notice, and it could not without notice to the owners divert the payment and charge them with a lien for a like amount. Being so marked, the check was not received in due course. A "holder in due course" is a holder who has taken an instrument, complete and regular upon its face. *Rem. & Bal. Code*, § 3443. Waiving the actual notice which the books of appellant import, the equities of the respondents Flint would still be paramount. The rule is stated in 7 Cyc. 949: "As a rule any irregularity, erasure, ambiguous or uncertain clause, or peculiarity connected with the paper, which is sufficient to excite suspicion, or demand inquiry of a person exercising ordinary business prudence and judgment, will operate as constructive notice to a purchaser taking the same without inquiry."

In this respect the case falls within the rule of *Bowles Co. v. Fraser*, 109 Pac. 812, where the proceeds of a check drawn by the owner in favor of the supply house, for the estimated cost of plumbing supplies, had been applied as follows: A part to cover the cost of supplies then furnished; a part to balance an older account; and the remainder in money paid to the contractor. The supply house furnished additional materials and filed a lien. It claimed to have received the check in due course. The fact that the check was drawn by a stranger to the supply house was held to be enough to show a property in the check in the drawer. The court there said: "But we think it too much to say that these circumstances were of such a nature as to warrant the belief that the property in the check was the property of Fraser [the contractor]. The check itself contained a distinct warning to the contrary. It was made payable to the respondent [the supply house], a stranger to the drawer, and not to Fraser, and it is not reasonable to suppose that Fraser would have accepted payment of an obligation due himself in a form which he could not use without the consent and co-operation of a third person."

In *Crane Co. v. Pacific Heat & Power Co.*, 36 Wash. 95, 78 Pac. 460, it was held that the answer of a surety, alleging that plaintiff had received and credited money paid on a particular contract, knowing its source, to other accounts, stated a defense; and, further, that knowing the source of the payment the materialman could not apply payments under the general rule to the prejudice of a surety on the contractor's bond. In principle that case is like unto this. The

right to apply the payments to the older or other accounts was denied, because the lien claimant had notice that the money was paid on the contract which the surety company had underwritten. The owner of land, who lets a contract for the erection of a building upon it, is an involuntary debtor, made so by the terms of a statute; and where he has made payment on his contract, and the amount thereof has passed to the materialman having notice of the contract, and the source of the payment, or the payment being made by check bearing words which import an equity in the drawer so as to exempt it from the provisions of the negotiable instruments act, equity and fair dealing demand that the owner should not be made to pay his debt over again. The appellant in this case has lost nothing through the conduct of the respondents Flint, and they are entitled to a just credit for the money paid by them on their contract with Maxwell.

It is now insisted that, if the payments should be credited to the Flint job account, nevertheless appellant should have judgment for the \$1,022.80 tendered by Maxwell, because the check was tendered "in full payment" of the Flint job, and for that reason they were not bound to accept it. The Flints were liable for \$195.73, and no more, and as the greater sum included the less, appellants might have accepted the check without prejudice to their rights. The tender did not create a right of action or alter the relations of the parties. Nor could the court have entered, as we are now asked to do, a judgment against Maxwell for a greater sum than was due on the Flint job, that being the subject-matter of the present action, and no issue having been tendered on his personal or general accounts with appellant.

The court denied an attorney's fee, and this too is alleged as error. Under the facts, the trial judge did not abuse his discretion in this respect. Respondents should not be penalized in costs or attorney's fees after tendering all that could be charged against their property.

Judgment affirmed.

RUDKIN, C. J., and CROW, MORRIS, and DUNBAR, JJ., concur.

(61 Wash. 405)

STATE v. LEROY.

(Supreme Court of Washington. Jan. 3, 1911.)

1. JURY (§ 82*)—DRAWING JURY—TIME OF SERVING.

Laws 1909, c. 73, § 3, requires the division of each county into jury districts, and section 4 declares that terms of court shall commence on the first Monday in each month, unless postponed by order of the judge; that a jury need not be called for any month unless the judge shall consider that there is sufficient business to require it, and, when he does deem it necessary,

that he shall require the clerk to draw a jury "to serve for the ensuing month"; that persons drawn to serve shall not be called to serve again for five years unless their service becomes necessary because there are not sufficient competent jurors remaining in the county who have not served within the time. On the second Saturday in November, 1909, the names of 24 jurors were drawn to serve for the ensuing month, but a few days later it developed that there were no jury cases for hearing for the month of December, and the jurors were not summoned to serve in that month. On the second Saturday in December, 12 additional jurors were drawn, and the two panels thus drawn were summoned to serve in January, 1910, and of these defendant was required to accept the jury for his trial over objections. Held that, the only deviation from the statute being in the time of the drawing of the first 24 jurors, the statute was substantially complied with, and the defect was not fatal to a conviction under Rem. & Bal. Code, § 2140, providing that challenges to the panel shall only be allowed for a material departure from the form prescribed by law for the drawing and return of the jury.

[Ed. Note.—For other cases, see Jury, Dec. Dig. § 82.*]

2. CRIMINAL LAW (§ 1086*)—APPEAL—RECORD.

Where it did not appear from the appeal record that any juror was in the courtroom when the court inquired of defendant's counsel on what day he broke jail during argument of a motion to quash the jury panel, an objection that such question constituted a comment on the facts in the presence of the jury was unsustainable.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1086.*]

3. CRIMINAL LAW (§ 598*)—CONTINUANCE—DILIGENCE.

Accused was arrested November 8, 1909, escaped November 17th, and was recaptured and returned to jail about November 20th. On December 6th he was arraigned, and counsel appointed to defend him. On December 7th he entered a plea of not guilty, and his trial was set for January 11, 1910. On January 4th his counsel withdrew, and other counsel was appointed, and the trial reset for January 10th. Accused took no steps to secure the issuance of a subpoena until January 6th, and in an affidavit for a continuance stated that his witnesses were in Spokane. The sheriff, however, in an answering affidavit stated defendant made no effort to locate the witnesses by correspondence until January 8th. Held, in the absence of a showing of excuse for the delay, that there was not sufficient diligence to require the granting of a continuance.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1336; Dec. Dig. § 598.*]

4. CRIMINAL LAW (§ 1160*)—APPEAL—RULINGS ON EVIDENCE—PREJUDICE.

In a prosecution for burglary, prosecutor testified that he left his house on the morning of November 5th, and, on his return the following evening, he discovered that certain articles of personal property including a jar of fruit had been taken; that on the next day he found the fruit jar at a spring near the house partially empty, and that "whoever it was had eaten all they wanted out of it and left it setting there." He also testified: "I found those shoes lying there in the draw below the spring where he had eaten his dinner, and there wasn't any one else that I knew of that could have put them there." Held, that the statement concerning the shoes referred to the unknown person who had eaten the fruit at the spring, and, while the statement was mere opinion and im-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

material, defendant was not prejudiced by the court's refusal to strike it out.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3137-3143; Dec. Dig. § 1169.*]

5. CRIMINAL LAW (§ 339*)—EVIDENCE—IDENTITY.

Complaining witness testified that the day succeeding the alleged burglary he discovered certain shoes lying in the draw below a spring where he claimed accused had eaten his dinner after committing the burglary. A state's witness testified that accused was then wearing witness' shoes, and that witness had tried on one of the two shoes shown to him, and that it fitted him, and he could wear it. *Held* that, assuming that the shoes identified by the witness were those found at the spring, the evidence was admissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 767, 768; Dec. Dig. § 339.*]

6. CRIMINAL LAW (§ 339*)—IDENTITY OF ACCUSED—EVIDENCE.

Evidence, though of no probative force standing alone, to identify accused, *held* admissible in connection with other evidence to show that accused was in the vicinity of the house alleged to have been burglarized at the time the burglary was claimed to have been committed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 768; Dec. Dig. § 339.*]

7. CRIMINAL LAW (§ 369*)—OTHER OFFENSES.

Though proof of a previous independent crime is not admissible to prove the crime charged, evidence tending to identify accused is admissible, though it also indicates the commission of another offense, under the rule that testimony otherwise relevant is not incompetent because it may incidentally show that accused has committed another crime.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 823; Dec. Dig. § 369.*]

8. CRIMINAL LAW (§ 351*)—EVIDENCE—ESCAPE.

Evidence of the escape and recapture of accused is admissible to show guilt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 783; Dec. Dig. § 351.*]

9. BURGLARY (§ 10*) — "BURGLARY IN THE SECOND DEGREE"—ELEMENTS OF OFFENSE—"BURGLARY IN THE FIRST DEGREE."

Rem. & Bal. Code, § 2578, declares that every person who with intent to commit some crime therein shall enter in the nighttime the dwelling house of another in which there shall be at the time a human being, etc., shall be guilty of burglary in the first degree. Section 2579 provides that every person who with intent to commit some crime therein shall under circumstances not amounting to burglary in the first degree enter the dwelling house of another, or break and enter, or, having committed a crime therein, shall break out of any building or part thereof wherein any property is kept for use, sale, or deposit, shall be guilty of burglary in the second degree. *Held*, that it is not essential to a conviction of burglary in the second degree that it shall have been committed in the nighttime.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. § 5; Dec. Dig. § 10.*]

For other definitions, see Words and Phrases, vol. 1, p. 911.]

10. BURGLARY (§ 41*)—SECOND DEGREE—EVIDENCE.

In a prosecution for burglary, evidence *held* to sustain a conviction of burglary in the second degree.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. §§ 94-103; Dec. Dig. § 41.*]

Parker, J., dissenting.

Department 1. Appeal from Superior Court, Okanogan County; E. W. Taylor, Judge.

Frank Leroy was convicted of burglary in the second degree, and he appeals. *Affirmed.*

C. Burton and E. C. Jennings, for appellant. William C. Brown, for the State.

GOSE, J. The defendant was convicted of the crime of burglary in the second degree. The charge is that on or about the 5th day of November, 1909, he feloniously broke and entered the dwelling house of William Plemmons, with intent to commit the crime of larceny therein, etc. After the return of the verdict, he was tried upon a supplemental information, and the jury found that he had been theretofore twice convicted of burglary. He has appealed from a judgment entered upon the verdicts.

On the second Saturday of November, 1909, under the direction of the superior judge, the county clerk drew from the jury box the names of 24 jurors to be summoned to serve for the ensuing month. A few days later, through pleas of guilty and the escape of the appellant from jail, it developed that there were no jury cases for hearing for the month of December, and the jurors were not summoned to serve in that month. On the second Saturday in December, 12 additional names were drawn by the county clerk under the directions of the superior judge, and the two panels thus drawn were summoned for service at the January, 1910, term of court. The appellant's motion to quash the panel for irregularity in drawing the jury was overruled. It is contended that the panel drawn in the month of November could serve only in the following month, and that the appellant was prejudiced by the refusal of the court to sustain his motion. There is no merit in the contention. Section 3, p. 132, Laws 1909, requires the judge of a superior court to divide the county into not less than three, nor more than six, jury districts. It makes it the duty of the county clerk to make up a jury list in the month of July of each year, containing the names of all the qualified jurors in the county, to provide as many boxes as there are jury districts, numbered to correspond with the districts, and to deposit in each box slips of paper containing the names of the jurors for that district. Section 4 provides that terms of court shall commence on the first Monday of each month, unless postponed to a later date by order of the judge; that it shall not be necessary to call a jury for any month unless the judge "shall consider that there is sufficient business to be submitted to a jury to require that one be called"; that, where the judge of the superior court deems that the public business requires a jury term to be held, he shall require the clerk to draw a jury "to serve for

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the ensuing month"; that the names shall be drawn in equal numbers from each jury box; that the names of persons so drawn "to serve as jurors" shall be struck from the jury list, and shall not be called "to serve as jurors for five years," unless their service becomes necessary because there are not sufficient competent jurors remaining in the county who have not served within that time. Section 7 provides that, when a juror is excused from service for the causes enumerated in the section, his name shall be placed upon the jury list, and he shall be summoned to serve at the next succeeding jury term. The precise contingency presented here is not covered by the letter of the statute. Rem. & Bal. Code, § 2140, provides that "challenges to the panel shall only be allowed for a material departure from the forms prescribed by law for the drawing and return of the jury." The departure from the statute was not a material one. Reading the statute as an entirety, it is apparent that its purpose is to distribute and equalize the burden of jury service, to secure a jury in all cases from the body of the county, and to avoid the evils that flow from an open venire and its attending mischief, the everpresent professional juror. This fact is emphasized by the provision in the act that an open venire shall not issue except by stipulation of the parties, made in open court, entered of record, and approved by the court. "The statutory provisions with regard to making up the jury list are ordinarily held to be merely directory, and errors and irregularities in failing to comply strictly with their provisions which are not prejudicial to the parties do not invalidate the list or furnish any ground for challenging the array; but a substantial compliance with the law is necessary, and a disregard of the material provisions which make up the essential features of the system and are designed to secure and preserve a fair and impartial trial is not a mere irregularity, and is ground for challenging the array, even though it does not affirmatively appear that any injury has resulted therefrom." 24 Cyc. 217, 218. " * * * Statutory provisions respecting the drawing of the panel are generally regarded as directory merely, so that irregularities therein, unless plainly operating to the prejudice of the challenging party, form no ground for challenging the array." 1 Thompson on Trials, § 34. In *State v. Krug*, 12 Wash. 288, 41 Pac. 126, speaking to the question of the failure of the county commissioners to select and certify the names of the grand jurors as directed by statute, this court said: " * * * Nothing appears in the record to indicate that the defendant was in any way injured by the action of the court, or that the grand jurors were not qualified grand jurors under the law. The qualification of a grand juror after all is the main question to decide, and that question could have been decided in each instance

by an examination of the individual juror." It is not claimed that the county had not been divided into jury districts, nor is it claimed that there was any departure from the terms of the statute in depositing the names of the jurors in the proper boxes, or in drawing their names from the jury boxes. The only deviation from the statute was in the time of the drawing of the first 24 names. We think there was a substantial compliance with the spirit of the statute. It is apparent that the material provisions which make up its essential features were not disregarded. What we have said disposes of the objection to the individual jurors based upon the same ground.

Pending the argument on the motion to quash the panel, and before the jurors had been called to the box for examination as to their qualifications, the court inquired of counsel on what day the appellant broke jail. The contention that this was a comment on the facts in the presence of the jury is untenable. It does not appear from the record that any juror was then in the courtroom. The appellant was arrested on November 8, 1909, escaped from jail on November 17th, and was recaptured and returned to jail on or about November 20th. On December 6th, he was arraigned, and counsel was appointed to defend him. On the following day he entered a plea of not guilty, and the trial was set for January 11, 1910. On January 4th the counsel first appointed to defend him withdrew his appearance, and other counsel was appointed in his stead, and the trial was reset for January 10th. After the motion to quash the panel had been overruled, a motion for a continuance was presented and denied. This ruling is assigned as error. The actual trial began on January 11th. The appellant took no steps to secure the issuance of a subpoena until January 6th. After the case was set for trial, he had more than a month in which to secure the attendance of witnesses. He waited until within five days of the trial before taking out a subpoena. In his affidavit for a continuance, the appellant states that his witnesses are at Spokane. The sheriff stated in his answering affidavit that the appellant made no effort to obtain or locate these witnesses by correspondence with them until January 8th, when he handed him two letters, one addressed to one of the witnesses at Aetna in Clarke county, Wash., and the other addressed to the other witness at Spokane. This was not due diligence. No excuse is shown for the delay. The court was diligent in appointing counsel to defend the appellant. There was no abuse of discretion in the denial of the motion.

The complaining witness testified that he left his house on the morning of November 5th, and that, upon his return the following evening, he discovered that certain articles of personal property, including a jar of fruit, had been taken; that the next day he found

the fruit jar at the spring near the house, partially empty; that "whoever it was had eaten all they wanted out of it and left it settling there," and that "I found those shoes laying there in the draw below the spring where he had eaten his dinner, and there wasn't any one else that I knew of that could have put them there." The appellant's counsel then asked that the statement, "There wasn't any one else that I know of that could have put them there," be stricken. The court remarked: "It is a matter of his opinion anyway." This ruling is assigned as error. The statement about the shoes clearly refers to the unknown person who had eaten the fruit at the spring. While the statement was merely the opinion of the witness and immaterial, no prejudice resulted from the court's ruling.

A witness for the state testified that the appellant was then wearing the witness' shoes, and that the witness had tried on one of two shoes shown him, that it fit him, and that he could wear it. Error is suggested in the admission of this testimony. It does not clearly appear that the shoes identified by the witness are the shoes found at the spring; but assuming that they are, as the argument suggests, there was no error in admitting the testimony. *State v. Nordstrom*, 7 Wash. 506, 35 Pac. 382. The appellant argues that the fact that the witness could put on one of the shoes does not prove that he could wear them. Whether it tended to prove that fact was a question for the jury.

Another witness for the state testified that the day following a burglary of the Gillespie store at Brewster he was driving a stage from Okanogan to Brewster; that he observed a man near the road; that when the latter saw the witness he turned and went into a bunch of brush and lay down; that the man had his hat over his face so as to conceal it; and that he could not identify him. The admission of this testimony is assigned as error. Plemmons, the complaining witness, had testified that the day after the articles were taken from his house he followed tracks leading from his house to a point above the Davis place, and above the bench near his house. The witness further said that he had heard Mr. Plemmons' testimony; that he was slightly acquainted with the country in the vicinity of the Plemmons house; and that the tracks Plemmons described, if continued in the course indicated, would reach the stage road at the point where he saw the unknown man. The appellant says that this evidence does not tend to connect him with the crime charged. It must be admitted that standing alone it has no probative force, but, as we shall see later, taken in connection with other evidence in the case, it is a circumstance tending to connect the appellant with the Plemmons burglary. The reference to the burglary at Brewster was only for the purpose of ena-

bling the witness to fix the date he saw the man near the stage road.

Another witness testified that he saw a man in Brewster the day before the safe was broken who wore a mackinaw coat and had two weeks' growth of beard. This statement was made by the witness in answer to a question whether he saw a man in Brewster about November 4th or 5th who resembled the appellant. The statement does not reach the dignity of evidence, tends in no way to identify the appellant, and, of course, could not have been prejudicial. Trial by jury would be a farce if prejudice were presumed from such trivial incidents of the trial. There is, however, other competent evidence to the effect that the appellant at and before the time of his arrest wore a mackinaw coat, and that he had a short growth of beard.

A witness for the state testified that in the early morning of the 5th day of November, 1900, the safe in his store at Brewster was blown open, and the key to the back door taken. He was then shown a key taken from the possession of the appellant at the time of his arrest, and testified that he believed it was his key. He also identified certain knives taken from the appellant as his, witness', property, and stated that a steel wedge, similar to those found upon the appellant, was left in his store the morning the burglary was committed. It is contended that it was error to permit the witness to state that his safe was blown open. The purpose of the testimony was to show that the appellant was in the vicinity of the Plemmons house a short time before the commission of the crime charged. Brewster is about 10 miles from the Plemmons house. A stage road extends northerly from Brewster to Conconully, and passes near the Plemmons house. As we have seen, the house was entered between the morning of November 5th and the evening of November 6th. On November 6th the appellant took passage on the stage north of the Plemmons house, and was carried to Conconully the same day. On the morning of November 8th he was arrested at that place. He had in his possession when arrested a number of the articles taken from the Plemmons house, and also a set of burglar's tools. The case was tried on circumstantial evidence, and the purpose of this testimony was to fix the whereabouts of the appellant about the time the Plemmons house was entered. In short, its purpose was to show that the appellant was in the vicinity, and had the opportunity to commit the crime charged. The matter of the burglary, the key, the knives, and the wedge tended to identify and locate him. If the appellant left a trail of crime behind him, the misfortune is his, and that fact cannot defeat the right of the state to connect him with the crime charged by proof of all relevant circumstances. *State v. Dana*, 109 Pac. 101; 12 Cyc. 406, 407. Testimony

otherwise relevant does not become incompetent because it may tend incidentally to show that the accused has committed another crime. *State v. Hyde*, 22 Wash. 551, 61 Pac. 719; *State v. Norris*, 27 Wash. 453, 67 Pac. 983. The appellant has cited *State v. Thompson*, 14 Wash. 285, 44 Pac. 533; *State v. Boklen*, 14 Wash. 403, 44 Pac. 889; *State v. Gottfreedson*, 24 Wash. 398, 64 Pac. 523. The principle we have stated is recognized in these cases. They also announce the familiar rule that proof of a previous independent crime is not admissible for the purpose of proving the crime charged. The testimony of the sheriff, showing the escape and recapture of the appellant, was admissible as a circumstance tending to establish his guilt, and the error assigned to its admission is not meritorious.

It is further contended that burglary in the second degree, as defined in Rem. & Bal. Code, § 2579, must be committed in the nighttime, and that the court should have so instructed the jury. A comparison of the statute defining burglary in the first degree (Rem. & Bal. Code, § 2578) with that defining the second-degree offense makes it apparent that the construction suggested is not warranted by the language used. The statute makes an entry or a breaking and entry of a dwelling house with intent to commit some crime under circumstances not amounting to burglary in the first degree burglary in the second degree. There is abundant evidence which warranted the jury in finding either an entry or a breaking and entry of the dwelling house of Plemmons with intent to commit some crime. Indeed, it is conclusively shown that his dwelling house, which he had locked before leaving, was entered during his absence, and that several articles of personal property were taken and found in the possession of appellant at Conconully, two days later. The circumstantial evidence of the guilt of the appellant amounts almost to a demonstration. The plea of not guilty under the law left all defenses open, and the duty was imposed upon the state of anticipating any defense he might offer, such as an alibi or that he came lawfully into possession of the property of the complaining witness. To meet the burden, some circumstances, unimportant standing alone but possessing strength in connection with the other circumstances shown, were submitted to the jury. If it be conceded that some of the circumstances were so slight as to be immaterial, they were not prejudicial. Convictions in criminal cases will not be set aside for mere technical error which could not have worked prejudice to the accused.

The judgment is affirmed.

RUDKIN, C. J., and FULLERTON and MOUNT, JJ., concur.

PARKER, J. I dissent. I think that both the letter and the spirit of the statute were violated in compelling the accused to be tried by jurors who were drawn in November. The jurors then drawn were drawn for service during the "ensuing month" of December. The fact that after their drawing it developed that there would be no business for them during that month was no warrant for using them in January. To some this may seem technical, but it is a technicality which can easily be avoided; and the principle which will allow the time of drawing to be thus departed from will allow the substantial rights of the accused to be violated, even if it be said they were not in this case, though I think they clearly were.

(61 Wash. 540)

LEVY et al. v. CITY OF SEATTLE et al.
(Supreme Court of Washington. Jan. 6, 1911.)

1. PLEADING (§ 343*)—PUBLIC IMPROVEMENTS—ASSESSMENTS—MOTION FOR JUDGMENT ON PLEADINGS.

In an action to set aside a special assessment for regrading a street, the complaint alleged that plaintiff's property was not liable, for in a prior condemnation proceeding to widen the street it was determined that the property was damaged more than benefited by the improvement. The defendants filed a general denial, and also affirmative defenses, to which a demurrer was sustained. *Held*, that plaintiff's motion for judgment on the pleadings was properly refused, for the denial put the plaintiffs on their proof; the sustaining of the demurrer establishing the law of the case only as to the affirmative defenses, and not as to the entire answer.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 343.*]

2. EMINENT DOMAIN (§ 243*)—CONCLUSIVE-NESS OF JUDGMENT.

In an action to set aside a special assessment for regrading a street, the plaintiffs claimed that their property was exempt, because in a prior condemnation proceeding to widen the street the jury determined that the property was damaged more than benefited by the improvements; the plaintiffs maintaining that the widening and regrading were really one improvement. In the first proceeding the jury assessed damages for the land taken, and found the land not taken was not damaged by changing the grade. *Held*, that the assessment was binding; the two proceedings being entirely separate, and the finding of the jury, if warranting any inference, supporting one that the lots were benefited.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 627-629; Dec. Dig. § 243.*]

Department 1. Appeal from Superior Court, King County; A. W. Frater, Judge.

Action by Eva Levy and husband against the City of Seattle and others to set aside a special assessment. From a judgment for defendants, plaintiffs appeal. Affirmed.

Carkeek & McDonald, for appellants. Scott Cal' un, James E. Bradford, O. B. Thorgrimson, and Leander T. Turner, for respondents.

MOUNT, J. This action was brought by the plaintiffs to set aside an assessment levied

upon their property for local improvements, and also to restrain the city and its officers from enforcing collection of the assessment. The action is based upon the alleged ground that the property of the plaintiffs was not liable to assessment because in a prior condemnation proceeding, where a portion of the plaintiffs' property was taken, it was determined that the property was damaged in the sum of \$1 over and above the benefits accruing by reason of the improvement. For answer to the complaint, the defendants denied that it was determined in the condemnation action that the plaintiffs' property was damaged over and above the benefits, and alleged two affirmative defenses. The first defense was, in substance, that in the condemnation case no damages were found for change of grade. The other defense by way of estoppel was that the city relied upon the legality of the proceedings, and had let contracts and expended large sums of money in said improvements, with plaintiffs' knowledge and without objection thereto. The trial court sustained the plaintiffs' demurrer to these affirmative defenses. Thereafter the case was tried upon the issues made by the complaint and answer, and the action was dismissed. The plaintiffs appeal.

The facts are not disputed. It appears that in May, 1906, the city of Seattle passed an ordinance providing for the widening of Third, Fourth, and Fifth avenues, 12 feet on each side, and establishing new grades for these streets. Thereafter the city began proceedings to acquire the necessary land, and to ascertain the damages on account of private property taken and damaged. The plaintiffs were made parties to those proceedings. On a trial the jury therein returned a verdict as follows: "We, the jury in the above-entitled proceeding, duly impaneled and sworn to ascertain the just compensation to be made to the owners, occupants, and persons otherwise interested in the following described real property, to wit: The west twelve feet of lots 3 and 4, in block J, in Bell's Fifth addition to the city of Seattle—which the respondents Eva Levy and Henry E. Levy, her husband, and the Northwestern Mutual Life Insurance Company, a corporation, claim to own, or to be otherwise interested in, find that the just compensation to be paid to the owners, occupants, and other persons interested therein for the taking of said described real property, is the sum of \$4,750, and we assess the damages to the remainder of the lots by reason of the taking of said described real property at the sum of one dollar, and we assess the damages to the remainder of said lots by reason of the taking and establishing of the grades and grading and the regrading of Third, Fourth, and Fifth avenues, and other streets, avenues, alleys, and approaches thereto described in Ordinance No. 13,776 of the city of Seattle in conformity with such established grades, and

in the construction of the necessary slopes and retaining walls for cuts and fills upon the real property abutting on the streets, avenues, alleys, and approaches thereto as provided for and specified in said Ordinance No. 13,776, at the sum of no dollars." Subsequently a judgment of appropriation was entered in accordance with the verdict, and the plaintiffs were paid and received the money for the taking and damaging of their property. In December, 1906, the city passed an ordinance providing for the improvement of these streets by regrading them, and providing also for an assessment district to pay for such improvements. A contract was awarded for doing the work, and an assessment roll was prepared. The property of the plaintiffs was assessed for the sum of \$6,642.24. The plaintiffs made no objection to this assessment roll. In January, 1909, an ordinance was passed, confirming the assessment and declaring the same a prior lien upon the property assessed. In February, 1909, the assessment roll was placed in the hands of the city treasurer for collection, and plaintiffs were thereafter notified to pay the assessment on or before May 21, 1909. They thereupon brought this action to set aside the assessment.

It is argued that the trial court erred in not granting plaintiffs' motion for judgment on the pleadings. This contention is based upon the fact that the court had sustained a demurrer to the affirmative defenses, and that such ruling became the law of the case. There is no merit in this contention, because the denials in the answer were sufficient to put the plaintiffs upon proof that the assessment roll was void. The first affirmative defense was no more than a denial of the allegations of the complaint. But, when the demurrer was sustained to that defense, the effect was not to hold that no proof was required on the part of the plaintiffs. The trial court was of the opinion, no doubt, that the affirmative matter pleaded was fully covered by the denials, and did not constitute an affirmative defense, and for that reason sustained the demurrer to that defense. The law of the case was established only as to the affirmative defenses, and not as to the answer denying the allegations of the complaint.

It is next argued that the court erred in dismissing the action. This contention is based upon the claim that the grading and regrading of the streets was one subject, and the two features constituted one improvement, and the question of damages and benefits was determined by the jury in the condemnation proceeding. It is, no doubt, true that the city, when it passed the ordinance providing for widening the streets by 12 feet on each side, intended also to regrade the streets at some future time. But the city was not bound to make the whole improvement at one time, and did not do so. The

necessary land was acquired first by an independent proceeding in condemnation. In that proceeding the jury found that the just compensation to be paid to the appellants for the property which was taken was \$4,750, and for damages to the land not taken was \$1, and that there were no damages by reason of changing the grades and grading or regrading the streets. The jury, by finding that there were no damages to the remaining property by reason of the grades and regrading, did not find that the property would not be benefited thereby. The implication, if any is to be drawn from that finding, is that the property would be benefited, and therefore the case of Schuchard v. Seattle, 51 Wash. 41, 97 Pac. 1106, is not in point. In Wolverton v. Seattle, 110 Pac. 29, we said upon this point: "In the absence of special findings, it cannot be now determined whether the jury actually offset benefits against damages. Benefits have since been found by the board of eminent domain commissioners, as the basis of an assessment. The appellant, upon the hearing of her objections, was entitled to show, if such was the fact, that no benefits had resulted to her property from the improvement; but she could not make that showing in the manner attempted, or by proceeding upon the theory that the general verdict of the jury, aided by the repetition of the evidence admitted on the condemnation trial, would establish her contentions."

It follows that, if the acquisition of the land and the improvement of the streets was one unified scheme, there is nothing in the general verdict in condemnation to justify the contention that the appellants' property was not liable to assessment for benefits. But the proceedings were conducted separately. The acquisition of the land was an independent proceeding. The assessment for the benefits was also independent of the condemnation proceedings, and was made after the land was taken, and after compensation had been made therefor and damages to the land not taken had been paid. The assessment was properly made, and was in our opinion valid.

The judgment must therefore be affirmed.

RUDKIN, C. J., and PARKER, GOSE, and FULLERTON, JJ., concur.

(51 Wash. 696)

MCDONALD et ux. v. CITY OF SEATTLE
et al.

(Supreme Court of Washington. Jan. 6, 1911.)

Department 1. Appeal from Superior Court, King County; A. W. Frater, Judge.

Action by F. A. McDonald and wife against the City of Seattle and others to set aside a special assessment. From a judgment for defendants, plaintiffs appeal. Affirmed.

For related opinion, see 112 Pac. 639.

Carkeek & McDonald, for appellants. Scott Calhoun, James E. Bradford, O. B. Thorgrimson, and Leander T. Turner, for respondents.

PER CURIAM. This case is governed by the decision in No. 3,989, *Levy v. Seattle*, 112 Pac. 639, and must be affirmed for the reasons there stated.

(51 Wash. 549)

STATE v. GRAY.

(Supreme Court of Washington. Jan. 7, 1911.)

1. LARCENY (§ 55*)—PROSECUTION—SUFFICIENCY OF EVIDENCE.

Evidence in a prosecution for stealing horses held to sustain a conviction.

[Ed. Note.—For other cases, see *Larceny*, Cent. Dig. §§ 164-169; Dec. Dig. § 55.*]

2. CRIMINAL LAW (§ 1159*)—APPEAL—VERDICT—CONCLUSIVENESS.

The question of whether the evidence is sufficient to support a conviction depends on the weighing of conflicting evidence, is not a question of law, and the verdict is conclusive on appeal.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.*]

3. CRIMINAL LAW (§ 1166*)—APPEAL—HARMLESS ERROR.

The court over accused's objection permitted the prosecuting attorney at the beginning of trial to indorse upon the information the names of four state's witnesses, whereupon accused stated that, in view of such action, they would either have to have a continuance or subpoena four witnesses, and the court permitted the issuance of subpoenas for five additional witnesses for accused, who testified. Held, that the court's action in permitting the names of the state's witnesses to be indorsed on the information was not prejudicial error.

[Ed. Note.—For other cases, see *Criminal Law*, Dec. Dig. § 1166.*]

4. CRIMINAL LAW (§ 938*)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE.

That a certain state's witness was intoxicated while testifying was not a newly discovered fact which could be brought into the record by affidavit on motion for new trial; that fact, if true, existing at trial.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2306-2317; Dec. Dig. § 938.*]

5. CRIMINAL LAW (§ 938*)—NEW TRIAL—GROUNDS—NEWLY DISCOVERED EVIDENCE.

Accused's affidavits on his motion for new trial tended to show that state's witness W. admitted after trial that he testified falsely, which he denied by counter affidavit, and also tended to show that he could be impeached by the testimony of witnesses who did not testify at trial, and the reasons for not testifying were not shown. Other affidavits tended to show that W. was not at the place he said he was on a certain date when testifying, which he denied by counter affidavit, and the evidence did not fix the time with such certainty as to make it impossible for him to have been at both places. A witness at the trial made affidavit that he believed he was mistaken in testifying that he saw accused in a town about 20 miles from where the horses were stolen on the day they were claimed to have been stolen, and as to talking to him relating to pasturing horses, and that, if called to testify again, he would testify that the incident occurred at another date. Held, that the court did not abuse its discretion

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

in denying a motion for a new trial on the ground of newly discovered evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2306-2317; Dec. Dig. § 938.*]

6. CRIMINAL LAW (§ 936*)—NEW TRIAL—
Grounds—ACCIDENT AND SURPRISE.

The court did not abuse its discretion in denying a motion for a new trial on the ground of accident and surprise.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2299-2305; Dec. Dig. § 936.*]

Department 1. Appeal from Superior Court, Lincoln County; C. H. Neal, Judge.

George Gray was convicted of horse theft, and he appeals. Affirmed.

Martin & Wilson, for appellant. O. A. Pettijohn and W. T. Warren, for the State.

PARKER, J. The defendant was convicted in the superior court for Lincoln county of stealing four horses, and has appealed therefrom to this court. The principal contention of learned counsel for appellant is that the trial court erred in overruling their challenge to the sufficiency of the evidence to sustain the conviction, made by their motion for a directed verdict and by their motion to set aside the verdict. The evidence is in serious conflict as to the whereabouts of appellant at the time of and for a few days following the taking of the horses. There is no question as to the fact of the stealing of the horses by some one at about the time charged. It appears by the uncontradicted evidence of George Huck, owner of the horses, that he saw them in his pasture about 20 miles southeasterly from Wilbur, in Lincoln county, on the morning of May 4, 1909, the day they are alleged to have been stolen; that he missed them a few days later, and found them in the Aldridge pasture about 12 or 14 miles northerly from Wilbur on May 24th; that they had all been branded, and one had been castrated, since they were seen by him in his own pasture on May 4th. The Aldridge pasture is conducted by a father and son, as a business in pasturing stock of others for hire. The son stays most of the time in Wilbur having business there, while the father had charge of the pasture, living near it, in May. The son testified that he saw appellant in Wilbur on May 4th, when appellant asked if he could put some horses in their pasture, and was told by the son to see his father at the pasture and it would be all right; that appellant then said he would put in four or five head, the son giving his assent; that on the following Sunday, May 9th, he visited his father, and saw in the pasture four colts, all of which were freshly branded and one was freshly castrated. Another witness named Warehime, who lives some ten miles northerly from Wilbur and about three miles from the Aldridge pasture, testified that he saw appellant pass his place on the morning of May 4th, 5th, or 6th, with

two other men, one being appellant's brother, all on horseback, driving four young horses in the direction of the Aldridge pasture; that they stopped at a pasture about a mile from Warehime's place, got another horse therefrom, and went on; that he could not identify this horse, but that the brother of appellant had a horse in that pasture; that four or five days later he saw the same four young horses in the Aldridge pasture; that they had all been lately branded, and one was freshly castrated. The elder Aldridge, who had charge of the pasture and lived near it, testified that appellant came to his home between 11 and 12 o'clock on May 5th, and said to him "that he had turned some horses in the pasture. He had seen my son the day before, and he told him it would be all right; yes, I told him that was all right"; that appellant said he had turned in four colts and one old horse and asked to have them looked after; that on the Sunday following, May 9th, he saw four colts in the pasture that he had not seen there before, one being freshly castrated; that Mr. Huck, the owner, came and took the colts away 20 days later. There was introduced in evidence a small memorandum book admitted to be the property of appellant and containing his signature. The book also contained this memorandum: "Put four horses in pasture May the 5 1909." There is a similarity of handwriting between the memorandum and the signature, though appellant positively denied writing the memorandum. The evidence shows without dispute that appellant lived at his sister's up to the latter part of April in the neighborhood of Warehime's place, and that he went to work for a Mr. Woollen on May 1st about three miles from the pasture where the owner of the horses last saw them. This evidence it seems to us was sufficient to support the verdict unless we can hold that the testimony of these witnesses as to appellant's whereabouts at the time stated was so conclusively refuted by the evidence of appellant and his witnesses tending to show that he was not then at those places that the minds of reasonable men could not differ upon that question. Appellant's witnesses did testify that he was at Woollen's place or near there working for him from May 2d to May 9th, and, if those witnesses are to be believed, their testimony accounts for his whereabouts during that entire week, and showed that he was not at the places testified to by the state's witnesses. There were a greater number of witnesses who so testified for appellant than there were for the state upon this subject. However, we see nothing lending greater weight to the testimony of defendant's witnesses than to that of the state's witnesses, save the mere fact that they were greater in number. The jury rendered their verdict after seeing and hearing all of the witnesses testify, and the learned

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

trial judge had the same opportunity, which no doubt influenced his decision upon appellant's challenge to the sufficiency of the evidence. The contentions of learned counsel for appellant that the evidence was insufficient to support the conviction presents only the question of conflict in and weight of evidence. This cannot be determined by us as a matter of law, but must be left to the jury, the tribunal instituted by law to pass upon such questions. *State v. Manville*, 8 Wash. 523, 36 Pac. 470; *State v. Murphy*, 15 Wash. 98, 45 Pac. 729; *State v. Elswood*, 15 Wash. 453, 46 Pac. 727; *State v. Maldonado*, 21 Wash. 653, 59 Pac. 489; *State v. Druxinman*, 34 Wash. 257, 75 Pac. 814; *State v. Hill*, 45 Wash. 694, 89 Pac. 160.

At the commencement of the trial, the prosecuting attorney asked permission to indorse upon the information the name of the witness Warehime and three others as witnesses for the state. This was permitted by the court over the objection of counsel for appellant, and he then stated: "Now, if the court please, since these names have been indorsed upon the information over our objection, we will either have to have a continuance or a subpoena for about four witnesses." The court thereupon permitted the issuing of subpoenas for five additional witnesses for the appellant, all of whom appeared in time to testify before the close of the trial. Under these circumstances, the action of the court was not prejudicial error. *State v. Carpenter*, 56 Wash. 670, 106 Pac. 206.

In support of appellant's motion for a new trial, there were filed in his behalf several affidavits. Their purpose apparently was to support the motion in so far as it rested upon the grounds of accident and surprise and newly discovered evidence. Some of the affidavits tended to show that the witness Warehime made statements since the trial in which he admitted that he testified falsely against appellant upon the trial. The making of these statements was denied by him in a counter affidavit. Some of the affidavits tended to show that the witness Warehime could be impeached by the testimony of witnesses who did not testify at the trial by showing his reputation as to truth and veracity. According to the statement of one of the attorneys for the appellant, some witnesses were subpoenaed and were present at the trial for the purpose of so impeaching the witness Warehime; but they do not appear to have testified upon that subject, and the reason thereof does not appear. Some of the affidavits tended to show that the witness Warehime was not at the place he said he was at the time testified to by him on or about the morning of May 5th; but at another place. This is denied by him in a counter affidavit, and, besides, the time is not fixed with such certainty that renders it impossible for him to have been at both places.

In an affidavit made by the younger Aldridge, he expresses the belief that he was mistaken as to seeing the appellant in Wilbur on May 4th and talking to him relative to the pasture, and that since refreshing his memory he believes it was on or about April 30th, and that he would so testify if again called upon the stand. Another affidavit is to the effect that the witness Warehime was intoxicated while on the witness stand. There is nothing else in the record so indicating. The learned trial judge saw and heard him testify, but there is nothing in the statement of facts showing that the trial judge certified to such fact. It, of course, was not a newly discovered fact. So it cannot be brought in to the record by affidavit, after trial, since it occurred, if at all, at the trial in the presence of the court. *State v. McGonigle*, 14 Wash. 594, 603, 45 Pac. 20. Other facts are stated in these affidavits, but they are of less importance than those above noticed. We are of the opinion that the court did not abuse its discretion in denying the motion for a new trial in so far as it was based upon these grounds.

Another ground of appellant's motion for a new trial was the alleged misconduct of the prosecuting attorney and his assistants. We are clearly of the opinion there was no such misconduct shown by the record in this regard as calls for the granting of a new trial. We deem it unnecessary to discuss this contention. We have carefully read all of the evidence, together with the affidavits in support of the motion for a new trial, and are unable to find any prejudicial error in the record. So far as appears thereby, appellant had a fair trial, and we cannot disturb the verdict and judgment.

The judgment is affirmed.

RUDKIN, C. J., and GOSE, MOUNT, and FULLERTON, JJ., concur.

(61 Wash. 559)

COFFER v. ERICKSON.

(Supreme Court of Washington. Jan. 7, 1911.)

1. MUNICIPAL CORPORATIONS (§ 706*)—INJURIES ON STREETS—CONTRIBUTORY NEGLIGENCE.

Whether a pedestrian on a bridge over a street, injured by a cinder from an engine drawing dirt cars, on the street, being thrown into his eye, was guilty of contributory negligence in entering on the bridge while engines were at work on the street held, under the evidence, for the jury.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1518; Dec. Dig. § 706.*]

2. MUNICIPAL CORPORATIONS (§, 705*)—REGRADING STREETS—CARE REQUIRED.

A contractor to regrade a street over which a bridge for pedestrians has been erected by him must, in operating engines on the street for the carriage of dirt cars, look out for the safety of pedestrians on the bridge and investigate and determine what character of cars and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

what manner of operation of cars will inure to the safety of the traveling public.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1515-1517; Dec. Dig. § 705.*]

3. MUNICIPAL CORPORATIONS (§ 706*)—REGRAVING STREETS—CARE REQUIRED.

Whether a contractor to regrade a street over which he had built a temporary bridge for pedestrians was guilty of negligence in the operation of engines on the street drawing dirt cars, so as to be liable for injuries sustained by a pedestrian receiving a cinder in his eye thrown by an engine, *held* under the evidence, for the jury.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518; Dec. Dig. § 706.*]

4. EVIDENCE (§ 132*)—RELEVANCY—SIMILAR FACTS.

Where, in an action for the loss of an eye alleged to have been caused by a cinder from an engine, defendant sought to show that the loss was caused by gonorrheal ophthalmia, and a physician who had treated the eye testified that he had treated it as caused by that disease, and another physician testified as to the history of the disease and its indications, the exclusion of a question as to whether the latter physician frequently met the disease in his experience was not erroneous.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 132.*]

5. TRIAL (§ 295*)—INSTRUCTIONS—MISLEADING INSTRUCTIONS.

Where, in an action for injuries to a pedestrian on a bridge over a street, caused by a cinder thrown into his eye by an engine on the street, the court charged that pedestrians had a right to cross on the bridge, but that in crossing they must act as a person of ordinary prudence, with knowledge and experience of such pedestrians, a charge that a pedestrian must not blindly and heedlessly rush in a place where danger is likely to be apprehended, and that if plaintiff met this requirement, he was not guilty of contributory negligence, but if he fell short thereof, he was guilty of negligence, was not erroneous on the issue of contributory negligence, for the entire charge, when taken together, required the pedestrian to exercise reasonable care.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 703-717; Dec. Dig. § 295.*]

6. APPEAL AND ERROR (§ 981*)—REVIEW—NEWLY DISCOVERED EVIDENCE—DISCRETION OF COURT.

The granting of a new trial on the ground of newly discovered evidence is largely within the discretion of the trial judge and his ruling will not be disturbed, unless the discretion has been abused to the prejudice of the party complaining.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3876; Dec. Dig. § 981.*]

7. NEW TRIAL (§ 102*)—GROUNDS—NEWLY DISCOVERED EVIDENCE.

Where a defendant obtained knowledge of the testimony of a witness for plaintiff early in the trial, and he was in a position to learn of the whereabouts of a third person referred to in the testimony, but he made no effort to do so, and he did not ask for a postponement of the case to enable him to procure the testimony of the third person on the ground of surprise, the court properly denied a new trial on the ground of newly discovered evidence, consisting of the testimony of the third person.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 210-214; Dec. Dig. § 102.*]

8. NEW TRIAL (§ 102*)—GROUNDS—NEWLY DISCOVERED EVIDENCE.

A party will not be permitted to submit his case on one set of facts and obtain, after verdict against him, another trial on another set of facts known to him at the time of his submission of the case.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 210-214; Dec. Dig. § 102.*]

Morris and Chadwick, JJ., dissenting.

Department 2. Appeal from Superior Court, King County; J. T. Ronald, Judge.

Action by J. W. Coffey against C. J. Erickson. From a judgment for plaintiff, defendant appeals. Affirmed.

Peters & Powell, for appellant. H. E. Foster, for respondent.

DUNBAR, J. The appellant Erickson was under a contract with the city of Seattle for the regrade of Fourth avenue from Yesler Way north to Pike street. Fourth avenue runs northerly and southerly, and is crossed by Columbia street running easterly and westerly. At the intersection of Columbia street and Fourth avenue, Fourth avenue had been cut down about 13 feet, and, in order to permit the going and coming of foot passengers upon Columbia street across Fourth avenue, the city had authorized the appellant to construct a wooden bridge, extending along the north side of Columbia street from the east side of Fourth avenue to the west side, spanning the entire Fourth avenue. The bridge was 68 feet long, the main part of it 6 feet wide, with extending floors 3 feet on each side, making the entire width of the bridge, so far as protection from anything below was concerned, about 12 feet. The appellant, at the time of this accident, which was in September, 1908, had laid down two tracks upon which he operated trains of dump cars drawn by small locomotive engines, to carry the dirt from the northern portion of the work southerly, and the east trains passed to and fro under this footbridge. The respondent was a timber cruiser and had lived in that neighborhood for about a year. On the 1st of September, 1908, while walking down Columbia street, he stepped upon this bridge and, while going across it, one of the appellant's engines carrying some empty dirt cars passed under the bridge and, according to respondent's complaint, puffed up or threw up on top of the bridge a cloud of cinders, one of which was thrown into respondent's eye, with the effect that, after a long treatment, the eye was lost; and this action is brought for damages for said loss.

The material allegation in the complaint, upon which the issues were tried, was in substance as follows: That while plaintiff was upon the overhead bridge and attempting to cross said Fourth avenue, the defendant, his agents and servants, wrongfully and without

right, had standing upon said public street and near said overhead bridge a work train propelled by a steam locomotive, which steam locomotive was not equipped so as to protect pedestrians and others from injuries by reason of its operation, the same not being equipped with what are known as spark arresters; and while plaintiff was upon said overhead bridge the defendant, his agents and servants, wrongfully and without right, suddenly and without notice or warning, started said work train forward, with great force and energy, and the same not then and there being equipped with appliances to prevent it from throwing particles and cinders, a particle, cinder, or other substance was, on account of the careless and negligent manner in which the locomotive was kept and operated and started, and on account of the lack of proper equipment in the way of arresters, thrown with great force and power from said locomotive into plaintiff's right eye, thereby and instantly causing the plaintiff great pain and suffering, and which cinder or particle so thrown in his eye embedded itself therein, and the same became so serious that, before the particle could be removed, it so damaged and injured plaintiff's eye that said eye became totally destroyed.

It was admitted by the appellant that he did not have the ordinary or technical spark arresters on the engines which he operated, but it was claimed that they had other devices which were equally effective. The effectiveness of these devices was a question which, under conflicting testimony, was submitted to the jury; its verdict shows that it was decided in favor of respondent's contention, and that question we will not further discuss. At the close of the respondent's testimony, motion for a nonsuit was made; also motion for an instructed verdict; and, upon the conclusion of the entire case, a demurrer to the evidence; the denial of all of which is alleged as error.

The main contention of the appellant is that the respondent had failed to show any negligence on the part of the appellant, and that he had shown by his own testimony contributory negligence. It is urged that it was contributory negligence for a man 40 years of age, a timber cruiser, who had lived for six years in the city of Seattle and for one year prior to the accident continuously within a block of where the accident occurred, and who had observed daily the manner of operating the trains, to step upon this bridge when he was cognizant of the fact that the engines were passing and were liable to pass under it. Several cases from this court are cited to sustain this contention, the first of which is *Woolf v. Washington Ry. & Nav. Co.*, 37 Wash. 491, 79 Pac. 997. In that case it was held that a traveler who drives a team upon a railroad crossing, at a point where for considerable distance he had an

unobstructed view of an approaching locomotive, is guilty of contributory negligence as a matter of law, where he drives on to the crossing either without looking, or looks and whips up his horses in an endeavor to cross ahead of the engine. The other cases cited—*Criss v. Seattle Electric Co.*, 38 Wash. 320, 80 Pac. 525; *Coats v. Seattle Electric Co.*, 39 Wash. 386, 81 Pac. 830; and *Davis v. Cœur d'Alene & S. R. Co.*, 47 Wash. 301, 91 Pac. 839—are all of the same character, and based on the doctrine announced in *Woolf v. Washington Ry. & Nav. Co.*, supra. But these cases can be readily distinguished from the case under consideration, for there it was a foregone conclusion that, if the parties injured drove or walked on to railroad tracks when cars were close to them, as shown by the testimony in those cases, there was no probability of their escaping instant death or serious damage. But in this case there is no such impending or apparent danger shown, for a person might walk over this footbridge many times and escape serious consequences. The appellant, in his argument to show that he was not guilty of negligence, says: "But even if there had been competent proof that there were no spark arresters on the defendant's engines or that the injury to plaintiff's eye resulted from a defect in such, still the injury and extent of it was an occurrence so unusual in human experience as not to constitute negligence on the part of the defendant"—citing cases to sustain this doctrine. Again, it is said: "When the act and injury are not known by common experience to be naturally and usually in sequence, and the injury does not, according to the ordinary course of events, follow from the act, then the act and the injury are not sufficiently connected to make the act the proximate cause of the injury." If this is true, it must necessarily follow that the peril was not sufficiently apparent to constitute negligence on the part of the party who was walking across the bridge. It must be borne in mind that this was a bridge built for the special use of foot passengers, and that the respondent had a right to walk and cross this bridge, in the absence of any apparent danger. So that the vital question in this case is, Do the circumstances under which these engines were operated, taking into consideration their construction with reference to preventing sparks from flying, show negligence on the part of the appellant? The same test of negligence could not be applied to the passenger as would be applied to the operator of the engines, for it was his duty to look out for the safety of foot travelers, and to investigate and determine what character of cars and what manner of operation of said cars would inure to the safety of the traveling public. But, as we have said, we think there was sufficient on this question of negligence to be passed to the consideration of the jury.

There was an attempt on the part of the appellant to prove that the cause of the loss of the eye was not attributable to a cinder from appellant's engine, but was caused by what is technically termed gonorrheal ophthalmia, the effect of a loathsome disease, and he introduced Dr. R. W. Perry, who was asked to describe this loathsome disease, and did so. He was then asked the question: "Do you frequently meet it in your experience in the practice of your profession?" This question was objected to as immaterial, the objection was sustained, and this is alleged as error by the appellant. The court said, "That would be competent testimony for you, if you can show any probability or likelihood, or if you are going to follow it up by showing that this man had gonorrhea, and that it could have come in contact with his eye in such manner as the doctor testifies infection could take place," but held, as we think properly, that it was immaterial under the circumstances proven. Dr. Burns, who had treated the eye, had testified that he had treated it as gonorrheal ophthalmia, and Dr. Perry was then allowed, after this objection was sustained, to go into the history of this disease and of its indications at great length, stating the distinguishing germ of the disease, which he described as the diplococcus of nesla, over the objection of the respondent. He was then asked, "If, upon a microscopic examination of a smear from the discharge, an oculist should discover the presence of this diplococcus, what would he be likely to assume as the cause of this pus discharge, as well as to surmise?" and answered that "if he found the diplococcus of gonorrhea or nesla, he might say definitely that was the cause of the trouble in his eye—of the discharge," and much more to the same effect. So that we think that the testimony of Dr. Burns was not restricted, and that the mere fact that this disease might have been frequently found in his experience in the practice of his profession as an oculist was not material, for it was conceded that it was a disease pertaining to the eye.

It is also contended that the court erred in instructing the jury, in relation to the alleged contributory negligence of respondent, as follows: "He must not blindly and heedlessly rush into a place where danger is likely to be apprehended. If plaintiff met this requirement, he cannot be charged with contributory negligence. If he fell short of this requirement, and if his negligence in this respect contributed to and was a proximate cause of his injury, then he cannot recover." Objection is made to the language "blindly and heedlessly rush into a place where danger is likely to be apprehended." This may not be the most fortunate expression that the court could have used, but no two judges express themselves exactly alike, and when the whole instruction in this respect is considered, we think that the

jury were not in any way misled. On this branch of the subject, the court said: "Pedestrians had a right to cross said overhead bridge, but the law requires that a pedestrian in crossing a street which is being improved, or wherein work is being carried on, must act as a person of ordinary prudence, care, and caution, with the knowledge and experience of such pedestrian, would act under similar circumstances. He must not blindly," etc. It will not be presumed that the jury seized on two or three words in an instruction and lost sight of the sense of the instruction as a whole, where it was as plainly stated as it was in the instruction in this case. The instructions throughout, both as to the duties and liabilities of the appellant and the corresponding care demanded of the respondent, are full and fair, and we are satisfied that the jury were in no way misled by them.

It is also assigned that the court erred in not granting the appellant a new trial on the ground of newly discovered evidence. The application for new trial was based on the affidavit of John J. Jamison, a clerk in the office of the attorneys for the appellant, who swears that, as such clerk, he had sole charge of the investigation of the facts constituting a defense, and of the securing of witnesses and the preparation of the trial for the appellant; that effort had been made to obtain the names of the nurses at the hospital at the time of respondent's sojourn there, which had failed; that the nurse, Anna Bonen, had testified that, in irrigating the eye of the respondent, a cinder, about a quarter of an inch long, had been washed therefrom into the receiving basin, and that this cinder had been discovered by, and examined by, Sister Crescent, who was the chief nurse; that the existence of Sister Crescent was not known to the appellant prior to the time of this testimony, and that immediate steps were taken to obtain the testimony of said Sister Crescent, who was found to be in Colfax, Wash.; that an affidavit had been obtained from her which, in effect, disputed the testimony of Miss Bonen in relation to the cinder, and that on account of this newly discovered evidence, a new trial should be granted. But this testimony was adduced early in the case. Counsel had notice on the 2d of February, by the testimony of the nurse, Miss Bonen, that Sister Crescent was present when the particle was washed from the eye into the basin, and that Sister Crescent picked up the particle and examined it, and afterwards lost it. It also appears from the testimony of Dr. Burns early in the case that, while he was attending the respondent at the hospital, he was advised that this substance had been washed from the eye. The granting of a new trial on the ground of newly discovered evidence is a question necessarily so largely in the discretion of the trial judge that it must appear with reasonable

certainly that such discretion has been abused to the prejudice of the appellant, before the appellate court will substitute its judgment for that of the presiding judge, who has observed the proceedings throughout the trial. In this case, the judge might reasonably have concluded that due diligence had not been exercised by appellant's attorneys. The attending physician, Dr. Burns, indicated by his testimony that he was at least friendly to the defense. A consultation with him would, no doubt, have disclosed who the nurses were who attended on respondent while in the hospital, and it would seem in a case of this kind that due diligence would have required the ascertainment of that fact. Nor did it seem to have been any secret, for it readily developed in the trial, by the testimony of the nurse, Miss Bonen, and Sister Arthur, that Sister Crescent was the chief nurse during respondent's stay at the hospital. These were circumstances which the court might reasonably take into consideration, in connection with the claim of the clerk that he had been unable to ascertain who the nurses were. In addition to this, the appellant was informed of this transaction and of the fact that Sister Crescent witnessed it, in the early stage of the trial, viz., on February 2d, and the trial was extended over February 4th; and, notwithstanding the fact that the affidavit sets forth that the town of Colfax is about 350 miles or more from the city of Seattle, and that it was utterly impossible to obtain an interview with, or the attendance of, Sister Crescent at said trial, no motion was made for a continuance and no suggestion of surprise. After having knowledge of the facts complained of, the appellant offered his testimony and, at the close thereof, formally rested his case. He should not be permitted to submit his case on one set of facts and, if a verdict is found against him, obtain another trial on another set of facts which were known to him at the time of such submission. Such has been the uniform holding of this court where no continuance was asked for. *Pincus v. P. S. Brewing Co.*, 18 Wash. 108, 50 Pac. 930; *Reeder v. Traders' Nat. Bank*, 28 Wash. 130, 68 Pac. 461; *Woods v. Globe Nav. Co.*, 40 Wash. 376, 82 Pac. 401.

Considering the whole case, we see no reason for disturbing the judgment. It is therefore affirmed.

RUDKIN, C. J., and CROW, J., concur.

MORRIS, J. I dissent. The evidence to my mind clearly establishes the contributory negligence of the respondent. He had lived within a block of the place where he claims to have received his injury for a year, crossing the bridge daily. He knew the engines discharged quantities of smoke

and cinders, while they were passing under the bridge. He noticed it frequently. He says the bridge "was literally covered there at times, I noticed," and that he never passed there without observing cinders being thrown out with great force. As he saw an engine going south, he hesitated because, he says, he did not want to get in the way of the smoke. Evidently he appreciated the probability of cinders being thrown upon him if he crossed over the engine. Then he proceeded on his way and saw the north-bound engine approaching the bridge "puffing up sparks." He does not hesitate this time, however, but walks upon the bridge directly over this engine and right into the cloud of smoke, cinders, and sparks he saw being ejected from its smokestack. He deliberately and without any necessity for so doing placed himself in a position where the cinders and sparks from the engine must strike him. To do so was to voluntarily risk any danger that might arise from such a position, and was contributory negligence. If the majority hold it was negligence for the engine to pass under the bridge puffing out cinders, how can we escape the conclusion that it was likewise negligent for the respondent to deliberately walk into the cinders? He cannot be heard to say that, while he knew sparks and cinders would be thrown up against and about him, he did not anticipate any serious danger. As we said in *Nordstrom v. Spokane & Inland Empire R. Co.*, 55 Wash. 521, 104 Pac. 809, 25 L. R. A. (N. S.) 364, that "is a plea of knowledge of the danger, but not of its consequences, a doctrine which the law does not recognize; * * * knowledge of danger is in law knowledge of the injurious results naturally and proximately flowing from that danger." I cannot escape the conclusion that this principle of law is applicable to the facts here disclosed, and that respondent's knowledge of the ejecting sparks and cinders being thrown with force upon and over the bridge, his voluntary walking into them with full knowledge of them, seeing them being so ejected, was a knowledge of the danger, and in law a "knowledge of the injurious results naturally and proximately flowing from that danger."

The appellant's motion for instructed verdict should have been granted.

CHADWICK, J. I concur.

(61 Wash. 578)

BAKER v. SEATTLE-TACOMA POWER CO.

(Supreme Court of Washington. Jan. 7, 1911.)

1. CORPORATIONS (§ 186*)—STOCKHOLDERS—DEALINGS WITH CORPORATION.

Majority stockholders of a corporation purchasing property greatly needed by the corporation when it had no money to make the

purchase, and, after a full disclosure of all the circumstances in connection with the transaction, selling the property to the corporation at its fair value, but making a large profit, are not within the rule requiring trustees of a corporation to act for the benefit of the corporation and not for their own benefit and to account to the corporation for profits received from the corporation's business, and the stockholders will not be required to account to the corporation for the profits of the transaction.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 695-701; Dec. Dig. § 186.*]

2. CORPORATIONS (§ 189*)—STOCKHOLDERS—DEALINGS WITH CORPORATION—ESTOPPEL TO DENY VALIDITY.

A minority stockholder, who, after the stockholders have voted to purchase property from majority stockholders at a profit to the latter, to which transaction the minority stockholder objected, signed a writing ratifying the proceedings taken, whereby it was made possible to place bonds of the corporation, with the proceeds of which the purchase was completed, is estopped from subsequently seeking to overthrow the purchase.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 715; Dec. Dig. § 189.*]

3. CORPORATIONS (§ 189*)—STOCKHOLDERS—ACTIONS BETWEEN STOCKHOLDERS AND CORPORATION—LACHES.

Where, a month after a sale by majority stockholders to the corporation, a minority stockholder ratified the transaction, an action by him two years later to set aside the sale and require the majority stockholders to account for their profits, which action is not brought to trial for another two years, shows laches.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 715; Dec. Dig. § 189.*]

4. CORPORATIONS (§ 189*)—STOCKHOLDERS—ACTIONS BETWEEN STOCKHOLDERS—COSTS.

Where an action by a minority stockholder for himself and other stockholders to require the majority stockholders to account for profits in a transaction with the corporation resulted in the voluntary payment by some of the defendants of over \$12,000 to the corporation, an award of \$750 to plaintiff as an attorney's fee is proper, though he recovered nothing in the action.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 189.*]

Chadwick, J., dissenting. Dunbar, J., dissenting in part.

Department 2. Appeal from Superior Court, King County; Mitchell Gilliam, Judge.

Action by Charles H. Baker against the Seattle-Tacoma Power Company. From the judgment, plaintiff appeals and defendant prosecutes a cross-appeal. Affirmed.

Roberts, Battle, Hulbert & Tennant, C. J. France, and E. N. Zoline, for appellant. Peters & Powell, for respondent.

MORRIS, J. In May, 1907, appellant commenced this action on behalf of himself and other stockholders of the respondent company. The theory of the action is that in April, 1905, N. H. Latimer and some 15 associates organized a syndicate, to acquire the stock and properties of two corporations named, the Mutual Light & Heat Company and the Diamond Ice & Storage Company;

that, at the time of this transaction, Mr. Latimer and all his associates save one were connected with the respondent company as stockholders and in various official capacities, owning and controlling the majority stock of the company; that this syndicate fraudulently combined and conspired to obtain control of the stock and property of the Mutual Light & Heat Company and the Diamond Ice & Storage Company, and to transfer the same to the respondent company, to its great loss and detriment and to the great financial profit of the syndicate, the fraudulent purpose and intent being consummated by the transfer of these properties to the respondent company in June, 1905, some 59 days after the purchase, at an estimated profit of \$50,000, which was divided among the syndicate pro rata with the amount contributed. The relief asked for originally was the setting aside of the transfer to the respondent company, and for the restitution of the purchase price, or for a recovery of the profits made by the syndicate, or those of its members who stood in a fiduciary relation to the company. The answer admits the organization of the syndicate and the purchase of the properties of the Mutual Light & Heat Company and the Diamond Ice & Storage Company, and the subsequent transfer and sale to the respondent company, denies any fraud or conspiracy to defraud, and affirmatively alleges that the transactions complained of were authorized at a regular meeting of the stockholders of the respondent company; that the appellant was present and voting at such meeting, and was opposed to the action of the majority; that at the time of such authorization the respondent company had under consideration the execution and delivery to the Northern Trust Company of Chicago of a mortgage or trust deed, to secure an issue of \$7,500,000 of its bonds; that it was the intention to then issue \$1,150,000 of such bonds and sell the same to N. W. Harris & Co., for the purpose of supplying the company with funds for its corporate uses, among which was the purchase of the stock and properties of the two corporations referred to; that the company was not willing to execute said mortgage, nor to issue said bonds, nor were the owners of the transferred properties willing to transfer the same to the company unless appellant would waive and withdraw his objection; that thereupon appellant did waive all objections to the transaction, and did signify his acquiescence in the same by executing, after a complete investigation and with full knowledge, the following waiver: "Seattle, Wash., July 17, 1905. Messrs. N. W. Harris & Co., and N. H. Latimer and his associates in what is known as the Diamond Ice & Storage Co., Syndicate—Gentlemen: While the purchase by the Seattle-Tacoma Power Company of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the properties of the Mutual Light & Heat Company and the nineteen hundred ninety-four (1904) shares of the capital stock of the Diamond Ice & Storage Company, as authorized and directed at the meetings of the stockholders of the Seattle-Tacoma Power Company and of the board of trustees of that corporation, held on June 15, 1905, and June 19, 1905, did not meet with my approval as a matter of business expediency, yet after a further and full investigation of all the facts, and in view of the figures submitted and explained to me by Mr. Latimer, and in order that the proposed purchase of certain first mortgage bonds of the said Seattle-Tacoma Power Company may be completed by Messrs. Harris & Co., and in order that the sale and transfer of the properties of the Mutual Light & Heat Company and the said shares of stock of the said Diamond Ice & Storage Company may be finally effected and completed free from any objection upon my part, and in order that the said properties and stock may be brought under the lien of the mortgage securing the said bonds, I do hereby ratify and confirm each and all of the proceedings taken and done at any and all of the said meetings of said board of trustees and of the stockholders of said Seattle-Tacoma Power Company in accordance with and as shown by the copies of the minutes hereto attached. Chas. H. Baker. Executed in presence of: Thomas B. Hardin."

The answer further set forth that, relying upon this waiver of all objections, the aforesaid mortgage was executed in August, 1905, covering the property acquired from the syndicate, and \$1,982,000 of bonds issued and sold thereunder. It is further alleged that, in June, 1906, the power company executed an additional or supplemental mortgage to the same trust company, to secure these bonds; that the property acquired by the power company from the syndicate was purchased in good faith—that is, was fully worth the amount paid—and that no objections were ever made after the purchase until appellant commenced his action, some two years after the transaction complained of. Appellant sought to overcome the effect of this waiver of his objections by pleading in his complaint, in evident anticipation of its value to respondent as a defense, that it was signed under duress, and that he did not withdraw or surrender his opposition to the alleged wrongful acts of respondent in bringing about the sale and transfer to the power company; and, evidently anticipating a charge of laches, he pleaded further that he delayed in bringing suit, hoping some favorable contingency would arise in which the matter might be satisfactorily adjusted. Upon the trial appellant waived any claim to rescind the sale, and confined his efforts to an attempt to obtain a restitution to the power company of the profits of the sale. These profits he alleged

were about \$50,000, while respondent admits the profits to be \$24,278.87.

The facts upon which there seem to be now no contention are these: The Seattle-Tacoma Power Company was, in 1905, engaged in supplying electricity to the cities of Seattle and Tacoma, and had been seeking to establish itself in Seattle as a retailer of such power. In this effort it found itself confronted with serious opposition, especially in the business section of the city where the most profitable business was to be found. This opposition was furnished by the Seattle Electric Company, and the Mutual Light & Power Company, each of which was owning and operating a steam-heating plant in connection with its electric lighting business. The Seattle Electric Company's heating franchise covered that portion of Seattle's business district south of Madison street; and the Mutual Light & Power Company and the Diamond Ice & Storage Company's franchise covered that portion north of Madison street. The Mutual Light & Power Company and the Diamond Ice & Storage Company were closely allied corporations, being controlled by a Mr. Crane, and were virtually operated as one company. The situation was therefore this: The Seattle-Tacoma Power Company could sell only light and power; the rival companies could sell heat, light, and power, and, in order to obtain the business, could and did make rates for light and power at comparatively low rates, while exacting a high rate for heat, which could be done because of no competition in the territory covered by the respective franchises. These low rates for light and power the power company could not meet and do business on a profitable basis. It therefore found itself in a precarious financial condition. It could not get business; it could not pay dividends; it could not even pay its taxes. At this juncture of affairs, it became known that the Mutual Light & Power Company and the Diamond Ice & Storage Company—the Crane properties—were for sale, and it was at once evident that, should these properties fall into the hands of the Seattle Electric Company, the power company would virtually have to go out of business so far as the big business of the city was concerned. It was therefore not only desirable, but almost necessary, that the Crane companies should be controlled by the power company. This situation was called to the attention of the trustees by the manager of the company, in a letter in which he showed how the power company was losing some \$60,000 a year by virtue of the situation, and how imperative it was that the Crane properties be acquired and the power company thus put in a situation where it could obtain business in the downtown section of the city. The power company, however, had no money to make this purchase, and it was then that Mr. Latimer, the president of the company, after

consultation with its other officials and local stockholders, organized this syndicate and eventually purchased the Crane properties, in order that such properties might be in friendly hands until such time as the power company was in a position to take them over. The purchase by the syndicate was in April, 1905, and on June 19, 1905, at a called meeting of the stockholders, after hearing the report of a committee previously appointed to investigate the Crane properties and report on their value, the purchase by the power company was authorized by the stockholders. It is apparent from what happened at this meeting that there was a full and complete disclosure of all the facts in relation to the matter; it was very fully discussed by a number of those present, and all seemed to have a full knowledge and understanding of the situation at the time the purchase was authorized. In addition to the other facts upon which the stockholders acted at this meeting of June 19th were three reports made in full detail by certified public accountants, showing the exact situation of the Crane properties, at the time of the taking of the option to purchase by the syndicate, some time prior to April, the situation in April at the time of the purchase by the syndicate, and the situation on June 19th, the day of the purchase by the power company. These reports covered the condition of the Crane properties for the years 1902, 1903, 1904, and 1905. The evidence shows, in addition to making known the price at which the syndicate purchased (\$320,000) and the price asked of the power company (\$349,600), a full statement was made of moneys expended by the syndicate in its control of the property, and the profits of the business during the period of its ownership. In fact, it is difficult, after reading the record, to imagine what additional knowledge could have been communicated to the stockholders in order for them to obtain a full and complete understanding of the situation. That they did so is evidenced best by their act. Appellant admits the wisdom of their act, by saying in his brief "the evidence is conclusive in this case upon the point that the properties of the Mutual Light & Heat Company were properties which it was almost necessary for the power company to acquire." It is equally conclusive to our mind, as found by the court below, that at the meeting of the stockholders of the power company on June 19th, held to consider the purchase of the Crane properties from the syndicate, "said meeting was fairly held, and that all the facts and circumstances in connection with said sale were fully and clearly disclosed to the stockholders of said Seattle-Tacoma Power Company; that it was fully known and understood by said stockholders at said meeting and prior to said sale who were the owners of the property, and from whom the same was being purchased and the amount of profit which

the sellers were making on such sale; that plaintiff, prior to the consummation of said sale and with full knowledge of all the facts and circumstances connected with the same, acquiesced in such sale and waived all objections thereto."

The contention of appellant is that the trustees of a corporation stand in a fiduciary relation to the corporation, and are to be regarded as its agents to transact its business for the benefit of its stockholders; that, so standing and so acting, all their acts must be for the benefit of the corporation, and not for their own benefit; and, if by their acts they receive any profit from the corporation's business, equity will regard such profit as the property of the corporation. As an abstract statement of a legal proposition, that such is the law will readily be admitted: but, like every other rule of law, it must be concreted with proper facts, before it will be announced as the law in any given case. No such facts are present in this record. There is nothing in the law to prevent trustees or other officers of a corporation, who may as individuals own certain property which it is necessary or advantageous for the corporation to acquire, from selling such property to the corporation at its fair value, and making a profit on the transaction, when such sale is made with a full disclosure on the one side and a full understanding on the other side of all the facts entering into or affecting the transaction. In so doing they are not within the rule contended for by appellant dealing with the property of the corporation and reserving to themselves the profits. They are dealing with their own property, which, if desired by the corporation, can be sold and purchased as may any other property derived from any other source.

Appellant in his argument urges the fact that members of the syndicate represented the majority of the stockholders, either in their own holdings or by virtue of proxies from other stockholders, and says, in making disclosures and in selling, they were disclosing to themselves what they already knew, and purchasing in one relation what they already owned in another. It does not alter the legal situation that the syndicate represented the majority of the stock either in person or by proxy. In voting their own stock, or that which they represented by proxy, they were within their legal rights. The proxy clothed them with full power to represent such portions of the stock, and binds the absent stockholder to the same extent as if so voted in person, in the absence of any fraud or exceeding of authority, as between him and his principal. *Synot v. Cumberland*, 117 Fed. 379, 54 C. C. A. 553. Accepting, as a further rule contended for by appellant, that, in cases of dealing between a stockholder of a corporation and the corporation itself, the burden is on the stockholder to show good faith and honesty in every feature of the transaction and to

such end the transaction will be carefully scrutinized by the courts, the respondent has fully sustained such burden in this instance, and the most exacting scrutiny discloses no evidence of actual or intentional fraud, or other circumstance that should be permitted to impair the validity of the transaction.

We are further of the opinion that appellant, by reason of his written waiver, the execution of which induced the purchase, the execution of the trust mortgage, and the issuance of bonds, is now estopped from seeking to overthrow such purchase. Neither can we, as pleaded by him, find any duress or other intimidating reason for his execution of such waiver. At the time of the purchase on June 19, 1905, he opposed the purchase. Doubtless he had reason satisfactory to himself for such opposition. One month later he says: "After a further and full investigation of all the facts, and in view of the figures submitted and explained," he withdraws his opposition and ratifies and confirms the entire transaction. He then waits two years before again expressing his attitude toward the transaction, when he returns to his first opinion and brings this action to set aside the sale and restore the profits. Then he waits another two years before he seeks a trial of his action. That such conduct is laches seems to us irrefutable. *Wright v. Tacoma Gas & Electric Light Co.*, 53 Wash. 262, 101 Pac. 865.

One other feature of the record requires a ruling. The court below found that, subsequent to the commencement of the action, N. W. Harris & Co. and Howard W. Baker, although not made parties by service, yet, because of the commencement of the action, paid into the power company the sum of \$12,195, and being of the opinion that the corporation had profited to that extent by reason of appellant's suit, it awarded him \$750, as an attorney's fee in this action. From this portion of the decree the power company brings a cross-appeal, contending that, inasmuch as the court found no equity in plaintiff's action, it was not justified in awarding him \$750 as an attorney's fee for bringing an unjustified suit; and further there is nothing to justify a holding that these payments were made because of this suit. We are referred by appellant to a number of cases holding that, where a stockholder brings an action for the benefit of the corporation, and recovers property of which it has been deprived, he is entitled to recover a reasonable attorney's fee. Two things occur in these cases which are not present here. The corporation had been wrongfully deprived of its property, and the suing stockholder had been successful in recovering it. The corporation in the case at bar has not been wrongfully deprived of its property; neither has any such property been recovered. Howard Baker paid back his share, it appears, because the amount was small, and he could

not afford to bother with it, regardless of the right or wrong of the matter, and have trouble with appellant, who is his brother. Harris & Co. thought they had a legal right to the money; but, inasmuch as they had made a profit on the bonds and were associated in various ways with the Bakers in the affairs of the Baker estate, they preferred to return the money rather than to have any question raised by appellant. It therefore appears that, while appellant has not been successful in his action in demonstrating that there is property belonging to the corporation that should be restored to it, he has by reason of his position in the matter caused the corporation to receive \$12,195 it would not otherwise have received. The bringing of this action has enriched the corporation that much. It does not seem equitable to us, although conceding the case is not within the rule generally applied, to permit the corporation to retain this money and appellant bear all the burden of its acquirement. It is probably true that, in most cases where counsel fees have been allowed in actions of this character, the payments have been involuntary. Here the payment was voluntary, but it was apparently induced by the commencement of the action, and we think the same rule should obtain.

The cross-appeal is therefore denied, and the judgment as appealed from is affirmed.

RUDKIN, C. J., and CROW, J., concur.

DUNBAR, J. I concur on the ground of estoppel alone.

CHADWICK, J. I cannot agree with my associates in their disposition of this case. The rule being that trustees of a corporation act in a fiduciary capacity and are to be held to the strictest accountability, a wrong to the corporate body should not go uncorrected because of equities or estoppels arising between individual stockholders. If plaintiff alone were concerned—that is, if the loss or gain were chargeable to him alone—it might be properly held that he was estopped to maintain this action. We may admit that appellant has by his conduct estopped himself, but in this class of cases it is not the right of some individual with which we are concerned, but the fundamental principles of the law; and the rule declared should be applicable in all cases where those in authority use their place and power to exploit a corporate body for their individual gain. This suit is maintained for the benefit of the corporation which has suffered a wrong which, by reason of the majority stock holdings of the manipulators of the deal, it was powerless to prevent. In *Morawetz on Private Corporations*, vol. 1 (2d Ed.) § 662, it is said: "The benefit of an action brought by a corporation necessarily results to all the shareholders equally, even where

a portion of them were parties to the wrong, or have, by acquiescence, forfeited their equitable claims to redress. And this result is not, as a rule, unfair. The only possible method of working out the rights of the parties in a case of this kind is to preserve the fiction of a separate corporate entity, and to enforce the collective and the individual rights and obligations of the shareholders separately. It is clear, therefore, that the acquiescence of a shareholder in a violation of the corporate rights, or even a participation in the wrong, would not deprive him of his interest in the cause of action belonging to the corporation as an entity. He would have a share in the benefits of a recovery, even although his personal liabilities should be thereby increased."

The record shows that the acquisition of the Mutual Light & Heat Company and the Diamond Ice Company, known as the Crane companies, was essential to the life of the power company. This was known to Mr. Latimer and his associates. They confess it, justifying the purchase of the competing companies in their own names by saying that the purchase was so made that the Crane companies might not fall into unfriendly hands. But the fact remains that they did not purchase it in their individual capacity, or at all, until they had a purchaser for the property at such figure as they might choose to put upon it. They controlled the stock of the buying as well as the selling corporations. They took no chances. As officers of the power company, they had a right to purchase the competing companies, of course, but only for the benefit of the power company; for equity will not allow them either to buy the competing companies which were admittedly in a position to destroy the power company, and thus take the work of destruction in their own hands in defiance of their duties as trustees, or, as they did in this case, turn the property over to the power company at a greatly increased price and to their personal profit. The transaction should be held to have been made for the benefit of their principal.

In *Simmons v. Vulcan Oil & Mining Company*, 61 Pa. 217, 100 Am. Dec. 630, the court quoted from *Lindley on Partnership*, as follows: "Judging from recent events and disclosures, nothing seems more common than for a person in getting up a company to obtain for the company property of which it is in want, and try and make the company pay him more than he gave for it. Such a transaction can never stand. There may undoubtedly be a valid sale to a company by persons engaged in getting it up; but once let it be shown that the alleged vendor obtained the property, when it was his duty to obtain it for the company, and it immediately follows that he cannot, without the fullest disclosure on his part, charge the company with more than he actually gave"—citing *Bank of London v. Turrell*, 5

Jur. N. S. 924, and *Grt. Luxembourg R. R. Co. v. Magney*, 25 Beav. 586.

In *Thompson on Corporations* (2d Ed.) § 1246, it is said of the duties owing a corporation by the directors that: "Well-settled rules forbid them acquiring for themselves the property which it is their duty to acquire for the corporation and which is necessary for its purposes. It is said that such dealing would be equally as objectionable as purchasing from the corporation land which it was their duty to sell on its behalf. 'In respect to this class of dealings, directors of corporations stand upon the same footing as ordinary trustees.' It is a familiar rule that a trustee is disqualified to act by the intervention of a personal interest in the performance of his duties as such trustee; and such trustee is not permitted to obtain title to property where he has any duty to perform which is inconsistent with the character of a purchaser on his own account. The rule was stated by the Supreme Court of Utah as follows: 'The president and board of directors of a corporation are trustees, and act in a fiduciary capacity for its stockholders, and while doing so are forbidden, in equity, to acquire any interest in a property hostile to the interests of the stockholders.' Officers acting as agents of a railroad corporation cannot be permitted, while acting as such, to buy lands ostensibly for their corporation and take conveyances to themselves for the purpose of reselling it to the corporation at an advance. Thus, the law will not permit directors of a corporation, formed for the purpose of constructing a railroad whose duty it is to acquire the right of way, to expend the funds of the corporation in making expensive improvements upon land necessary for the railroad, but which the corporation has not acquired the right to use, and at the same time to purchase the identical land in their individual right, and avail themselves of the title thus acquired to make extortionate demands upon the company for the use of such land. The rule as to the duty of directors in such cases has been stated thus: 'It is a breach of their fiduciary obligations which equity will not tolerate for such officers, in antagonism to the corporate interest, to oust the corporation from beneficial property rights which ought to be preserved to it by acquiring the property themselves. Derelictions of this kind are treated as a fraud on the corporation from which equity will raise a constructive trust in its favor.' On this principle, the officers of a corporation were not permitted to purchase lands on which the corporation had a lease. A director will not be permitted to act in hostility to the corporation and to acquire for his own benefit a lease of the premises occupied by such corporation or of premises necessary for its use. In such a case he will be treated as trustee of the lease so acquired by him."

In *Pepper v. Addicks*, 153 Fed., at page 405, the court, speaking to the same subject, says: "His liability rests upon the fundamental principle that one who occupies a position of trust and confidence—such as the president, or a director, of a corporation—shall never be permitted to abuse his official position by dealing with the corporate property for his private gain. If he so deals, by whatever tortuous devices, his acts are voidable if his trail can be followed, and he may be called upon to account for the profits that he has wrongfully made. If authority is needed for so plain a proposition, it may be found in *Wardell v. Railroad Co.*, 103 U. S. 651, 26 L. Ed. 509; *Fox v. Mackreth*, 1 Lead. Cas. Eq. (4th Am. Ed., Hare & Wallace's Notes) 237 et seq.; *McCants v. Bee*, 16 Am. Dec. 616, note; *Wilson v. Brookshire*, 9 L. R. A. 792, note; *Hindman v. O'Connor* [Ark.] 13 L. R. A. 490, note; 4 *Thompson, Corporations*, §§ 4672, 4674." In this case the promoter of the deal was the president of the corporation and also a director. He controlled 26,792 shares of stock. A majority of the directors of the corporation were interested in the syndicate and profited thereby. Members of the syndicate had control of 30,551 shares of the total, 35,000. It is because of situations like this that courts have intervened and frowned upon all attempts of favored stockholders and officers of corporations to enrich themselves at the expense of their companies.

Much has been said about a full disclosure of the facts. It is utterly immaterial and should in no way affect the issue. That the syndicate should make a full disclosure to the power company was a mere pretense to satisfy the law, for the men composing the syndicate were at the same time the majority stockholders of the power company. They were merely passing the property from their right hand to their left. They disclosed to themselves only what they already knew, and did what they would not have undertaken to do if they had not been in control with power to receive the property. When the same man buys and sells, what comfort to the minority stockholder or the corporate entity is there in finding that precedent to the transfer he made a full disclosure of the facts—to himself? The record in this case shows simply an artful deal in high finance, and the profit less a just return to the promoters of the scheme for the use of the money advanced; and such expenses or expenditures as were put out for the maintenance of the Crane companies should be covered back into the treasury of the power company. It should not be possible, for it is against the policy of the law, to defeat these just principles by bookkeeping methods which can at best cover the real transaction with a transparent veil.

(61 Wash. 574)

SIMONS v. WILSON.

(Supreme Court of Washington. Jan. 7, 1911.)

1. MUNICIPAL CORPORATIONS (§ 663*) — STREETS—INJURY TO TREES—RIGHT OF ACTION.

Rem. & Bal. Code, § 939, providing that whenever any person cuts or injures any tree, etc., on the street or highway in front of another's house, without lawful authority, the judgment in an action against the trespasser, if it be for plaintiff, shall be for treble the damages assessed, gives a right of action to a lot owner against one cutting trees on the street adjacent to his lot, irrespective of whether the fee to the street is in the municipality or in him.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1440; Dec. Dig. § 663.*]

2. MUNICIPAL CORPORATIONS (§ 663*) — STREETS—OWNERSHIP OF FEE.

The fee-simple estate of streets rests in the owner of abutting property and not in the municipality.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1438; Dec. Dig. § 663.*]

Department 2. Appeal from Superior Court, Spokane County; Wm. A. Huneke, Judge.

Action by Mildred Simons against John A. Wilson. From a judgment for plaintiff, defendant appeals. Affirmed.

O. C. Upton, for appellant. D. W. Henley, for respondent.

MORRIS, J. Respondent is the owner of lots in Cannon Hill addition to Spokane, which are unimproved and unoccupied. In the street abutting on the north of said lots and in the alley at the rear, a number of pine trees were growing. Between the north lot line and the south curb line of the street, the trees were from six to twelve inches in diameter. Those in the alley were somewhat smaller. In March, 1909, appellant, without any authority or permission so to do, and for no apparent purpose so far as we can ascertain from the record, cut these trees down and carried them away. Thereupon respondent commenced this action under Rem. & Bal. Code, § 939, providing: "Whenever any person shall cut down, girdle, or otherwise injure or carry off any tree, timber, or shrub on the land of another person, or on the street or highway in front of any person's house, village, town or city lot, or cultivated ground, or on the common or public grounds of any village, town, or city, or on the street or highway in front thereof without lawful authority, in an action by such person, village, town or city against the person committing such trespass or any of them, if judgment be given for the plaintiff, it shall be given for treble the amount of damages claimed or assessed therefor." Upon the trial, the court found for respondent, and assessed the damage at the sum of \$100, which, as provided in the statute, was tre-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

bled, and judgment given for \$300, from which defendant appeals.

The contention of appellant here is that respondent has no right of action, not being the owner of the land upon which the trees were growing when cut, and that the section quoted simply provides the measure of damage in cases where the right of action exists independent of the statute. He also suggests that the lot owner has no title to any portion of the abutting street. It seems clear that, irrespective of whether the fee to the streets is in the municipality or the abutting lot owners, a right of action is given by this statute to the lot owner against any person cutting down the trees growing on the street adjacent to such lot. The statute can have no meaning, unless it be a recognition of the right of action for trespass resting in either the municipality or lot owner. It could avail appellant nothing if the right of action was not conferred by the statute, since such right undoubtedly exists irrespective of the statute. This court has uniformly held, whenever the question has been suggested, that the fee to the street rests in the owner of the abutting property. *Schwede v. Hemrich Bros. Brewing Co.*, 29 Wash. 24, 69 Pac. 362; *Seattle v. Seattle Electric Co.*, 48 Wash. 599, 94 Pac. 194; *In re Third Ave.*, Seattle, 54 Wash. 460, 103 Pac. 807; *Gifford v. Horton*, 54 Wash. 595, 103 Pac. 988. Under such a holding, an undoubted right of action rested in the respondent. So that it is immaterial whether the right exists by virtue of the fee to the street resting in respondent, or simply by reason of the statute irrespective of the fee.

Such being the case, the judgment is affirmed.

RUDKIN, C. J., and CHADWICK, CROW, and DUNBAR, JJ., concur.

(61 Wash. 546)

PICKLE v. LINCOLN COUNTY STATE BANK et al.

(Supreme Court of Washington. Jan. 7, 1911.)

1. FRAUD (§ 50*)—EVIDENCE.

Fraud is never presumed, but must be established by clear and convincing evidence, and this is especially true where the integrity of written instruments is attacked.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. §§ 46, 47; Dec. Dig. § 50.*]

2. BILLS AND NOTES (§ 520*)—FRAUD—EVIDENCE.

In an action for an accounting, evidence held insufficient to show that defendants induced plaintiff to sign a note and mortgage for \$11,000 upon the representation that they were drawn for \$1,100.

[Ed. Note.—For other cases, see *Bills and Notes*, Dec. Dig. § 520.*]

Department 1. Appeal from Superior Court, Lincoln County; Henry L. Kennan, Judge.

Bill for an accounting by J. R. Pickle against the Lincoln County State Bank and others. From a judgment for defendants, plaintiff appeals. Affirmed.

John M. Gleason and Joseph F. Morton, for appellant. A. J. Hibschan and Sessions & Warren, for respondents.

PER CURIAM. This is a bill in equity for an accounting. There was a judgment for the defendants. The plaintiff has appealed.

The complaint alleges, in substance, that the respondents induced the appellant to execute a note and mortgage for \$11,000 upon the representation that they were drawn for \$1,100, and that the latter amount represented the entire indebtedness of the appellant to the respondent. It appears from the evidence that there was a settlement between the parties on June 6, 1908. At that time the appellant and his wife executed their note and mortgage for \$11,093. The appellant and his wife and the respondents on the same day signed a statement that they had settled and adjusted all their prior business transactions, that there was due from the appellant and wife \$11,093, and that they would execute their note and mortgage for that amount. Some time after the settlement was completed, a representative of the appellant demanded a further statement from the respondents, and they said to him that they would furnish it if the appellant and wife would produce their bank books and checks, and that, if appellant and wife desired, they would have the bank books examined and an account made by an expert accountant. This offer was not accepted. At a later date the books of the bank were examined by an attorney for appellant, and he reported to appellant and wife that, if there was any discrepancy in the accounts, it was in their favor. One of the respondents while being cross-examined several times stated that there was a record of the matters which made up the \$11,093, and that with very little delay he could produce it. But appellant insisted upon his stating the transactions without the aid of the books. The witness finally said: "I should think, if you wished to know, I could get it for you in a minute." He, however, did give a statement from memory which showed that on the day of the settlement the appellant and wife were owing a number of notes and an overdraft, which, including a judgment against them and paid by the respondents, aggregated about \$11,000. At the close of the case the court said: "I am of the opinion that Mr. Pickle's testimony is utterly unworthy of belief, and that there has been an utter failure to show any fraud in that settlement, and that the defendants are entitled

to judgment." It appears from the testimony of the appellant and wife that they knew that a much larger amount than \$1,100 was due at the date of the settlement. Moreover, they knew that the respondents paid for them on that date in satisfaction of a judgment and an attorney's fee the sum of \$2,250. As the learned trial court aptly said, they knew that, if the note and mortgage were drawn for \$1,100, there was a mistake in their favor, and common honesty demanded that they should have had it corrected. Fraud is never presumed, but must be established by clear and convincing evidence. This is especially true where a party assails the integrity of written instruments. The trial court saw the witnesses, observed their manner while testifying, and arrived at the conclusion that the appellant failed to make a case which warranted an accounting. A careful reading of the evidence has failed to convince us that he was in error.

The judgment is affirmed.

(61 Wash. 547)

THOMPSON-SPENCER CO. v. THOMPSON
et al.

(Supreme Court of Washington. Jan. 7, 1911.)

1. PLEADING (§ 406*)—OBJECTIONS—WAIVER.

Omission of a suing domestic corporation to allege and prove payment of its annual license fee, as required by Rem. & Bal. Code, § 3715, was waived by defendants' failure to raise the question below by demurrer or answer.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 406.*]

2. PLEADING (§ 406*)—OBJECTIONS—PAYMENT OF LICENSE—INSUFFICIENT OBJECTION.

Motion to dismiss plaintiff corporation's action on the ground that its proof does not show a right to recover is insufficient to question plaintiff's omission to allege and prove payment of its annual license fee, as required by Rem. & Bal. Code, § 3715.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 406.*]

Department 1. Appeal from Superior Court, Stevens County; E. H. Sullivan, Judge.

Action by Thompson-Spencer Company against O. A. Thompson and others. Judgment for plaintiff, and defendants appeal. Affirmed.

O. C. Moore and Martin & Wilson, for appellants. Hamblen & Gilbert and Danson & Williams, for respondent.

MOUNT, J. This is the second appeal in this case. When it was here before, the judgment was reversed and the cause remanded for further proceedings. 49 Wash. 170, 94 Pac. 935. The facts are fully stated in the report of the former appeal, and need not be restated here. We there held that the facts proven were sufficient to afford relief to plaintiff in the action. Thereafter the cause

was remanded, a new trial was had, and the trial court found, in substance, that the land in question was the property of the plaintiff; that the appellant Martin took a quitclaim deed thereto from Thompson, with notice and knowledge that Thompson had no interest in the land, and without any consideration except an antecedent debt past due. A decree was thereupon entered, removing the cloud by reason of the quitclaim deed from Thompson to Martin. The defendants have appealed from that decree, and argue that the trial court should have dismissed the action because the plaintiff is a domestic corporation, and the complaint did not allege and the proof did not show that the corporation had paid its annual license fee, under section 3715, Rem. & Bal. Code.

The record shows that the action was begun in the year 1906, and was completely at issue prior to the passage of that statute. In *Rothchild v. Mahoney*, 51 Wash. 633, 99 Pac. 1031, we held that this objection must be taken either by demurrer or answer, and a failure to do so waived the question. The appellants in this case, at the close of plaintiff's evidence, moved the court to dismiss the action, because "the evidence introduced does not show a right of recovery." But the ground now urged was not specifically mentioned. We think the appellants should have stated this ground, so that the fact could have been supplied if the respondent could do so. The question, not having been raised, was waived.

The other questions argued are questions of fact. The evidence is amply sufficient to show that Mr. Thompson had sold the land to plaintiff, and received pay therefor, and had no equitable interest in the land when he deeded it to Martin, and that the latter was advised and knew of all the facts. The evidence is sufficient to show, also, that no present consideration passed between Thompson and Martin, and Martin therefore was not an innocent purchaser for value.

The judgment was right, and must therefore be affirmed.

GOSE, PARKER, FULLERTON, and CHADWICK, JJ., concur.

(61 Wash. 576)

PACIFIC COAST PIPE CO. v. HEDICAN
et al.

(Supreme Court of Washington. Jan. 7, 1911.)

QUIETING TITLE (§ 7*)—CLOUD ON TITLE—NATURE OF INSTRUMENT.

Under Rem. & Bal. Code, § 809, authorizing the determination of conflicting claims to real estate, an action to remove a cloud on title lies where the person in possession is incommoded by the assertion of some claim adverse to him, and an owner in possession may sue for the removal of a cloud on his title, based on a mortgage executed by a stranger to the title.

[Ed. Note.—For other cases, see Quietening Title, Cent. Dig. §§ 14-33; Dec. Dig. § 7.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Department 2. Appeal from Superior Court, Spokane County; J. D. Hinkle, Judge.

Action by the Pacific Coast Pipe Company against Daniel Hedican and others. From a judgment of dismissal, rendered on sustaining a demurrer to the complaint, plaintiff appeals. Reversed and remanded.

P. C. Shine, for appellant. McWilliams & McWilliams, for respondents.

MORRIS, J. The only question involved in this appeal is whether or not the complaint, the action being one to quiet title, states a cause of action. The court below, having sustained a demurrer, dismissed the action upon appellant's refusal to further plead, and from such judgment this appeal is taken.

The complaint recites that the plaintiff is now the owner and for a long time has been in possession of the land; that defendants claim and assert an interest therein adverse to the plaintiff, which claim is without right, neither of the defendants having any right, title, interest, or estate in the land; that Thomas Hedican, one of the defendants, for the purpose of defrauding the plaintiff and acting under a power of attorney from Daniel Hedican executed for the purpose of defrauding plaintiff, did on March 12, 1909, enter into a conspiracy with defendant Bolton, who is the alleged husband of the divorced wife of Daniel Hedican, who is wrongfully supposed to be deceased, to and did execute a mortgage upon the land to said Bolton, without any consideration, which said mortgage was placed of record and purports upon its face to be a lien upon the land; that, under the belief that Daniel Hedican was dead, an administrator has been appointed for his estate, which said administrator and the wife of Daniel Hedican claim an interest in the land because of said wrongful alleged death. The ground upon which the demurrer was sustained, as we gather from the briefs, is that the complaint did not show any such interest in the property as to require the intervention of a court of equity, and, even if such interest be shown, the alleged cloud is not of such a substantial nature as to justify an action to remove it. The argument being that the mortgage is shown to have been executed by a stranger to the title, and that the complaint alleging that plaintiff is now the owner of the property, it does not appear that it was the owner or had any interest in the property when the mortgage was given. Nor does it appear that Daniel Hedican was not the owner at the time of the giving of the mortgage. It may be admitted that many states hold that, in order to constitute a cloud upon title, the alleged offending instrument must upon its face confer some

right or interest in the land, and that it could not show such interest if executed by a stranger to the title. Such, however, is not the rule in this state; actions of this character being permitted, even though the claim be shown to be absolutely invalid, upon the theory that Rem. & Bal. Code, § 809, has enlarged equity jurisdiction in cases of this character, and under this section the action may now be brought by the person in possession "for the purpose of stopping the mouth of a person who has asserted or who is asserting a claim to the plaintiff's property. It is not aimed at a particular piece of evidence, but at the pretensions of the individual," and "it is sufficient that the party in possession is incommoded or damaged by the assertion of some claim or interest in the property adverse to him." *McGuinness v. Hargiss*, 56 Wash. 162, 105 Pac. 233, and cases there cited. Under the above rule, this complaint stated a cause of action, and it was error for the court to sustain the demurrer and enter a judgment of dismissal.

The judgment is reversed and the cause remanded for further proceedings.

RUDKIN, C. J., and CHADWICK and DUNBAR, JJ., concur.

(61 Wash. 569)

JORDAN v. WELCH et al.

(Supreme Court of Washington. Jan. 7, 1911.)

1. RAILROADS (§ 113*)—RIGHT OF WAY DEEDS—WAIVER OF DAMAGES.

A railway right of way deed waiving claims for damages through the location, construction, and operation of the road waives such damages only as naturally flow from the ordinary method of construction and operation, and not specific acts of negligence not necessary or usual, and hence does not defeat the grantor's claim against the constructing contractor for negligently setting a fire, for negligent blasting, and for cutting trees and fences.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 361; Dec. Dig. § 113.*]

2. ASSIGNMENTS (§ 24*)—ASSIGNABILITY OF CLAIM.

A claim against a railway contractor for negligently permitting a fire to escape to adjoining land is assignable as being one which survives to claimant's personal representative.

[Ed. Note.—For other cases, see *Assignments*, Cent. Dig. § 42; Dec. Dig. § 24.*]

3. RAILROADS (§ 453*)—FIRES SET BY CONTRACTOR—NEGLIGENCE.

In an action against railway contractors for negligently setting a fire on a right of way and permitting it to escape to the plaintiff's lands, it was unnecessary to prove any defect in the engine, that it was negligently operated, or that the contractors were negligent in permitting combustible material to accumulate on the right of way.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1657; Dec. Dig. § 453.*]

4. RAILROADS (§ 453*)—FIRES—DUTY OF CONTRACTORS.

Where the soil and vegetation on a railway right of way are dry and easily ignited, a railway contractor must take precaution against

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

communication of fire to the right of way and its spread to adjoining lands.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1659; Dec. Dig. § 453.*]

Department 2. Appeal from Superior Court, Spokane County; Wm. A. Huneke, Judge.

Action by E. S. Jordan against Patrick Welch and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Robertson & Miller and Harry Rosenhaupt, for appellants. Charles P. Lund, for respondent.

MORRIS, J. Respondent brought this action to recover damages for injuries to property occasioned by a fire, alleged to have been started by appellants and by them permitted to escape to respondent's lands. Appellants are railroad contractors, and were engaged in constructing the right of way of the Spokane, Portland & Seattle Railway Company through respondent's lands, near Cheney. This right of way had been purchased by the railway company, and appellants were engaged in making a deep cut through what had formerly been a meadow. The loose material blasted into the cut was being elevated by a steam shovel into a skip attached to a derrick, the beam of which swung the skip around and deposited the material upon the right of way. The engine operating this derrick was placed on the bank of the cut, and is alleged to have been so operated as to emit and discharge large quantities of sparks, cinders, and live coals upon the right of way, which, igniting a fire, was permitted to burn until it had been communicated to respondent's adjoining meadow. The negligence complained of was in discharging the fire upon the right of way in the dry grass and combustible material, and in not preventing its escape on to respondent's land.

Seven causes of action were set forth: (1) The destruction of the meadow including as a special item a road leading from the farm to Cheney; (2) the value of the use of teams in seeking to control the fire; (3) damage to four horses burned in the fire; (4) damages for cutting trees and fences; (5) damages caused by rocks thrown by the blasting through the roof of respondent's barn; (6) damages for loss of time to respondent and his employes in seeking shelter from the frequent blasts; and (7) an assigned claim of damage to the lands of John Taylor burned in the same fire. The jury returned a separate verdict upon each cause of action, aggregating \$2,636, and defendants appeal. A number of errors are assigned, but they will all be disposed of in so far as they merit attention in the discussion of three.

The right of way deed from respondent to the railway company contained a waiver of all damage sustained by reason of the loca-

tion, construction, and operation of the road. Appellants sought to use this waiver as a defense. The court, however, refused to so regard it. We see no error in so holding. The waiver could not be broader than its terms, and would only cover such damage or injury as would naturally flow from the ordinary and proper method of construction and operation. Such a waiver would not destroy any right of action growing not out of the ordinary happening of events in the construction and operation of the road, but based upon specific acts of carelessness and negligence not necessary nor usual in the construction and operation of the road. *McMinn v. Pittsburg M. & Y. Ry. Co.*, 147 Pa. 5, 23 Atl. 325.

The second contention is that the Taylor claim for damages was not assignable, as it rested in tort. The rule governing assignments of causes of action was early determined in this state in *Slauson v. Schwabacher Bros.*, 4 Wash. 783, 31 Pac. 329, 31 Am. St. Rep. 948, where it was held, following the New York rule as established in *Zabriskie v. Smith*, 13 N. Y. 322, 64 Am. Dec. 551, and *Byxble v. Wood*, 24 N. Y. 607, that the true test of whether or not an action was assignable was whether or not it survived, using this language: "We think it may be fairly said that, by a great preponderance of authority, mere personal torts which die with the party, and do not survive to personal representatives, are not capable of passing by assignment, and, conversely, that a cause of action which does survive to the personal representative can be enforced in the name of the assignee." It would hardly be contended that the cause of action for damage to the Taylor lands did not survive. It was therefore a proper assignment, and it was not error to so hold. In addition to the *Slauson* Case we held in *Weed v. Foster*, 109 Pac. 123, that an assignment of a recovery or part of a recovery in tort was an enforceable contract.

The next and main contention is that appellants cannot be liable in the absence of proof that the fire was caused by their negligence, assenting there is no proof that the engine was defective in any manner, or that it was negligently operated, or that the appellants were negligent in permitting combustible material to accumulate upon the right of way. The charge of negligence was discharging the live coals upon the dry grass of the right of way, and in not preventing the fire from escaping from the right of way to respondent's lands. This negligence in no way involved any defect in the engine, or any negligent manner of operation, except as the jury might have held that discharging live coals upon the right of way under the circumstances was "negligent operation." The engine might have been in the best possible condition, and yet have been so used as to discharge the fire, and as there was evidence to justify the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes 112 P.—42

jury in holding that the fire originated from the engine, such evidence would sustain the charge of negligence made. Thompson on Negligence, § 2277, says: "The circumstances may be such that the mere act of setting the fire will involve such obvious danger to adjoining property as affords of itself evidence of negligence." The season was dry. The fire was in August. The right of way and the respondent's meadow were dry and easily ignited. The soil itself burned easily, and, when once ignited, would burn below the surface until moisture was reached. Under such circumstances, it was the duty of appellants to take precaution against the communicating of any fire to the right of way, or its spread to adjoining lands. The engine may have been perfect in all its parts, the engineer may have been the best obtainable, and the operation of the engine mechanically correct; yet, if under such circumstances as here detailed appellants permitted sparks or live coals to ignite the combustible material upon the right of way and thence to communicate itself to respondent's meadow, they must answer for the damage.

The case nearest in point cited in the briefs is *Louisville, New Albany & Chicago R. Co. v. Nitsche*, 126 Ind. 229, 26 N. E. 51, 9 L. R. A. 750, 22 Am. St. Rep. 582, where it was held that the railroad company was liable for negligently suffering a fire upon its right of way to escape and injure adjacent peat or turf lands, where, on account of the dry season and the combustible character of the material, it was reasonably certain that the fire would escape through the peat into the adjoining lands, and that it was no defense that the railroad company was lawfully using the fire upon its own right of way, saying: "A lawful act may be done in such a mode or under such circumstances as to make it wrongful, and, where fire is used in an improper manner or under circumstances such as inexcusably imperil surrounding or adjacent property, the person so using it is a wrongdoer." Such is a statutory rule in this state, under Rem. & Bal. Code, § 5141: "If any person shall for any lawful purpose kindle a fire upon his own land, he shall do it at such time and in such manner and shall take such care of it to prevent it from spreading and doing damage to other persons' property, as a prudent and careful man would do, and, if he fail so to do, he shall be liable in an action to any person suffering damage to the full amount of such damage." While this statute has no special controlling force here, as this action is not within its terms, it is indicative of the declared policy of this state in requiring care and caution in handling and controlling such a destructive agency.

Finding no error, the judgment is affirmed.

RUDKIN, C. J., and CROW and DUNBAR, JJ., concur.

(61 Wash. 493)

In re CITY OF EVERETT.

AUSTIN et al. v. CITY OF EVERETT.

(Supreme Court of Washington. Jan. 5, 1911.)

MUNICIPAL CORPORATIONS (§ 472*)—ACQUISITION OF LAND FOR STREETS—ASSESSMENT OF BENEFITS—VALIDITY.

Where, in a condemnation proceeding by a city for streets, the court admitted on the record that he openly declined in advance to appoint as commissioners to assess benefits any one who would not adopt a plan by which unplatted property should be assessed more than platted property, irrespective of its relation to the streets or to the benefits derived therefrom, arbitrarily assuming that, because the property was unplatted, the benefit was greater than the benefit to platted property, so that the assessment should be proportionately greater, on the theory that the taking of land for streets was a benefit to unplatted property, since, to get the most out of the property, it was necessary to plat it, the assessment of benefits was invalid for want of the impartial exercise of the judgment of the commissioners and a confirmation of the assessment by an unbiased judge, to both of which the property owners were entitled.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 472.*]

Department 2. Appeal from Superior Court, Snohomish County; W. W. Black, Judge.

Petition by the City of Everett for the establishment and extension of streets in the city. From an order confirming the assessment of benefits and damages, A. D. Austin and others, owners of property affected, appeal. Reversed and remanded.

Coleman & Fogarty and Todd, Wilson & Thorgrimson, for appellants. Benj. W. Sherwood, for respondent.

PER CURIAM. This is an appeal by A. D. Austin and six other owners of property assessed to pay for the extension of Highland and other streets in the city of Everett, from the judgment confirming the assessment roll. Condemnation proceedings were duly had and judgments entered, fixing the amounts to be paid for the property taken and damaged. Thereupon the court appointed one set of commissioners to make up the assessment rolls on the five streets involved in the condemnation proceedings. The five rolls were prepared and a consolidated hearing had thereon, the assessment rolls being confirmed as to four of the streets and modified by charging up \$485 against the general fund in the case of the other street. The facts being the same in each of the five proceedings, and the legal controversy being the same, the cases were consolidated below, and are so treated here.

The errors upon which appellants rely for a reversal are that their property was not assessed according to benefits, and is charged with more than its proportionate share of the cost of the improvement. From an examination of the record, it appears that the commissioners adopted a plan by which they assessed unplatted property at about

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

10 times as much as platted property, irrespective of its relation to the streets, or to the benefits derived therefrom, arbitrarily assuming that, because the property was unplatted, the benefit was greatly in excess of the platted property, and the assessment should therefore be proportionately greater. This resulted in one case of an assessment of \$3 upon one lot, while the unplatted property directly across the street for the same area is assessed 16 times as much. In other cases the difference is \$1.50 a front foot upon platted property upon one side of the street, while upon the other side the assessment is about one-eleventh as much. Another discrimination shows an assessment of \$2 a front foot on unplatted lands, while lands immediately north thereof, and practically in the same relation to the street, are assessed at only 28 cents a front foot.

The reasons for this discrimination, we think, will be found in the following portion of the record upon the hearing below: "Cross-examination by Mr. Sherwood: Q. Mr. Adamson, in giving your opinions on these various assessments in these various districts, you have not taken into consideration at all the fact that these property owners that you claim—who, in your opinion were overassessed—you have not taken into consideration the fact that they were allowed very large awards for the property condemned and taken as part of these proceedings? Mr. Thorgrimson: I object, for the reason it is absolutely immaterial. The Court: * * * I so announced then that if I could do it, I wanted to offset the benefits right there. I said, if I could do it; I asked the law of the question, and counsel convinced me, I believe, that I could do it. I believe Mr. McKee was there and asked if he didn't think the land was worth more after it was platted than it was before, and he said he thought it was, and I took that as pretty good evidence because it agreed with me; and I announced then that if I could do it, I would so declare, and counsel said, then, it would be the duty of the commissioners to take that into consideration, and I did not instruct these commissioners at all, but I did— Mr. Coleman: Mr. Anderson was present at the time? The Court: I have no doubt he was. I meant that the word should be conveyed to the commissioners, because I had seen, in the Colby avenue district and several other districts, what I thought were wrongs done, and I didn't propose to sit up here and see it done while I was judge. So I did take this method of substantially telling the commissioners, although they were not appointed. I meant that they should know about it; that this court was not going to see men, who were really benefited by the opening up of a street, hold up a whole community and gain that much more than they ought to; and I didn't like the allowance of great, big damages, and I tried to get out of it. I would have

allowed a good deal less. Brother Fogarty didn't agree with me at all, because he was interested in that land and I know he shook his head pretty vigorously, as his habit is; and still I have to, without reference to who they are. I always shut my eyes to who they are when I come to deciding these questions. I felt it was not the right thing to do; so I think, right now, the commissioners ought to take that into consideration in awarding benefits; ought to take into consideration the fact that these people are getting pay for something that, ordinarily, they ought not to get pay for. Mr. Coleman: Don't your honor think that you are going pretty far to say that you wouldn't stand for more than 80 per cent. in this matter? The Court: I don't know but what, if the whole matter came up together, the fixing of damages and the benefits, I would say that the man who was forced to dedicate his street was benefited for the full amount of the land taken, because of the fact that every practical real estate man who has any acreage, if he wants to get the most out of it, he plats it into lots and blocks, and he feels that he is getting back more by giving away the street than by keeping it. If I put the question the other way, What would you do with your land to get the most out of it? Why, surely, I would dedicate it and plat it with streets and alleys; and so I think that is what every sensible man would do with town property. I say this much now, because I want counsel to know where the court is drifting in this particular case. I gave it out—I talked to the city attorney privately—and I said to him, 'When you recommend commissioners to this court, while I know men differ about this, I have seen so much of what I think injustice to the public done that if they follow out that old idea, I will not reappoint them. And I might—if I have power, I will—set aside the whole assessment and appoint men that will come more nearly doing what I thought was just.' So I told—I will let the record show that—I told the city attorney that in recommending men, I wanted him to take that into consideration, and that I wanted to let him and the commissioners know that that was my idea. I had seen injustice done and I thought about it and it worried me, and I didn't propose to let it be done any more; so I laid down the general rule, which I intended to influence the commissioners in doing what I think they have done in this case. Mr. Sherwood: As I understand it, then, you overrule the objection? Mr. Thorgrimson: I would like to be heard on that a little further before your honor passes on that. (Argument.) The Court: I am willing to let the record show that I tried to influence the commissioners to that extent, because, as counsel knows very well, when I gave the awards I said—they said—'You cannot consider the benefits,' and counsel on

both sides agreed to it, and still I wanted to see if I couldn't do it. Mr. Coleman: That was a question under the statute. The Court: Then they convinced me that they were right, but I was stretching out my arm just as far as I could then; and if I had had my way about it, I would have said to Mr. Coleman and Fogarty and some of the other people there, 'You are benefited more than you are damaged, and I won't allow you anything.' That is probably what I would have done, if I had any authority; but I didn't have that authority, and I figured out that that could be taken care of just in this way, that the commissioners appointed to assess the benefits ought to take that into consideration, that they are getting paid for the land, that the taking away from them was a benefit to them, rather than a damage, and that they ought to take that into consideration; that was the only fair way that could result. Now, I am willing to let the record clearly show that, because, if I am wrong, the Supreme Court can say so. I admit I endeavored to influence the commissioners to the extent that I talked to the city attorney about it, and I said if these commissioners kept on doing the way they have been doing in other cases, I will not appoint them and I will set aside the whole assessment roll, and I will appoint new commissioners that will more nearly carry out the ideas of the court. I would have been a little more indignant about some cases, where I have sustained an assessment; and I furthermore told them if they went onto these side streets where improvements went and levied very large assessments, that I would set that aside. I had in mind Colby avenue, where I thought a wrong was done a lot of people under the guise of law, and I didn't propose to do it nor have it done, as far as I was concerned. That is the fact, and I want the record— Mr. Coleman: The city attorney told me that you wouldn't stand for more than 80 per cent. The Court: I don't think I got down to percentage, but I told him that that should be considered, and if they didn't say that they considered that, I would probably set the whole matter aside and appoint new commissioners. I told the city attorney that, and I announced to all the litigants in court here before that if I could do it, I wouldn't allow these people very large damages, and Mr. Coleman shook his head very vigorously; thought I was entirely wrong. But the court did influence, I think, the commissioners. The commissioners had gone before on the theory, 'Well, we will divide this up all up and down the street.' Here is a man who has platted his land and dedicated his land to the public and got nothing for it, and the man adjoining him that couldn't sell his land at all, unless he did plat it and did dedicate the street, he would make the other man pay him damages, because he was

being benefited; and I didn't think it was fair, didn't think it was just, and didn't think it was right, and I wanted to stop that practice, and I figured the only way I could was by the kind of men I got in as commissioners, and whether they would consider the matter or not, and I did that, although in the particular case in which I did it, I had some pretty close friends whom I knew were interested directly; but that is the way I believe, and that is what I did, and I did it in the interest of honesty, as I look at it, and square dealing, and if I am wrong, I am wrong, and the record may show just exactly what I did do. I will overrule the objection. Mr. Thorgrimson: Your honor overrules the objection on the ground that it is material, in making these assessments, as to what the different parties whose land was assessed received as awards for the land taken? The Court: Well, probably not, stated in that form; but the question of benefits is whether they had any street there before or not, and whether a street is given them in front of their own property that they would have to give anyhow, if they were going to sell the property. It is in another form; I think the objection should be overruled. Objectors except."

We think it is apparent, without giving other reason for our opinion, that the court endeavored to, and did, influence the commissioners in fixing their assessments. Each property owner is entitled to the fair and impartial individual judgment of the commissioners as to the benefits received by his property from the improvement in question, and when he desires to test their assessment in court he is likewise entitled to a fair and impartial hearing before an unbiased court. It is manifest these appellants had neither. Assessment according to benefits is largely a matter of opinion, and while we have often refused to disturb assessments where there was a conflict in the testimony as to the character and extent of the benefits, and have held the assessment roll as handed in by the commissioners and confirmed by the court was conclusive in the absence of fraud or apparent mistake, we have likewise held it will not be so regarded when it appears to have been arbitrarily made; such an assessment being a manifest abuse of the discretion vested in the commissioners. In *re Westlake Avenue*, 40 Wash. 144, 82 Pac. 279.

In the case of *In re City of Seattle*, 55 Wash. 519, 104 Pac. 799, we said no assessment would be disturbed, unless the evidence was so clearly predominating as to indicate that the trial court had lost sight of its judicial discretion in determining its judgment. The remarks of the trial court as above quoted would seem to plainly indicate his mind was not in that equal poise to carefully and considerably weigh the matter before him, and exercise a judicial discretion in arriving at his conclusion.

The order of confirmation is vacated, and the assessment rolls set aside. The cause is remanded, with instructions to appoint new commissioners, and prepare new rolls.

(61 Wash. 434)

CITY OF TACOMA v. BOUTELLE

(Supreme Court of Washington. Jan. 4, 1911.)

1. STREET RAILROADS (§ 70*)—REGULATIONS AS TO SERVICE—ORDINANCES—REASONABLENESS.

A municipal ordinance regulating the frequency of street car service, enacted under the general power reserved in the ordinance granting a street railway franchise, is valid, provided it is reasonable, to be determined by considering whether the regulation has been carried to the point where it has become confiscatory.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 147½-149; Dec. Dig. § 70.*]

2. STREET RAILROADS (§ 70*)—REGULATING SERVICE—ORDINANCES—REASONABLENESS.

The question of such reasonableness is one of fact, and the burden of proving unreasonableness is on the party asserting it.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 147½-149; Dec. Dig. § 70.*]

3. STREET RAILROADS (§ 70*)—ORDINANCES—REASONABLENESS.

The question of such reasonableness is a legislative one for the council of the city, subject to review by the court.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 147½-149; Dec. Dig. § 70.*]

4. CONSTITUTIONAL LAW (§ 126*)—IMPAIRING OBLIGATION OF CONTRACTS—STREET RAILWAY FRANCHISE.

A street railway franchise which reserves to the city the right to require the cars to make "sufficient" round trips each day authorizes the city to adopt an ordinance prescribing the frequency of cars, as against the objection that it impairs the obligation of a contract evidenced by the franchise.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 366-369; Dec. Dig. § 126.*]

5. CONSTITUTIONAL LAW (§ 126*)—IMPAIRING OBLIGATION OF CONTRACTS—STREET RAILWAY FRANCHISE.

A street railway franchise reserving to the city the right to regulate the speed of cars, and stipulating that it may require cars to be run two round trips each day, fixes the minimum street car service, and does not prevent the city from requiring more frequent service; and an ordinance prescribing a five-minute service is not invalid, as impairing the obligation of a contract evidenced by the franchise.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 147½-149; Dec. Dig. § 126.*]

6. CONSTITUTIONAL LAW (§ 126*)—IMPAIRING OBLIGATION OF CONTRACTS—STREET RAILWAY FRANCHISE.

A street railway franchise stipulating that the city may adopt ordinances necessary for the protection of the interests of the city and to carry out the provisions of the franchise reserves to the city power to regulate the frequency of street car service; and an ordinance prescribing the frequency of service is not in-

valid, as impairing the obligation of a contract as evidenced by the franchise.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 147½-149; Dec. Dig. § 126.*]

7. MUNICIPAL CORPORATIONS (§§ 595, 596, 597, 598*)—POLICE POWER.

The police power of a city includes the power to preserve the peace, security, health, morals, and general welfare of the city.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1321-1326; Dec. Dig. §§ 595, 596, 597, 598.*]

8. STREET RAILROADS (§ 70*)—REGULATING CAR SERVICE—POLICE POWER.

The police power reserved to a city in a street railway franchise stipulating that the city may adopt ordinances necessary for the protection of the interests of the city vests in the city the power to determine the frequency of street car service, having in mind the general welfare of the traveling public, and the health and safety of the citizens.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 147½-149; Dec. Dig. § 70.*]

9. MUNICIPAL CORPORATIONS (§ 688*)—POLICE POWER—RIGHT TO SURRENDER.

A city may not, by granting a street railway franchise, divest itself of its governmental police power, the exercise of which is necessary for the public welfare and safety.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1465; Dec. Dig. § 688.*]

10. STREET RAILROADS (§ 70*)—POLICE POWER—REGULATION OF STREET CAR SERVICE.

Under Const. art. 11, § 11, authorizing any city to make local, police, and sanitary regulations, and Rem. & Bal. Code, § 7507, subds. 9, 36, authorizing any city to regulate the operation of street railroads within its limits, and to provide for the punishment of all practices dangerous to the public safety, a city empowered by its charter to regulate the operation of street railroads within its limits may adopt an ordinance requiring a five-minute street car service between designated hours of each day.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 147½-149; Dec. Dig. § 70.*]

11. STREET RAILROADS (§ 70*)—ORDINANCES—VALIDITY—REASONABLENESS.

The superintendent of a street railway company in a city in charge of the operation of the system may not urge that an ordinance providing for a five-minute street car service during specified hours of each day, and imposing a fine not exceeding \$100 for a violation, is oppressive, when applied to him.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 147½-149; Dec. Dig. § 70.*]

Rudkin, C. J., and Chadwick, J., dissenting.

Department 2. Appeal from Superior Court, Pierce County; C. M. Easterday, Judge.

F. A. Boutelle was convicted of violating an ordinance of the City of Tacoma, and he appeals. Affirmed.

B. S. Grosscup and W. C. Morrow, for appellant. T. L. Stiles, F. R. Baker, and F. M. Carnahan, for respondent.

MORRIS, J. Appellant, the superintendent in charge of the running and operation of the street car system of the city of Ta-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

coma, belonging to the Tacoma Railway & Power Company, was convicted of a violation of Ordinance No. 3883 of said city, and prosecutes this appeal. Said ordinance is as follows:

"An Ordinance Regulating the Operation of Certain Street Cars in the City of Tacoma by the Tacoma Railway & Power Company, and Providing a Penalty for the Violation Thereof.

"Whereas, the street railway service rendered by the Tacoma Railway & Power Company over its line from South Ninth street to Union avenue, South Tacoma, along 'C' street, Jefferson avenue, Pacific avenue, Delin street, 'G' street, South 38th street, 'M' street, South Fifty-Sixth street, Railroad street and South Fifty-Fourth street is inadequate, in that a sufficient number of cars are not operated to accommodate the number of passengers:

"Now, therefore, be it ordained by the city of Tacoma:

"Section 1. That from and after October 5th, 1909, the Tacoma Railway & Power Company, its managers, servants and agents, be required to operate at least one passenger street car each way every ten minutes between South Ninth street and Union avenue (South Tacoma), between the hours of 5:30 o'clock a. m., and 12:30 o'clock a. m., following, and one car each way every five minutes between the hours of 6 o'clock and 8 o'clock a. m., and between the hours of 5 o'clock and 7:30 o'clock p. m., over its line along South 'C' street, Jefferson avenue, Pacific avenue, Delin street, 'G' street, South Thirty-Eighth street, 'M' street, South Fifty-Sixth street, Railroad street and South Fifty-Fourth street.

"Sec. 2. Every person violating the provisions of this ordinance shall, on conviction thereof, be fined in any sum not exceeding one hundred dollars.

"Sec. 3. Each day's failure of said Tacoma Railway & Power Company to comply with the provisions of this ordinance shall constitute a separate offense."

Appellant urges two grounds of error: (1) The ordinance is unconstitutional, and violates the guaranties of both the state and federal Constitution, in that it seeks to impair the obligations of a contract, and to deprive the street railway company of its property without due process of law; and (2) the city was without authority to pass the ordinance, it was not authorized under the specific provisions of the city charter conferring power over street railways, nor can it be sustained as a valid exercise of the police power. The street railway line referred to in the ordinance, from South Ninth street to Union avenue, South Tacoma, is known as the South Tacoma line, and is operated over portions of 10 different streets. The right to operate over these different streets was conferred by three different ordinances, passed at as many different times, and containing

different provisions and conditions affecting the franchise therein granted. The tracks on Jefferson avenue, Pacific avenue, and C street are operated under franchise granted by Ordinance No. 152 as amended by Ordinance No. 238. This ordinance was passed in 1887, and section 5, as amended in 1889, provides as follows: "The city council may regulate the speed for running the cars and may require the cars to be run on or over the lines of said railways sufficient round trips each day, and no cars shall be allowed at any time to stop and remain upon any intersection of streets for a longer period than three minutes, and any violation of the provisions of this section shall subject the owners of said railways to a fine of not less than five or more than twenty-five dollars for every offense upon conviction thereof before any court having jurisdiction." The tracks on Delin and G streets are operated under Ordinance No. 188, passed in 1888, section 6 of which is as follows: "The city council may regulate the speed for running the cars and may require cars to be run two round trips each day on all completed portions of said railway after one mile thereof is completed. No car shall be allowed at any time to stop or remain upon any street intersection. The fare upon said railway over the whole, or any part thereof, shall not exceed five cents for each passenger, including ordinary hand baggage. Any violation of the provisions of this section shall subject the owners of said railway to a fine of not less than five or more than twenty-five dollars for every offense, upon conviction thereof before any court having jurisdiction." The franchise for the remaining streets was granted by Ordinance No. 860, passed in 1893, section 12 of which is as follows: "Nothing in this ordinance shall be so construed as to prevent the city council of the city of Tacoma from passing all ordinances and resolutions necessary for the protection of the interests of the city, and to carry out the spirit and provisions of this franchise or ordinance, or from granting to any other street railway the right to cross the tracks of the line or lines of this railway at the same grade."

Appellant's contention is that Ordinance No. 3883, in providing for a five-minute service over the entire South Tacoma line, is an attempted impairment of the obligation of the contracts between the city and the railway company, as established by the various franchises; that, as to the first group of streets, the city is not authorized by the franchise to determine what shall be "sufficient round trips each day," as provided for in section 5, supra; that such clause does not confer upon the council the right to determine arbitrarily the number of round trips each day that will be sufficient, but that the determination of that matter presents a judicial, rather than a legislative, question; that, as to the second group of streets, the provision of section 6, supra, investing the city

council with power to "require cars to be run two round trips each day," is a manifest expression of intention on the part of the council; that it reserved no authority to require a more frequent service than two round trips a day; that the third group of streets controlled by the provisions of section 12, *supra*, have no reservation whatever as to any authority in the council to require any specific degree of service, or to determine what should be a sufficient service, there being no expressed intention in section 12 to reserve any such power; that inasmuch as, in the ordinances governing the first two groups of streets, a specific authority had been declared, the omission of such declaration in the ordinance governing the third group was intentional and deliberate. The suggestion first advanced in support of these contentions is that a franchise grant to a public service corporation is in the nature of a contract, equally binding upon both the city and the railway company, and that an attempt of the city to abrogate any of the rights conferred by the passage of a subsequent ordinance is an impairment of a contract obligation, and hence void. So far as being a correct statement of the law, the above position may be admitted, but in our opinion it has no place in the determination of the question before us.

A good illustration of the correct application of the above rule of law may be found in *Minneapolis v. Minn. St. Ry. Co.*, 215 U. S. 417, 30 Sup. Ct. 118, 54 L. Ed. 259, cited by appellant as supporting his application of the rule. In 1875 the city of Minneapolis gave a franchise to the railway company for 50 years, by the terms of which the company had the right to charge a fare not exceeding five cents on any continuous line not exceeding three miles in length. In 1907 the city council enacted an ordinance requiring the railway company to sell 6 tickets for 25 cents, which ordinance was held to be void as impairing the obligation of a contract. The right to charge a five-cent fare was a specific grant of the franchise, and the city could no more violate such a specific grant than it could abrogate the franchise itself. As was said by Chadwick, J., in *Peterson v. Tacoma Ry. & Power Co.*, 111 Pac. 338, in reviewing this same case: "The right to charge the fare provided in the franchise was of the essence of the contract, and that it could not be abridged by the city." We have confronting us in the present case no attempt on the part of the city to change or destroy by Ordinance No. 3883 any specific or implied right vested in the railway company under any previous ordinances; but rather an enactment under a general power expressly reserved in each of the original ordinances.

The fact that the provisions of Ordinance No. 3883 are more specific than the expression of the general power reserved in the initiating ordinances does not destroy the

specific enactment, but leaves for determination the question whether such specific requirement is reasonable. If so, it will be sustained; if not, it will be held invalid. *Elliot on Railroads*, 1624. And "the question of reasonableness usually resolves itself into this: Is the regulation carried to a point where it becomes prohibition, destruction, or confiscation?" *Freund on Police Power*, 61. Reasonableness in this connection is a question of fact, and will be presumed; the burden of proof being upon those asserting unreasonableness of which there was no evidence in this case. In *People v. Detroit Citizens' St. Ry. Co.*, 116 Mich. 132, 74 N. W. 520, an ordinance was passed in 1897 requiring the railway company to maintain a six-minute service on certain streets between prescribed hours under a franchise granted the railway company in 1862. It was provided that cars should be run as often as public convenience required, but not oftener than once in 20 minutes. Another provision of the franchise reserved the right to the city to make such further regulations as may be deemed necessary to protect the safety, welfare, and accommodation of the public. This franchise was amended in 1879, extending its life and providing that cars on all lines subject to the ordinance should be operated as public convenience required. The railway company contended, when it was sought to enforce the six-minute service, as appellant here contends, that the city had no power to pass such an ordinance, and that the franchise constituted an inviolable contract, under which they could only be compelled to run cars every 20 minutes. In passing upon this contention, the court referred to the fact that Detroit, in 1862, was a city of about 50,000 people. Its residents all lived within a comparatively short distance of the business center, and it was probably believed that the time fixed for the running of the cars would fully answer the convenience and demands of the people. It was then held that in view of the increased population of the city, with the consequent demands for a quicker and more convenient street railway service, together with the provisions of the amendment of 1879, the ordinance was valid, and a reasonable determination of the power vested in the common council. A like argument might well be used in referring to the city of Tacoma in 1887 and 1888, the years of the passage of the first two ordinances, one of which provided that the city council might require the cars to be run "sufficient round trips each day," and the other "two round trips each day." Sufficient for what? Manifestly not the convenience of the railway company, but the convenience and demands for reasonable transportation on the part of the residents of the city whose inhabitants at that time looked forward to its becoming a great city before the life of the granted franchise had expired, and, as it increased in population, so

would there be an increased demand for an improved street railway service, recognized by the city in reserving to itself, as it did in the first franchise, the right to require "sufficient round trips each day" to accommodate the necessities of its residents and their demands for a proper public service. Nor is this a question for judicial determination, as contended by appellant, but what would be "sufficient round trips each day" is purely a legislative question to be determined and solved by the common council of the city, subject to a review by the courts upon the question of the authority and reasonableness of its act. So the provision of the second ordinance, requiring cars to run two round trips a day, is not, as contended for by appellant, the expression of an intention to not require more trips. It is nothing more than an expression of the minimum service regarded by the city as being sufficient for the demands of the then city in the territory covered by the franchise. As to the third provision found in section 12 of Ordinance 860, appellant contends it to be simply a declaration of a reservation of the police power. If it is such a declaration, then such a reservation, if needful, would be ample to invest the city with full power to pass ordinance No. 3883, as we shall argue more fully hereafter.

Referring again to the rule of "reasonableness," as determinative of the effect of subsequent requirements upon franchise regulation, a good case may be found in *Trenton Horse R. Co. v. Trenton*, 53 N. J. Law, 132, 20 Atl. 1076, 11 L. R. A. 410. The charter of the city of Trenton conferred general power to pass ordinances necessary and proper for the good government, order, and protection of persons and property; also power to prescribe the manner in which corporations should exercise any granted privilege in the use of the streets. Under these grants, the city based its right to pass an ordinance requiring horse railways to have an agent, in addition to the driver on each car. The ordinance being attacked for lack of power, the court held that neither of the above enumerated powers added anything to the right of the city to exercise the police power, and the only question to be considered was the reasonableness of the ordinance, and, if reasonable, no special delegation of power was required to vindicate it; and added: "In concluding whether the ordinance under consideration is a reasonable precaution in favor of the public safety and order, we must regard it in the light of the following conditions, which surround the question: First. A rule of construction to be applied is that, when an ordinance is passed upon a matter clearly within a general power, the presumption is in favor of its reasonableness. The judicial power to declare it void can only be exerted when from the inherent character of the ordinance, or from evidence taken showing its operation, it is demonstrated to

be unreasonable." See, also, *Mayor, etc., v. Dry Dock E. B. & B. R. Co.*, 133 N. Y. 104, 30 N. E. 563, 28 Am. St. Rep. 609; *Van Hook v. Selma*, 70 Ala. 361, 45 Am. Rep. 85; *North Jersey St. Ry. Co. v. Jersey City*, 75 N. J. Law, 349, 67 Atl. 1072. In the present case there was no attempt to show Ordinance No. 3883 was unreasonable. Nor is there in its inherent character anything which would move the court to hold it unreasonable as a matter of law, and thus declare it void. We therefore hold upon the first point reserved by appellant that the ordinance in question is not an attempt to impair the obligations of a contract, and therefore void.

Much of the second assignment of error is involved in what has already been said. We will, however, discuss it more in detail. All courts concede the impossibility of adopting fixed rules by which to test the validity of laws passed under the police power. It covers a wide range of subjects, but is especially occupied with whatever affects the peace, security, health, morals, and general welfare of a community. While originally it was used as a rule to indicate the protective function of the government, its development of late years has been in the direction of the function of the state that cares for the general welfare. *Social Progress and the Police Power*, 36 Am. Law Review, 681. As was said by Chadwick, J., in *Bowes v. Aberdeen*, 109 Pac. 369: "Its exercise in proper cases marks the growth and development of the law rather than, as some assert, a tyrannical assertion of governmental powers denied by our written constitution." In its broadest acceptance it means the general power of the state to preserve and promote the public welfare, even at the expense of private rights. *Karasek v. Peier*, 22 Wash. 419, 61 Pac. 33, 50 L. R. A. 345. That it, when generally reserved, vests ample power in the common council of a city, having in mind the general welfare of the traveling public, and the health and safety of the citizen, endangered by crowded and heavily loaded cars, to determine by ordinance the frequency with which cars should be run upon the public streets, is to our mind demonstrated both upon principle and by authority. In *Detroit v. Detroit Citizens' St. Ry. Co.*, 184 U. S. 368, 22 Sup. Ct. 410, 46 L. Ed. 592, the court held that a general reservation in a franchise to make such regulations as may from time to time be deemed necessary to protect the interest, safety, welfare, or accommodation of the city and public, while not sufficient to permit the city to pass an ordinance changing the rate of fare, was ample in regard to all matters incident to the operation of the road such as "in the interest of public travel, the frequency with which cars should be run for the public convenience." Such a reservation is not as broad as that contained in Ordinance No. 152, *supra*; nor is it in effect any broader than the reservations contained in Ordinances Nos. 188 and 860. In *Lawton v.*

Steele, 152 U. S. 133, 14 Sup. Ct. 499, 38 L. Ed. 385, the court says the police power is universally conceded to include everything essential to the public safety, health, and morals, and includes "the regulation of railroads and other means of public conveyance." Joyce on Franchises thus states the same rule, in section 387: "A municipality under its right to make reasonable regulations concerning the use of its streets by a street railroad company may limit the speed of its cars, or the length of time of service or of running of cars on certain streets." We believe it to be equally well settled that it was not within the power of the city, in any franchise it may have conferred upon the railway company, to divest itself of its governmental police power, the exercise of which is necessary for the public welfare and the preservation of the public safety. Elliott on Railroads, § 1062; Joyce on Franchises, § 386; Abbott on Municipal Corporations, § 854; Beer Company v. Massachusetts, 97 U. S. 25, 33, 24 L. Ed. 989; St. Louis & San F. Ry. Co. v. Mathews, 165 U. S. 1, 23, 17 Sup. Ct. 243, 41 L. Ed. 611. "The power is continuing and no grant that can be made legally can destroy it. Therefore the municipal corporation in granting franchises for the use of its streets may not divest itself of the authority of control and regulation. It is true under our constitutional system that neither vested rights can be destroyed, nor the obligation of a contract impaired. But public necessity may legally limit or control these fundamental rights only, however, in the reasonable exercise of the sovereign police power. The police power to regulate comprehends all necessary and convenient regulations designed to protect life and limb or to promote the comfort of the public in the use of the streets and thoroughfares. Not only does such power exist, but the duty to exercise it is imposed as a solemn obligation upon the municipal authorities." McQuillan, Mun. Ord. § 473; Petz et al. v. Detroit, 95 Mich. 169, 54 N. W. 644.

Maintaining, then, that the city of Tacoma had reserved to itself ample police power to pass Ordinance No. 3883, the next inquiry naturally is, Has the city the power to use this reserved power? The general police power conferred upon municipal corporations by the Constitution is found in article 11, § 11: "Any county, city, town or township may make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with general law." The general powers delegated by the state to cities of the first class are enumerated in section 7507, Rem. & Bal., among them: "(9) To authorize or prohibit the locating and constructing of any railroad or street railroad in any street, alley or public place in such city and to prescribe the terms and conditions upon which any such railroad or street railroad shall be located or constructed; to provide for the alteration, change of

grade, or removal thereof; to regulate the moving and operation of railroad and street railroad trains, cars, and locomotives within the corporate limits of such city, and to provide by ordinance for the protection of all persons and property against injury in the use of such railroad or street railroads." Under subdivision 36 of the same section is granted the right to provide for the punishment of all practices dangerous to public safety, and to make regulations necessary for the preservation of public health, peace, and good order, and to provide for the punishment of all persons violating any of the ordinances. These provisions of the Constitution and statute would seem to be a sufficient conferring of police power upon the municipality by the state. The charter of Tacoma, passed under these general powers, contains, in section 52, subd. 9, the assertion of its authority "to regulate the moving and operation of railroad and street railroad trains, cars and locomotives within the corporate limits, and to provide for the protection of persons and property against injury in the use of such railroads and street railroads"; while, under subdivision 36, it asserts its power to pass penal ordinances, in the language of subdivision 36, supra. These constitutional, statutory, and charter provisions show a sufficient conferring of power upon the municipality by the state, and the assertion on the part of the municipality to use all such power conferred. The police power being ample, then, to sustain Ordinance No. 3883, and the exercise of this power having been conferred upon the city, and the city having exercised it as conferred, appellant's second objection, that the ordinance is not justified and cannot be vindicated as a valid exercise of the police power, must also fail.

Appellant, in connection with his second assignment of error, makes another assertion which we will notice, contending that the ordinance is void because it is oppressive and arbitrary in declaring, "every person violating the provisions of this ordinance shall be fined;" and in support of this contention cites Town of Oxanna v. Allen, 90 Ala. 468, 8 South. 79, Townsend v. Circleville, 78 Ohio St. 122, 84 N. E. 792, 16 L. R. A. (N. S.) 914, and Ex parte Young, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932. A review of those cases will, we think, show they are based upon reasoning which cannot obtain here. In the Oxanna Case the superintendent of a street railway company was convicted of a violation of an ordinance providing that it should be unlawful for any street railway company to permit its roadbed or tracks to remain so high above the surface of the street as to discommode and seriously interfere with public travel, and declaring that the president, superintendent, or other officer of such railway company violating the foregoing provision should be fined. Held, that the ordinance was unreasonable

and oppressive in so far as it concerned the superintendent, as it made him quasi criminally responsible for the failure of the company to expend money in putting its track in suitable repair; that it was the duty of the company to appropriate money to keep its roadbed in repair. The superintendent had no power to make them, nor could he be expected to use his own money for such purpose. He could not be held responsible for a dereliction of duty on the part of the company. In the case before us, the charge is failure to maintain a schedule provided for in the ordinance. It was charged in the complaint, admitted in the answer, and the court expressly found, that appellant was "in charge of the running and operation of the street car system of the city of Tacoma"; hence, he was clothed with the power denied the superintendent in the Oxanna Case, and the reasoning of the court has no application. In fact, it was not attempted to be shown that appellant had no such power. In the Townsend Case the ordinance required an interurban railway to stop its cars at all cross-streets and street intersections. The conductor of one of the cars was arrested and fined for failing so to stop. Held, no power in the municipality to pass such an ordinance under a power granted "to regulate speed of interurban cars within the corporation," or a second provision providing for the control of the streets. The reasoning of the court is best given in its own language: "The street railway is what its name signifies—a railway on a street—to facilitate its use as a way for persons to pass from one point to another in the city or through the city, but, with the advent of electricity as a motive power, the street railway was extended to the suburbs, and, as a result of development in its use, it has been found practicable to operate cars for long distances; so that now we have the interurban railway extending from city to city over the streets and upon or along the highways. * * * If every city and village through which such a railway passes may require its cars to be stopped at every street intersection to take on or to discharge passengers and to serve the purpose of a street railway, then its usefulness as a means of interurban transportation may be very much limited because so much time will be consumed in passing through cities and villages that it will no longer be practicable for many to travel in that way. Councils may reasonably be expected to be actuated by considerations of local convenience rather than those of the public, and, in view of the importance of the subject and its comparatively recent origin, it would seem to be a matter for consideration by the Legislature; and it is in view of these considerations that we reach the conclusion that the power has not been conferred by the general terms of section 28." From the

above reasoning, it is apparent that the decision on this branch of the case is based upon the character of the railway—an interurban, as distinguished from a local street railway—and the holding of unreasonableness is due to the impracticability of stopping the cars of such a railway at every street crossing in every city. Such reasoning is of no value here. In the Young Case the state of Minnesota passed an act fixing two cents a mile as the maximum passenger rate in that state. The act further declared that "any railroad company or any officer, agent, or representative thereof, who shall violate any provision of this act, shall be guilty of a felony, and upon conviction thereof, shall be punished by a fine not exceeding \$5,000, or by imprisonment in the state prison for a period not exceeding five years, or both such fine and imprisonment." It was held that imposing such enormous fines and possible imprisonment rendered the statute unconstitutional on its face, irrespective of the insufficiency of the rates, as persons affected by the law were, because of the enormous penalties for disobedience, prevented from so doing and resorting to the courts to test the validity of the statute, and thereby denied the equal protection of the law. The penalty fixed by the ordinance under review is a fine not exceeding \$100. It does not seem to us, therefore, that the reasoning of the courts, nor the grounds upon which the decision in each of these three cases is made, renders them authoritative upon the question before us.

We therefore conclude that the judgment of the court below was right upon the law, and the same is affirmed.

CROW and DUNBAR, JJ., concur.

RUDKIN, C. J., and CHADWICK, J. (dissenting). Before an officer of a street railway company can be held liable criminally for the violation of an ordinance requiring the company to make repairs, maintain schedules, etc., it must affirmatively appear that the company has supplied him with both the means and the authority to comply with the requirements of the local law, otherwise the ordinance is manifestly unreasonable and oppressive. *Town of Oxanna v. Allen*, 90 Ala. 468, 8 South. 79. We think both the complaint and findings in the case at bar are deficient in this respect, and therefore dissent.

(61 Wash. 593)

SILVER v. LONDON ASSUR. CORPORATION.

(Supreme Court of Washington. Jan. 11, 1911.)

1. INSURANCE (§ 323*)—FIRE INSURANCE—POLICY—CONSTRUCTION.

Under a fire insurance policy on a building occupied as a saloon which provided that the policy should be void if the building be-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

came vacant or unoccupied and so remained for 10 days, but did not state that the building should be devoted to saloon purposes, the occupancy may be by a watchman acting under a sheriff under legal process.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 775; Dec. Dig. § 323.*]

2. INSURANCE (§ 321*)—CONSTRUCTION—"OCCUPIED AS A SALOON."

In a fire insurance policy, the words, "occupied as a saloon," are words of description only, and do not mean that the building insured shall be at all times conducted as a saloon.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 729; Dec. Dig. § 321.*]

For other definitions, see Words and Phrases, vol. 6, pp. 4908-4909.]

3. INSURANCE (§ 323*)—POLICY—CONSTRUCTION—OCCUPATION.

Where a fire insurance policy provides that it shall be void if the building insured is vacant or unoccupied, and so remain for 10 days, it is no defense that the building was not occupied continuously for 10 days previous to the fire if it was occupied when the loss occurs. If the loss occurred during the prohibited vacancy, there could be no recovery, but reoccupancy revives the insurance.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 768; Dec. Dig. § 323.*]

4. INSURANCE (§ 640*)—POLICY—PLEADING.

In an action on a fire insurance policy, which provided that it should be void if insured made any change in interest, title, or possession (except change of occupancy without increase of hazard), defendant cannot claim a change of occupancy increased the hazard without pleading the clause.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1618; Dec. Dig. § 640.*]

5. INSURANCE (§ 646*)—FIRE INSURANCE POLICY—INCREASED HAZARD—EVIDENCE.

In an action on a fire insurance policy, which provided that, in case of change of occupancy (except where the hazard was not increased), the policy should be void, the burden is upon the defendant to prove that the hazard was increased, and it will not be presumed to follow from the possession of an officer of the law.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1655; Dec. Dig. § 646.*]

6. APPEAL AND ERROR (§ 1056*)—HARMLESS ERROR—EVIDENCE.

Where, in an action on a fire insurance policy, the jury necessarily found that plaintiff was the owner of the property, it was not prejudicial error to exclude the testimony of the fire record of one claimed by the defendant to be the real owner.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1056.*]

7. WITNESSES (§ 275*)—CROSS-EXAMINATION.

In an action on a fire insurance policy, defended on the ground that the property was in fact owned by one F., who had a bad fire record and could not obtain insurance, a question asked plaintiff on cross-examination as to his knowledge of F.'s fire record was properly excluded, since the fact that F. had a bad fire record was a part of the affirmative defense, and could not be established on cross-examination of plaintiff.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 275.*]

Department 1. Appeal from Superior Court, King County; Wilson R. Gay, Judge.

Action by Harry Silver against the London Assurance Corporation. From a judg-

ment for plaintiff, defendant appeals. Affirmed.

H. T. Granger and Fred G. Clarke, for appellant. Hughes, McMicken, Dovell & Ramsey, for respondent.

GOSE, J. This is a suit upon a fire insurance policy. There was a verdict and judgment for the plaintiff. The defendant has appealed.

On the 4th day of February, 1908, the appellant issued to the respondent its policy of insurance for the term of one year from that date, whereby it insured him against loss by fire to an amount not exceeding \$1,300 on two one-story frame buildings, each occupied as a saloon. The two buildings were separated by a partition only, and were insured for \$650 each. On the 28th day of June, 1908, both buildings were totally destroyed by fire. The appellant resists recovery upon two grounds: (1) It is alleged that the respondent did not own the property at the time the policy was issued or at the time of the fire, but that it was at all times owned by one Finkelberg, who on account of a bad fire record could not obtain insurance, and that for the purpose of obtaining the policy he conspired and agreed with the respondent to, and did, convey the property to him, and that the policy was taken for the benefit of Finkelberg; and (2) that the policy provides, "This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void * * * if a building herein described, whether intended for occupancy by the owner or tenant, be or become vacant or unoccupied, and so remain for ten days," and that at the time of the fire both buildings were vacant and unoccupied, and had been unoccupied for a period of more than 10 days. The reply denied the ownership of Finkelberg, denied that the buildings were vacant and unoccupied at the time of the fire, and admitted that the policy contained the provision quoted.

It is earnestly insisted that the record discloses that neither of the buildings was occupied at the time of the fire. We think that there is evidence which warranted the jury in concluding that both buildings were occupied at that time. Kichinko, a witness for the respondent, testified that he had rented one of the buildings for a saloon on Monday before the fire, which occurred the following Saturday night; that he cleaned and arranged it on Friday and Saturday; that he had the bar fixtures, stove, chairs, pool tables, glasses, cigars, and a barrel of soda in the building; that he had a license; and that he opened the place for business on Saturday, and made some sales. The sheriff had possession of the other building on a legal process, and had put a watchman in possession. The watchman testified

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

that he had charge of this building in 1908; "I should judge along the beginning of June." and that "I watched in there from 10 to 15 days. I am not sure. I ain't certain of it," and that, if he remembered correctly, it was unoccupied 11 or 12 days, but whether before he began watching or after his duties had terminated does not clearly appear. The jury was warranted in inferring from his testimony that he began watching the building as late as the 6th or 7th of June, and that his duties ended 15 days later, which would be less than 10 days before the fire. It cannot therefore be ruled as a matter of law that he was not in possession within ten days before the date of the fire.

The appellant, however, contends that, if the watchman was in charge of the building within 10 days before the date of the fire, his possession was not such an occupancy as the contract and the law contemplates. The language of the policy, which is the same as to both buildings, is "\$650 on the one-story frame building occupied as a saloon." It is said that the word "occupied" should be given its ordinary and popular meaning, and, as applied to this building, means such occupancy as ordinarily attends or is exercised over a saloon building while being used as such. The vice of this position is that the policy does not provide that the building shall be devoted to saloon purposes. The words "occupied as a saloon" are words of description only. As was said in *Burlington Insurance Company v. Brockway*, 138 Ill. 644, 28 N. E. 799: "If the company desired to make its liability contingent upon the continued occupancy of the house as a dwelling, it would have been very easy and natural to have stated that among the other conditions expressed." In that case the policy in describing the property insured used the words, "on the two-story shingle-roof frame building while occupied by assured as a store and dwelling house." Some weeks before the fire, the building was abandoned as a dwelling, but continued to be occupied as a store until it burned. The policy provided, as in this case, that it should be void "if the premises hereby insured are or shall hereafter become vacant or unoccupied," without notice, consent, etc. It was contended that the company undertook to insure the building only so long as it continued to be occupied both as a store and a dwelling, and in meeting this contention the court said that a provision in a policy will not be construed to be a continuing warranty unless expressed in apt words. In *Doud v. Citizens' Insurance Company*, 141 Pa. 47, 21 Atl. 505, 23 Am. St. Rep. 263, the tenant moved out of the house on Tuesday, the owner went to the house and stayed during Wednesday, placed a man in charge, went to her home and packed on Thursday preparatory to moving into the house on Friday, and was prevented from doing so by the burning of the house on that day. Her offer to prove

that she put a man in charge of the house on Wednesday, to remain until Friday, was denied. This was held to be error. See, also, *Traders' Insurance Company v. Race* (Ill.) 29 N. E. 846; *Stensgaard, etc., v. National Fire Insurance Company*, 36 Minn. 181, 30 N. W. 468; *Shackelton v. Sun Fire Office*, 55 Mich. 288, 21 N. W. 343, 54 Am. Rep. 379; *German Insurance Company v. Davis*, 40 Neb. 700, 59 N. W. 698. In the *Shackelton* case a watchman or overseer was in charge of the building when the fire occurred. This was deemed a sufficient occupancy. The appellant has cited a number of cases which, it contends, show that the possession of the watchman was not an occupancy within the meaning of the policy. There is a conflict in the authorities, and any attempt to harmonize them would be futile. However, the facts in the cases cited differ so materially from the facts here that it may be said that they state no more than general principles. Each case must be determined largely upon its own peculiar facts. Viewing the case from the standpoint of the object to be attained, viz., to guard against an increase of hazard, caused by nonoccupancy, it would seem to be a common sense view that the possession of a watchman, acting under a sheriff under legal process, would be such an occupancy as would satisfy the burden imposed by the policy upon the insured. The burden of proving that the buildings were unoccupied was upon the appellant.

It is said that the court erred in instructing the jury that the building was not unoccupied while it was in charge of an officer of the law. In urging this view, the appellant relies upon another provision of the policy in the following words: "This entire policy unless otherwise provided by agreement indorsed hereon or added hereto shall be void if any change other than by the death of an insured take place in the interest, title or possession of the subject of insurance (except change of occupancy without increase of hazard) whether by legal process or judgment or by voluntary act of the assured or otherwise." The point is not well taken (1) because the clause was not pleaded, and is therefore not an issue; and (2) there is no evidence that the change of occupancy increased the hazard. The burden was on the appellant to prove that fact. It will not be presumed to follow from the possession of an officer of the law. *Hoover v. Mercantile, etc., Ins. Co.*, 93 Mo. App. 111, 69 S. E. 42. In the cases cited by the appellant under this head, there was a change of title, and there were no exception clauses in the policies. The testimony shows that after the policy was issued both buildings were unoccupied for a period of more than 10 days. As we have said, it also shows that one of the buildings was in the possession of a tenant at the time of the fire, and that there is no direct evidence that the other building was not in the possession of the

watchman within 10 days preceding that date. It is contended that a vacancy for the period of 10 days terminates the policy, and that its operative force is not restored by a reoccupancy. Several authorities are cited which support that view. The question, however, is no longer an open one in this state. In *Port Blakely Mill Company v. Springfield, F. & M. Co.*, 110 Pac. 36, this court, after an exhaustive review of the cases, announced the rule that a provision in a policy of insurance to the effect that the policy shall be void upon the doing of a prohibited act or the failure to do an act agreed to be performed by the insured only suspends the operation of the policy while the condition is broken, and has no application to a loss occurring at a time when there is no breach of the contract. Among others, the following authorities are cited to support the text: *Hinckley v. Germania Fire Ins. Co.*, 140 Mass. 38, 1 N. E. 737, 54 Am. Rep. 445; *Insurance Company v. Pitts*, 88 Miss. 587, 41 South. 5, 7 L. R. A. (N. S.) 627, 117 Am. St. Rep. 756; *Athens Mutual Ins. Co. v. Toney*, 1 Ga. App. 492, 57 S. E. 1013; *Traders' Insurance Co. v. Catlin*, 163 Ill. 256, 45 N. E. 255, 35 L. R. A. 595; *Born v. Home Insurance Company*, 110 Iowa, 379, 81 N. W. 676, 80 Am. St. Rep. 300; *Warehouse Company v. Insurance Company*, 76 S. C. 76, 56 S. E. 654, 10 L. R. A. (N. S.) 736, 121 Am. St. Rep. 941.

In the *Hinckley* Case the insurance company sought to defeat a recovery because the insured conducted a saloon business without a license for a short time. He had a license when the policy was issued and when the fire occurred. The property insured was saloon equipment, furniture, fixtures, and stock. In considering this contention the court said that the word "void," as used in policies of insurance, does not signify under all circumstances an absolute and permanent avoidance of a policy which has begun to run, but that it may be held to mean a temporary suspension of liability; and, quoting from 1 Phillips on Insurance, § 975: "To carry it further is to inflict a penalty upon the assured, and decree a gratuity to the insurer, who is thus permitted to retain the whole premium when he has merited but part of it." In the *Pitts* Case, while the policy was in force, the premises were vacant at one time for more than 10 days, but were occupied when the fire occurred. The policy provided that it should be void if the building "be or become vacant or unoccupied and so remain for ten days." The court said that, if the loss had occurred during the prohibited vacancy, there could be no recovery; but that occupancy revived the insurance, and that any other rule would be a harsh construction of a technical word. In the

Toney Case it was held that the policy was suspended during the period of the prohibited vacancy, and revived by reoccupancy. The court said: "But we place our decision squarely on the proposition that the violation of the condition as to vacancy in this case in no wise contributed to the loss. The increased hazard existed while the house was vacant, and when the house was reoccupied the danger from vacancy was terminated, and the policy again attached and became of binding effect."

The point is made that the court erred in sustaining an objection to a question put to a witness as to Finkelberg's fire record, and in denying the appellant the right to cross-examine the respondent as to his knowledge of that fact. These contentions have no force, in view of the fact that the jury necessarily found that the respondent was the owner of the property. The court instructed the jury that, if they believed that the respondent and Finkelberg conspired to conceal the true ownership of the property, that it was placed in the name of the respondent for that purpose, and that the policy was issued with that fact concealed, there could be no recovery. Moreover, the appellant offered evidence that Finkelberg had a bad fire record, and the respondent offered no countervailing evidence. The question put to the respondent was not proper cross-examination. If Finkelberg had a bad fire record, that was a part of the affirmative defense, and could not be established upon the cross-examination of the respondent. The real issue under this defense was, whether the respondent owned the property. If he did, the good or bad fire record of Finkelberg would be a matter of no concern to the appellant.

The court, in instructing the jury, said: "Now, coming to the other branch of this case which the defendant relies on or has pleaded," etc. It is said that the language quoted conveyed the impression to the jury that the other defenses pleaded were immaterial. It is obvious that the statement was merely introductory to another phase of the case upon which the court desired to instruct.

The view we have taken of the facts of the case makes it unnecessary to determine whether the vacancy of one of the buildings for more than 10 days before the fire would defeat a recovery on either or both buildings, and also the technical meaning of the words "if a building herein described" becomes vacant or unoccupied.

The judgment is affirmed.

RUDKIN, FULLERTON, PARKER, and MOUNT, JJ., concur.

(61 Wash. 555)

HOLT MFG. CO. v. ODENRIDER.

(Supreme Court of Washington. Jan. 7, 1911.)

1. PRINCIPAL AND AGENT (§ 150*)—CONTRACTS —RIGHT OF BUYER TO RESCIND.

In an action for the price of agricultural machinery bought under a written agreement that the order could be countermanded only for failure of crops before shipment, and that the terms of sale could not be varied by an agent, it is no defense that the seller's agents, through whom the contract was made, concurrently agreed that the buyer might rescind at any time within a month, and afterwards consented to a cancellation of the order within that time.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 556-563; Dec. Dig. § 150.*]

2. EVIDENCE (§ 441*)—WRITTEN AGREEMENTS — MERGER OF CONTEMPORANEOUS STIPULATIONS.

Contemporaneous stipulations are merged into a written agreement, regardless of express provision therein to that effect.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 441.*]

3. SALES (§ 354*)—COUNTERMAND OF ORDER—PLEADING.

That a buyer countermanded an order for a reason reserved in his order, or that the contract was cancelled by mutual agreement, are matters of defense to an action for the price which should be affirmatively pleaded.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 354.*]

4. NEW TRIAL (§ 35*)—GROUNDS — SUBMITTING ISSUES NOT PLEADED.

A seller suing for the price is entitled to a new trial for error in receiving evidence on, and submitting a question of, cancellation of the contract before shipment by mutual agreement or under a right reserved to the buyer, where such cancellation was not pleaded.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 51-55; Dec. Dig. § 35.*]

Department 1. Appeal from Superior Court, Lincoln County; C. H. Neal, Judge.

Action by the Holt Manufacturing Company against H. C. Odenrider. Judgment for defendant, and plaintiff appeals. Reversed, with directions.

Hamblen & Gilbert, for appellant. Martin & Wilson, for respondent.

GOSE, J. On the 22d day of April, 1908, the defendant gave the plaintiff a written order directing it to manufacture a combined harvester, and ship it to him at Almira Station, in this state. The order stipulated that the defendant "agrees not to countermand this order except for failure of crops prior to the date of shipment, * * * and it is understood and agreed that all stipulations, agreements, and warranties entered into between the respective parties are embodied in this contract, and no agent has any power to make any additions to or to vary the terms and conditions hereof." The machine was manufactured and shipped to the defendant at the point designated. Upon his refusal to pay for the machine as provided in the order, this suit was commenced. The complaint alleges, so

far as material to the questions raised by the appeal, the sale and delivery of the machine, and the defendant's promise and refusal to pay for it. The answer denies the sale and delivery, denies that any sum is due, and alleges affirmatively: "For further and separate defense, defendant alleges that on or about the 22d of April, 1908, he entered into negotiations with one E. R. Gordon and one Pew, who represented themselves to be agents of the plaintiffs in this action, and that then and there he entered into a contract for the purchase of one Holley Junior combined harvester, with the express understanding and agreement with the said Pew and said Gordon that said contract was not to be completed nor deemed in effect nor become effective or delivered to the Holt Manufacturing Company, for at least one month, and that he was to have the right at any time within the month to recall said contract from the hands of said Pew and Gordon and cancel the same; that afterwards, within two weeks from the said 22d day of April, the said defendants did notify said Pew and Gordon that he did not desire to continue said contract, and he therefore desired the same destroyed and canceled, to all of which the said Pew and Gordon agreed, and then and there the said Pew began negotiations for the sale to said defendant of a McCormick header, instead of the combined harvester; that thereafter this defendant purchased a Best combine, and that, as soon as the plaintiffs discovered that he had purchased the 'Best,' they then shipped and consigned to him a secondhand Holley Junior machine from Walla Walla, Wash., and that said secondhand machine did not arrive at Almira until the 14th day of July, 1908, or about three months after said contract had been cancelled and revoked; that this defendant never received said machine, never had anything to do with it, never accepted it, and it has never been in his possession." This averment was denied by the reply. From a verdict and judgment for the defendant the plaintiff has appealed. The evidence is undisputed that the appellant delivered a new machine.

It is apparent that the new matter pleaded is not a defense, and that it does not raise an issue. The order expressly provides that all the contemporaneous stipulations between the parties are merged into the contract, and that no agent has the power to vary its terms. This would follow if the order did not so provide. Otherwise a written order or contract would be a useless formality and precaution. The object to be accomplished by a written agreement is that it may furnish the evidence of what the contract is. The very purpose of the averment was to contradict the terms of the written contract, and to prove a contract materially different from the written order. Respond-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ent reserved the right to countermand the order for a failure of crops prior to the date of shipment. He does not plead that he exercised this right. The court refused to admit evidence offered in support of the new matter in the answer, but did over the appellant's objection admit proof that the contract was canceled before the machine was shipped by the mutual agreement of the parties to the suit. If the respondent countermanded the order before the machine was shipped, on account of the failure of crops, or if the contract was cancelled by mutual agreement, such matter was an affirmative defense, and should have been pleaded in the answer: *Denney v. Stout*, 59 Neb. 731, 82 N. W. 18; *Grunwald v. Freese* (Cal.) 34 Pac. 73; *Koons v. St. Louis Car Co.*, 203 Mo. 227, 101 S. W. 49; *Taussig v. So. Mill & Land Co.*, 124 Mo. App. 209, 101 S. W. 602; *Roberts v. Pacific, etc., Nav. Co.*, 121 Fed. 785, 58 C. C. A. 61. While the appellant's objections were not as full and specific as they might have been, we think they served to challenge the attention of the court and counsel to the fact that the evidence was not within the issues. The court instructed the jury that the order was a valid and binding contract, and "continued at all times thereafter to be a legal contract, unless you find that the same was cancelled by the parties," and that, "If you find that the parties, the plaintiff and the defendant, for any reason agreed and consented to the cancellation of said account, it would thereafter cease to be a valid and binding contract on the part of either plaintiff or defendant, and that these are questions for the jury to determine from the evidence in the case." This instruction was excepted to on the ground that it presented a question to the jury not within the issues. The appellant in due time moved for a judgment notwithstanding the verdict, and for new trial. The motion for new trial was based upon the several statutory grounds. A litigant prepares his case for trial in the light of the issues. It is obvious that the appellant was not prepared to meet an entirely new issue, and one not remotely suggested by the answer. The motion for a new trial should have been granted.

Evidence was admitted which, under a proper issue, would have warranted the jury in finding, either that the right reserved in the order to countermand was exercised, or that the parties agreed to cancel it. The judgment is reversed, with directions to the trial court to permit an amendment to the answer if applied for within 30 days after filing the remittitur in the court below. Otherwise to enter a judgment upon the pleadings in favor of the appellant.

RUDKIN, C. J., and PARKER and MOUNT, JJ., concur.

(61 Wash. 601)

STATE ex rel. BUSSELL et al. v. ABRAHAM et al., Board of Com'rs of King County.

(Supreme Court of Washington. Jan. 12, 1911.)

CONSTITUTIONAL LAW (§ 290*)—DUE PROCESS OF LAW—CREATION OF WATERWAY DISTRICT—VALIDITY OF STATUTE.

Laws Sp. Sess. 1900, c. 8, for the construction and maintenance of commercial waterways, provides in section 11 that the county commissioners shall file a petition setting forth specified facts. Section 13 provides that a summons shall issue to all parties interested. Section 15 provides that on the return of the summons the court shall hear the petition, and "shall impanel a jury to ascertain the just compensation to be paid for the property taken or damaged." Section 23 provides that any judgment rendered on the finding of a jury or of the court in case the jury is waived "shall be lawful and sufficient condemnation of the land or property to be taken or of the right to damage the same in the manner proposed" on payment of the amount of the finding and costs. Section 27 provides that, upon entering of the judgment, the clerk of courts shall prepare and certify a transcript containing a list of the lands and persons benefited by the improvement and the amount of benefit to each, and file the same with the county auditor, who shall enter the same on the tax rolls against the land of each person named in the list, and the same shall be collected as other taxes, but that such assessments shall not become due except as may be designated by the board of commissioners for said waterway district, which designation shall be made by serving written notice on the county auditor, and the amount so designated shall be added by the auditor to the general taxes, provided that no call for assessments shall exceed 25 per cent. of the actual amount necessary to pay the cost of construction of said work. Section 30 provides for changes in the system of improvements, the compensation to the owners of the land taken by the change to be determined by a jury impaneled as in case of the original proceedings, and they shall "readjust the amount of benefits claimed to have been increased or diminished" by reason of such proposed change. *Held*, that the act is void for failure to authorize any person or board to make the necessary assessment, and, if it be construed to make the original estimates or benefits set forth in the commissioners' petition stand as the assessment of benefits, it is void because affording the owner of the property assessed no notice of the proceedings and opportunity to defend against the assessment before his property is taken to satisfy the charge, and, if construed as authorizing the commissioners to make the assessment, it is invalid for the same reason.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 871-875; Dec. Dig. § 290.*]

Department 1. Appeal from Superior Court, King County; Mitchell Gilliam, Judge.

The State of Washington, on the relation of Wallace A. Bussell and others, sued out a writ of review from the superior court to review the order of Dan. R. Abraham and others, as County Commissioners of King County, in creating a commercial waterway district. The superior court dismissed the writ, and Wallace A. Bussell and others appeal. Reversed and cause remanded, with instructions to enter judgment quashing proceedings before the board of water commissioners.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Robert A. Devers, for appellants. Shorett, McLaren & Shorett, Geo. F. Vandever, M. H. Ingersoll, and Bausman & Kelleher, for respondents.

FULLERTON, J. The Legislature of the state of Washington at the specially convened session of 1900 passed an act intended to provide for the construction and maintenance of commercial waterways. Laws Sp. Sess. 1900, p. 8. Acting in accordance with the provisions of the act, certain citizens of the county of King petitioned the board of county commissioners of that county to establish a commercial waterway district therein comprised of territory specifically described in the petition. The board of county commissioners assumed jurisdiction of the petition, and thereafter, upon due procedure being had as contemplated by the statute, entered an order purporting to create a commercial waterway district. The relators own property included within the boundaries of the proposed district, and appeared before the board of county commissioners and opposed the creation of the district, alleging as grounds therefor, among others, that the act under which the proceedings were being had were in violation of both the state and federal Constitutions. Their objections were overruled, whereupon, after the establishment of the district, they sued out a writ of review from the superior court of King county seeking to review the order of the board. The superior court on a hearing had thereon affirmed the order creating the district and dismissed the writ. This appeal was taken therefrom.

While many objections are urged in this court against the statute and the proceedings had thereunder, we have found it necessary to consider only the constitutional question suggested, as we deem it fatal to the proceedings. The law plainly contemplates that the expense of constructing the commercial waterway for which the district is organized shall be provided for by an assessment upon the real property situated in the waterway district benefited by the improvement, yet no person, board, or other authority is authorized by the act to make the assessment. Nor does the act contain any direct provision for making an assessment roll, nor any provision for its equalization when made at which the property holder may be heard as to the amount that may be charged against his property. Since no other means of raising the necessary cost of making the improvement is contemplated than by an assessment, we think that the assessment is so far an integral part of the act that the omission to make it effective renders the whole act void. *Skagit County v. Stiles*, 10 Wash. 388, 39 Pac. 116; *Snohomish County v. Hayward*, 11 Wash. 429, 39 Pac. 652; *Franklin Savings Bank v. Moran*, 19 Wash. 200, 52 Pac. 358.

Counsel for the respondent, however, while

conceding there is no direct provision in the act empowering any particular person or body to make an assessment of benefits, contend that the act by necessary implication confers that power upon the jury called to determine the just compensation to be paid owners whose property will be taken by the improvement. To sustain the contention we are cited to certain sections of the act which we will briefly notice. After provisions relating to the organization of the waterway district, and the election of a board of waterway commissioners, it is provided in section 11 of the act that, whenever it is desired to prosecute the construction of a system of waterways within the district, the board of commissioners shall file a petition in the superior court of the county in which the district is located, setting forth therein the route over which the waterway is to be constructed, the estimated cost thereof, the names of the owners and occupants of the lands within the proposed district, the maximum amount of benefits to be derived by each tract of land from the construction of the proposed improvement, a description of the land necessary to be taken for the purpose of the proposed improvements, and the names of the owners and occupants thereof, and certain general statements to the effect that the improvement will be of public benefit, conducive to public health, increase the public revenue, and that the proposed system is necessary. Section 13 provides that, upon filing the petition, a summons shall be issued, returnable as summons in other civil actions, and served either personally or by publication upon all parties interested. Section 15 provides that upon the return of the summons, or as soon thereafter as the business of the court will permit, the court shall proceed to hear the petition, and "shall impanel a jury to ascertain the just compensation to be paid for the property taken or damaged" by the proposed improvement. Section 23 provides that "any final judgment or judgments rendered by said court upon any finding or findings of any jury or juries, or upon any finding or findings of the court in case a jury be waived, shall be lawful and sufficient condemnation of the land or property to be taken, or of the right to damage the same in the manner proposed, upon the payment of the amount of such findings, [and] all costs, which shall be taxed as in other civil cases." Section 27 reads as follows: "Upon the entering of the judgment upon the verdict of the jury, the clerk of said court shall immediately prepare a transcript which shall contain a list of all of the names, persons and corporations benefited by said improvement, and the amount of benefit derived by each respectively, and shall duly certify the same, together with a list of the land benefited by said improvement belonging to each person or corporation, and shall file the same with the auditor of the county, who shall immediately enter the same on the rolls of the tax-

es, as provided by law, for the entry of the taxes against the land of each of the said persons named in said list, together with the improvements therefor, and the same shall be subject to the same interests and benefits, in case of delinquency, as in cases of general taxes, and shall be collected in the same manner as other taxes, and subject to the same right of redemption, and the land sold for the collection of said taxes shall be subject to the same right of redemption as in the sale of land for general taxes: Provided, that said assessments do not become due and payable, except at such time or times and in such amount as may be designated by the board of commissioners for said commercial waterway district, which designation shall be made to the county auditor by said board of commissioners of said commercial waterway by serving a written notice upon the county auditor, designating the time and amount of assessment, said assessment to be in proportion to the benefits to become due and payable, which amount shall fall due at the time of the filling out of general taxes, and the amount so designated shall be added by the auditor to the general taxes of said person or corporation, according to said notice upon the assessment rolls in his said office and collect therewith: Provided further, that no one call for assessments by said commissioners shall be in an amount to exceed 25 per cent. of the actual amount necessary to pay the costs of the proceedings and the assessment of said district and system of commercial waterways, and the costs of construction of said work." Section 30 provides for changes in the system of improvements, manner of construction, and course of the waterway, should the commissioners deem the same desirable, and for the appropriation of such additional land as may be necessary to make the required changes; and, to ascertain the amount of compensation and damages to be paid the owners of the land taken by the change, it is provided that the court "shall cause a jury to be impaneled as in the case of the original proceedings for the establishment of said improvement, and upon the final hearing of said cause the jury shall return a verdict in the amount of damages, if any, sustained by all persons and corporations, the same as upon original petition, by reason of such proposed change; and the amount of compensation to be paid to any persons or corporations therefor, and for any additional right of way that may be necessary to be appropriated by reason of such proposed change, and shall readjust the amount of benefits claimed to have been increased or diminished, if any, of said land owners by reason of such proposed change in said improvement, and the proceedings thereunder would be the

same as to rendering judgment, appeal therefrom."

It is on these sections of the act that counsel base their contention that the jury are empowered to assess the benefits, but we think they fall far short of sustaining it. The last section cited, it is true, provides that the jury shall "readjust the amounts of benefits claimed to have been increased or diminished," by reason of any changes made in the assessment district or waterway, and were the language of the original section obscure might raise an inference that the jury were to make the original assessment. But the language defining the powers of the jury in the first instance is not obscure. It clearly limits the power of the jury on the first hearing to a determination of the "just compensation to be paid for the property taken or damages," nothing more. It has been suggested, however, that the Legislature intended that the original estimate of benefits set forth in the commissioners' petition to establish the district should be taken as an assessment of benefits, and that it is from this estimate the clerk is required to prepare his transcript of the "names of persons and corporations benefited by said improvement * * * and the amount of benefit derived by each respectively," but this theory would be fatal to the act if adopted. It is essential to the validity of any law authorizing an assessment for benefits that the owner of the property assessed be given notice of the proceedings and an opportunity to defend against the assessment before his property is taken to satisfy the assessment charge. It is not necessary that he have notice of every step taken in the proceedings, but the law, to be valid, must give him at least one opportunity to be heard as to the amount and legality of the tax. *State ex rel. Savings Union v. Whittlesey*, 17 Wash. 447, 50 Pac. 119; *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112, 17 Sup. Ct. 56, 41 L. Ed. 369; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. Ed. 616. Construing the statute as one authorizing the commissioners to make the assessment, it is invalid because it does not give the owners of the property assessed an opportunity to be heard as to the amount and legality of the assessment before their land is sold in satisfaction thereof.

The judgment appealed from is reversed, and the cause remanded, with instructions to enter a judgment quashing the proceedings had before the board of county commissioners, and holding the same to be void and of no effect.

RUDKIN, MOUNT, PARKER, and GOSE, JJ., concur.

(19 Idaho, 49)

WHITE PINE MFG. CO. v. MOREY.

(Supreme Court of Idaho. Dec. 14, 1910.)

*(Syllabus by the Court.)***1. TAXATION (§ 686*)—TAX SALE—VALIDITY OF CERTIFICATE.**

A tax sale certificate issued under the provisions of section 1759 of the Revised Codes, which recites that the tax for which the property was sold was "state and county, \$28.00; penalty and costs, 3.05; total, \$31.05," and leaves blank the space following the enumeration of poll tax, city, town, village, and independent school district tax, is a substantial compliance with the statute, for the reason that such statement on its face excludes the idea that the taxes for which the property was sold included anything other than "state and county tax" and "penalties and costs."

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1377-1379; Dec. Dig. § 686.*]

2. TAXATION (§ 769*)—TAX SALE—CORRECTION OF DEED.

Where a tax sale certificate shows on its face the year for which the tax was assessed, and a deed thereafter issued leaves the year blank, and does not show upon its face the year for which the tax was assessed, it is competent and proper for the officer on discovering the mistake to execute a new deed for the correction of the error.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1533-1536; Dec. Dig. § 769.*]

3. TAXATION (§ 754*)—TAX SALE—SUFFICIENCY OF TAX DEED.

Sections 1763 and 1764 of the Revised Codes must be construed together, and when so construed only require the officer making a tax deed to incorporate therein "substantially the matters contained in the certificate," and a substantial compliance therewith is all that is necessary.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1504, 1505; Dec. Dig. § 754.*]

4. TAXATION (§ 773*)—SALE FOR TAXES—VALIDITY OF TAX DEED.

Under the provisions of section 1653 of the Revised Codes, dealing with the assessment and collection of taxes, "no mistake in the name of the owner or supposed owner of real property shall render the assessment thereof invalid"; and, under the provisions of section 1788, no informality will render an assessment, or any act relating to an assessment, or the collection of a tax, illegal.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1541; Dec. Dig. § 773.*]

5. TAXATION (§ 773*)—SALE FOR TAXES—VALIDITY OF TAX DEED.

Where a tax deed was not in fact made, executed, and delivered until after the time for redemption by the property owner had expired, it is not fatal to the deed, and will not render it invalid if it recite upon its face that the purchaser or his assignee was entitled to a deed one day earlier than he was in fact entitled to it under the law.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1541; Dec. Dig. § 773.*]

6. TAXATION (§ 695*)—REDEMPTION.

Where the proceedings have been in substantial compliance with the law, and the tax sale has been made in substantial conformity therewith, and the time within which the landowner may redeem is fixed and limited by the statute, there is no right of redemption, whether a deed has been issued or not, after the ex-

piration of the statutory period allowed for redemption.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1392; Dec. Dig. § 695.*]

7. TAXATION (§ 769*)—SALE FOR TAXES—TAX DEED—SCOPE OF AUTHORITY TO ISSUE.

Where the power is vested in an officer to execute a tax deed, such power and authority is not exhausted until a deed is made in compliance with the law, provided the preceding steps have been taken in accordance with the law as the same appears of record in his office. The making of an insufficient, defective, and invalid deed does not exhaust the power of the officer where the facts exist upon which a valid deed may be made.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1533-1536; Dec. Dig. § 769.*]

*(Additional Syllabus by Editorial Staff.)***8. EVIDENCE (§ 48*)—JUDICIAL NOTICE.**

The court will not take judicial notice of the fact that, in a given year, the county commissioners of a specified county must have levied school taxes and special road taxes.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 70; Dec. Dig. § 48.*]

Appeal from District Court, Nez Perce County; Edgar C. Steele, Judge.

Action by the White Pine Manufacturing Company against Peter Morey. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Reversed and remanded.

Burcham & Blair and C. H. Lingenfelter (Eugene A. Cox, of counsel), for appellant. Clay McNamee, for respondent.

AILSHIE, J. This action was instituted by plaintiff to quiet its title to a certain tract of land situated in that part of Nez Perce county which formerly belonged to Shoshone county. The plaintiff traces its title by mesne conveyances from one Frank Andrews, the original patentee from the United States. Defendant bases his title on a tax sale made by Shoshone county for the taxes levied and assessed against the property in the year 1903. Judgment was entered in favor of the plaintiff, and the defendant appealed from the judgment and order overruling a motion for new trial. The district court held that the sale of the land for taxes was illegal, that the tax certificate was illegal and void, and that the tax deeds issued thereon were consequently illegal and void. We shall take up the points separately and in the order in which they are treated by the respondent in its brief in support of the findings and judgment of the trial court.

1. The first point made in support of the judgment is that the certificate of tax sale issued to Shoshone county on the 12th day of July, 1904, is wholly void. This contention is based upon the grounds that the certificate does not fully comply with section 1759 of the Revised Codes in specifying the state and county taxes, poll tax, city, town, village, and independent school district tax,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

etc. This objection is unfounded, for the reason that the certificate recites that the tax for which the property was sold was as follows: "State and county, \$28.00; penalty and costs, \$3.05; total, \$31.05." The statement in the certificate that the taxes for which the land was sold were "state and county," and "penalty and costs," excludes the idea that taxes were included for any other purpose or of any other nature. It has been suggested that the court will take judicial knowledge of the fact that in the year 1903 the county commissioners of Shoshone county must have levied school taxes and special road taxes, etc. The court, on the contrary, cannot take judicial notice of any such fact, and in the absence of proof that such taxes were included within the total sum for which this land was sold, we must assume that the land was in fact not sold for anything other than state and county taxes. Even if other taxes were levied and assessed for 1903, that would not invalidate this sale if it was only made for the "state and county" taxes.

2. It is not contended that, under the provisions of section 1764, "the recitals in the tax deed must be identical with those in the tax sale certificate." A tax deed was executed and delivered by Shoshone county to appellant's grantor on the 28th day of August, 1907, which, among other things, contained the recital that the property therein described "was duly assessed for state and county purposes to Frank Andrews for the year —, the assessed value being \$800; that the amount of the taxes for state and county assessed for said year was \$28.00," etc. The tax certificate recited that the tax for which the sale was made was levied and assessed for the year 1903, while the deed fails to show the year for which this tax had been levied and assessed. While this fact would not impair the sale or the validity of the certificate, it would impair the deed and render it inadmissible as evidence of compliance with the law. For reasons, however, which will hereafter be stated, this error was subsequently corrected. Before passing from this point, it is worth while to observe that sections 1764 and 1763 must be construed together. Section 1764 says, among other things, "that the matters recited in the certificate of sale must be recited in the deed, while 1763 says, "if the property is not redeemed within three years from the date of sale, the assessor or ex officio tax collector * * * must make to the purchaser or the other person lawfully entitled thereto, upon demand by him, a deed to the property, reciting in the deed substantially the matters contained in the certificate." It will therefore be seen that section 1763 recognizes the substance instead of the form, and authorizes the officer to make a deed containing "substantially the matters contained in the certificate." Section 1764 when construed in the light of the previous section cannot be

said to require a literal or verbatim copy of the certificate embodied in the deed. It has been accordingly held that not all the provisions of the statute with reference to the assessment of property and the sale for taxes are mandatory, but that on the contrary some of those provisions are only directory. This is true with reference to the name of the owner or supposed owner of the lands, and is the general holding of the courts, especially under a system of assessments and delinquent sales such as we have in this state. The authorities are uniform under statutes similar to ours that the proceeding in the assessment and collection of taxes against real property is purely a proceeding in rem, and that it does not run against the person of the owner, but simply against the property assessed. *Klumpe v. Baker*, 131 Cal. 80, 63 Pac. 137; *Palomares Land Co. v. Los Angeles County*, 146 Cal. 530, 80 Pac. 931; *Coolidge v. Pierce County*, 28 Wash. 95, 68 Pac. 391; *Helms v. Wagner*, 102 Ind. 385, 1 N. E. 730; *Bradley v. Bouchard*, 85 Mich. 18, 48 N. W. 208. It is specifically provided by our statute (section 1653, Rev. Codes), that "no mistake in the name of the owner or supposed owner of real property shall render the assessment thereof invalid." The foregoing section is also reinforced by section 1788, Rev. Codes, which provides that: "No assessment, or act relating to assessment, or collection of taxes is illegal on account of informality, nor because the same was not completed within the time required by law."

3. It is next urged by the respondent that since the deed of August 28, 1907, recites on its face that the purchaser at the tax sale was on the 12th day of July, 1907, entitled to a deed, whereas in fact he was not entitled to a deed until the 13th day of July, the deed is therefore void. This position would be true had the deed been executed on July 12th and prior to the time when the purchaser or his assignee was entitled thereto, but the record shows that the deed was not in fact made, executed, and delivered until the 28th day of August, 1907. It follows, therefore, that although the recital on the face of the deed may be to the effect that the party was entitled to the deed prior to the expiration of the time of redemption, the deed itself shows that it was not made until after the party was entitled to the same. This is a mere irregularity that could injure no one, and could not render void the title of the purchaser or impair the validity of the deed.

4. The complaint in this action was filed on February 18, 1908. The answer was filed on September 4, 1909. Subsequent to the commencement of the action and prior to the filing of an answer, the defendant procured from the assessor and tax collector of Shoshone county a second tax deed for this same property which corrected the errors and omissions pointed out in the first deed,

and recited on its face that it was given for the purpose of correcting the deed of August 28, 1907. The latter deed recited that the tax for which the sale was made was "assessed to Frank Andrews for the year 1903"; that there was no poll, city, town, village, hospital, or school district tax included therein, and that the sale was made for state and county taxes only; "that publication of the intention to sell for taxes was made as provided by law, on or before the fourth Monday of May, 1904"; "that the said premises were by the said William T. Hooper as assessor and ex officio tax collector of said Shoshone county on the 11th day of July, 1904, after due and legal notice given as required by law, offered for sale," etc.; "that at the said auction there was no purchaser or bidder on the first day said property was offered for sale * * *"; that thereafter the said premises were next again offered for sale at the same place by the assessor on the 12th day of July, 1904, and there again was no purchaser of them or any part thereof, and thereupon the whole amount of said premises * * * were by the said William T. Hooper as assessor and ex officio tax collector sold and struck off to the said Shoshone county," etc. This deed further recited that the assignee of the tax certificate was on the 13th day of July, 1907, entitled to a deed. It is not urged that these recitals contained in the latter deed were not in substantial compliance with the statute if there existed any power on the part of the assessor and tax collector to issue this deed. It is contended, however, "that a defective tax deed cannot be cured by the issuance of a second or corrected deed, as is sought in this case." In support of this contention, respondent cites the following authorities: *Vestal v. Morris*, 11 Wash. 451, 39 Pac. 960; *Hewett v. Storch*, 31 Kan. 488, 2 Pac. 556; and *Daly v. Ah Goon*, 64 Cal. 512, 2 Pac. 401.

Vestal v. Morris was decided under the laws in existence in Washington in 1886, and, as I gather from the decisions, it was based on the provisions of the 1881 Code of Washington. That case has subsequently been distinguished by the Washington court on several occasions, and it has been said that under the statutes which applied to that case the tax was in effect a personal liability, and "that the assessment was against the person." See *Woodward v. Taylor*, 33 Wash. 1, 73 Pac. 785; *Washington Timber & Loan Co. v. Smith*, 34 Wash. 625, 76 Pac. 267; *Railroad Co. v. Galvin (C. C.)* 85 Fed. 811. There the sheriff was authorized and directed to seize the personal property of the taxpayer for his taxes both real and personal. It is also worthy of note that what is said in the *Vestal* Case with reference to the issuance of the second and corrected deed subsequent to the commencement of the action and the tender of the taxes and penalties was merely dictum in that case, and it

was not the point on which the judgment of the appellate court rested. The observation there made is clearly contrary to the great weight of authority from states where the statute limits the time within which a redemption may be made, and where there is no foreclosure required on the part of the county. *Hewitt v. Storch* is not in point for the reason that the court there held that the description of the property was defective on which the sale was made, and that the county clerk could not go back of the tax roll for a description, but that he was bound by the description therein contained, and that since the original deed contained the same description as that found on the tax roll the clerk could not by a subsequent deed amend the description, or insert a different description from that found on the tax roll. *Daly v. Ah Goon* was a case where the land was assessed to "G. A. Hemenway, and to all owners and claimants known and unknown." The opinion in that case rested upon a line of authorities that exists in California to the effect that such a description of the owner of the premises is defective, and renders the proceedings void.

On the other hand, as above observed, the later authorities are overwhelming to the effect that if the proceeding has been regular and a tax sale has been made in substantial conformity with law that the time within which the landowner may redeem is fixed and limited by the statute, and that after the expiration of such period he has no right of redemption, whether a deed has issued or not. *Blackwell on Tax Titles*, § 734; *Black on Tax Titles*, §§ 350, 353, 354; *Pearson v. Robinson*, 44 Iowa, 413; *Beggs v. Paine*, 15 N. D. 436, 109 N. W. 322; *McMillan v. Hogan*, 129 N. C. 314, 40 S. E. 63; *Levy v. Newman*, 130 N. Y. 11, 28 N. E. 660; *Dumphy v. Hilton*, 121 Mich. 315, 80 N. W. 1; *Quinn v. Kenney*, 47 Cal. 147.

It is equally well settled that, if through some mistake or negligence the officer fails to make a good and valid deed in pursuance of the sale and the certificate previously issued and in accordance with law, mandamus will lie to compel him to thereafter exhaust the power vested in him by law by executing a good and valid deed, and that if mandamus will lie to compel him to perform the act, he may perform such act voluntarily when the defects are called to his attention. In other words, the correct rule of law, as we understand it, is that where the power is vested in an officer to execute a tax deed, such power and authority is not exhausted until a deed is made in compliance with the law, providing the preceding steps have been taken according to law as they appear from the certificate or record of the sale. *Black on Tax Titles*, § 408; *Blackwell on Tax Titles*, § 734; *Duggan v. McCullough*, 27 Colo. 43, 59 Pac. 743; *McQuade v. Jaffray*, 47 Minn. 326, 50 N. W. 233.

It follows from what has been said that

the judgment must be reversed, and it is so ordered, and the case is remanded for further proceedings in harmony with this opinion. Costs awarded in favor of appellant.

SULLIVAN, C. J., concur.

(19 Idaho, 60)

STEWART v. WHITE.

(Supreme Court of Idaho. Dec. 14, 1910.)

(Syllabus by the Court.)

1. SUFFICIENCY OF TAX CERTIFICATE.
Form of tax certificate held sufficient.
2. FORMER DECISION APPROVED.
Bacon v. Rice, 14 Idaho, 107, 93 Pac. 511, cited and approved.
3. EVIDENCE (§ 83*)—PRESUMPTION—OFFICIAL ACTS.

The presumption is that the officer performed his duty in making the tax sale, and that the land was not struck off to the county as a competitive bidder, unless the tax sale certificate affirmatively shows to the contrary.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 105; Dec. Dig. § 83.*]

4. SUFFICIENCY OF TAX DEED.
Held, that the tax deeds conveyed the title.

5. STATUTORY PROVISIONS.
Under the provisions of section 1788, Rev. Codes, no assessment or act relating to assessments' or collection of taxes is illegal on account of informality, or because the same was not completed within the time required by law.

6. TAXATION (§ 799*)—SALE FOR TAXES—RIGHT TO EQUITABLE RELIEF.

Where an owner of real property permits the taxes thereon to go delinquent for 15 years, and neglects his obligation to pay the taxes thereon, and thereafter conveys the same by quitclaim deed for the nominal consideration of \$1, the grantee has no special equities that would require a court to exercise a nice discrimination in laying down a rule for the preservation of a just balance between the state and such grantee.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 799.*]

Appeal from District Court, Nez Perce County; Edgar C. Steele, Judge.

Action by C. B. Stewart against S. D. White. Judgment for defendant, and plaintiff appeals. Affirmed.

Chas. L. McDonald and D. E. Hodge, for appellant. Eugene A. Cox, for respondent.

SULLIVAN, C. J. This action was brought to quiet the title in the appellant to the W. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ and the E. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of section 27, township 32 N., range 2 W. B. M., in Nez Perce county. The answer denied appellant's title to said land, and claimed title in the defendant by virtue of certain tax deeds, and also by adverse possession, but asked for no affirmative relief. Subsequently there was filed an agreed stipulation of the facts in the case. The case was argued to the court upon the stipulated facts and submitted for decision. The court thereafter made findings in support of the af-

firmative defenses in the answer, and entered a decree denying the prayer of the complaint, and refusing to quiet the title to said land in the plaintiff. This appeal is from the judgment. The land in controversy was patented September 19, 1890, to Charles F. Graham. Graham on October 30, 1890, conveyed the same to R. P. Mudge, and Mudge and his wife on April 13, 1896, conveyed the same to Willis B. Reed. On July 12, 1909, Reed and his wife, in consideration of \$1, quitclaimed said land to the appellant Stewart.

It is stipulated that said land was subject to taxation from 1895 to 1909. The taxes were not paid and went delinquent, and the land was sold for taxes and purchased by the county for the years 1895 to 1899, inclusive. During the years 1900 and 1901, the taxes went delinquent but the land was not sold, the previous certificates being then held by the county and the delinquent taxes being extended in red ink on the roll as provided by law. In 1902 respondent White purchased of the county five tax sale certificates, and paid the delinquent taxes and received assignments of the certificates and tax deeds for the property from the proper officer, which deeds were promptly recorded, and additional deeds were executed to him in 1904 and 1909. From 1902 to 1909, inclusive, respondent White paid all taxes assessed upon the premises. From 1895 to 1909, inclusive, Willis B. Reed and his wife, the grantors of the plaintiff, were nonresidents of the state of Idaho, and during that period the premises were uninclosed, and Reed was never in actual possession thereof, nor did he pay or offer to pay any taxes thereon. Immediately after acquiring title in 1902, respondent White went upon the premises, and thereafter visited the same year after year to see that no timber depredations were committed, and at the time of trial had constructed a fence which joined the fences of adjacent owners and inclosed the premises. White has paid all taxes assessed upon said land for 15 years—from 1895 to 1909, both years inclusive. After White had paid the taxes on said land for 15 years, and had claimed under his tax deeds for 7 years, appellant Stewart purchased the rights of Reed, the former owner of the premises, for \$1 consideration named in the deed, and instituted this action to quiet his title. He made no tender of, and has not repaid any of, the taxes paid by White. That fact, however, has no particular bearing in the case, as the trial court, as a court of equity, could require that to be done before granting plaintiff any relief. The stipulated facts practically leave but one question for decision, and that question is whether the form of tax certificates showed that Nez Perce county was a competitive bidder at the tax sale, thus rendering the certificates void. The form of the tax certificates as identical

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

with those that this court had under consideration and held valid in the case of *Bacon v. Rice*, 14 Idaho, 107, 93 Pac. 511, except in that case the tax claimant had paid taxes for only nine years, during which time the original owner had maintained some kind of possession; while, in the case at bar, the respondent and defendant paid the taxes for 15 years, during which time the alleged owner of the property utterly abandoned all of his claims, and these claims are now sought to be enforced by the appellant, who is evidently a speculative purchaser. In the *Bacon* Case the court held the tax certificate sufficient.

It does not affirmatively appear from said tax certificates that the county was a competitive bidder at said tax sale, and the presumption is that the officer did his duty and complied with the law in making said sales; that there was no purchaser at said sale who would take said land and pay said taxes; and that the land was therefore offered for sale and struck off to the county. It is contended by counsel for appellant that the certificates fail to show the circumstances or the conditions precedent necessary to a sale to the county for taxes, and that the description of the land is inadequate to show what land was attempted to be sold. There is nothing in those contentions. The description is amply sufficient and the conditions precedent are sufficiently shown in the certificates. From the stipulated facts and the evidence introduced on the trial, it clearly appears that the tax deeds issued to the respondent are amply sufficient to convey the title and do convey it.

It was held, in effect, in *Couts v. Cornell*, Tax Collector, 147 Cal. 500, 82 Pac. 194, 109 Am. St. Rep. 168, that there is an enforceable obligation to pay a general annual tax, which in a sense is legal as well as moral; and a lien therefor is established by law irrespective of the irregularities or informalities of the assessment. Even if there were some informalities in the assessment or collection of the taxes upon said land, those were all cured by the provisions of section 1788, Rev. Codes, which section is as follows: "No assessment, or act relating to assessment, or collection of taxes is illegal on account of informality, nor because the same was not completed within the time required by law." See, also, *White Pine Mfg. Co. v. Morey*, 112 Pac. 674, decided at the October, 1910, term of this court.

Cases sometimes arise in which the court of equity is required to exercise a nice discrimination in laying down a rule which will preserve a just balance between the state and the individual citizen. The case at bar, however, involves the exercise of no particular discretion on the part of the court, as there are no equities involved in favor of the plaintiff. It appears that the owner of the

real estate involved in this suit abandoned the property for 15 years, and neglected his obligation to the state to pay the taxes imposed thereon, and apparently abandoned the same until the appellant in this suit procured a quitclaim deed for the land involved, for the nominal consideration of \$1. The record shows that the respondent is the holder of five tax certificates and five tax deeds, and has paid the taxes for 15 years, and the period of redemption on all of the tax sale certificates has long since expired.

No sufficient error appearing in the record to warrant a reversal of the case, the judgment is affirmed, with costs in favor of respondent.

AILSHE, J., concurs.

(19 Idaho, 3)

NORTHERN PAC. RY. CO. v. PYLE et ux.
(Supreme Court of Idaho. Dec. 8, 1910.)

(Syllabus by the Court.)

1. ADVERSE POSSESSION (§ 95*)—ACQUISITION OF LAND.

Under the provisions of section 4043, Rev. Codes, title to land by adverse possession cannot be established under the provisions of the Revised Statutes unless it shall be shown that the land has been occupied and claimed for a period of five years continuously, and the party or persons, their predecessors and grantors, have paid all taxes, state, county, and municipal, which have been levied and assessed upon said land according to law.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 530-532; Dec. Dig. § 95.*]

2. ADVERSE POSSESSION (§ 95*)—PAYMENT OF TAXES—EVIDENCE.

Held, that the evidence is sufficient to show that the respondents paid all taxes that had been assessed against the land in dispute according to law from 1902 to 1907.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 530-532; Dec. Dig. § 95.*]

3. PUBLIC LANDS (§ 71*)—RAILROAD LAND GRANT.

Under an act of Congress approved July 2, 1864, entitled "An act granting land to aid in the construction of the railroad and telegraph line from Lake Superior to Puget's Sound on the Pacific Coast, by the northern route" (Act July 2, 1864, c. 217, 13 Stat. 365), and the acts and joint resolutions of Congress supplemental thereto and amendatory thereof, there was granted to the Northern Pacific Railroad Company certain lands along its right of way upon the conditions mentioned in said act. The line of said railroad company was definitely fixed opposite the land in controversy, and a plat thereof filed in the office of the Commissioner of the General Land Office on December 12, 1882. Thereafter the said railroad company complied with the terms and conditions of said acts, and said railroad and telegraph line were constructed and accepted by the President of the United States. Held, that said land was within the limits of said grant and became a part thereof, and, under a mortgage foreclosure sale, said land was sold and conveyed, with other land, to the appellant herein, the Northern Pacific Railway Company; that said grant to the Northern Pacific Railroad Company was

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

in present; and that the legal title to said land passed to said railroad company upon its filing its map of definite location and thereafter complying with the terms and conditions of said grant.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 232; Dec. Dig. § 71.*]

4. EJECTMENT (§ 11*)—RAILROAD LAND GRANT—RIGHTS OF GRANTEE.

The delay of the government in issuing a patent to said railroad company for said land did not prevent the company from maintaining an action in ejectment to remove any person from said land and maintain its right to the possession thereof.

[Ed. Note.—For other cases, see Ejectment, Dec. Dig. § 11.*]

5. ADVERSE POSSESSION (§ 45*)—ACQUISITION OF RIGHT BY PRESCRIPTION.

The pendency of a homestead contest in the Land Department of the United States does not suspend the running of the statute of limitations.

[Ed. Note.—For other cases, see Adverse Possession, Dec. Dig. § 45.*]

6. EJECTMENT (§ 11*)—ACQUISITION OF RIGHT BY PRESCRIPTION.

Held, that the Northern Pacific Railroad Company was entitled to the possession of the land in dispute from December 2, 1882, up to the time that said lot was conveyed to the appellant corporation in 1896, and that said appellant corporation could have maintained an action in ejectment to remove any trespasser from said lot at any time prior to the running of said statute in favor of an adverse claim.

[Ed. Note.—For other cases, see Ejectment, Dec. Dig. § 11.*]

7. ADVERSE POSSESSION (§ 60*)—SUFFICIENCY OF DEFENDANT'S TITLE.

In an action in ejectment to recover land in this state, the defendant may admit title in the United States either with or without claim on his part of the right to procure title from the United States, and it is sufficient if he has such possession as is required by our statute and claims title adversely to the plaintiff and all others except the United States.

[Ed. Note.—For other cases, see Adverse Possession, Dec. Dig. § 60.*]

Appeal from District Court, Shoshone County; W. W. Woods, Judge.

Action by the Northern Pacific Railway Company against E. E. Pyle and wife. Judgment for defendants, and plaintiff appeals. Affirmed.

E. J. Cannon, F. M. Dudley, and Featherstone & Fox, for appellant. C. W. Beale, Walter H. Hanson, and James A. Wayne, for respondents.

SULLIVAN, C. J. This is an appeal from the judgment of the district court adjudicating that the respondents, who are defendants, E. E. Pyle and Aletha J. Pyle, husband and wife, are the owners in fee of lot 10 in section 5, township 45 N., range 3 E., of Boise meridian, and adjudging that the appellant, the Northern Pacific Railway Company, has no right, title, or interest in or right of possession to said lot, and that the respondents are entitled to the payment of the sum of \$9,200, awarded by the commissioners to be paid by the Chicago, Milwaukee & St. Paul

Railway Company for a railway right of way over said lot.

On the 9th of March, 1908, the plaintiff in the original action, the Chicago, Milwaukee & St. Paul Railway Company of Idaho, instituted proceedings in the district court of Shoshone county against the respondents Pyle and the Northern Pacific Railway Company to condemn a strip of land extending across said lot 10 for a right of way for its proposed railway. Thereafter the defendants Pyle filed their answer, and amended answer to said complaint. The Northern Pacific Railway Company, one of the defendants in said proceeding, refused to plead to the amended complaint, and thereafter proceedings were had which resulted in the appointment of three commissioners to assess and award the damages sustained by the defendants. For the facts in that proceeding, reference is made to the case of E. E. Pyle et ux., Plaintiffs, v. Woods, Judge, Defendant, 111 Pac. 746, decided on November 26, 1910, by this court. It appears that the Northern Pacific Railway Company took no part in said condemnation proceedings whatever, and offered no evidence as to any damages that would result to it from the Milwaukee Company's procuring such right of way, and said commissioners awarded to the said Pyles damages in the sum of \$9,500 which it was found they had sustained by reason of such condemnation and appropriation. Said commissioners also found that the Northern Pacific Railway Company would not sustain any damages whatever. Thereafter, on the 1st of May, 1908, on an ex parte application and while said Northern Pacific Company was still in default, it secured an order from the trial court enjoining and restraining the payment of \$9,200 of the \$9,500 awarded as aforesaid. Repeated applications were made by the Pyles for an order of the court requiring the payment to them of said award, which the court failed to grant, and on the 14th day of February, 1910, nearly two years after said award was made, the court ordered said Northern Pacific Railway Company to file its complaint herein, showing by what right it claimed said award that had been made to said defendants Pyle. Upon the order of the trial court, the Northern Pacific Railway Company filed its answer and cross-complaint, in which it was alleged, among other things, that by act of Congress of the United States, approved July 2, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget's Sound, on the Pacific Coast, by the northern route" (Act July 2, 1864, c. 217, 13 Stat. 365), and the acts and joint resolutions of Congress supplemental thereto and amendatory thereof, there was granted to the Northern Pacific Railroad Company every alternate section of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

public land, not mineral, designated by odd sections, to the amount of 20 alternate sections per mile on each side of said railroad as said company may adopt, and whenever on the line thereof the United States has full title, not reserved, sold, granted, or otherwise appropriated and free from pre-emption and other rights at the time said road is definitely fixed and the plat thereof filed in the office of the Commissioners of the General Land Office that the line of said Northern Pacific Railroad opposite lot 10 was definitely fixed and the plat thereof filed in the office of the Commissioner of the General Land Office December 12, 1882; that thereafter the said Northern Pacific Railroad Company duly constructed its said railroad and telegraph line over and along said line of definite location, and the same, having been examined by the commissioners appointed by the President of the United States for that purpose, was reported by said commissioners to have been so constructed and completed in the manner required by said act of Congress, and said railroad and telegraph line was thereupon accepted by said President of the United States; that said lot 10 is within less than 40 miles of the line of said Northern Pacific Railroad and is within the limits of said grant; that said land is non-mineral in character, as appears by record in the United States Land Office for the district in which said land is located, and in the office of the Commissioner of the General Land Office, and petitioner avers that said land was at the date of the grant to said Northern Pacific Railroad Company and at the date of the filing of the map of definite location by said railroad company in the office of the Commissioner of the General Land Office public lands of the United States, not reserved, sold, granted, occupied by homestead settlers or otherwise appropriated and free from pre-emption or other claims or right; that in the year 1896 a decree was entered by the United States Circuit Court for the District of Idaho foreclosing a mortgage theretofore given by said Northern Pacific Railroad Company upon its said land grant and other property, which land grant included said lot 10, whereby said lands were sold and conveyed to this plaintiff, the Northern Pacific Railway Company; that the defendants Pyle in August, 1902, made application at the United States Land Office at Cœur d'Alene, Idaho, to enter said lot 10 as public land of the United States under the provisions of the homestead act of Congress and acts supplemental thereto and amendatory thereof; that said application was rejected by the register and receiver of said land office for the reason that the application conflicted with the grant of the Northern Pacific Railroad Company (now Railway Company); that thereafter an appeal was taken to the Commissioner of the General Land Office, who sustained the decision of

the register and receiver; that thereafter an appeal was taken to the Secretary of the Interior, and he also sustained the decision of the register and receiver; that the Northern Pacific Company has at all times asserted its title to said lot and to the whole thereof, and paid taxes levied and assessed against said lot in the years 1904, 1905, 1906, and 1907, and prays that it be adjudged and determined that it is the owner of said land and entitled to receive whatever compensation shall be paid for said right of way by the Chicago, Milwaukee Company, and that it be decreed that the defendants Pyle have not and never have had any right, title, or interest in or to said lot.

A demurrer to said cross-complaint having been overruled, the defendants answered, admitting some of the allegations and denying others, and pleaded title by adverse possession. Trial was had to the court without a jury, and the court found the issues in favor of the defendants Pyle. It found that the Northern Pacific Railroad Company became the owner of said lot under the provisions of said act of Congress granting lands to aid in the construction of railroads, and that the Northern Pacific Railway Company became the owner by purchase thereof at mortgage sale; that Pyle and wife established their residence on said lot on March 11, 1902, and have resided upon and maintained their home thereon and have been in the actual, peaceable, notorious, continuous, and adverse possession of said lot and every part thereof from the 11th of March, 1902, up to the time of the commencement of this action on March 9, 1908; that they had paid all taxes, state, county, and municipal, which were levied and assessed upon and against said lot and improvements, and every part thereof; that no taxes, state, county, or municipal, had been levied and assessed according to law upon said lot 10 or any part thereof to said defendants or to the Northern Pacific Railway Company, and, upon the findings thus made, judgment and decree were entered in favor of defendants E. E. Pyle and Aletha J. Pyle, decreeing that they were entitled to the payment of said \$9,200 theretofore awarded to them by said commissioners, and that the claim of the said "Northern Pacific Railway Company to said lot 10 and to each and every part thereof and the said \$9,200 and to each and every part thereof is without right and foundation and is invalid and groundless," and quieted said title in said defendants Pyle. The appeal is from the judgment.

The principal question presented for determination is: Did the statute of limitations run in favor of respondents who had settled upon said lot 10 under the facts as established by the evidence and under the law? In other words, Did the respondents procure title to said lot 10 by adverse possession? Under the provisions of section

4043, Rev. Codes, title by adverse possession cannot be established unless it be shown that the land has been occupied and claimed for a period of five years continuously and the party or person, his predecessors and grantors, has paid all taxes, state, county, and municipal, which have been levied and assessed upon said land according to law. The court found that the defendants Pyle had paid all taxes that had been assessed against said property according to law. It also found that no taxes had been levied and assessed upon said lot 10 according to law. The evidence is sufficient to support that finding.

Counsel for appellant contend that the running of the statute of limitations was suspended during the pendency of the contest between the respondents and appellant in the land department of the United States, and cites many decisions in support of his contention. The respondents did make application to the proper United States Land Office to enter said land as a homestead under the laws of Congress in 1902, but the register and receiver refused to permit them to do so on the ground that said land was within said railroad grant and belonged to the appellant company. Appeals were taken, respectively, to the Commissioner of the General Land Office and to the Secretary of the Interior, where the decision of the local office was sustained, and counsel contend that the statute of limitations was tolled or ceased to run during the pendency of such proceedings before the United States Land Department, citing *St. Paul, M. & M. Ry. Co. v. Olson*, 87 Minn. 117, 91 N. W. 294, 94 Am. St. Rep. 693, and *Braun v. Sauerwein*, 10 Wall. 218, 19 L. Ed. 895, and many other decisions. In the *Olson* Case that court held that, whenever a person is prevented from exercising his legal remedy by some paramount authority, the time during which he is thus prevented is not to be counted against him in determining whether the statute of limitations has barred his right.

In *Sage v. Rudnick*, 91 Minn. 325, 98 N. W. 89, 100 N. W. 106, the court had under consideration a railroad grant, and held that the grant to the railroad company was in present, and that the legal title to the land passed to the railroad company upon its filing its map of definite location, and that the statute of limitations began to run in favor of defendant's alleged title by adverse possession at the time of his settlement upon the land; the legal title thereto being in the railroad company. While in that decision the Supreme Court of Minnesota does not in express terms overrule the *Olson* Case, it clearly does so in effect.

In *Deseret Salt Co. v. Tarpey*, 142 U. S. 241, 12 Sup. Ct. 158, 35 L. Ed. 999, and in *Toltec Ranch Co. v. Cook*, 191 U. S. 532, 24 Sup. Ct. 166, 48 L. Ed. 291, it was held that the grant to the railroad company was a grant in present, and that the legal title

passed at the date of the definite location of the company's line of railroad; that the railroad company could maintain an action for the possession of its land before the issuance of patent, and in the latter case it was held that the conveyance of title was by the granting act rather than by patent; and that the title thus transferred was a legal title as distinguished from an equitable interest and the title acquired by adverse possession would prevail against a patent.

Barden v. N. Pac. Ry. Co., 154 U. S. 288, 14 Sup. Ct. 1030, 38 L. Ed. 992, which is cited by counsel for appellant, we do not think supports their contention. In the course of the opinion in that case Justice Field said: "The delay of the government in issuing a patent to the plaintiff, of which great complaint is made, does not affect the power of the company to assert in the meantime by possessory action (as held in *Deseret Salt Co. v. Tarpey*, 142 U. S. 241, 12 Sup. Ct. 158, 35 L. Ed. 999) its right to lands which are in fact nonmineral."

In *Toltec Ranch Co. v. Cook*, supra, the court said: "The case, therefore, like *Barden v. Northern Pacific R. Co.*, decided only that lands did not pass by the grant which were reserved from it. An evident proposition, whatever might have been the difficulties in determining what lands were reserved. And there were difficulties. This court in consequence divided in opinion. But those difficulties do not confront us in the case at bar. They are settled, and in their settlement no doubts were cast upon the efficacy of the grants to convey title to all the lands they covered—to all that was not reserved from them." In the case at bar there is no question about the character of the land as both parties admit that it was not exempt from the grant to the railroad company, but was included within it.

The case of *Iowa Railroad Land Co. v. Blumer*, 206 U. S. 482, 27 Sup. Ct. 769, 51 L. Ed. 1148, is cited by counsel for appellant in support of the contention that the pendency of a contest in the Interior Department precludes the running of the statute, but, as we read it, it is against that contention. The court said: "Under the decisions made by this court in *Deseret Salt Co. v. Tarpey*, 142 U. S. 241, 12 Sup. Ct. 158, 35 L. Ed. 999, and *Toltec Ranch Co. v. Cook*, 191 U. S. 532, 24 Sup. Ct. 166, 48 L. Ed. 291, notwithstanding the patent had not been issued, the railway company, grantor of the plaintiff in error, having succeeded to the right and title of the original company, and complied with all the terms and conditions of the grant, as required in the legislation of Congress and the acts of the Iowa Legislature after the acceptance of the grant by the state, was in a position and clothed with the requisite title in order to transmit the same to another who might have recovered possession of the lands, and it could itself have brought an action in ejectment to oust

one holding adverse possession thereof, and, being clothed with these rights, was in such position that the statute of limitations would run against it in favor of one who occupied the premises by adverse possession under color of title. This was distinctly decided in the Toltec Ranch Company Case, wherein it was held that the statute of limitations would run against the railroad company, thus situated toward the lands, although the patent had not issued. * * * But when the grant is in present, and nothing remains to be done for the administration of the grant in the Land Department, and the conditions of the grant have been complied with and the grant fully earned, as in this case, notwithstanding the want of final certification and the issue of the patent, the railroad company had such title as would enable it to maintain ejectment against one wrongfully on the lands, and title by prescription would run against it in favor of one in adverse possession under color of title. *Deseret Salt Co. v. Tarpey and Toltec Ranch Co. v. Cook*, supra. Applying and giving weight to the decisions thus recently rendered in this court, we think the debatable proposition in the case concerns not the title of the railway company, or its right to have maintained an action to recover the premises, but involves the right of Carraher, and the defendant in error as his successor, to claim the title to the premises by adverse possession."

That the grant to the Northern Pacific Railroad Co. to lot 10 was a grant in present we have no doubt. *N. Y. Indians v. U. S.*, 170 U. S. 1, 18 Sup. Ct. 531, 42 L. Ed. 927; *Iowa R. R. Land Co. v. Blumer*, 206 U. S. 482, 27 Sup. Ct. 769, 51 L. Ed. 1148.

This court said in *Balderston v. Brady*, 17 Idaho, 567, 107 Pac. 493, that: "It has been the uniform holding of the Supreme Court of the United States that such grants are grants in present and immediately vest title in the grantee." Under the facts of this case, the Northern Pacific Railroad Company was entitled to the possession of said lot 10 from December 12, 1882, up to the time that said lot was conveyed to the appellant in 1896, and that company might have maintained an action in ejectment from the date of filing its map of definite location, to wit, December 12, 1882, up to the time of transfer in 1896 to the present appellant, and this appellant from that date up to a time within five years subsequent to the initiation of adverse possession by the respondents, which was on the 11th day of March, 1902.

In *Toltec Range Co. v. Babcock*, 24 Utah, 183, 66 Pac. 876, the court said: "The railroad company having had, as we have seen, the legal title to the land in dispute at least from time of filing of the map of definite location with the Secretary of the Interior, and having had the right to enter upon, occupy, and use the land, there would seem to be

neither reason nor authority to hold that the statute of limitations did not run against the company and its grantee as well before as after the issuance of the patent, and this even though the intervener may have supposed that her title was subordinate to that of the United States; for possession held in subordination to the title of the government may be adverse as to another claimant. *Francoeur v. Newhouse* (C. C.) 14 Sawy. 600, 43 Fed. 236; 9 Am. & Eng. Enc. Law, 58; *Hayes v. Martin*, 45 Cal. 559."

The precise question under consideration was before the Supreme Court of the United States in *Mo. Valley Land Co. v. Wiese*, 208 U. S. 234, 28 Sup. Ct. 294, 52 L. Ed. 466, which case went from the Supreme Court of the state of Nebraska. In the course of the opinion the court said: "The plaintiff, by his reply, in substance alleged that the grants were in present, and that the effect of the completion of the railroads and compliance with all the terms and conditions of the act prior to January 1, 1870, operated to pass the title of the government on or prior to that date, and that the General Land Office had not thereafter jurisdiction in respect to such lands, and that the adverse possession of the plaintiff was not affected by the proceedings had in the Land Department concerning such land. * * * We are clearly of opinion that the possession of Japp and his grantee was adverse in the strictest sense of the term, and the acts of Wiese in seeking to acquire title from the United States under the act of 1887, with the view of removing a cloud upon his title, was not an act of recognition or acknowledgment of a superior title, either in the United States or in the Sioux City Company, operating to interrupt the continuity of his adverse possession."

In *Sage v. Rudnick*, 91 Minn. 325, 98 N. W. 89, 100 N. W. 106, the court said: "Patent was not, however, issued to the railroad company until 1884, but it was held that the statute of limitations began to run against the company and in favor of the adverse claimant, not from the date of the issue of the patent, but from the date of the grant by Congress. * * * The authorities all hold, and it is thoroughly settled, that, when land has passed from the general government, controversies between individuals concerning title thereto are exclusively within the jurisdiction of the courts."

In *Southern Pacific R. R. Co. v. Whitaker*, 109 Cal. 268, 41 Pac. 1083, it was held that the commencement of a contest in the United States Land Department did not stop the running of the statute of limitations of the state.

In *Northern Pac. R. Co. v. Kranich* (C. C.) 52 Fed. 911, the court held in an action in ejectment to recover land situated in Montana that an admission in the answer that the title was in the United States is not in-

consistent with the plea of the statute of limitations, for possession held in subordination to the title of the United States may be adverse to all others. After stating the general rule applicable to obtaining title by adverse possession, to the effect that the person so claiming must claim title as against all others, the court said: "The fact that he admits that another is owner, or does not claim title against all others, would generally be insufficient. There is no doubt that in the answer defendant admits ownership of the property in the United States. Is there any exception as to the general rule I have stated? I think in all of the western states there is an exception thereto. If a party claims title to land here against all persons but the United States, that is sufficient. This view is recognized in the cases of *Francœur v. Newhouse* (C. C.) 43 Fed. 236; *Hays v. Martin*, 45 Cal. 563; *McManus v. O'Sullivan*, 48 Cal. 15. In this state I am satisfied the rule is well established not to allow, as a plea of title in a third party, a plea of title in the United States. For many years no one in Montana held title to real property against the United States. The admission, then, that the title to the property was in the United States was not at all inconsistent with the plea of the statute of limitations by defendant as against plaintiff, and the two defenses are not inconsistent."

In *Allen v. McKay*, 120 Cal. 332, 52 Pac. 823, it was held that it was not requisite that the party who relies on the statute of limitations to show that he claims title in hostility to the United States; that he may admit title in the United States either with or without claim on his part of the right to claim title from the United States, and it is sufficient if he has such possession as is required by the statute and claims in hostility to the title which the plaintiff tries to establish in the action. We think that the correct rule in this class of cases. This doctrine is supported by the Supreme Court of the United States and by many of the courts of last resort of other states.

We therefore conclude that the statute of limitations was not suspended or tolled from the time that the Pyles made application to homestead said lot 10 until the final decision in the matter by the Secretary of the Interior, that the Northern Pacific Railway Company was the absolute owner of said lot at the time the Pyles settled thereon in 1902, and that they held and possessed the land adversely to the railroad company, and that the statute of limitations began to run from the date of their settlement and adverse possession and that the railway company had the right to bring an action in ejectment against them at any time within five years after their settlement thereon and possession thereof, and that the Pyles have obtained title to said lot by adverse possession.

Other errors are assigned which we have examined, and we are unable to find any reversible error in the record.

The judgment is therefore affirmed with costs in favor of the respondents.

AILSHIE, J., concurs.

(19 Idaho, 66)

ST. JOE IMPROVEMENT CO. v. LAUMIERSTER et al.

(Supreme Court of Idaho. Dec. 15, 1910.)

(Syllabus by the Court.)

1. NAVIGABLE WATERS (§ 3*)—CONTROL AND REGULATION—IMPOSITION OF ADDITIONAL DUTIES ON CONSTITUTIONAL OFFICERS.

An act of the Legislature entitled "An act for the improvement of the navigation of rivers, and their tributaries, in the state of Idaho, by deepening, straightening and clearing the channels thereof, by the erection of dams, booms and canals, and otherwise, and for collecting tolls and charges thereon, for the floating, driving and handling of sawlogs, and other timber products, and the navigation of barges and rafts" (Laws 1899, p. 332), and repealed in 1905 (Sess. Laws, p. 30), was not void for the reason that it imposed certain duties on the board of state land commissioners, which duties were additional to those imposed by the provisions of section 7, art. 9, of the state Constitution.

[Ed. Note.—For other cases, see *Navigable Waters*, Dec. Dig. § 3.*]

2. CONSTITUTIONAL LAW (§ 26*)—LEGISLATIVE POWERS.

The Legislature has plenary power in all matters of legislation except as prohibited by the Constitution.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. § 30; Dec. Dig. § 26.*]

3. EMINENT DOMAIN (§ 71*)—TAKING OF PRIVATE PROPERTY FOR PUBLIC USE—COMPENSATION.

Said act does not authorize the taking of private property for public use without just compensation, but under its provisions private property might be taken for the public uses therein mentioned upon payment of just compensation therefor to be ascertained under the eminent domain statutes of the state.

[Ed. Note.—For other cases, see *Eminent Domain*, Dec. Dig. § 71.*]

4. STATUTES (§ 123*)—SUBJECTS AND TITLES—NAVIGABLE WATERS—"LOGS AND OTHER TIMBER PRODUCTS."

Title of said act held sufficient.

[Ed. Note.—For other cases, see *Statutes*, Dec. Dig. § 123.*]

Appeal from District Court, Kootenai County; Robert N. Dunn, Judge.

Action by the St. Joe Improvement Company against H. A. Laumierster and others. Judgment for plaintiff, and defendants appeal. Affirmed.

A. A. Crane and McBee & La Veine, for appellants. Gray & Knight, for respondent.

SULLIVAN, C. J. This is an action to recover a balance of an account amounting to \$554.50, alleged to be due from the defendants for tolls for the use of the St. Joe river

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

in Kootenai county, for towing logs in booms and bralls. The cause was tried by the court without a jury upon a stipulation of the facts, and judgment was rendered for the plaintiff in accordance with the prayer of the complaint. The plaintiff claims the right to charge tolls on said river by virtue of its compliance with an act of the Legislature approved February 28, 1899 (Sess. Laws, p. 332). Said act was repealed in 1905. See Sess. Laws 1905, p. 30.

The defendants are engaged in operating a shingle mill at Harrison, on Lake Cœur d'Alene, in said county, and obtain a large quantity of logs for their mill from the upper St. Joe river, bringing the logs down the river and across the lake to their mill. The logs for which tolls are sought to be charged in this case were placed in booms by the defendants at the head of navigation on the St. Joe river, and towed by the defendants, or floated down said river in booms or bralls. The plaintiff rendered no service to the defendant so far as these logs were concerned, and their alleged right is by virtue of the improvement of the river and the alleged charter granted them under the provisions of that act. A part of said river flows through the Cœur d'Alene Indian reservation, which is under the control of the federal government. The plaintiff expended in improving said river about \$8,000, mainly by removing trees and snags that had lodged in said river, and also by placing sheer booms along the banks, and by driving some piling along said river, and by blasting out and removing rocks from said river. Said river is a navigable stream and has been navigated by steamboats since the earliest settlement of the country, and for the same length of time sawlogs have been floated down it, either singly or in booms each year.

The first and principal contention of the appellant is that said act of the Legislature is unconstitutional and void. It is first contended that it is void because it attempts to impose duties and burdens upon the board of state land commissioners not authorized by the Constitution of the state. Article 9, § 7, of the state Constitution provides that the Governor, Superintendent of Public Instruction, Secretary of State, and Attorney General shall constitute the state board of land commissioners, who shall have direction, control, and disposition of the public lands of the state under such regulations as may be prescribed by law. It is contended that said board is by the provisions of said section created for the one specific purpose stated in the Constitution, to wit, the direction, control, and disposition of the public lands. Conceding that said board was created by the Constitution for the specific purpose of controlling the public lands of the state under such regulations as might be prescribed by law, there is nothing in the Constitution prohibiting the Legislature from imposing on

the identical persons who compose that board the duties required to be performed under the provisions of the act referred to. And the improvement of the navigation of the rivers of the state is intimately connected with the control and disposition of the public lands of the state, as all navigable rivers are to a certain extent under the control of the state. It must be remembered that the Legislature has plenary power in all matters of legislation except where prohibited by the Constitution, and we find nothing in the Constitution prohibiting the Legislature from imposing on the board of state land commissioners the duties imposed by said act. We therefore conclude that said act is not unconstitutional, so far as imposing additional duties on said board is concerned.

It is next contended that said act is void for the reason that it authorizes the deepening, clearing, and straightening of the channels of navigable streams without providing any compensation for damages done to riparian owners. There is nothing in that contention, for the reason that said act is supplemented by the eminent domain statutes of the state. It is provided, among other things, in subdivision 2 of section 5210 of the Revised Codes, that the right of eminent domain may be exercised in behalf of the following uses: "(2) * * * Raising banks of streams, removing obstructions therefrom and widening or deepening or straightening their channels. * * *". The state by the act under consideration has authorized the improvement of the navigation of the rivers of the state "by deepening, straightening and clearing the channels thereof; by the erection of dams, booms and canals," etc. It was not the intention in carrying out the provisions of said act that private property should be taken without just compensation; hence, wherever it was necessary to take property for the purposes contemplated by said act, such property could not be taken until just compensation therefor had been paid as provided by the eminent domain statutes of the state. *Mashburn v. St. Joe Improvement Co.* (decided at the October, 1910, term of this court) 113 Pac. 92.

It is next contended that neither in the title nor by the act itself is any authority granted for charging tolls on "booms" or "bralls" of logs. In the title we find, among other things, the following: "And for collecting tolls and charges thereon, for the floating, driving and handling of sawlogs and other timber products." While the title does not name booms or bralls, it does name "logs and other timber products" which is broad enough to cover "booms" and "bralls," which are composed of logs and timber products.

The judgment is therefore affirmed, with costs in favor of respondent.

AILSHIE, J., concurs.

(19 Idaho, 130)

VALENTINE v. ROSENHAUPT.

(Supreme Court of Idaho. Dec. 31, 1910.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 854*)—REVIEW—REASON FOR DECISION.

The fact that the trial court gives a wrong reason for striking out certain evidence is not a reason for reversal of the case.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3418; Dec. Dig. § 854.*]

2. APPEAL AND ERROR (§ 1056*)—HARMLESS ERROR—STRIKING OUT EVIDENCE.

It is not error of the trial court to strike out evidence which is hearsay and immaterial, and which could in no way affect the rights of the opposite party.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4188; Dec. Dig. § 1056.*]

3. PLEADING (§ 258*)—AMENDMENT.

Where, after the close of the evidence in the trial of a case, an amendment is proposed to the answer, and it appears that such proposed amendment would not be supported by the proof, it is not error to disallow the same.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 776; Dec. Dig. § 258.*]

Appeal from District Court, Kootenai County; Robert N. Dunn, Judge.

Action by Sarah D. Valentine against Sid Rosenhaupt. Judgment for plaintiff, and defendant appeals. Affirmed.

Alex M. Winston and Gray & Knight, for appellant. R. E. McFarland, for respondent.

STEWART, J. Sid Rosenhaupt, the appellant, brought an action in the district court of Kootenai county against R. S. Valentine, the husband of Sarah D. Valentine, respondent herein, upon a promissory note for the sum of \$530. Attachment was issued and levied upon the real property involved in this action. After the attachment had been levied, the respondent commenced this action against the appellant to restrain and enjoin him from further proceedings in said attachment suit, alleging that said lands so levied upon were her sole and separate property, and that her husband, R. S. Valentine, had no interest whatever in the same. The case was tried to the court without a jury, and findings of fact and conclusions of law were made, and a decree rendered in favor of the respondent. A motion for a new trial was made and overruled. This appeal is from the judgment and from the order overruling the motion for a new trial.

In the complaint the plaintiff alleges that on the 12th day of October, 1905, her father died intestate in the state of Michigan, leaving by his last will and testament to the plaintiff the sum of \$7,575, and that she received said sum on or about the 9th day of April, 1906, upon the distribution of said estate, and that all the consideration and purchase price of the property described in her complaint, upon which the attachment was

levied in the suit of Rosenhaupt v. R. S. Valentine, was paid out of the moneys received by her upon the distribution of her said father's estate, and that her said husband, R. S. Valentine, paid no part of the purchase price, and that all of said real estate is her sole and separate estate. The defendant answered, and among other things alleged: "That this defendant says that he is informed and believes, and therefore states the fact to be, that the said lands were in fact purchased by R. S. Valentine, the husband of the said plaintiff, pursuant to the contract entered into with the said George T. Addis and wife by the said R. S. Valentine, on or before the 15th day of December, 1908, and defendant says that he is informed and believes, and therefore states the fact to be, that the said lands described in plaintiff's complaint were purchased with community funds of the said R. S. Valentine and Sarah D. Valentine, and that said lands are community property of the said R. S. Valentine and Sarah D. Valentine." It is also further alleged in the answer as follows: "As to whether or not all or any of the considerations or purchase price of the lands described in plaintiff's complaint were paid for by the money, or any moneys, received from plaintiff's deceased father, or as to whether or not plaintiff's husband, R. S. Valentine, paid anything for the purchase of said lands, this defendant has not sufficient knowledge or belief to enable him to answer, and he therefore denies said allegations, and each and all thereof, and every part thereof." This answer was verified upon information and belief.

During the trial and while the appellant was being examined, he testified that he had loaned R. S. Valentine \$250, which was to apply upon the purchase price of the lands described in the complaint. Counsel for respondent moved to strike out this testimony. The motion was sustained, and the principal argument upon this appeal is based upon this ruling of the trial court. The bill of exceptions recites the ruling of the court as follows: "The court announced that he was of the opinion that the plaintiff's motion to strike from the record all of the testimony of the defendant relative to the advancement of the sum of \$250, which was applied upon the purchase price of the lands described in the complaint, should be sustained, upon the grounds and for the reason that the defendant's answer is made upon information and belief that the purchase price paid for the lands mentioned in the complaint was not the separate funds of the plaintiff, Sarah D. Valentine." It seems from this bill of exceptions that the trial court was of the opinion that inasmuch as the answer was based upon information and belief, therefore the defendant in his testimony could not testify positively to any fact

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

stated in the answer to be upon information and belief.

It is a rule that where a pleading is made upon information and belief, and it appears that the facts stated in such pleading are within the knowledge of the person making the same, such pleading may be stricken out, yet we are not aware of any rule which would authorize the striking out of proffered testimony because it is positive, when the pleading it is offered to support is made upon information and belief. In this instance, however, although the reason for the court's ruling may have been erroneous, the ruling was correct. The evidence of Rosenhaupt as to loaning Valentine the \$250 was proper, but the statement as to the purpose for which the loan was made was hearsay, irrelevant, and incompetent as against the respondent, and the respondent could in no way be bound by any contract or arrangement made between the appellant and her husband, unless made with her permission or authority, and in this instance it does not appear that she authorized or consented to Valentine's borrowing such sum of money. Valentine did not testify, neither did Addis, the person from whom the land was purchased, that the money claimed by Rosenhaupt to have been loaned Valentine was in fact applied on the purchase price of said land, and because of this fact the evidence as to the use of the money was hearsay and immaterial, and the trial court did not err in striking said testimony from the record.

There is another reason why the case should not be reversed because of this ruling of the trial court, and that is that even although this evidence had been relevant, still the cause was tried to the court, and the court made findings of fact in favor of the respondent, and this evidence could in no way have induced a different conclusion from that reached by the trial court.

It is next argued that the trial court erred in not permitting the appellant to amend his answer, after the motion to strike out the evidence of Valentine heretofore described, and before the trial court had ruled thereon. This proposed amendment consisted of an allegation that the appellant had loaned R. S. Valentine the sum of \$250, which was used toward the purchase price of the lands mentioned in the complaint. While courts should be very liberal in allowing amendments offered, to make pleadings conform to the proof, yet where a proposed amendment, even if allowed, would not be supported by the proof received, it is not error to disallow such amendment. In this instance, even if the amendment had been allowed, the evidence would not have supported it, as there is no evidence that the \$250 loaned was ever applied by R. S. Valentine on the purchase price of the property. The evidence in this case conclusively shows

that all the purchase money paid was paid by Mrs. Sarah D. Valentine, and out of moneys received by her from her deceased father's estate, and the court finds in accordance with this proof, and the proof clearly supports such findings, and would not have supported the amendment, even if allowed.

We have examined all the other questions involved in this appeal, and find no merit in the appeal. Judgment is affirmed. Costs awarded to the respondent.

SULLIVAN, C. J., and AILSHIE, J., concur.

(19 Idaho, 163)

CAIN v. VOLLMER et al.

(Supreme Court of Idaho. Dec. 31, 1910.)

(Syllabus by the Court.)

DAMAGES (§ 40*)—REMOTE AND SPECULATIVE DAMAGES.

Where C. has an apprentice who is serving him as a horse jockey, and who is riding in a race at a racing association, and is thrown and injured and disabled for future riding by reason of the wrongful act of V. and others in allowing a dog to rush upon the race track in front of the horse as he is making the home stretch, and C. thereafter sues V. and others for damages on account of the injury to his jockey and his disability for riding in future races, and alleges that he will be unable to secure another jockey of equal skill and ability in riding races, and that he would have won large prizes and premiums had his jockey not been thus injured, *held*, that the damages claimed by the master on account of the injury to his apprentice, the jockey, are too remote, speculative, contingent, and uncertain to be estimated or allowed, and that no recovery can be had therefor.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 72; Dec. Dig. § 40.*]

Appeal from District Court, Nez Perce County; Edgar C. Steele, Judge.

Action by William M. Cain against John P. Vollmer and others. Judgment for defendants, and plaintiff appeals. Affirmed.

This is an appeal from a judgment of nonsuit and an order denying a motion for a new trial. The action was one of trespass *vi et armis* whereby the respondents are alleged to have wrongfully and unlawfully injured and disabled appellant's apprentice from the further discharge of his duties. The facts and circumstances out of which the injury or accident occurred are quite fully stated in *McClain v. Racing Ass'n*, 17 Idaho, 63, 104 Pac. 1015, 25 L. R. A. (N. S.) 691.

McClain v. Association and this case both grew out of the same injury and accident. In that case the apprentice, a horse jockey, sued the owner of the dog which caused the injury for injuries and damages sustained by him personally. This action is prosecuted by the master against the owner of the dog for damages caused by reason of the injury and disability received by the jockey, whereby the latter was disabled and disqualified from thereafter riding appellant's race horses in

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

speed contests. Appellant alleged in his complaint that by reason of the injury and disability received by the jockey, Benny McClain, the latter was thereafter unable to perform the contract of apprenticeship and discharge the duties for which he had been apprenticed, and that by reason thereof the appellant sustained large damages, for the reason that he would thereafter during the life of the contract of apprenticeship be unable to employ a jockey equal in skill and ability to his apprentice, McClain, and that it would thereby defeat and deprive him from earning large prizes and purses in speed contests, state and county fairs, and racing associations. He alleges that the jockey, by reason of being an expert at the business of riding in speed contests, had earned him upwards of \$12,000 in the preceding year. Evidence was introduced and other evidence offered which was refused, all of which tended to establish such facts after a manner and as definitely perhaps as would be possible. At the close of the plaintiff's case, defendants moved for a nonsuit which was granted.

The original contract of apprenticeship was entered into in the state of Missouri by one Claude Lorene Enyart, party of the first part, as master and employer, and Benjamin Franklin McClain and Louise J. McClain, father and mother of the apprentice, and B. F. McClain, Jr., apprentice. It provided that B. F. McClain, Jr., should have free board, lodging, medical attendance and transportation and the right and privilege to collect for all "outside mounts when the first party has no horses entered in such race," and that the first party would pay to the parents of the apprentice \$15 per month for the first year, \$20 per month for the second year, and \$20 per month for the third year. This contract was entered into on the 26th day of December, 1905. Thereafter and on the 30th day of March, 1907, at Emeryville, Cal., Enyart for and in consideration of the sum of \$500 as provided in the contract "did sell, assign and transfer to William Cain all the right, title and interest in and to that certain contract for the services of B. F. McClain, Jr., bound to him, C. Enyart, for three years, and agreed to deliver to the said William Cain said contract for services, properly assigned, as may be required by racing clubs and associations." The parents of the apprentice did not approve or consent to this assignment by any writing or apparently in any manner, unless it be by subsequently receiving monthly wages from the assignee Cain.

I. N. Smith and Clay McNamee, for appellant. G. W. Tannahill, for respondent Vollmer. Fred E. Butler, for respondent Lewiston & Interstate Fair & Racing Association.

AILSHIE, J. (after stating the facts as above). Two principal and decisive questions are presented to the court in this case. The

first is that an apprentice is not assignable, or, in other words, that a contract of apprenticeship may not be assigned by the master or employer. The second question is that, even if the contract was assignable, the damages claimed are too speculative, remote, and contingent to be recognized or considered by a court. In the argument of these matters, counsel for appellant contends that the question of the right to collect damages in such a case has been definitely decided and settled by this court in *McClain v. Association*, 17 Idaho, 63, 104 Pac. 1015, 25 L. R. A. (N. S.) 691, and that therefore the only real question to be considered is that of the assignment of the contract of apprenticeship.

Addressing our attention then, first, to this initial contention made by appellant, we will see what rule as to the law of damages was settled in *McClain v. Association*. There the boy sued for the injury received, and the resultant pain and suffering and attendant loss of earning capacity. In proving loss of earning capacity, he was allowed to produce what he called a "dope" book wherein he had a memoranda of his earnings from races in running "outside mounts." It is now contended that this element of damage allowed in the other case is no more speculative than the damages claimed in this case. In this case the one seeking damages is a race horse man—one who follows the races and enters his horses, and, according to the record, depends on making his money by winning prizes in the various races. That there is a wide difference between the nature and character of damages asked in each of these cases cannot escape the attention of any one. The one is direct; the other is proximate and dependent on innumerable secondary and intervening causes. The jockey earned a salary and certain sums for "outside mounts" whether he won the race or not. This was his earning capacity. On the other hand, the jockey alone cannot win the race; he must have a fleet horse. In the meanwhile other horses may develop that can outrun Cain's horse, jockey and all. Other jockeys may in the meanwhile develop as much skill as Cain's jockey, and upon the whole these imaginative profits may dwindle into real losses.

Again, horse racing is not an established business which can be estimated and counted upon to yield a permanent and reasonably certain income like most of the occupations and businesses out of which appellant's cited cases arose. The business of horse racing and competing for prizes is not to be compared with an established right of fishery (*Whaling Co. v. Alaska Packers*, 138 Cal. 632, 72 Pac. 161); the profits of sheep growing (*Schrandt v. Young*, 2 Neb. [Unof.] 546, 89 N. W. 607); or cattle raising (*Arkansas Land & Cattle Co. v. Mann*, 130 U. S. 69, 9 Sup. Ct. 458, 32 L. Ed. 854); or mining (*Paul v. Craknaz*, 25 Nev. 293, 60 Pac. 983, 47 L. R. A. 540); or the established practice of a mid-

wife (*Wardle v. New Orleans City Ry. Co.*, 35 La. Ann. 202); or the profession of a music teacher (*Baker v. Manhattan Ry. Co.*, 54 N. Y. Super. Ct. 394); or a personal injury (*Lund v. Tyler*, 115 Iowa, 236, 88 N. W. 333); and the many other cases to that effect cited by appellant.

Western Union Tel. Co. v. Crall, 39 Kan. 580, 18 Pac. 719, was an action against the telegraph company for the inaccurate transmission of a message by reason of which the plaintiff claimed to have lost anticipated gains and profits from a failure to be able to have his horse entered in certain racing and trotting contests. The court, after reciting the character of the evidence offered and the nature of damages sought, said: "The law excludes uncertain and contingent profits and also speculative profits and gains. No damages ought to have been allowed based upon the probability of the horse's being able to win prize purses in trotting contests." In support of this holding, the court cited *Telegraph Co. v. Hall*, 124 U. S. 444, 8 Sup. Ct. 577, 31 L. Ed. 479. In the latter case the court considered at some length what constitutes speculative and remote damages for which no recovery ought to be allowed.

In *Smith v. Gentry* (Ky.) 45S. W. 515, 42 L. R. A. 302, the plaintiff sued for damages sustained by reason of the defendant wrongfully disclosing the hiding place of a fugitive for whose capture a reward had been offered and whose arrest the plaintiffs were planning to make. The defendant wrongfully and in violation of the confidence he had assumed disclosed the whereabouts of the fugitive and enabled the officers to arrest him before the plaintiffs were able to perfect their capture of the fugitive. In considering the question as to whether the plaintiffs were entitled to recover damages, the Court of Appeals of Kentucky said: "But the basis of the recovery had in this case was evidently the loss by appellees of the reward which they expected to obtain for the arrest of the fugitive,

and this seems to us to be at once too remote and too contingent an item of damage to sustain a recovery. It is uncertain whether the gain would have been realized. The chance is too remote to be estimated."

Another author in speaking of this class of damages has well said: "The fact that the plaintiff has suffered actual damage from the defendant's conduct is not capable of legal proof, because it is not within the compass of human knowledge, and therefore cannot be shown by human testimony. It depends on numberless unknown contingencies, and can be nothing more than a matter of conjecture." 1 *Suth. Damages*, § 30; *Walker v. Goe*, 3 Hurl. and N. 395.

So it is in the case at bar. The profits it is claimed appellant would have realized depend on so many intervening circumstances and contingencies, the unfavorable happening of any of which would dissipate these prospective gains. We are fully satisfied that prospective profits to a race horse man for races that have never been run and race meets and associations that have never been held and against all contestants, is entirely too remote, uncertain, and indeterminable to be allowed. If this were a case where appellant was seeking damages for the loss of a prize for a race in which his horse had been entered, and in which at the time of the injury he had turned the home stretch, and was so in the lead that it could be said with reasonable certainty that he would have won the contest, then the damage would be direct and a recovery might be had, but that is not the case before us.

The conclusion we have reached as to the character of the damages sought renders it unnecessary for us to consider the other questions presented.

The judgment should be affirmed, and it is so ordered, with costs in favor of respondents.

SULLIVAN, C. J., concurs.

(49 Colo. 284)

FIST v. CURRIE

(Supreme Court of Colorado. Jan. 3, 1911.)

1. BROKERS (§ 64*)—COMMISSIONS—SHAM TO AVOID.

Where a broker, hired to find a customer for real estate, produces a purchaser ready, willing, and able to buy on the terms agreed, he is entitled to his commission, though the property is not taken in the name of the purchaser, when it appears that it was taken in the name of another as a sham, to avoid the commission.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 97; Dec. Dig. § 64.*]

2. BROKERS (§ 86*)—COMMISSIONS—EVIDENCE.

In an action by a broker for commissions, evidence examined, and held to warrant a finding that plaintiff produced a purchaser ready, willing, and able to buy, but that the property sold was taken in the name of another, to defeat payment of commissions.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 116-120; Dec. Dig. § 86.*]

3. BROKERS (§ 82*)—COMMISSIONS—PLEADING.

Where, in an action by a broker for commissions for sale of real estate, the complaint alleged that plaintiff produced a purchaser ready and willing to buy, leaving out the word "able," but did allege that he found a purchaser who was satisfactory, and who in fact purchased the property, the complaint stated a cause of action.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 101-103; Dec. Dig. § 82.*]

Appeal from District Court, Pueblo County; C. S. Essex, Judge.

Action by H. S. Currie against Emanuel Fist. From a judgment for plaintiff, defendant appeals. Affirmed.

A. W. Arrington, for appellant. Jas. H. Teller and Jas. H. McCorkle, for appellee.

CAMPBELL, C. J. This is an action by plaintiff, Currie, a real estate broker, to recover of defendant, Emanuel Fist, his commission earned in the sale of defendant's real estate. The complaint alleges an employment, at a reasonable commission, to sell at a designated price, and, acting under the employment, the production by plaintiff to defendant of Dr. Moore, who was ready and willing to buy, and that Moore did buy of defendant at that price, and the premises sold were duly conveyed to the purchaser. The answer denies the employment and sale, and as a special defense alleges that, if there was any contract, the price fixed was to be net to the defendant, exclusive of commission. The new matter of the answer was denied, and, on trial before a jury, verdict was for plaintiff, upon which judgment was entered. The defendant assigns errors in the ruling of the court denying his motion for a nonsuit at the close of plaintiff's case, and in certain rulings on the evidence, and in refusing and giving instructions, and to the insufficiency of the complaint.

The evidence is in conflict, but it is legally sufficient to sustain the verdict; and if,

in the other rulings criticised, no prejudicial error was committed, the judgment should stand. There was evidence by plaintiff tending to establish the allegations of his complaint that he was employed by defendant as broker to sell defendant's property at a fixed price; that, acting under the employment, he produced to defendant Dr. Moore, who was ready, willing, and able to buy, and did buy, at the price and upon terms satisfactory to defendant; and that a deed to the property was executed and delivered to him. The deed was executed, however, not by Emanuel Fist, the defendant, but by Julius Fist, his brother. The contract of employment did not give to plaintiff the exclusive right to sell, or prescribe a period of time within which such sale was to be made. The defendant, therefore, reserved to himself the right, as he might do, to sell the property for a consideration, and upon terms, satisfactory to himself. But if, before he made such sale, the plaintiff, assuming the existence of the contract as alleged, produced to defendant a customer ready, willing, and able to buy at the price and on the terms fixed, defendant could not himself complete the sale to such customer, or sell to some other person, without paying to the broker his commission. The evidence is that part of the negotiations with Emanuel Fist for the sale to Dr. Moore were conducted by plaintiff, and some by Moore himself. None were had either by plaintiff, or Moore, with Julius, to whom Emanuel conveyed the property after the employment of plaintiff. Defendant testifies that he conveyed to his brother Julius before Moore made his offer of purchase; but there is other testimony that it was after Emanuel and Dr. Moore completed the agreement of sale that the conveyance to Julius was made. From the evidence the jury were justified in finding, as a legitimate inference, that the conveyance from Emanuel to Julius was sham and fictitious, not made in good faith, but for the purpose of escaping payment of the commission on a sale which had been brought about through the instrumentality of the broker. We have examined with care the rulings of the court on the evidence, and find no error therein.

Complaint is made that the court was wrong in denying certain instructions tendered by defendant; but, in so far as these requested instructions stated the law applicable to the facts, they were covered by instructions given by the court of its own motion. The particular objection which ingenious counsel for defendant presents to the instructions is that in one of them the court told the jury that if they believed from the evidence that, before plaintiff found a purchaser, ready, willing, and able to buy on the terms agreed, the defendant in good faith consummated a sale thereof to another

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party, the plaintiff was not entitled to recover any commission. The only fault found with this is the use of the expression "good faith." It is said to be misleading and inapplicable, in that the question of fraud or good faith was not raised by the pleadings. We think that, taken in connection with the rest of the instruction and with all the other instructions in the case, the jury might well have found from the evidence that the sale to Julius was sham and fictitious. There was no special defense in the answer that defendant, in employing the broker, reserved and exercised his legal right to sell. But defendant himself produced evidence of the sale to his brother Julius, which he claims was in good faith, and made before Moore agreed to buy. He certainly may not now complain that the court treated the good faith of the sale as an issue in the case. He himself so treated it, and his evidence responsive to the issue came in under the general denial, without objection by plaintiff.

Defendant contends that the complaint is insufficient, in that the allegation is, not that plaintiff produced a purchaser ready, willing, and able to buy at the price agreed upon, and that conveyance was made to him, but that he merely produced a customer ready and willing, but not *able*, to buy. True, the pleading does not contain the specific averment that the customer was able to buy; but it does say that the purchaser bought at a price, and on terms, satisfactory to defendant. Thus an averment equivalent to one stating the customer's ability to buy is present, and that is all that is necessary. Though the conveyance was made by Julius, the contract of employment with plaintiff undoubtedly was made, as alleged; and if the jury believed that the alleged sale by Emanuel to Julius was after a satisfactory purchaser was produced by plaintiff, or that it was merely fictitious and sham and in bad faith, or made merely to defeat the claim for commission, upon which issues there was evidence, the plaintiff's case was established, and he was entitled to a judgment. We find no prejudicial error in the record.

The judgment is therefore affirmed.

GABBERT and HILL, JJ., concur.

(49 Colo. 217)

GERMAN FIRE INS. CO. OF PEORIA v.
HERBERTSON et al.

(Supreme Court of Colorado. Dec. 5, 1910.
Rehearing Denied Jan. 3, 1911.)

1. INSURANCE (§ 389*)—**AVOIDANCE—WAIVER.**
An insurance policy contained a clause providing that, unless otherwise agreed and indorsed on the policy, the policy would be void if on a building on ground not owned in fee simple by the insured. Plaintiffs owned an insured building, which was on leased ground, but the policy was secured through the regular agents

of the company, which seemed to regard it as an old risk, and the agents, having written insurance on it before, made no inquiries as to the title to the ground, and no representations relative thereto were made, the application not being in writing, the agents apparently attaching no importance to the title, so that the plaintiffs remained in ignorance as to its materiality. The policy was issued, received, and paid for in good faith. *Held* that, under all the circumstances, the law imputed to the company a knowledge of the condition of the title to the ground, and it waived the provision relative thereto, when it issued the policy with such knowledge.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1028; Dec. Dig. § 389.*]

2. APPEAL AND ERROR (§ 1001*)—**VERDICT—CONCLUSIVENESS.**

A verdict based on sufficient evidence will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3928; Dec. Dig. § 1001.*]

Appeal from District Court, City and County of Denver; Booth M. Malone, Judge.

Action by Mose Herbertson and another against the German Fire Insurance Company of Peoria. Judgment for plaintiffs, and defendant appeals. Affirmed.

Sylvester G. Williams, for appellant.
George K. Andrus, for appellees.

MUSSER, J. This is an action upon an insurance policy, insuring a building and stock of merchandise belonging to the plaintiffs against fire, and containing, among other things, the following provision: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if * * * the subject of insurance be a building on ground not owned by the insured in fee simple." While the building was owned by the plaintiffs, it stood upon ground leased by them. No agreement covering this was indorsed on or added to the policy. The policy was obtained for the plaintiffs, through an insurance broker, from the regular agents of the company. No written application was made for it. No inquiry was made by the agents about the title to the ground, and no representations relative thereto were made to them. There is no evidence or claim of any fraudulent concealment of facts in order to obtain the insurance. The agents, who represented several companies, had for several years before written insurance on this building in other companies for persons that owned it and leased the ground. One of the agents testified that he did not know the building was on leased ground. Their office seemed to regard it as an old risk with which they were familiar. For some reason, they regarded it as hazardous, and demanded and received from the plaintiffs increased premium for the insurance. The agents did not appear to attach any materiality to the question of title to the ground, and the plaintiffs remained in ignorance of any such

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

materiality. The policy seems to have been issued, received, and paid for in good faith, for the purpose of indemnifying the plaintiffs against loss of their building and merchandise by fire. Under all these circumstances, the law imputes to the company a knowledge of the condition of the title to the ground and it waived the aforesaid provision in its policy issued with such knowledge. Such a conclusion is the only one consonant with correct business methods, and is supported by the weight of authority. *Glens Falls Ins. Co. v. Michael*, 167 Ind. 659, 74 N. E. 964, 79 N. E. 905, 8 L. R. A. (N. S.) 708; *Allesina v. London Ins. Co.*, 45 Or. 441, 78 Pac. 392; *Hall v. Niagara Fire Ins. Co.*, 93 Mich. 184, 53 N. W. 727, 18 L. R. A. 135, 32 Am. St. Rep. 497; *Miotke v. Mechanics' Ins. Co.*, 113 Mich. 166, 71 N. W. 463; *Hanover Fire Ins. Co. v. Bohn*, 48 Neb. 743, 67 N. W. 774, 53 Am. St. Rep. 719; *Phenix Ins. Co. v. Fuller*, 53 Neb. 811, 74 N. W. 269, 40 L. R. A. 408, 68 Am. St. Rep. 637; *Sharp v. Scottish Union, etc., Co.*, 136 Cal. 542, 69 Pac. 253, 615; *Dooly v. Hanover Fire Ins. Co.*, 16 Wash. 155, 47 Pac. 507, 58 Am. St. Rep. 26; *Lancashire Ins. Co. v. Monroe, Jefferson & Co.*, 101 Ky. 12, 39 S. W. 434; *Philadelphia Tool Co. v. British Am. Assur. Co.*, 132 Pa. 236, 19 Atl. 77, 19 Am. St. Rep. 596; *Manchester Fire Assur. Co. v. Abrams*, 89 Fed. 932, 32 C. C. A. 426.

On behalf of the defendant, it is claimed that the plaintiff, after the loss, committed fraud and false swearing, touching a matter relating to the subject of the insurance, contrary to another provision of the policy. This matter was submitted to the jury under proper instructions. The jury found against the defendant upon sufficient evidence and that finding will not be disturbed. The judgment is affirmed.

Judgment affirmed.

GABBERT and HILL, JJ., concur.

(49 Colo. 328)

McLEY et al. v. PEOPLE.

(Supreme Court of Colorado. Jan. 3, 1911.)

CRIMINAL LAW (§ 590*)—CONTINUANCE—ABSENCE OF WITNESSES—PREPARATION OF DEFENSE.

Where there was no preliminary hearing, the information charging a grave offense being filed on affidavit, the refusal of defendants' application for a continuance based on affidavits, to which no counter affidavit was filed, showing efforts made to procure funds to aid in making a defense, and to secure the attendance of witnesses, the probability of obtaining such funds, the failure to locate an important witness who, if present, would testify to an alibi, and setting forth that such witness could be secured by the next term of court, was error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1316; Dec. Dig. § 590.*]

Error to District Court, Delta County; Sprigg Shackelford, Judge.

R. L. McLey and another were convicted of crime, and bring error. Reversed and remanded.

H. J. Baird, for plaintiffs in error. J. K. P. McCallum, for plaintiff in error McLey. John T. Barnett, Atty. Gen., and George H. Thorne, Asst. Atty. Gen., for the People.

BAILEY, J. The record discloses that, by leave of court, an information based on affidavit was filed on September 27, 1909, charging the two defendants here complaining, jointly with one R. L. Cunningham, with an attempt to commit the crime of larceny through the use of explosives. On the same day, the defendants appearing to be indigent, H. J. Baird, Esq., an attorney and counselor of this state, was appointed to defend. Also on the same day, on behalf of the defendants Black and McLey, who alone were convicted, a motion for a continuance was filed, supported by their affidavit, setting forth the efforts which had been made by them, through applications to relatives and friends, to secure funds to aid in making a defense, and particularly for the purpose of procuring the attendance of witnesses; that up to the time of the interposition of that motion the defendants had received no answers to these requests, but were of belief that if time were given they could get funds to secure the attendance of witnesses in their behalf; that an important witness, R. L. Hudson, would, if present, testify that, at the time of the alleged offense, these defendants were in the town of Delta, miles from the vicinity of the place where the crime is charged to have been committed; that they had used every effort to locate Hudson, and had every reason to believe that he could be found and secured for the trial of the case, if it should be continued until the next term of court. No counter affidavit was filed, and no denial was made of the truth of the facts, as set forth in the affidavit; indeed the sufficiency of the application, and the materiality of the matter proposed to be shown, seems to have been conceded below, as it is here. However, the application was promptly, and on that same day, overruled, the defendants arraigned, entering a plea of not guilty, and the cause forthwith put to trial. The mere statement of these facts shows that the defendants, though charged with one of the gravest crimes known to the law, and for which, upon conviction, they suffered a sentence of imprisonment in the state penitentiary for a term of not less than twenty-five nor more than thirty years, were allowed no time whatever to prepare a defense. The information was filed, counsel appointed to defend, plea of not guilty entered, motion for continuance interposed, denied and trial proceeded with all on the same day, over the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

protest of defendants and in the face of a sworn, formal and sufficient showing to entitle them, as matter of law, to a continuance, if not over the term, certainly for a brief period. Indeed we are of opinion that the mere statement of counsel, under the facts and circumstances here disclosed, without a formal application and sworn statement to support it, would in and of itself alone have been abundantly sufficient to require at least a short respite, and afford some opportunity for preparation to meet so serious a charge. It will be noted that there had been no preliminary hearing, at least the record shows none, the information being filed on affidavit. So far as is shown, except from the fact of previous arrest, these defendants had no official notification, prior to the time when the information was lodged in court, that any charge at all would be preferred, and certainly none as to its precise nature, and were given no opportunity whatever to meet it. The celerity with which this prosecution was pushed is repugnant to our sense of justice, and the fair, equal and impartial administration of the law. Such action was plainly prejudicial, going to the very substance of the rights of the defendants, and practically denying them a defense. They were clearly entitled to a reasonable time in which to prepare for trial, after the formal charge had been filed.

The case of *Hockley v. People*, reported in 30 Colo. 119, 69 Pac. 512, presents a somewhat similar state of facts; there, however, the rights of the defendant were given more consideration. In that case a preliminary examination had been had, and the defendant thereby advised as to the character of testimony likely to be adduced and the nature of the charge. There, on application, a short continuance was allowed, at the expiration of which, the defendant still not being ready, a second application was interposed, which the court denied, on the ground that, in view of the notice afforded by the preliminary trial, the defendant had had abundant time in which to prepare his defense, and was negligent in not doing so. On that state of facts this court, in an opinion by Chief Justice Campbell, said:

"The granting or refusing of applications for a continuance rests largely in the discretion of the trial court, and the doctrine established in this state is that only for an abuse of such discretion will a reversal be had. No authority has been called to our attention, nor have we been able to find one, which holds it to be the duty of a defendant in a criminal case to make preparations for his trial before an indictment has been found, or an information filed, against him. Various reasons for this ruling are given by the courts, some of which put it upon the ground that before the filing of an indictment

or an information the defendant may not have compulsory process for his witnesses. Others declare that even if compulsory process may be had before that time, and though defendant may have his witnesses, like those of the prosecution, recognized to appear at an ensuing term of the court having jurisdiction to try the charge, his omission to take out such process before an indictment found, or information filed, cannot be considered as negligence or exhibiting a want of due diligence, so as to deprive him of the full benefit of his affidavit for continuance which shows that he is unable to have his witnesses present at the first term. Whatever be the reason, it seems clear that there was no obligation resting upon defendant to make preparations for his trial and to secure the attendance of his witnesses before the informations were filed against him; and since there is no question that he diligently moved immediately thereafter, it was plainly wrong for the trial court to refuse the continuance asked for."

Citing these authorities: *United States v. Moore*, 26 Fed. Cas. 1308; *Allen v. State of Georgia*, 10 Ga. 85, 91; *Dinkens v. State*, 42 Tex. 250; *State v. Wood*, 68 Mo. 444; *Salisbury v. Commonwealth*, 79 Ky. 425, 430; *Dowda v. Georgia*, 71 Ga. 481; *Blige v. Florida*, 20 Fla. 742, 51 Am. Rep. 628; *Newman v. State*, 22 Neb. 355, 35 N. W. 194; 4 Enc. Pleading & Practice, p. 485 et seq.

On the authority of this decision, and cases cited, unquestionably it was error to deny the defendants' application for continuance, and for this reason the judgment must be reversed.

Other alleged errors are assigned and discussed, which we do not consider, as a situation involving them is not likely to arise at another trial.

Judgment reversed and cause remanded.

CAMPBELL, C. J., and WHITE, J., concur.

(49 Colo. 261)

DENVER & R. G. R. CO. v. PAONIA DITCH CO.

(Supreme Court of Colorado. Jan. 3, 1911.)

1. APPEAL AND ERROR (§ 384*)—APPEAL BOND—FORM AND REQUISITES.

Under Rev. St. 1908, § 1537 (1 Mills' Ann. St. § 1086), providing that on appeal from the county to the district court, if the judgment is against appellant and for payment of money, the appeal bond shall contain certain conditions, and where it is not for payment of money, a different kind of bond is prescribed, a judgment for defendant on the merits, carrying costs, was not one for the payment of money, and, the appeal bond not being in the form required, the appeal should have been dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2049-2056; Dec. Dig. § 384.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep.'s Indexes

2. DISMISSAL AND NONSUIT (§ 11*)—VOLUNTARY DISMISSAL.

Code Proc. § 166, giving plaintiff right to dismiss at any time before trial, on payment of costs, if a counterclaim is not made, does not give plaintiff, against whom the judgment is rendered in the county court, the right to dismiss his action without prejudice, after he has appealed to the district court and before trial there.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 25, 26; Dec. Dig. § 11.*]

Error to District Court, Delta County; Sprigg Shackelford, Judge.

Action by the Paonia Ditch Company against the Denver & Rio Grande Railroad Company. There was judgment in the county court for defendant, and plaintiff appealed to the district court, where defendant's motion to dismiss was refused, and plaintiff was granted leave to dismiss the action without prejudice, and defendant brings error. Reversed and remanded.

Vaile & Waterman, A. R. King, E. N. Clark, F. S. Titsworth, and J. G. McMurry, for plaintiff in error.

CAMPBELL, J. In the trial in the county court, where the action was begun, judgment went for defendant, railroad company, whereupon plaintiff, ditch company, prayed an appeal to the district court, executed an appeal bond, which was approved, and lodged the transcript with the clerk of the district court. The defendant, appearing specially in the district court, moved to dismiss the appeal because the appeal bond was inadequate. Section 1537, Rev. St. 1908 (section 1086, 1 Mills' Ann. St.), which is controlling, provides that upon an appeal from the county to the district court, if the judgment appealed from is against the party appealing, and is for the payment of money, the appeal bond shall contain certain conditions; and where such judgment is not for the payment of money, then an essentially different kind of an appeal bond is prescribed. The judgment against plaintiff was not for the payment of money. It went for defendant on the merits, and this carried the costs as an incident. The appeal bond, therefore, was the one which is required where the judgment is not for the payment of money, and not such a bond as the statute makes imperative where there is a money judgment. The trial court was wrong in denying defendant's motion to dismiss the appeal.

After the court denied this motion, plaintiff asked, and was granted, leave to dismiss its action without prejudice, at its own costs, and, over the objection of defendant, this motion was granted, and the action was so dismissed. In this the court also erred. Section 166 of our Code of Procedure gives to a plaintiff the right to dismiss his action, at any time before trial, upon the payment

of costs, if a counterclaim has not been made. No counterclaim was made in this case, but a trial of the action had already been had in the county court. It cannot be that this section gives a plaintiff, against whom a judgment is rendered in the county court, as the result of a trial had there, the right to dismiss his action without prejudice after he has appealed it to the district court, and before trial there, upon the mere payment of costs. Otherwise a plaintiff might thus nullify a judgment against himself, then begin another action in the county court, there fail, appeal to the district court, and by dismissing his action without prejudice, begin again in the county court, and so indefinitely repeat the process, to the annoyance and vexation of his adversary. The spirit of the Code provision, as applicable to the facts of this case, is that the plaintiff may, as matter of right, before trial in the county court, dismiss his action upon payment of costs, if no counterclaim has been made; but an unsuccessful plaintiff is not thereby authorized, after failing in the county court, to appeal to the district court, and, before trial there, dismiss his action without prejudice, over the objection of the successful defendant. The perfecting of an appeal to the district court from a judgment rendered by the county court does not vacate that judgment. It merely suspends its execution till the district court otherwise orders. The action of the district court here is equivalent to an investiture in a litigant of the power in the appellate court to vacate a judgment rendered against him in the court of original jurisdiction, without a trial on the merits, which, in a case like this, resides only in the district court itself.

It is to the interest of the state that there be an end of litigation. If the practice below should be sanctioned here, it would tend unjustly to prolong litigation and to put unrestrained power into the hands of one litigant to harass and annoy the other. Because of these errors, the judgment is reversed and the cause remanded to the district court, for further proceedings in accordance with the views expressed in this opinion.

Reversed and remanded.

GABBERT and HILL, JJ., concur.

(33 Nev. 511)

STATE v. MANGANA. (No. 1,880.)
(Supreme Court of Nevada, Dec. 2, 1910.)

1. HOMICIDE (§ 18*)—"MURDER IN FIRST DEGREE"—STATUTES.

Crimes and Punishments Act, § 17 (Comp. Laws, § 4672), making all murder by poison, lying in wait, or torture, or any other kind of willful, deliberate, and premeditated killing, or committed in the perpetration or attempt to perpetrate any arson, rape, robbery, or burglary, murder in the first degree, does not create

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

separate statutory homicides, but the killing of a human being in either one of the methods described is "murder in the first degree," and a felony and a homicide committed in perpetrating or attempting to perpetrate a felony constitute together the one crime of murder in the first degree.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 18.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4637-4641; vol. 8, p. 7727.]

2. HOMICIDE (§ 142*)—INDICTMENT—MURDER IN THE FIRST DEGREE.

Under Crimes and Punishments Act, § 17 (Comp. Laws, § 4672), making all murder by poison, lying in wait, or torture, or any other kind of willful, deliberate and premeditated killing, or that committed in the perpetration or attempt to perpetrate any robbery or other enumerated felony, murder in the first degree, and under an indictment charging a killing with malice aforethought, accused may be convicted of either willful, deliberate, and premeditated killing, or of a killing committed in the perpetration of a robbery, whether willful, deliberate, and premeditated or not; but if the indictment should allege that a killing was committed in the perpetration of a robbery, and the evidence should indicate that the killing was premeditated, but not in the perpetration of robbery, the variance would be fatal.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 250-259; Dec. Dig. § 142.*]

3. HOMICIDE (§ 253*)—MURDER IN THE FIRST DEGREE—EVIDENCE—SUFFICIENCY.

Evidence held to justify a conviction of murder in the first degree either on the ground that the killing was done willfully, deliberately, and premeditatedly, or on the ground that it was committed in the perpetration of a robbery.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 523-532; Dec. Dig. § 253.*]

4. HOMICIDE (§ 18*)—HOMICIDE IN COMMISSION OF OTHER OFFENSE—PRESUMPTIONS.

A killing committed in the perpetration of a robbery is presumed to have been willful, deliberate, and premeditated.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 24-31; Dec. Dig. § 18.*]

5. HOMICIDE (§ 142*)—INDICTMENT—SUFFICIENCY.

An indictment for murder committed in the perpetration of a robbery may be charged in the same manner as ordinary murders are charged, and it need not be alleged that the murder was committed in the perpetration of a robbery in order to admit testimony showing that a robbery was committed in addition to the killing.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 250-259; Dec. Dig. § 142.*]

6. CRIMINAL LAW (§ 761*)—TRIAL—INSTRUCTIONS—ASSUMPTION OF FACT.

Where accused by his own testimony admitted that he fled from the scene of the murder, and his counsel, in his opening statement, admitted the same fact, it was not improper for the court in its instructions to assume that there was evidence of flight.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1754; Dec. Dig. § 761.*]

7. CRIMINAL LAW (§ 1169*)—HARMLESS ERROR—ERRONEOUS ADMISSION OF EVIDENCE.

Where accused, on trial for murder perpetrated in the commission of a robbery, admitted that he was in possession of a watch of decedent, and sought to excuse his possession, the error, if any, in admitting evidence as to

the number of the watch of decedent, was harmless.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3137-3143; Dec. Dig. § 1169.*]

8. CRIMINAL LAW (§ 59*)—PARTIES—LIABILITY.

No distinction exists between an accessory before the fact and a principal, or between principals in the first and second degree in cases of felony, and all persons concerned in the commission of a felony, whether they deliberately commit the offense or merely aid and abet in its commission, though not present, are properly indicted, tried, and punished as principals.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 71-74; Dec. Dig. § 59.*]

9. CRIMINAL LAW (§ 1056*)—APPEAL—INSTRUCTIONS—REVIEW.

The action of the court in failing to charge on matters will not be reviewed on appeal, where it does not appear that instructions were requested or that any exception was taken in regard thereto.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2668, 2670; Dec. Dig. § 1056.*]

10. CRIMINAL LAW (§§ 1043, 1059*)—APPEAL—EVIDENCE—REVIEW.

Under Criminal Practice Act, § 421 (Comp. Laws, § 3995), authorizing exceptions to the admission or rejection of testimony, the particular ground of an objection or exception to the admission of evidence must be stated in order to make the ruling reviewable on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2654, 2655, 2671; Dec. Dig. §§ 1043, 1059.*]

Appeal from District Court, Nye County.

Ascension Mangana was convicted of murder in the first degree, and he appeals. Affirmed.

The defendant was tried under an indictment, the charging part of which follows: "The said Ascension Mangana, the defendant above named, at Leeland, in the county of Nye, state of Nevada, on or about the 15th day of June, A. D. 1909, and before the finding of this indictment, without authority of law, and with malice aforethought, then and there killed one Byron Nelson, a human being, by then and there stabbing the said Byron Nelson with a sharp instrument, the character of which being unknown to the said grand jury." The jury brought in a verdict of murder in the first degree and fixed the punishment at death.

The following are the principal facts as claimed by the state:

Byron Nelson conducted a little saloon in Leeland, Nev., and had a partner or associate named Richard Stillwell, and Nelson was in the habit of cashing the checks of the different employes of the railroad on pay days. On June 15, 1909, which was pay day at Leeland for the section hands on the railroad, Nelson did not cash them, for the reason that the station agent or an employe of the railroad had in his possession sufficient money to cash the checks of the other employes. The defendant and an associate of

his, Ochoa, who worked with him as a section hand on the railroad, were aware that Nelson on pay day nights had sufficient money in the till to cash a number of checks, and that on this pay day he did not cash the checks, and consequently had the money on hand, and had other money which was paid in that evening upon previous accounts and for drinks. The defendant and Ochoa and others were in the saloon drinking that night. The defendant and Ochoa remained with Nelson and Stillwell until after the others had gone, and the saloon remained open later than usual and until about midnight. The next morning the body of Nelson was found near the bar and door, and that of Stillwell 90 feet away from the saloon and partly under a wagon. The former had been stabbed in the throat and chest five times, and the latter in the throat and chest and back four times. There were numerous tracks overlapping each other and blood from the wounds at the place where Stillwell's body lay, and no blood was found between there and the saloon. His shoes were on his feet, unlaced, without his stockings. Only the top button of his trousers was fastened, and his suspenders were hanging down loose. The till was found open, and nothing remained in it but a five-cent piece and a crumpled \$5 bill. With the exception of a cent piece upon the bar, no other money was found. Nelson's watch, which had been fastened to his suspender by a chain, had been jerked off and was missing, and the watch ring which had been fastened to the watch was found at his side.

One of the men working on the section testified that after he had gone to bed in the bunkhouse that night he heard somebody say that they had got into trouble and would have to leave. The next morning the defendant and his companion, Ochoa, were missing and not to be found. Wages for half a month were due them and unpaid at the time they left. The tracks of the two men were found, and were turned and made so as to elude pursuers. After two days and a night the defendant was captured at Amargosa, a little after dark, in a store where he had gone to purchase crackers, canned corn, and tomatoes. His own watch, knife, pistol, and a few dollars in money were taken from him at the time he was arrested. The next morning he threw away and made an effort to conceal the watch which had been taken from the body of Nelson.

The defendant, a Mexican about 20 years of age at the time of the killing, and not speaking English much, if any, relying upon his own testimony, claimed on the trial that he returned from work upon the section after 5 o'clock on the evening of the 15th, received a check for his wages for the previous month, cashed it at the railroad office, and after paying a grocery bill had his dinner and was in the saloon in the company of some of the other section hands, drinking;

that later in the evening he left the saloon with another railroad laborer, Tomas Gutierrez, and went with him to the bunkhouse; that they went to bed in their respective rooms; that later in the evening he was awakened by Ochoa, who was in the saloon when he left about 10 o'clock, and who at the time he awakened him had a knife and commanded him to keep quiet and to get up and come with him; that he arose, put on his clothes, and followed Ochoa; that he had a pistol in his possession when he went with Ochoa.

The attorney who had been appointed by the court to represent the defendant said to the jury in his opening statement regarding what the defendant would testify to upon the stand: "That Ochoa dogged his footsteps. He will show that he went down the railroad with Ochoa; that they fled across the desert until they came to another railroad; that during this time they traveled the greater part of the first night and the greater part of the next day; that upon the second evening he was tired and thirsty; that he sat down and drank part of a can of tomatoes which Ochoa had brought along with him; that he thereupon lay down by the railroad and slept; that in the morning he arose and Ochoa was gone; that when he lay down at night his coat was alongside of him, and in the morning his coat was gone, and Ochoa's was there. He says he got up and started on his journey, and he will tell you that this watch, which plays such an important part in this case, was in the coat. He will tell you that he came into Amargosa; that he was ignorant and thirsty and hungry and went into the store to purchase something to eat, and while in the store he was arrested. He will tell you that he was searched; that they found certain things on his person; that they took the purse and the knife and the gun; that they didn't find the watch which has been introduced in the case. He will tell you that this watch was on his person; that he didn't know what he was arrested for; but that when he was arrested he suspected there was something in connection with the watch which had caused the flight of Ochoa from the town of Leeland. Consider his position: A stranger, entirely ignorant of the laws and customs of this country, found in the midst of hostile people with a piece of evidence on his person which he must know came out of some trouble on the part of Ochoa. He will tell you that the next morning he threw that watch away. He tried to get rid of that evidence upon his person that the watchers found."

Upon the witness stand, Tomas Gutierrez contradicted the defendant's testimony that he had left the saloon and gone with Gutierrez to the bunkhouse and then to bed on the night the men were killed.

Also tending to contradict defendant's statement upon the trial that he had gone to the bunkhouse with Gutierrez and had gone

to bed and was not present or aware of the killing of Nelson and Stillwell, there was testimony that the defendant said, a few days after his arrest and before the preliminary hearing, that he and Tomas Gutierrez were present at the time Nelson was stabbed; that Gutierrez knew all about it if he would tell; that Ochoa treated and paid for the drinks, and, looking over his change, made complaint to Nelson that it was wrong, and demanded more money; that Tomas asked Nelson to give him his right change; that Nelson made an effort to use a gun; that Ochoa stabbed or tried to stab Nelson; that, while Ochoa was trying to stab Nelson over the bar, defendant made a pass to stop him; that Stillwell was behind the bar, and defendant could not hold Ochoa.

J. A. Sanders, for appellant, R. C. Stoddard, Atty. Gen., and Leonard B. Fowler, Deputy Atty. Gen., for the State.

TALBOT, J. (after stating the facts as above). As error it is urged by counsel for defendant that the case was presented to the jury upon two theories: First, that the appellant was guilty as charged in the indictment with killing the deceased with malice aforethought; second, that the homicide was committed in the perpetration of robbery; and that, as the court submitted the case upon both theories, it is impossible for any one to say for what crime the appellant was convicted.

It will be observed that the indictment follows closely the form provided by the statute. Section 17 of the act relating to crimes and punishments provides that: "All murder which shall be perpetrated by means of poison, or lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which shall be committed in the perpetration, or attempt to perpetrate, any arson, rape, robbery, or burglary, shall be deemed murder of the first degree." Comp. Laws, § 4672. Under this statute and the indictment as drawn, defendant could be convicted of either willful, deliberate, and premeditated killing, or of a killing committed in the perpetration of a robbery, whether it was or was not willful, deliberate, and premeditated. If the defendant in advance planned or intended to kill in order to accomplish the robbery, and in pursuance of that intent did kill the deceased, he was guilty of both a willful, deliberate, and premeditated killing, and of a killing in the perpetration of a robbery. These are not separate statutory homicides, and if the jury believed, beyond a reasonable doubt, that the defendant was guilty of killing in either one or both of these ways, they were justified in the rendition of the verdict carrying the extreme penalty. If the indictment had unnecessarily charged that the killing was committed in the perpetration of a robbery, and there had been no evidence indicating that it was committed in such per-

petration, proof that the killing was willful, deliberate, and premeditated would have been at variance with the allegation in the indictment, and an instruction in such a case, based upon the two theories of willful, deliberate, and premeditated killing and of a killing in the perpetration of robbery, and directing the jury that they could convict upon either, would have been erroneous.

The evidence in this case is stronger than that on which Dr. Crippen was recently convicted and promptly hanged in London, and it is sufficient to justify the conclusion that the killing was done willfully, deliberately, and premeditatedly for the purpose of accomplishing robbery. But if the evidence indicated that there was a robbery, and there was no evidence indicating a previous intention to kill, nevertheless the killing committed in the perpetration of the robbery would be presumed to have been willful, deliberate, and premeditated. In *State v. Lindsay*, 19 Nev. 50, 5 Pac. 823 (3 Am. St. Rep. 776), Justice Hawley, speaking for this court, said: "Under this statute there are certain kinds of murder which carry with them conclusive evidence of premeditation, viz., when the killing is premeditated by means of poison, lying in wait, or torture; or when the homicide is committed in the perpetration, or attempt to perpetrate, any of the felonies enumerated in this statute. In these cases the question whether the killing was willful, deliberate, and premeditated is answered by the statute in the affirmative, and, if the prisoner is guilty of the offense charged, it is murder in the first degree. *State v. Hymer*, 15 Nev. 50, and authorities cited."

It has often been held that a felony and a homicide committed in perpetrating or attempting to perpetrate it, together, constitute the one crime of murder and may be charged as such and in the same manner as ordinary murders are alleged, and that it is not necessary to charge in the indictment that the murder was committed in the perpetration of another crime in order to introduce testimony showing that a felony was committed in addition to it, and that, under an indictment charging murder in the ordinary form and proof that it was committed in the perpetration of a felony, malice, deliberation, and premeditation are implied. *State v. Meyers*, 99 Mo. 107, 13 S. W. 516; *People v. Giblin*, 115 N. Y. 196, 21 N. E. 1062, 4 L. R. A. 757; *State v. Covington*, 117 N. C. 834, 23 S. E. 337; *People v. Sullivan*, 173 N. Y. 122, 65 N. E. 989, 63 L. R. A. 353, 93 Am. St. Rep. 582; *State v. Johnson*, 72 Iowa, 393, 34 N. W. 177; *Wall v. State*, 18 Tex. 682, 70 Am. Dec. 302; *Titus v. State*, 49 N. J. Law, 36, 7 Atl. 621.

In *State v. Foster*, 136 Mo. 653, 38 S. W. 721, it was held that, while the charge that a homicide was committed in an attempt to perpetrate a robbery is unnecessary, it will not vitiate an indictment for murder in the

first degree, and that in such a case the indictment may be drawn in the common form. In *Reyes v. State*, 10 Tex. App. 1, it was held that evidence tending to show that the killing was done in the perpetration of arson, rape, robbery, or burglary is admissible as part of the res gestæ on the trial under an indictment charging murder with express malice aforethought.

In *People v. Flanagan*, 174 N. Y. 357, 68 N. E. 988, on an indictment for murder in the first degree, a conviction for murder perpetrated while committing a felony, although not specially pleaded, was sustained, and it was said that deliberation and premeditation need not be found.

In *State v. McGinnis*, 158 Mo. 106, 59 S. W. 83, it was held that it is proper in a trial under an indictment which only charges murder to instruct the jury that, if the homicide was perpetrated in an attempt to commit robbery, the defendant was guilty of murder in the first degree.

In *State v. Weems*, 96 Iowa, 428, 65 N. W. 387, the indictment was in the usual form and without averments as to the murder having been committed in an attempt to perpetrate robbery, and it was held proper to instruct the jury that, if two or more persons conspire to commit robbery, and in pursuance of such conspiracy they or either of them kill a human being, it is murder.

In *State v. King*, 24 Utah, 483, 68 Pac. 418, 91 Am. St. Rep. 808, the information for murder contained the usual charge regarding malice and premeditation, but did not mention robbery. It was held sufficient to charge murder in the first degree; and that evidence to show that it was committed in the perpetration of a robbery was properly admissible; and that when two or more persons associate together to rob another, and he is killed by one of them, the act is that of each and all of the conspirators, and all are chargeable therewith. *State v. Schmidt*, 136 Mo. 652, 38 S. W. 719.

It is claimed that some of the instructions given by the court were erroneous, and more particularly the following: "The jury are instructed that in this case evidence of flight has been introduced. You are instructed that the flight of a person immediately after the commission of the crime, or after a crime has been committed with which he is charged, is a circumstance in establishing his guilt, not sufficient in itself to establish guilt, but a circumstance which the jury may consider in determining his guilt or innocence. The weight to which that circumstance is entitled is a matter for the jury to determine in connection with all the evidence introduced in the case."

It is said that by the first sentence of this instruction the court charged the jury as to a matter of fact. If it be conceded that this is true, and that the language used would have constituted reversible error if there had

been a conflict in the evidence as to whether the defendant fled from the place of the crime, it is not improper for the court to assume and state to the jury that there was evidence of flight, or that defendant had fled when by his own testimony and by the opening statement of his counsel it was admitted that he had fled. It is not error for the court to assume as true facts which are directly admitted by both parties in the case. Under a similar principle of law, the admission of a paper relating to the number of the watch, to which no objection or specification of error appears, was harmless, whether properly proven under the oath of any one knowing it was the correct number, because the effect of the defendant's testimony and the defense interposed amounted to an admission that he was in the possession of the watch of the deceased, and defendant sought to excuse his possession of the watch by his statement on the stand that Ochoa had taken his coat and had left Ochoa's, in the pocket of which he found the watch.

Strong objection is also taken to the following instruction: "The jury are instructed that an accessory is he or she who stands by and aids, abets, or assists, or who, not being present, aiding, abetting, or assisting, hath advised and encouraged the perpetration of the crime. He or she who thus aids, abets, or assists, advises, or encourages, shall be deemed and considered as principal, and punished accordingly. You are further instructed that no distinction shall exist between an accessory before the fact, and the principal, or between principals in the first and second degree, in cases of felony, and all persons concerned in the commission of a felony, whether they directly commit the act constituting the offense, or aid and abet in its commission, though not present, shall be indicted, tried, and punished as principals." In the specification of error relating to this instruction it is said: "No objection is made to the form of the indictment, but under the proof in this case there is some evidence tending to prove that the defendant, if guilty at all, committed the crime while in the perpetration of the robbery of the deceased. This is a separate and distinct offense from the crime of murder in the first degree. The instruction, therefore, is inconsistent and confusing and is prejudicial to the defendant, in that it so conglomerates the two issues raised—that of murder in the first degree and that of murder in the perpetration of robbery—it is impossible to determine from the instruction its meaning. If the court intended to present this case to the jury on the two theories suggested therein, in order for the verdict to stand and the instruction to be applicable to the facts, it was necessary for the jury to believe from the evidence, beyond a reasonable doubt, that both theories contained in this instruction were proven."

The first paragraph of this instruction is a copy of section 10 of the criminal practice act (Comp. Laws, § 3995), the other paragraph is a correct construction, as held by former decisions of this court, and what we have already said regarding the theory of two offenses is applicable. *State v. O'Keefe*, 23 Nev. 127, 43 Pac. 918, 62 Am. St. Rep. 768; *State v. Chapman*, 6 Nev. 320; *State v. Jones*, 7 Nev. 408; *State v. Hamilton*, 13 Nev. 386.

In the record on appeal it is specified that the court erred because it failed to instruct the jury upon other matters; but it does not appear that any further instructions were drawn or requested, or that any exception was taken in regard thereto. As no objection or exception was taken in the district court to the testimony of one of the witnesses, now claimed to have been erroneously admitted, that Ochoa was well liked and that defendant was quiet and not well liked, although the witness never knew of his having any quarrels, we do not determine whether it was proper evidence. If an objection had been made to its admission, the objection might have been sustained. This court has often held that in both civil and criminal cases the particular ground of an objection or exception to the admission of evidence must be stated. Criminal Practice Act, § 421, and cases there cited; *State v. Jones*, 7 Nev. 408; *State v. Murphy*, 9 Nev. 394; *Lightle v. Berning*, 15 Nev. 389; *Sharon v. Minnock*, 6 Nev. 377; *Schwartz v. Stock*, 26 Nev. 150, 65 Pac. 351; *State v. Williams*, 31 Nev. 377, 102 Pac. 974; *Finnegan v. Ulmer*, 31 Nev. 525, 104 Pac. 17; *McGurn v. McInnis*, 24 Nev. 370, 55 Pac. 304, 56 Pac. 94; *Wigm. Ev.* § 20.

The judgment is affirmed, and the district court is directed to fix a time and make an order for carrying its sentence into effect according to law.

SWEENEY, J., concurs.

NORCROSS, C. J. I concur in the judgment and in the law of this case as stated in the opinion of Justice TALBOT. There are, however, some matters disclosed by the record which, in my judgment, are worthy of further consideration although not affecting the ultimate result of this appeal.

The counsel appointed to present this case upon appeal, while urging a number of points of alleged error, frankly admitted his doubt as to whether they could be considered upon the record because of the lack of proper objections and exceptions. It was argued that the attorney who defended the appellant at the trial was inexperienced and failed to object to certain evidence, the admission of which was strongly urged to be prejudicial to the defendant, and that in other particulars there was a failure to incorporate in the record proper objections and exceptions. It was urged that this court should, in view of

the fact that this was a capital case, consider the points urged upon the argument upon appeal whether or not exception had been taken in the lower court. Had there been an objection interposed to certain of the evidence claimed to be most prejudicial to the defendant, doubtless the trial court would have ruled properly upon it, and, if it was in fact inadmissible, would have excluded it.

If the defendant had been the only one implicated in the killing of Nelson, it would be much easier to reach a satisfactory conclusion as to the measure of the defendant's guilt. This case was prosecuted upon the theory that the homicide was committed in carrying out the crime of robbery. The state offered evidence tending to establish the fact that Nelson had in his saloon or upon his person on the night of the killing a sum of money ranging from \$150 to \$200. Whatever money Nelson had was taken, with the exception of a \$5 bill and a few cents. When the defendant was arrested, there was no money found upon him other than the amount which could be accounted for as having been left from his monthly payment after deducting the bills which he is shown to have paid. The state offered in evidence in rebuttal statements made by the defendant to a countryman of his shortly after the arrest. In this statement the defendant said that Ochoa had treated; that the trouble which resulted in the death of Nelson grew out of a dispute over the change that was paid by Nelson to Ochoa; that Nelson started to use his gun, which was behind the bar; that Ochoa then stabbed him; that Stillwell started to get out of the saloon; that Ochoa started after him; that the defendant endeavored to stop Ochoa, but did not succeed in doing so. When the homicide was discovered, the following day, there was found upon the bar a glass of beer nearly full and a bottle of beer partly full, and a bottle containing a small quantity of Hostetter's Bitters. On the floor near the door and bar was a heavy bar bottle containing some whisky and a glass lying near it. There was blood upon the top of the bar and also the imprint of bloody fingers of both hands "outlined very perfectly." There was also some blood upon the standing board behind the bar and some broken bottles at that point. So much of the statement which the defendant made shortly after his arrest, as to the point at which the stabbing of Nelson occurred, appears to be borne out by physical facts. A witness, who had charge of the property after the homicide, and who testified concerning the boards which covered the top of the bar, which were offered in evidence, testified that, for sanitary reasons, he had thoroughly scrubbed and cleaned the blood from off the top of the bar. The witness in his efforts at sanitary precautions destroyed what might have been one of the most valuable pieces of evidence in this case. Had the bloody finger prints been preserved,

It could doubtless have been established with certainty whether or not they were those of the defendant, and thus clearly have established whether or not the defendant or Ochoa was the actual assassin of Nelson. In the statement which the defendant made shortly following his arrest he accounted for his possession of the watch of Nelson by stating that Ochoa had given him his (Ochoa's) coat, and the watch with it. If the coat which the defendant had on at the time of his arrest, and which he said was Ochoa's, did not in fact belong to the latter, that fact could easily have been disproved, and we may safely take it for granted that that portion of his statement was true. The watch was of little value and was the only thing found on the person of the defendant identified as belonging to Nelson. If Ochoa was the more guilty of the two, he may have had a motive in giving the watch to the defendant.

The witness Felip Gutierrez, who was also employed as a section hand upon the railroad, testified upon the part of the state that during the night of the killing he heard voices and heard one person say: "Let's get away from here. We have been in a fight in the saloon."

If it were true, as stated by the defendant after his arrest, that the killing of Nelson was the result of a difficulty over the amount of change paid to Ochoa, then the larceny may have been an afterthought and carried out to aid Ochoa and the defendant in getting out of the country. This, of course, is speculative, and not to be considered as affecting the judgment. The jury was the exclusive judge of the weight to be given to the testimony, and it was its proper function to determine from all the circumstances established the guilt or innocence of the defendant. Had Ochoa been captured, much that is now doubtful as to the extent in which the defendant participated in the crime would possibly have been cleared up.

The testimony of the defendant given upon the trial doubtless did him more harm than good. It was unreasonable in some respects and in conflict with his statements regarding the affair following his arrest. His statements made following his arrest, which were offered by the state, in which he admitted his presence at the killing, were more reasonable and more favorable to himself than his testimony given at the trial which conflicted in material points therewith.

While recognizing it was within the province of the jury, not only to determine the credibility of the witnesses and the weight to be given to the evidence offered; but also, upon finding the defendant guilty of murder in the first degree, to impose the death penalty instead of life imprisonment, nevertheless, after a very careful examination of the record, I cannot refrain from expressing the doubt that exists in my mind as to

whether the ends of justice will be subserved by carrying out the judgment of the court to the full letter.

In view of the youth of the defendant, his ignorance of the English language, the inexperience of his counsel, taken in connection with the fact that all the evidence was circumstantial, and that there was another participant in the crime, who escaped and who may have been the more guilty, I am impressed that the ends of justice would be subserved if the sentence of the defendant was commuted to life imprisonment. If the board of pardons should see fit to commute the sentence in this case, a result would be reached in consonance with what I believe would be a more just determination of the case. If precedent were needed for the position I have taken, the same may be found in the recent case of *State v. Byrd* (Mont.) 111 Pac. 407, 416.

(33 Nev. 535)

STATE ex rel. FOWLER v. EGGERS, State Controller, et al. (No. 1,940.)

(Supreme Court of Nevada. Dec. 31, 1910.)

1. STATES (§ 132*)—GENERAL APPROPRIATION BILLS—CONSTRUCTION.

The setting apart in a general appropriation bill of various funds to cover payment of salaries and other expenses of the state government, while it may reserve the money for that purpose, does not, in itself, authorize the payment of the money from the fund.

[Ed. Note.—For other cases, see *States*, Dec. Dig. § 132.*]

2. OFFICERS (§ 94*)—CONSTRUCTION — RETROACTIVE EFFECT.

Words in a statute simply specifying that an officer shall receive a designated compensation have no retroactive effect, unless there is something in the language indicating it.

[Ed. Note.—For other cases, see *Officers*, Dec. Dig. § 94.*]

3. ATTORNEY GENERAL (§ 3*)—GENERAL APPROPRIATION BILL—CONSTRUCTION — RETROACTIVE EFFECT.

A general appropriation bill approved March 22, 1909 (Laws 1909, c. 140) appropriated for the years 1909 and 1910, \$4,800 for salary of a deputy attorney general. An act approved on the following day (Laws 1909, c. 159) provided that the salary of a deputy attorney general should be \$2,400 a year, payable out of the general fund in the same manner that salaries of other state officers are paid, which, under an earlier statute, was monthly. There was nothing in either of the acts in the nature of a relief bill. *Held*, that the intent was that the Deputy Attorney General should be paid monthly in the future, and an incumbent who, during the part of the year before approval of the act, had acted as stenographer in the Attorney General's office, drawing a salary from the state therefor, and had also acted as Deputy Attorney General under a previous statute not providing compensation for such office, was not entitled under the acts to receive the designated salary for the portion of the year previous to their passage.

[Ed. Note.—For other cases, see *Attorney General*, Dec. Dig. § 3.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Mandamus by the State on the relation of Leonard B. Fowler against J. Eggers, State Controller, and another. Writ denied.

Thomas J. Salter, for petitioner. R. C. Stoddard, Atty. Gen., for respondents.

TALBOT, J. This is an application for a writ of mandate requiring the State Controller to draw his warrant in favor of relator for salary as Deputy Attorney General for the months of January and February, and for that part of March extending from the 1st to the 22d, 1909.

During all the times mentioned, and previously thereto, he was acting as stenographer in the Attorney General's office, and received from the state for his services in that connection \$100 per month. An act approved March 8, 1908 authorized the Attorney General to appoint deputies, but did not provide for the payment of any compensation to them by the state. On July 6, 1908, relator was appointed and qualified, and has since served as Deputy Attorney General. In the general appropriation bill approved March 22, 1909, there was appropriated, with other numerous items for the support of the government of the state for the years 1909 and 1910, for salary of stenographer in the Attorney General's office \$2,400, and for salary of the Deputy Attorney General \$4,800. Laws 1909, c. 140. In an act approved March 23, 1909, section 1 provides that "from and after the passage of this act the salary of the deputy secretary of state shall be \$2,400 per annum, payable out of the general fund," and section 2 that "the salary of one deputy attorney general is hereby fixed at \$2,400 per annum, payable out of the general fund in the same manner as salaries of other state officers are paid." Laws 1909, c. 159. Another act, approved March 22, 1909, provided that "from and after the passage of this act, the salary of the private secretary to the Governor shall be \$2,400 per annum, payable out of the general fund." Laws 1909, c. 141. The general appropriation bill for 1909 and 1910 appropriated for the salary of the Governor's private secretary \$4,800, and a like amount for the Deputy Secretary of State, sufficient to cover the salaries of those deputies as increased for the full period of two years, and including the time within the two years prior to the passage of the acts increasing the salaries; but it does not appear that they, or others, excepting the relator, who had their salaries increased by the Legislature, and for whose salaries as increased amounts were inserted in the general appropriation bill sufficient to cover their salaries for the full two years as increased, made any application for the payment of increased salaries for services prior to the time that the acts mentioned raising their salaries took effect.

It is claimed that under this general appropriation bill approved March 22, 1909, appropriating \$4,800 for the salary of the Dep-

uty Attorney General for two years, and under the act of March 23, 1909, fixing the salary of one Deputy Attorney General at \$2,400 per annum, payable out of the general fund in the same manner as salaries of other officers are paid, the relator is entitled to draw the full \$4,800 for the two years, and more particularly that part of it running at the rate of \$200 per month, from the 1st of January to the 22d of March, 1909, during which time he served both as Deputy Attorney General and as stenographer in the Attorney General's office, and during which period he was paid only as such stenographer. As money cannot be paid out of the state treasury except under an act of the Legislature indicating an intention that it shall be paid, the question arises whether there is anything in these acts which indicates that the Legislature intended to pay the relator for services as Deputy Attorney General for the part of the year previous to the passage of the acts, during which he was acting and received compensation as stenographer. We find nothing in either of the acts which evinces such an intention. The setting apart in the general appropriation bills of various funds to cover the payment of salaries and the payment of other expenses of running the state government, while it may reserve the money for that purpose, does not, in itself, authorize the payment of the money from the fund. Notwithstanding the appropriations in the general appropriation bill, claims, for instance, for fuel and stationery, or for salaries, would not be payable until the stationery and fuel or the services had been furnished, and part or all of them might never be furnished, and the paying out of the various sums appropriated is ordinarily, and in the absence of special language, dependent upon and authorized by other acts.

As we held in *State v. Eggers*, 29 Nev. 469, 91 Pac. 819, 16 L. R. A. (N. S.) 630, it is not necessary that money be appropriated from the general fund for the payment of the salaries of state officers when the Legislature has made direct provision for the payment of their salaries monthly. Hence here the Deputy Attorney General would be entitled to his salary, under the act of March 23d creating it, from that time without any appropriation having been made for it in the general appropriation bill. There is nothing in either of these acts in the nature of a relief bill, or, as we construe them, indicating that the Legislature intended to pay for services rendered before either act was passed. Under the principle stated in that case, it is necessary that it appear that the Legislature intended that payment be made for services out of the proper fund. The provision in the later act, which could be considered to control in case of conflict, that "the salary of the Deputy Attorney General is fixed at \$2,400 per annum, payable out of the general fund in the same manner that salaries of

other state officers are paid," which under an earlier statute is monthly, indicates an intention to have him paid monthly in the future, instead of one that payment be made by way of relief for nearly three months' previous services, while relator was acting and receiving compensation as stenographer. Bills for such relief are usually specific, stating the amount and the name of the person to whom it is to be paid. It has frequently happened that some of the appropriations made for two years intervening between the sessions of the Legislature have been larger than expended, in which case a part has lapsed into the treasury.

At the time of preparing and introducing the general appropriation bill, the Legislature probably did not know the exact date upon which the bill providing the salary for the Deputy Attorney General would be approved and become effective, and for that reason could not provide in the general appropriation bill the exact amount necessary to pay this salary from the time of the passage of the act providing for it, but inserted an amount which would cover the salary for the full period of two years, so that there would be ample in the fund.

We think the mere appropriation of the \$4,800 for the two years, considered in connection with the act passed one day later, did not authorize the Controller to draw warrants for salary for the period prior to the passage of the acts. We are unable to say that it was the intention of the Legislature to pay the Deputy Attorney General for the services rendered prior to such passage. Words in a statute simply specifying that an officer shall receive a designated compensation have no retroactive effect, unless there is something in the language indicating it. It is the rule ordinarily that the mere designation of an amount in the general appropriation bill sets apart the sum specified, so that it may be used to pay some indebtedness of the state authorized and incurred under some other statute. We think the mere setting apart of the money in the general appropriation bill for the two years is too vague to indicate an intention on the part of the Legislature to pay the relator a salary for a period prior to the passage of the act, and while he was drawing salary from the state for services rendered in another capacity.

The statement of the court, and cases cited in the case of *State v. La Grave*, 23 Nev. 125, 43 Pac. 471, are apparently conclusive against the principal contention advanced on behalf of the relator: "The purpose of the general appropriation act is to provide funds for carrying on the state government. The mere fact that money is appropriated for an officer's salary, or for any other purpose, does not, of itself, make that money payable to any particular person. There must still

be some authority of law to justify the Controller in drawing a warrant for it, or the Treasurer in paying it out. Gen. St. 1811. If more is appropriated than is sufficient for the particular purpose designated, it is to be covered back into the general fund at the end of the fiscal years. State ex rel. Wilkins v. Hallock, 20 Nev. 73 [15 Pac. 472]. If less, it does not repeal a former act fixing an officer's salary, unless such clearly appears to have been the intention. Mechem, Pub. Off. § 857; State v. Steele, 57 Tex. 200; State v. Cook, 57 Tex. 205." See, also, *Bradley v. Esmeralda Co.*, 32 Nev. —, 104 Pac. 1058.

The application for the writ is denied.

NORCROSS, C. J., and SWEENEY, J., concur.

(42 Mont. 371)

STREET et al. v. DELTA MINING CO.

(Supreme Court of Montana. Dec. 22, 1910.)

1. APPEAL AND ERROR (§ 1010*)—FINDINGS—CONCLUSIVENESS.

A finding not contrary to the preponderance of the evidence is conclusive on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3982; Dec. Dig. § 1010.*]

2. MINES AND MINERALS (§ 21*)—LOCATION OF LODGE MINING CLAIM—STATEMENT OF DISCOVERY—SUFFICIENCY.

Under the rule that a declaratory statement of the discovery of a lode mining claim sufficiently identifies the claim, where by any reasonable construction, in view of the surrounding circumstances, the description gives notice to subsequent locators that a particular part of ground has been located, a declaratory statement, which refers to a well-known patented claim or group of claims distant a specified number of feet in a northerly direction and to a designated claim adjoining on the north, is sufficient.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 45-50; Dec. Dig. § 21.*]

3. COURTS (§ 97*)—CONTROLLING DECISION—FEDERAL SUPREME COURT DECISIONS.

The decisions of the federal Supreme Court on the construction of the federal statutes relating to the location of mining claims are conclusive on state courts.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 329-334; Dec. Dig. § 97.*]

4. MINES AND MINERALS (§ 14*)—LOCATION OF CLAIMS—REQUISITES.

To obtain the exclusive possession of a mining claim, there must be a location completed in conformity with the federal statutes providing the mode for acquiring title to mineral lands and with the state statutes supplemental thereto and not inconsistent therewith, by making a discovery, posting the preliminary notice, marking the boundaries, doing the preliminary development work within the prescribed time, and making the record of a declaratory statement under oath, containing the required recitals.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 19, 20; Dec. Dig. § 14.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

5. MINES AND MINERALS (§ 29*)—LOCATION—RIGHTS ACQUIRED.

The posting of the preliminary notice cannot for any length of time establish an exclusive right to a greater area than a completed location.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. §§ 66-72; Dec. Dig. § 29.*]

6. MINES AND MINERALS (§ 20*)—LOCATION—STATUTES—MARKING BOUNDARIES.

The time allowed under the statute to mark definitely the boundaries of the location of a lode mining claim is intended to give the discoverer of the lode, who has posted his notice, time for exploration, so that he may know how to lay his claim; and where he completes his location within the statutory period, it relates to the date of the notice, and the fact that in swinging his claim he may conflict with junior locators does not destroy their rights, except so far as the conflict extends.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. §§ 40-44; Dec. Dig. § 20.*]

7. MINES AND MINERALS (§ 24*)—LOCATION—ABANDONMENT.

A location of a lode mining claim may be abandoned at any time, even before the expiration of the time for doing the annual work, and as soon as an abandonment is complete, the ground is restored to the public domain; but a location once shown to be valid presumptively so remains, until the time for doing the annual representation work has expired, in the absence of proof of some act or declaration evincing a present intention of the locator to abandon.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. § 60; Dec. Dig. § 24.*]

8. MINES AND MINERALS (§ 25*)—LOCATION—FORFEITURE.

A forfeiture of a lode mining claim takes place by operation of law, without regard to the intention of the locator, when he neglects to preserve his right by complying with the conditions imposed by law, and is made effectual by one entering on the ground after the expiration of the time within which the labor may be done, and completing a location before resumption of work by the original locator; but a claim is never subject to forfeiture, until expiration of the time within which the annual labor may be done.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. § 60; Dec. Dig. § 25.*]

9. MINES AND MINERALS (§ 27*)—LOCATION OF LODE MINING CLAIMS—VALIDITY—CONFLICTING CLAIMS.

A junior location of a lode mining claim within a senior valid and subsisting location is void ab initio, and the subsequent abandonment or forfeiture of the senior location does not inure to the benefit of the junior location.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. §§ 64, 65; Dec. Dig. § 27.*]

Appeal from District Court, Jefferson County; Lew L. Callaway, Judge.

Action by Alexander S. Street and others against the Delta Mining Company. From a judgment for defendant, plaintiffs appeal. Affirmed.

Jesse B. Roote, Peter Breen, T. O'Leary, and A. C. McDaniel, for appellants. L. P. Forestell, and I. A. Cohen, for respondent.

BRANTLY, C. J. This action was brought by appellants in aid of an adverse

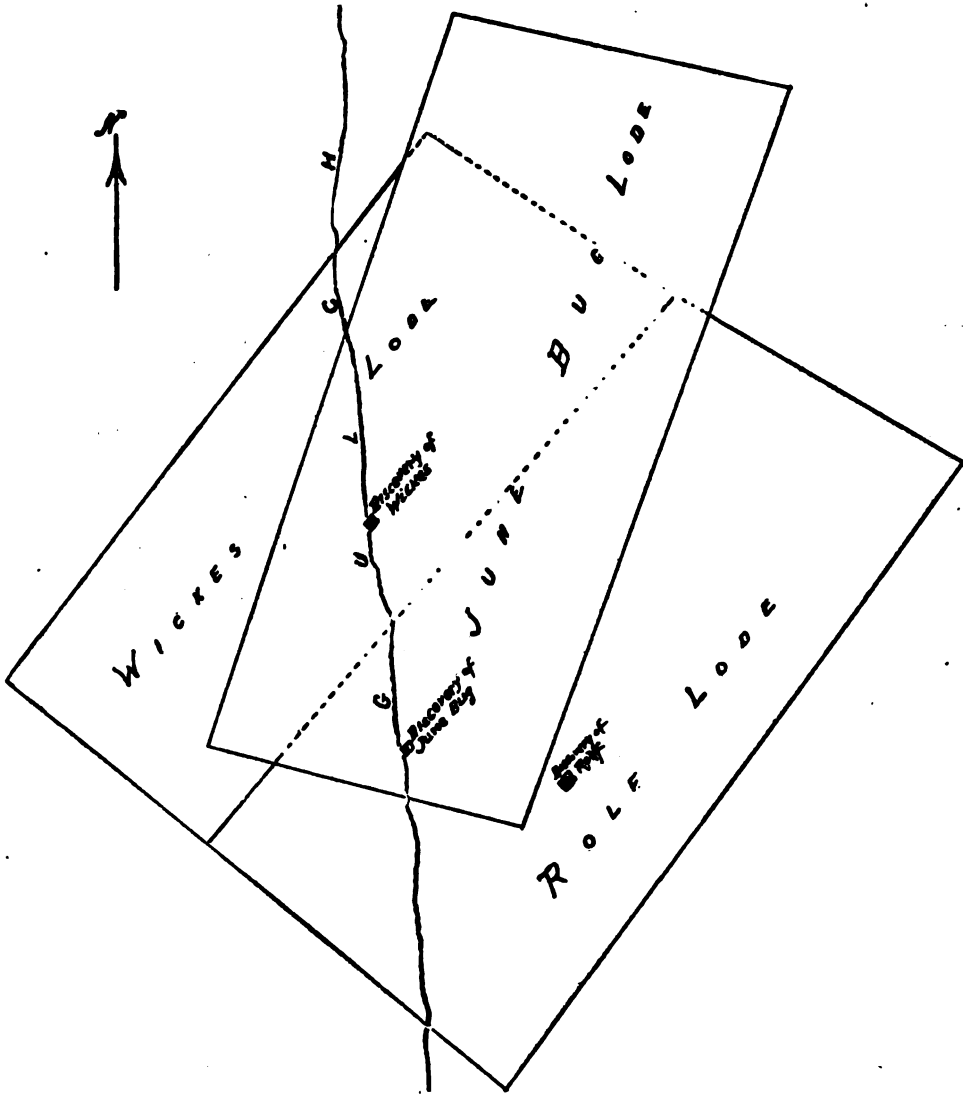
claim filed by them in the United States land office at Helena, against an application for patent by respondent to mining ground situated in Colorado unorganized mining district of Jefferson county. The respondent applied for patent to a contiguous group of six locations, designated as the Wickes, Mammoth, Covellite, Songbird, Ruby, and Daisy lodes. The adverse claim is based on a location designated as the June Bug. The latter was located on June 4, 1902. It is so situated with reference to the respondent's locations that it conflicts with all of them. The original locators of the June Bug were the appellant Street and one Hunt. Subsequently, Street acquired the Hunt interest and thereafter conveyed undivided interests to the other appellants. The Wickes location was made by Charles Huer on August 4, 1901. On May 22, 1902, he conveyed to J. H. McCabe. On June 12, 1903, McCabe made an amended location for himself and B. T. King. In making the amended location, McCabe and King readjusted the lines so as to make the claim pursue more nearly the course of the vein. On June 16, 1903, McCabe and King located the Mammoth, Covellite, Songbird, Ruby, and Daisy, as contiguous claims on the east, west, and south, and thereafter conveyed them, with the Wickes, to the respondent. At the trial, the main contention made by respondent was that the June Bug location was void ab initio, because the discovery upon which it was made was within the boundaries of another location, then valid and subsisting, designated as the Rolf. This latter location was made by Huer on October 24, 1901. Most of the area covered by it is now covered by the Covellite, Ruby, and Daisy, and also by the June Bug. The discovery of the latter was within the exterior boundaries of the Rolf. No representation work was done upon this claim in 1902, or afterwards. The subjoined plat shows the relative situation of the Wickes, Rolf, and June Bug at the time the location of the last was made. Upon the evidence adduced, the court found in favor of the respondent and directed judgment to be entered accordingly. From it, and an order denying a new trial, plaintiffs have appealed. Many questions are argued in the briefs of counsel, but the only ones which it is necessary to decide are, whether the evidence is sufficient to justify the findings as to the validity of the Rolf location, and whether the court erred in its conclusion that the June Bug location was void ab initio.

The evidence is somewhat conflicting as to the steps taken by Huer in the location of the Rolf, and the identification of it by reference to permanent monuments in the recorded declaratory statement is somewhat vague, but the trial court resolved the issue on both of these points in favor of respondent. A careful reading of the evidence leads to the conclusion that the findings should not

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

be disturbed. To say the least, the evidence does not preponderate against them, and, under the rule uniformly observed in this class of cases, they must be deemed conclusive upon this court. *Finlen v. Heinze*, 32 Mont. 354, 80 Pac. 918; *Bordeaux v. Bordeaux*, 32 Mont. 159, 80 Pac. 6; *Watkins v. Watkins*, 39 Mont. 367, 102 Pac. 860; *Pope v. Alexander*, 36 Mont. 82, 92 Pac. 203, 565.

before. "The rule applicable is that if, by any reasonable construction in view of the surrounding circumstances, the language employed in the description will impart notice to subsequent locators that the particular portion of ground in question has been located, it is sufficient." *Tiggeman v. Mrzlak*, 40 Mont. 19, 105 Pac. 77. and illustrative cases cited.



The reference in the declaratory statement is to the "Alta-California (pat.) * * * distant 1,500 feet in a northerly direction," and to the "Wickes claim" adjoining on the north. The evidence discloses that the Alta-California is a well-known patented claim, or group of claims, in the direction and at about the distance indicated. The Wickes claim is the one by that name in controversy here, which had been located some two months

The court found specially that on June 4, 1902, the Rolf was a valid, subsisting location, and that Huer had not then abandoned it nor expressed or evinced any intention to do so. The question, whether the June Bug location was void in its inception, because the discovery upon which it was based was within the exterior boundaries of the Rolf, turns upon the proper answer to the inquiry. Did the subsequent abandonment or forfei-

ture of the latter inure to the benefit of the former? Appellants contend that it did and rely with confidence upon the decision of this court in the case of *Helena Gold & Iron Co. v. Baggaley*, 34 Mont. 465, 87 Pac. 455, in which, it is said, this court adopted the rule announced in the case of *Lavignino v. Uhlig*, 198 U. S. 443, 25 Sup. Ct. 716, 49 L. Ed. 1119.

In the *Baggaley* Case, the court was considering the question whether the posting of an initial location notice effected an absolute withdrawal from exploration of the whole area within a circle described by swinging about the point of discovery as a center, the longest distance claimed from the point of discovery, over any part of which the completed location might be laid during the time allowed by the statute for its completion. After quoting, from the opinion in *Lavignino v. Uhlig*, the conclusion of the Supreme Court, to the effect that the senior locator may abandon or forfeit his rights under his location, and cause them in effect to inure to the benefit of the junior locator, this court said: "If this be the correct view of the law as to the effect of the forfeiture of an older claim which is overlapped by a junior one—and we deem it conclusive—for a much stronger reason must the failure of the claimant to complete his location after posting his preliminary notice inure to the benefit of a junior locator, whose claim is in conflict with such other claim, when the inchoate right acquired by the discovery and the posting of the notice never became fixed by a completion of the location." The conclusion was reached that none of the area surrounding the point of discovery, where the notice is posted, is absolutely withdrawn from exploration, but that discoveries and locations made therein by others pending the completion of the senior location are valid, in so far as they do not conflict with the senior location when completed. It was held that the failure of the discoverer of the Wisconsin claim (the senior location) to fulfill the conditions subsequent, by a completion of his location, did not cause the area covered by it, which was in conflict with the Success claim (the junior location), to revert to the public domain, but that it inured to the benefit of the latter, the location of which had been perfected.

The rule, as broadly stated in the *Lavignino* Case, was deemed controlling, even though it abrogated the rule theretofore declared in *Belk v. Meagher*, 104 U. S. 279, 26 L. Ed. 735, and subsequent cases, because it is the special prerogative of the Supreme Court of the United States to construe federal statutes. While not strictly in point, because the controversy in that case grew out of conflicting locations which had been completed and thereafter forfeited, yet in principle the rule was deemed to include cases like the *Baggaley* Case, where the prior locator, after initiating his location, had

failed to complete it during the time prescribed by the statute, and the junior locator had completed his location. And this is the correct view; for if the forfeiture or abandonment of a location already completed inures to the benefit of a subsequent location of the same ground, made prior to the forfeiture or abandonment, for a much stronger reason, as we said, should the failure of the prior locator to complete his location inure to the benefit of a junior locator of the same ground, who has actually complied with the requirements of the statute.

Upon further consideration of the situation presented in the *Baggaley* Case, we think the correct result was reached, even though the rule of the *Lavignino* Case should have been held wrong or inapplicable. To obtain the exclusive possession of any portion of the public domain, there must be a location, completed in conformity with the requirements of the federal statutes providing the mode for acquiring title to mineral lands, and also the state statutes supplemental thereto and not inconsistent therewith, by making a discovery, posting the preliminary notice, marking the boundaries, doing the preliminary development work within the prescribed time, and making the record of a declaratory statement under oath, containing the recitals required to be made therein. It was said in *Belk v. Meagher*, supra: "Mining claims are not open to relocation until the rights of a former locator have come to an end. A relocater seeks to avail himself of mineral in the public lands which another has discovered. This he cannot do until the discoverer has, in law, abandoned his claim and left the property open for another to take up. The right of location upon the mineral lands of the United States is a privilege granted by Congress, but it can only be exercised within the limits prescribed by the grant. Locations can only be made where the law allows it to be done. Any attempt to go beyond that will be of no avail. Hence a relocation on lands actually covered at the time by another valid and subsisting location is void; and this not only against the prior locator, but all the world, because the law allows no such thing to be done. * * * Location does not necessarily follow from possession, but possession from location. A location is not made by taking possession alone, but by working on the ground, recording and doing whatever else is required for that purpose by the Acts of Congress and the local laws and regulations."

The right to make a location is purely statutory. But for the statute, no exclusive right could be acquired; and the extent of the right, both as to the area withdrawn by the location and the character of the title acquired by it, depending, as it does, upon the fulfillment of conditions subsequent, must be measured by the provisions of the statute. If this is so, the posting of the pre-

liminary notice certainly cannot for any length of time establish an exclusive right to a greater area than does the completed location, first, because the statute does not so provide, and, second, because a rule which would permit a prospector by posting his notice of intention to locate—which intention he is not bound to carry out—to bar other prospectors from exploring the ground within the area over which the claim may be floated, is manifestly in direct violation of the spirit of the statute. As was pointed out in the case of *Sanders v. Noble*, 22 Mont. 110, 55 Pac. 1037, and *Bramlett v. Flick*, 23 Mont. 95, 57 Pac. 869, the time allowed under the statute to mark definitely the boundaries of the location, is intended to give the discoverer of a lode, who has posted his notice, time for exploration, so that he may know how to lay his claim. The result is that if he completes his location within the statutory period, it relates to the date of the notice; but it can have no other result. It is true that in swinging his claim he may conflict with junior locators, but this cannot destroy their rights, except so far as the conflict extends. The right acquired by posting the notice is merely a preference privilege of making a location which, when completed, will result in the appropriation of the area covered by it, to the exclusion of any junior location with which it conflicts. This we held in the *Baggaley Case*. But, however this may be, the rule as stated in the *Lavignino Case* has been entirely discredited by subsequent decisions of the Supreme Court of the United States, notably in *Brown v. Gurney*, 201 U. S. 184, 26 Sup. Ct. 509, 50 L. Ed. 717, and in *Farrell v. Lockhart*, 210 U. S. 142, 28 Sup. Ct. 681, 52 L. Ed. 994, 16 L. R. A. (N. S.) 162, and the rule declared in *Belk v. Meagher*, *supra*, reaffirmed.

In the case of *Brown v. Gurney*, the court, without referring to the *Lavignino Case*, distinctly held that ground covered by a valid location is not restored to the public domain so as to be open to relocation, until abandonment or forfeiture by the original locator, and that a location made prior to that time by another is void. In the case of *Farrell v. Lockhart*, the court, in view of the practice which had grown up in the mining states in reliance upon the decision in *Belk v. Meagher* and other cases, felt constrained to qualify the rule declared in the *Lavignino Case*, "so as not to exclude the right of a subsequent locator on an adverse claim to test the lawfulness of a prior location of the same mining ground, upon the contention that at the time such prior location was made, the ground embraced therein was covered by a valid, subsisting mining claim." The court further said: "It is to be observed that this qualification but permits a third locator to offer proof tending to establish the existence of a valid and subsisting location anterior to that of the location which is being adverse. It does not therefore include the

conception that the mere fact that a senior location had been made, and that the statutory period for performing the annual labor had not expired when the second location was made, would conclusively establish that the location was a valid and subsisting location, preventing the initiation of rights in the ground by another claimant, if, at the time of such second location, there had been an actual abandonment of the original senior location. We say this because, taking into view *Belk v. Meagher*, *Lavignino v. Uhlig*, and *Brown v. Gurney*, we are of opinion, and so hold, that ground embraced in a mining location may become a part of the public domain, so as to be subject to another location before the expiration of the statutory period for performing annual labor, if, at the time when the second location was made, there had been an actual abandonment of the claim by the first locator." Thus qualified the rule does not in any wise conflict with that which has controlled the decisions of all the courts in the mining states since the decision in *Belk v. Meagher*, and which has been recognized and applied by the Supreme Court of the United States in like cases (*Gwillim v. Donellan*, 115 U. S. 45, 5 Sup. Ct. 1110, 29 L. Ed. 348; *Clipper Mining Co. v. Eli Mining Co.*, 194 U. S. 220, 24 Sup. Ct. 632, 48 L. Ed. 944; *Mining Co. v. Tunnel Co.*, 196 U. S. 337, 25 Sup. Ct. 266, 49 L. Ed. 501; *Brown v. Gurney*, *supra*), viz., that a valid location can be made only upon a portion of the public domain then open to location. *Lozar v. Neill*, 37 Mont. 287, 96 Pac. 343; *Nash v. McNamara*, 30 Nev. 114, 93 Pac. 405, 16 L. R. A. (N. S.) 168, 133 Am. St. Rep. 694.

We understand that it has always been the rule that a location may be abandoned at any time, even though the time for doing the annual work has not expired, and that as soon as the abandonment is complete, it operates as effectively to restore the ground to the public domain as a forfeiture for failure to do the annual representation work. *Black v. Elkhorn Mining Co.*, 163 U. S. 445, 16 Sup. Ct. 1101, 41 L. Ed. 221. But a location once shown to be a valid and subsisting one will be presumed to remain so, until the time for doing the annual representation work shall have expired, in the absence, of course, of proof of some act or declaration, or both, evincing a present intention on the part of the locator to abandon. The distinction between the effect of an abandonment and a forfeiture is pointed out in *McKay v. McDougall*, 25 Mont. 258, 64 Pac. 669, 87 Am. St. Rep. 395. Abandonment takes place when the locator voluntarily leaves his claim to be appropriated by the next comer, without any intention to reclaim it, and becomes effective instantly. A forfeiture takes place by operation of law, without regard to the intention of the locator, whenever he neglects to preserve his right by complying with the conditions imposed by law, and is made

effectual by one who enters upon the ground after the expiration of the time within which the annual labor may be done, and completes a location before resumption of work by the original locator. In contemplation of law, the land is restored to the public domain as soon as the abandonment takes place. It is never subject to forfeiture, until the expiration of the time within which the annual labor may be done.

The court found that at the time the location of the June Bug was made, the Rolf was a valid, subsisting claim; and since the discovery of the June Bug was within the limits of the ground already appropriated under the Rolf location, the conclusion by the district court that the June Bug location was void ab initio was clearly correct. The result is that the judgment and order of the district court must be affirmed.

Affirmed.

SMITH and HOLLOWAY, JJ., concur.

(42 Mont. 105)

STATE ex rel. GALEN, Atty. Gen., v. DISTRICT COURT IN AND FOR SANDERS COUNTY et al.

(Supreme Court of Montana. Oct. 19, 1910.)

1. EMINENT DOMAIN (§ 46*)—PROPERTY SUBJECT TO APPROPRIATION — PROPERTY OF STATE.

Rev. Codes, § 7333, subd. 2, providing that the private property which may be taken by eminent domain under that title, includes lands belonging to the state, or any county, etc., not appropriated to some public use, authorizes a suit to condemn land owned by the state, except state school lands granted by act of Congress.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 91-93; Dec. Dig. § 46.*]

2. EMINENT DOMAIN (§ 46*)—PROPERTY SUBJECT TO APPROPRIATION — STATE SCHOOL LANDS.

Rev. Codes, § 7333, subd. 2, provides that the private property which may be taken by eminent domain under that title includes lands belonging to the state or any county, etc., not appropriated to some public use. Enabling Act, § 10,† grants to each state upon its admission, for the support of common schools, sections 16 and 36 in every township. Section 11 provides that all lands granted for educational purposes therein shall be disposed of only at public sale, the proceeds to constitute a permanent school fund, only the interest of which shall be expended to support the schools, but provides that such lands may be leased and shall not be subject to pre-emption, homestead entry, etc. Const. Mont. Ordinance No. 1, § 7, provides that the state accepts the grants of lands from the United States made by the enabling act upon the terms therein provided, and article 17, § 1, provides that all lands granted to the state by Congress shall be public lands and held in trust for the people, to be disposed of for the purposes for which they were granted, and that any lands held by grants from the United States shall not be disposed of except in the manner prescribed in the grant, without the consent of the United States. Held, that the title in fee to state school lands granted by

section 10 of the enabling act cannot be acquired by eminent domain.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 91-93; Dec. Dig. § 46.*]

Application for prohibition by the state, on the relation of Albert J. Galen, Attorney General, against the District Court of the Fourth Judicial District of the State of Montana, in and for the County of Sanders, and Henry L. Myers, a judge thereof. Writ issued.

Albert J. Galen, Atty. Gen., for relator. Walsh & Nolan, for respondents.

SMITH, J. In April, 1910, an action was begun in the district court of Sanders county by one Steele and others against the state of Montana and others, for the purpose of condemning certain lands belonging to the defendants, by the exercise of the power of eminent domain. The state interposed a demurrer to the complaint, on the grounds that the court had no jurisdiction of the person of that defendant or of the subject of the action, and that the complaint did not state facts sufficient to constitute a cause of action. The district court overruled the demurrer, whereupon the state, through the Attorney General, sued out of this court an alternative writ of prohibition commanding the district court and the Honorable Henry L. Myers, one of the judges thereof, to desist from exercising jurisdiction in said action until the further order of this court, and to show cause, at a day named therein, why a mandatory and permanent writ of prohibition should not issue. The respondents appeared and answered, and the cause has been argued.

The complaint in the case of Steele and others against the state of Montana and others alleges that the plaintiffs are about to construct a dam across the Clark's fork of the Columbia river, a navigable stream, for the purpose of generating electricity for general sale; that the state is the owner of the bed of the stream and also of the land between low and high water marks; also of certain lots in section 36, township 22 North of range 30 West, in the county of Sanders, situated on both sides of said river, upon which it is proposed to place the abutments of the dam; that plaintiffs also intend to flood portions of section 36; that the dam will rest upon the bed of the stream. The prayer of the complaint is that the use to which plaintiffs seek to devote the land be declared to be a public use, that they be adjudged to be entitled to perpetually use the same for that purpose, and that commissioners be appointed to ascertain and determine the amount to be paid by them to the defendants, as damages.

1. Plaintiffs in the condemnation proceedings claim the right to take the lands in

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes
† Act Feb. 22, 1889, c. 180, 25 Stat. 673.

question by virtue of the provisions of section 7333, Rev. Codes, subdivision 2 of which reads as follows: "The private property which may be taken under this title [title 7, Eminent Domain], includes * * * (2) lands belonging to this state, or to any county, city or town, not appropriated to some public use." It is contended by the Attorney General that this section of the Codes does not give consent for the state to be sued, and does not authorize a suit to condemn lands owned by the state. The Supreme Court of Idaho in *Hollister v. State*, 9 Idaho, 8, 71 Pac. 541, speaking of a similar statute, said: "This statute alone would not authorize this action." It then decided that authority is granted by another statute of Idaho, so that it will be seen that the remark above quoted was an unnecessary one. Although the opinion is not very clear upon the point, the California Court of Appeals, in *California & N. Ry. Co. v. State*, 1 Cal. App. 142, 81 Pac. 971, appears to have held that a statute similar to ours authorizes a suit against the state. We are of opinion that the Supreme Court of Idaho was wrong in saying that such a statute does not authorize the action. The language appears to us to be clear, and, if it means anything at all, it means that lands belonging to the state may be taken by the exercise of the power of eminent domain, and that the state may properly be made a party to the action. In other words, the state has expressly consented to be sued under such circumstances.

2. It will be observed that a part of the land sought to be taken is in section 36, commonly known as a school section, and the Attorney General argues that on that account it cannot be taken in condemnation proceedings, for the reason that "state school lands can only be disposed of in accordance with the terms of the grant to the state, the Constitution, and general laws consistent with both." Section 10 of the enabling act provides in part: "Upon the admission of each of said states into the Union, sections numbered 16 and 36 in every township * * * are hereby granted to said states for the support of common schools. * * *" Section 11 provides: "That all lands herein granted for educational purposes shall be disposed of only at public sale, and at a price not less than ten dollars per acre, the proceeds to constitute a permanent school fund, the interest of which only shall be expended in the support of said schools. But said lands may, under such regulations as the Legislatures shall prescribe, be leased for periods of not more than five years, in quantities not exceeding one section to any one person or company; and such lands shall not be subject to pre-emption, homestead entry or any other entry under the land laws of the United States, whether surveyed or unsurveyed, but shall be reserved for school purposes only." Section 7 of Ordinance No. 1, appended to the state Constitu-

tion, reads thus: "The state hereby accepts the several grants of land from the United States to the state of Montana mentioned in an act of Congress (the enabling act) upon the terms and conditions therein provided." Section 1 of article 17 of the state Constitution reads as follows: "All lands of the state that have been, or that may hereafter be granted to the state by Congress, and all lands acquired by gift or grant or devise, from any person or corporation, shall be public lands of the state, and shall be held in trust for the people, to be disposed of as hereafter provided, for the respective purposes for which they have been or may be granted, donated or devised; and none of such land, nor any estate or interest therein, shall ever be disposed of except in pursuance of general laws providing for such disposition, nor unless the full market value of the estate or interest disposed of, to be ascertained in such manner as may be provided by law, be paid or safely secured to the state; nor shall any lands which the state holds by grant from the United States (in any case in which the manner of disposal and minimum price are so prescribed) be disposed of, except in the manner and for at least the price prescribed in the grant thereof, without the consent of the United States. * * *"

It has been repeatedly held that the fund created from the sale of lands granted to the state by the federal Congress for a particular purpose is a trust fund "established by law in pursuance of the act of Congress." See *State ex rel. Bickford v. Cook*, 17 Mont. 529, 43 Pac. 928; *State ex rel. Dildine v. Collins*, 21 Mont. 448, 53 Pac. 1114; *State ex rel. Koch v. Barret*, 28 Mont. 62, 66 Pac. 504. Section 7332, Rev. Codes, provides, in part: "The following is a classification of the estate and rights in lands subject to be taken for public use: (1) A fee simple, when taken for public buildings or grounds or for permanent buildings, for reservoirs and dams, and permanent flooding occasioned thereby, or for an outlet for a flow, or a place for the deposit of debris or tailings of a mine." It seems clear from the allegations of the complaint that the plaintiffs in the *Steele Case* seek to take a fee-simple title to the lands of the state. We hold that the title in fee to state common school lands, granted by section 10 of the enabling act, cannot be acquired in condemnation proceedings. In the case of *Hollister v. State*, supra, the Supreme Court of Idaho took an opposite view. Mr. Justice Ailshie writing the opinion said: "Again, it is urged by appellant that the court had no jurisdiction of the subject-matter of the action; that the act of Congress known as the 'Idaho Admission Act,' granting sections 16 and 36 in each township to the state for school purposes, and providing that such lands 'shall be disposed of only at public sale, the proceeds to constitute a permanent school fund,' prohibited

the taking of this property under the claim of eminent domain. Under this act it is claimed that the state cannot authorize any disposition of such lands other than at public sale, and that, therefore, the court had no jurisdiction of an action to condemn any such lands to a public use. * * * When Idaho became a state, it at once necessarily assumed the power of eminent domain, one of the inalienable rights of sovereignty; and that right, we take it, may be exercised over all property within its jurisdiction. * * * But even if Congress had the authority, in granting these lands to the state, to restrict and prohibit the state in the exercise of the power of eminent domain, we do not think it was intended or attempted in the admission act. It was evidently the purpose of Congress in granting sections 16 and 36 in each township to the state for school purposes to provide that the revenue and income from all such lands should go to the school fund, and that, when sold, it should be at the highest market price. We cannot believe that Congress meant to admit into the Union a new state, and by that very act throttle the purposes and objects of statehood by placing a prohibition on its internal improvements. To prohibit the state the right of eminent domain over all the school lands granted would lock the wheels of progress, drive capital from our borders, and in many instances necessitate settlers who have taken homes in the arid portions of the state, seeking a livelihood elsewhere." We are unable to agree with the reasoning of the learned judge. It seems to us that the decision on this point simply amounts to a declaration that the Congress of the United States did not mean what it said when it commanded that sections 16 and 36 in every township should be sold at public sale. Neither can we agree that there is any question of the right of the United States to dictate and restrict the manner in which the state shall dispose of the lands. They all belonged to the United States. A grant to the state, as trustee for its common schools, was in contemplation, and we know of no authority which has the power to question the right of the grantor to make such terms as it saw fit. Neither is there any authority in the state to change the terms of the grant without the consent of the Congress of the United States. The framers of the state Constitution did not attempt to do so. They expressly agreed, for the state, not to dispose of any lands granted by the United States in any case in which the manner of disposal was prescribed in the grant, except in the manner prescribed, without the consent of the United States. It is expressly declared in the enabling act that the territory of Montana may become the state of Montana "as hereinafter provided"; that "sections 16 and 36 are hereby granted for the support of common schools"; that "all lands herein granted for educational purposes shall be disposed

of only at public sale." The Congress is presumed to have had good and sufficient reason for thus restricting the right of alienation, and the state solemnly accepted the conditions. If those restrictive words can be disregarded in favor of the right to exercise eminent domain, then the condition of the grant is not general in its application, as its phraseology would appear to indicate, exceptions may be read into it, and the entering wedge be inserted by which the safe guard may be entirely broken down and removed. The Supreme Court of Washington in *State ex rel. Heuston v. Maynard*, 31 Wash. 132, 71 Pac. 775, said: "The manner of the disposition of the sale of such lands * * * is subject to the limitations contained in section 11 of the act." The Supreme Court of North Dakota in *Board v. McMillan*, 12 N. D. 280, 96 N. W. 310, said: "Perhaps it is not necessary to state that by the acceptance of the grant for educational purposes * * * a trust was created, the character of which was fixed by the terms of the grant. By the mere acceptance of the grant the honor of the state was pledged to the observance of the obligation of the trust. * * *"

We cannot think that the mere fact that certain individuals may not condemn a portion of a school section which happens to be particularly advantageous as a dam site for generating electricity will have the effect of placing a prohibition upon internal improvements, or lock the wheels of progress, or necessitate the removal of settlers. Provision is made for the disposal of these lands at public sale, and in our judgment this provision will eventually be invoked not only to enhance and enlarge the internal improvements of the state, but to put money into the common school fund at the same time. Not such a sum as three commissioners or a petit jury in a county may think adequate, but such an amount as shall be realized from competitive bidding in open and unrestricted competition. We think the Congress of the United States and the framers of our Constitution so intended, and we so hold. While it is true that the power of eminent domain is one of the inherent and inalienable rights of sovereignty and may ordinarily be exercised over all property within the jurisdiction of the state, it is not to be supposed that this right is so limitless as to enable the state to violate its contract with the federal government.

Other questions are raised and argued in the briefs of counsel, but it is thought that the foregoing disposition of the main question makes the solution of others unnecessary. If we are in error, the fact may be brought to our attention.

It is ordered that a writ issue prohibiting the respondents from further proceeding in the case of *Steele et al. v. State of Montana et al.*, in so far as such proceedings will in any way affect those portions of section 36,

township 22 N. of range 30 W., county of Sanders and state of Montana, mentioned and described in the plaintiffs' complaint. Costs to the relator.

Writ granted.

HOLLOWAY, J., concurs. BRANTLY, C. J., being absent, takes no part in the foregoing decision.

(57 Or. 535)

TALBOT v. COOK.

(Supreme Court of Oregon. Jan. 10, 1911.)

1. MORTGAGES (§ 554*)—FORECLOSURE—CONVEYANCE TO PURCHASER—STATUTE OF LIMITATION.

Where a decree of foreclosure was made and confirmed in 1895, and in 1901 the then sheriff executed to the holder of certificate of sale a sheriff's deed conveying the premises in question, the fact that the sheriff under B. & C. Comp. § 7, subd. 1, after three years, could successfully resist a mandamus compelling him to execute a deed, does not prohibit him from voluntarily performing this duty originally enjoined by law, and executing a valid deed, independent of section 1035, B. & C. Comp., providing that, where a sheriff has failed to make a deed during his term of office, the then sheriff, at any time after such purchaser shall be entitled to a deed, shall execute such conveyance.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1585; Dec. Dig. § 554.*]

2. MORTGAGES (§ 143*)—POSSESSION OF MORTGAGOR—ADVERSE NATURE.

The possession of a mortgagor and her devisee cannot be held adverse to the claim of the mortgagee, even after judgment and sale in foreclosure, in the absence of any overt act indicating a change of attitude toward the mortgagee or his successor in interest, the purchaser at the foreclosure sale, from that of a voluntary mortgagor to that of a hostile claimant.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 281; Dec. Dig. § 143.*]

3. ADVERSE POSSESSION (§§ 16, 29*)—ACTUAL POSSESSION—NOTORIOUS POSSESSION.

The mere cutting of firewood by the mortgagor on uninclosed and unoccupied land for use at her residence or other land, and passing over it on a roadway thereon, are not such actual or open and notorious possession as will ripen into title against the claim of the mortgagee or the purchaser at the foreclosure sale.

[Ed. Note.—For other cases, see Adverse Possession, Dec. Dig. §§ 16, 29.*]

Appeal from Circuit Court, Multnomah County; Thos. O'Day, Judge.

Suit by Ella Talbot against Vincent Cook. Judgment for defendant, and plaintiff appeals. Affirmed.

The complaint in this suit was framed for the purpose of determining an adverse claim, interest, or estate of the defendant in the tract of land in question, and to quiet the title of plaintiff therein, pursuant to section 516, B. & C. Comp. The answer denies the title of the plaintiff, and on behalf of the defendant claims to deraign title for him by virtue of the foreclosure of a mortgage upon the premises in question given by the mother of the plaintiff, through whom the plaintiff claims. The reply admits that the

plaintiff's mother, being at the time the owner of the premises, gave the mortgage mentioned, and that a decree of foreclosure was duly made, rendered, and entered of record, as alleged in the answer, April 20, 1895, but denies the subsequent proceedings in the foreclosure suit and denies the defendant's claim of title. The reply also, as new matter, alleges "that neither the defendant nor his ancestors, predecessors, or grantors have been seised or possessed of the real estate described in the complaint herein within ten years before the date of the commencement of this suit." From findings and a decree of the circuit court in favor of the defendant, the plaintiff has appealed.

Granville G. Ames, for appellant. A. E. Clark, for respondent.

BURNETT, J. (after stating the facts as above). It appears in the evidence, and was virtually conceded at the hearing in this court that the sheriff's sale in pursuance of the decree of foreclosure was made June 10, 1895, was confirmed June 26, 1895, and that a subsequent sheriff, on July 11, 1901, made, executed, and delivered to the then holder of the certificate of sale, from whom the defendant derives title, a sheriff's deed in due form of law, conveying to the holder of the certificate the premises in question, so far as he might lawfully do, by virtue of the proceedings had in the foreclosure suit.

The principal contention of the plaintiff is that because the sheriff then in office could not be compelled by mandamus to execute a deed to the holder of the certificate after three years, owing to the statute of limitations (B. & C. Comp. § 7, subd. 1), neither he nor his successor in office had any right or power voluntarily to execute a sheriff's deed after the expiration of the three years prescribed in that statute of limitations, and hence that the sheriff's deed, through which the defendant here deraigns title, is void. In support of his contention, counsel for plaintiff cites one line of authorities holding under such a statute that the officer cannot be compelled to execute a deed after the expiration of the statute of limitations. This may be conceded as a general principle, but it has no application herein, for the then sheriff did in fact execute a deed to defendant's predecessor in interest. It is true, he might not have been compelled to make the conveyance, and could have pleaded the statute of limitations as against an action in mandamus to compel him to execute it, if that statute were applicable. But no such case arose, and the subsequent sheriff, by his action, in the matter, performed a duty enjoined upon him by law, waiving the statute of limitations, which might have operated in his favor as against a writ of mandamus to compel him to execute the deed. Of this sort of cases, the leading one cited by coun-

sel for appellant is *Hintrager v. Traut*, 69 Iowa, 747, 27 N. W. 807, where the purchaser sought by mandamus to compel the officer to convey, and the officer successfully pleaded the statute of limitations as a reason why he should not be thus compelled. The statute of limitations in such cases furnishes ground for questions between the purchaser and the officer, but does not affect the relations existing between the parties to the suit, at least during the period within which the decree would be a lien upon the land.

Another class of cases cited by the plaintiff is composed of those in which the statute affirmatively states that a certificate of sale shall be void and no deed shall issue within a certain period prescribed; or that no license for sale shall be in force after a certain period and such like provisions. Cases of that kind are *Macy v. Raymond*, 9 Pick. (Mass.) 287; *Ryhiner v. Frank*, 105 Ill. 326; but they are not applicable to the case at bar because no limitation is expressly provided by our Code against the time within which a sheriff may execute a deed to the purchaser at a foreclosure sale.

A third class of cases is like *Dixon v. Dixon*, 89 App. Div. 603, 85 N. Y. Supp. 609. In that case 40 years had elapsed between the issuance of the certificate of sale and the making of the deed. The lien of the judgment had long expired without the debtor's title having been questioned, and under those circumstances the court presumed that either the judgment had been paid or that the land had been redeemed, and that the foundation of the deed which was the lien of the judgment, having disappeared, the deed was void; but the reasoning of that class of cases does not apply in this case.

The decree of foreclosure here was entered April 20, 1895, and its lien would have operated for 10 years thereafter; but before the expiration of that time the deed was made on July 11, 1901, which circumstance distinguishes it from the class of cases of which *Dixon v. Dixon*, supra, is an example. It does not follow because the sheriff could successfully resist by means of the statute of limitations a mandamus compelling him to execute the deed, that he could not voluntarily have performed this duty originally enjoined upon him by law, independent of the statute (section 1035, B. & C. Comp.), to which attention will be presently given. In good reason, therefore, especially until the lien of the decree would otherwise lapse, the then sheriff might convey to the holder of the certificate, as was held by this court in *Moore v. Willamette Transportation Co.*, 7 Or. 359, and such a conveyance would be effective for the purpose disclosed by its terms.

But, in addition to this reasoning, section 1035, B. & C. Comp., provides "that in all cases where real property has been or may be sold under execution by any sheriff, and he shall fail or neglect, during his term of office by virtue of the expiration thereof or

otherwise, to make or execute a proper sheriff's deed, conveying said property to the purchaser; or if through mistake in its execution, or otherwise, any sheriff's deed shall be inoperative, the sheriff in office at any time after such purchaser shall be entitled to a deed shall execute such conveyance, and such conveyance so executed shall have the same force and effect as if made by the sheriff who made the sale." The effect of the words, "at any time after such purchaser shall be entitled to a deed" would seem to take such transactions out of the terms of section 7, subd. 1, B. & C. Comp., supra, for effect must be given to all the words of the statute set forth in section 1035, especially as that statute is remedial in its nature, and must therefore be construed liberally.

The plaintiff further claims title by adverse possession of the premises in question as against the defendant, continuing for more than 10 years prior to the commencement of this suit. In passing upon this question, some consideration must be given to the nature and situation of the land in dispute. The testimony shows that the premises had at one time been partially cleared, but had never been inclosed or cultivated in any way, and had afterwards grown up to underbrush and small timber; that the only acts of ownership or occupancy exercised by the plaintiff were an occasional cutting of a few cords of wood for her personal use in her residence on another tract of land, and in casually passing over a roadway on the land.

"There are five essential elements necessary to constitute an effective adverse possession: First, the possession must be hostile and under a claim of right; second, it must be actual; third, it must be open and notorious; fourth, it must be exclusive; and, fifth, it must be continuous. If any of these constituents is wanting, the possession will not effect a bar of the legal title." 1 Am. & Eng. Enc. Law (2d Ed.) 795; *Jasperson v. Scharinkow*, 150 Fed. 571, 80 C. C. A. 373, 15 L. R. A. (N. S.) 1178, and notes; *McNear v. Guistin*, 50 Or. 377, 92 Pac. 1075. If the plaintiff was ever in possession of this land her possession was not hostile in its origin. She claims as the devisee of her mother, who is admitted to have mortgaged this land and to have appeared and defended the suit for the foreclosure of that mortgage. The testimony does not disclose any overt act on the part of the plaintiff herein or her mother, under whom she claims, indicating any change of purpose or attitude towards the mortgagee or his successor in interest. The plaintiff cannot claim any better right or situation in that respect than her predecessor in interest, and before she can contend that her possession is hostile in its origin she must by some additional act show that she changes her situation from a voluntary mortgagor to that of a hostile claimant. Whatever her possession was, it lacks the element of being

actual or open or notorious. The mere casual cutting of the wood on the land and passing over it back and forth are not sufficient to constitute that open and notorious possession of wild or uninclosed land requisite as an element of adverse holding sufficient to defeat the legal title evidenced by the sheriff's deed.

For these reasons, if for no other, the claim of title by adverse possession in the plaintiff must fail. We conclude that the sheriff's deed was sufficient in law to pass the legal title, in addition to the equitable title, which had already passed by virtue of a foreclosure and sale, and that under the circumstances of this land being wild and uninclosed the deed conveying the legal title drew after it possession in defendant's grantor as against any showing of adverse possession on the part of the plaintiff disclosed by the testimony. *Swift v. Mulkey*, 14 Or. 59, 12 Pac. 76; *Altschul v. O'Neill*, 35 Or. 202, 58 Pac. 95.

Having determined that the sheriff's deed to defendant's grantor was effectual to pass the legal title and draw after it the possession of the premises in question, it is unnecessary to consider the offer of the plaintiff made in her reply to redeem the land from the lien of the original mortgage. That privilege was afforded in the regular course of the foreclosure suit, but was allowed to lapse. A court of equity, following the law, as the maxim teaches, cannot now resurrect that lost privilege, at least without a better showing than the mere fluctuation of land values.

These considerations lead to the conclusion that the defendant is the owner in fee simple and entitled to the possession of the land in question. The decree of the court below should be affirmed, and it is so ordered.

(58 Or. 453)

TURNHAM v. CALUMET & OREGON MINING CO.†

(Supreme Court of Oregon. Jan. 17, 1911.)

1. CONTRACTS (§ 188*)—CONSTRUCTION—PARTIES BOUND.

An agreement between individuals which provided that one party agreed to accept in satisfaction of his claims arising out of a sale of mining property to a corporation a specified sum paid in cash by the adverse party and a promise to pay an additional sum out of the second payment to be made to the vendors of the property, and signed by the parties as individuals, created an individual liability only, and the corporation purchasing the property was not bound thereby.

[Ed. Note.—For other cases, see *Contracts*, Dec. Dig. § 188.*]

2. FRAUDS, STATUTE OF (§ 17*)—PROMISE TO PAY DEBT OF ANOTHER—EVIDENCE.

Under L. O. L. § 808, providing that an agreement to answer for the debt of another, is void unless in writing, one cannot prove by parol that a corporation assumed an obligation

incurred by an individual and agreed to pay the same.

[Ed. Note.—For other cases, see *Frauds*, Statute of, Cent. Dig. §§ 16, 17; Dec. Dig. § 17.*]

3. FRAUDS, STATUTE OF (§ 146*)—CORPORATIONS (§ 513*)—CONTRACTS—UNDISCLOSED PRINCIPAL—COMPLAINT.

The complaint in an action against a corporation purchasing mining property which alleged the employment by the owner of plaintiff to procure a purchaser; that on the date of the contract of purchase, a third person acting as agent of a corporation and in its behalf agreed with plaintiff that if he would relinquish the claim for commission for the sale of the property to the corporation, the third person would pay to plaintiff a specified sum in cash, and an additional sum when the second payment on the purchase price should be made, and that the corporation subsequently assumed the obligation and agreed to pay the same, proceeded on the theory that the original obligation was personal to the third person and that subsequently the corporation assumed that obligation, and did not proceed against the corporation as an undisclosed principal, for to do so, the complaint must allege that the original contract was made directly by the corporation, and there could be no recovery unless the corporation assumed the obligation in writing within the statute of frauds, L. O. L. § 808.

[Ed. Note.—For other cases, see *Frauds*, Statute of, Cent. Dig. § 355; Dec. Dig. § 146;* *Corporations*, Dec. Dig. § 513.*]

4. CORPORATIONS (§ 513*)—CONTRACTS BY AGENT—RATIFICATION—PLEADING.

The complaint did not state a case of ratification by the corporation with full knowledge of the contract made by the third person having no power to represent the corporation, and there could be no recovery on the theory of ratification.

[Ed. Note.—For other cases, see *Corporations*, Dec. Dig. § 513.*]

5. CONTRACTS (§ 188*)—CONSIDERATION.

A promise by a broker employed by the owner to procure a purchaser, made to a third person, to take a specified sum in cash and the promise of the third person for an additional payment in the future in satisfaction of his claim for commissions arising out of a sale of property to a corporation, does not result in any benefit to the corporation in absence of proof that the corporation paid less for the property than it agreed to or that its obligation to the owner was diminished by reason of the promise, and the agreement of the third person for the additional payment though made in behalf of the corporation, may not be enforced against it.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 809; Dec. Dig. § 188.*]

Appeal from Circuit Court, Josephine County; H. K. Hanna, Judge.

Action by W. T. Turnham against the Calumet & Oregon Mining Company. From a judgment for plaintiff, defendant appeals. Reversed, with directions.

In this case, after alleging the corporate character of the defendant, the complaint states in substance that prior to April 1, 1905, the plaintiff had an agreement in writing with three men, Burke, Albright, and Wintjen, whereby if he should find a purchaser for certain mining property owned by

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

† Rehearing denied February 21, 1911.

them he would be entitled to all of the purchase price received for said mines in excess of \$20,000; that in pursuance of his contract of employment as a real estate agent he procured one Timothy F. Hopkins as a purchaser for said property; that afterwards Hopkins associated himself with several other men with whom he incorporated and organized the defendant corporation for the purpose of buying the property, and that the corporation entered into a contract for the purchase of this mining property. The complaint then states that on or about the date of the contract for the purchase of the mining property "Hopkins acted for and in behalf and as the agent of the defendant corporation, and did on behalf of said defendant corporation agree to and with the plaintiff that if the plaintiff would relinquish all claim he had for commission for the sale of said property to the Calumet & Oregon Mining Company, that he would pay to the said plaintiff the sum of one hundred eighty dollars cash, and the further sum of two thousand dollars when the second payment should be made on the purchase price of said mines; that the Calumet & Oregon Mining Company thereafter assumed the said obligation and agreed to pay same; that prior to the commencement of this suit and prior to the 1st day of April, 1906, the defendant did make a second and third payment on the purchase price of said mine to the owners thereof"; and further alleges a demand of the payment of the sum of \$2,000. The answer denies all the allegations of the complaint except that it admits the payment by the defendant of certain sums of money on the purchase price of the premises purchased by it from Burke, Albright and Wintjen. At the trial the circuit court denied the defendant's motion for nonsuit and submitted the case to the jury. A verdict was returned for the plaintiff in the sum of \$2,000, on which a judgment was rendered, and defendant appealed.

Hough & Blanchard, for appellant. Robert Glenn Smith, for respondent.

BURNETT, J. (after stating the facts as above). It will be noted that the complaint alleges an original individual promise of Hopkins. It is, indeed, stated in the complaint that "Hopkins acted for and in behalf and as the agent of the defendant corporation," and did on its behalf make the agreement, etc., but it is not alleged that this was done originally by the authority of the defendant or that with subsequent knowledge it ratified or made the agreement of Hopkins its own. To support the allegation about the agreement between the plaintiff and Hopkins, the plaintiff introduced in evidence a written contract made and entered into March 31, 1905, by and between Hopkins, as party of the first part, and Turnham, plaintiff herein, party of the second

part, whereby "the party of the second part, for and in consideration of the sum of one hundred eighty (\$180) dollars cash in hand paid by the party of the first part, hereby agrees and does hereby accept said sum in full satisfaction of all claims of whatsoever kind or nature arising out of the sale of the Golden Eagle Mining properties to the Calumet & Oregon Mining Company, save and except that the said party of the second part shall be entitled, as has already been provided, to an additional two thousand dollars (\$2,000) out of the second payment to be paid Wintjen, Burke, and Albright on the properties above mentioned." This agreement was signed by the plaintiff and T. F. Hopkins as individuals without further designation. As alleged in the complaint and as set forth in the contract between the plaintiff and Hopkins, this clearly constituted an individual liability of Hopkins. In the face of the denials in the answer it became necessary for the plaintiff to prove the allegation of his complaint "that the Calumet & Oregon Mining Company thereafter assumed the said obligation and agreed to pay same." The evident purpose of this allegation is to assert a new promise by the defendant to pay the debt incurred by Hopkins in his agreement with plaintiff; but it may well be doubted if the pleading is sufficient for that purpose in that it does not state the consideration for the new promise attributed to the defendant. 9 Cyc. 717; 4 Enc. Pl. & Pr. 928; Southern Ind. L. & S. Inst. v. Roberts, 42 Ind. App. 653, 86 N. E. 490; Southern Ry. Co. v. Wilcox, 98 Va. 222, 35 S. E. 355. But passing this, the question to be decided in this case is whether or not that allegation is proven.

A careful examination of the testimony fails to disclose any writing indicating such a promise to pay authorized by the defendant. Moreover, no oral testimony discloses any corporate action in that behalf. No further citation of authorities is deemed necessary than a quotation of the provisions of section 808, L. O. L.: "In the following cases the agreement is void unless the same or some note or memorandum thereof, expressing the consideration, be in writing and subscribed by the party to be charged, or by his lawfully authorized agent; evidence, therefore, of the agreement shall not be received other than the writing, or secondary evidence of its contents, in the cases prescribed by law. * * * 2. An agreement to answer for the debt, default, or miscarriage of another." The plaintiff, not having offered any such writing, was without legal or competent testimony to sustain his allegation that the defendant assumed the obligation of Hopkins and agreed to pay the same.

This is not an action directly against the defendant as an undisclosed principal for whom an agent contracted. Manifestly the

complaint proceeds upon the theory that the original obligation was one personal to Hopkins, and that subsequently the defendant assumed that obligation. If the plaintiff had proceeded against the defendant as an undisclosed principal, he should have alleged that the original contract was made directly by the defendant. This consideration distinguishes this case from that of Schreyer v. Turner Flouring Company, 29 Or. 1, 43 Pac. 719, principally relied upon by the plaintiff here. In that case the plaintiff declared upon a loan made directly to the defendant company, and proved that the latter actually received the money and repaid the debt in part, and further showed written acknowledgments of the defendant admitting the debt to the plaintiff. The plaintiff here relies largely upon the language of this court in that case: "But where, with full knowledge of all the facts, the corporation assumes the contract and agrees to pay the consideration, or accepts and retains the benefits, it will be bound thereby." The pleadings in the case at bar, however, do not state a case of ratification with full knowledge of an unauthorized contract made by one who had no power or permission to represent the defendant.

Neither is it shown that the defendant received any benefits from the transaction. Having found a purchaser for the property, the plaintiff probably had some claim against the original owners of the mines for his services as a real estate broker in finding that purchaser, and if, in the language of his contract with Hopkins, he accepted the sum of \$180 and the promise of Hopkins for an additional \$2,000 in full satisfaction of all claims of whatsoever kind or nature arising out of the sale of this mining property to the defendant, a substantial benefit would result to the original owners of the mines, but not to the defendant. It is not alleged or proven that by reason of any agreement between Hopkins and the plaintiff the defendant paid less for the mine than it originally agreed to pay or that its obligation to the first owners was in any wise diminished.

These features clearly distinguish the case at bar from the Schreyer Case, and strips it of every question except the one already indicated, namely, Did the plaintiff comply with the statute of frauds in endeavoring to prove his allegation that the defendant assumed the obligation of Hopkins and agreed to pay it?

We are of the opinion that the testimony of the plaintiff wholly fails to meet the requirements of that statute, and that the court below should have allowed the defendant's motion for a nonsuit.

The judgment of the circuit court is reversed, with directions to enter a judgment of nonsuit in favor of the defendant.

(68 Or. 91)

RUBIN et al. v. CITY OF SALEM et al.[†]
(Supreme Court of Oregon. Jan. 24, 1911.)

1. MUNICIPAL CORPORATIONS (§ 294*)—PUBLIC IMPROVEMENTS—NOTICE.

Under City Charter of Salem (Sp. Laws 1899, p. 936) § 27, requiring the recorder to give a notice "specifying with convenient certainty the street proposed to be improved and the kind of improvement which is proposed to be made," a notice of improvement of a certain street "by grading the same with proper crown and gutters to a point eight inches below the established grade thereof, and by then macadamizing the same with crushed rock eight inches deep, the same to be properly spread and rolled," was not insufficient, for not stating that the contractor should remove the crosswalks, and that the curbing should consist of certain sized lumber nailed to posts at certain distances.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 776-788; Dec. Dig. § 294.*]

2. MUNICIPAL CORPORATIONS (§ 324*)—PUBLIC IMPROVEMENTS—ACCEPTANCE OF WORK.

The city council having by proper notice of improvement of a street acquired jurisdiction, the ordinance adopting the plans and specifications could not be collaterally attacked.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 847-849; Dec. Dig. § 324.*]

3. MUNICIPAL CORPORATIONS (§ 278*)—PUBLIC IMPROVEMENT—JURISDICTION.

Whether the work in improving a street was completed according to plans and specifications did not affect the jurisdiction of the council.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 278.*]

4. MUNICIPAL CORPORATIONS (§ 324*)—PUBLIC IMPROVEMENTS—DEFECTS—COLLATERAL ATTACK.

Where it is admitted by plaintiffs that the council accepted the improvement as being made according to the plans and specifications, this is conclusive in a collateral attack, jurisdiction having been obtained.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 847-849; Dec. Dig. § 324.*]

Appeal from Circuit Court, Marion County; Wm. Galloway, Judge.

Bill by Peter Rubin and another against the City of Salem and another. From a decree for defendants, plaintiffs appeal. Affirmed.

This is a suit to enjoin the defendant city from collecting a street improvement assessment. The issues arise between the answer and reply. The answer, as a defense to the suit, sets up in detail the proceedings of the city in initiating and making the improvement, and the assessment of the expense thereof upon the adjacent property. The reply denies certain allegations of the answer, namely, that the plans and specifications were adopted on June 2, 1905; that the Warren Construction Company, to whom was let the contract for making the improvement, was the lowest bidder; that the cost of making the improvement was provided

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

† Rehearing denied February 21, 1911.

by ordinance or assessed to the property liable therefor; that the contract provided for the improvement to be made according to the plans and specifications, or that plaintiffs' property was liable for any portion of the expense thereof. It admits the allegations of the answer, to the effect that the council by resolution declared its purpose to improve the street, in a manner specified, by macadamizing the same with crushed rock at the expense of the owners of adjacent property, as provided in the charter and ordinance, and directed the recorder to give due notice thereof; and that the recorder did give notice, to the effect that the council proposed to improve a certain part of South Commercial street, specifically mentioned, by grading the same with crown and gutters and then macadamizing it with crushed rock; that the city did prepare plans and specifications for grading, macadamizing, and curbing the same and removing the crosswalks therefrom; and providing that when the work is completed the surface of the finishing course at the center of the street shall conform strictly to the grade established by ordinance, with a constructed curb of lumber, 3x12 inches, on each side of the improvement. On the trial findings were made for the defendant, and the suit was dismissed. Plaintiff appeals.

Geo. G. Bingham and John Bayne, for appellants. Grant Corby and John H. McNary (W. E. Keyes, on the brief), for respondents.

EAKIN, C. J. (after stating the facts as above). Plaintiffs concede that the main question presented by the record is, Did the city acquire jurisdiction to make the improvement set out in the answer? The notice, which is a publication of the resolution of the council proposing the improvement, describes it as follows: "To improve the following described part of Commercial street in said city by grading the same with proper crown and gutters to a point eight inches below the established grade thereof, and by then macadamizing the same with crushed rock eight inches deep. The same to be properly spread and rolled"; the improvement to be made at the expense of the owners of the adjacent property. This notice was published on April 18, 1905. The council, on June 2, 1905, adopted the plans and specifications, which, among other things, provide that the contractor shall remove from the street the crosswalks, and that the curbing shall consist of lumber 3x12 inches in size, nailed to oak posts six feet apart. Plaintiffs contend that these two elements are not included in the notice published, and by reason thereof it is insufficient.

The charter (Sp. Laws 1899, p. 936) does not authorize the city to make the improvement if the owners of more than two-thirds

of the superficial area of the property adjacent to the street remonstrate against it, and therefore in the present instance the council could only propose the improvement by directing the recorder to give the notice specified in section 27, which must "specify with convenient certainty the street proposed to be improved and the kind of improvement which is proposed to be made." If no such remonstrance is made and filed, the council may commence to make the proposed improvement, by determining its probable cost, and assess upon each lot its proportionate share. Although the notice provided for in section 27 is jurisdictional, it is not necessary to set out the plans and specifications, or do more than specify, in general terms, with convenient certainty the kind of improvement which is proposed to be made. The removal of crosswalks only relates to obstructions in the way of the work and, as the improvement is to be provided with gutters, a curb may be deemed to be a necessary part of the improvement, and specifying in the notice that the street is to be improved with crown and gutters and macadamized eight inches deep is a sufficient general designation of the kind of improvement proposed to be made. As supporting the contention of plaintiffs, we are referred to the cases of *Ladd v. Spencer*, 23 Or. 193, 31 Pac. 474, and *Clinton v. Portland*, 26 Or. 410, 412, 38 Pac. 407, which construe the charter of East Portland of 1885, in which the terms of the charter upon this matter are almost identical with the Salem charter. In the first case mentioned the specification of the improvement is, "by building to the established grade an elevated roadway 36 feet wide," in which it was held that such a specification was wholly insufficient, and correctly so, as it gives no intimation of the character of the improvement proposed. In the latter case the description in the notice is identical with that in *Ladd v. Spencer*, supra, with the addition that it is to be built "according to the plans and specifications now on file," in which it is held that, without referring to the specifications, the notice would have been insufficient. But the notice in the present case contains a specific designation as to what the improvement shall consist of, except it does not expressly mention the curbs. But we think it sufficiently comprehensive to include them.

The charter provisions relating to this question are (section 25): "The city council shall have power and is authorized whenever it deems it expedient, * * * to establish or alter the grade and improve any street or part thereof * * * within the limits of said city, and to lay down all necessary sewers and drains; and to build and maintain, or cause to be built or maintained, any streets or parts thereof; and they shall establish the grade * * * and direct the character of materials to be used in the improvement thereof, and the manner of such

improvement, and the said improvements of streets and sidewalks and crosswalks herein provided for shall be done at the expense of the owners of adjacent property." Section 26 provides that no grade or improvement mentioned in section 25 can be undertaken without 10 days' notice thereof being first given by publication. Section 27 provides that "such notice must be given by the recorder by order of the council, and must specify with convenient certainty the sewer or street or part thereof, proposed to be improved or of which the grade is proposed to be established or altered, and the kind of improvement which is proposed to be made." There is no requirement in the charter that the council shall prepare plans and specifications or by resolution describe the work in detail before directing the notice to be issued. No mention is made of any particular kind of improvement, but the council is authorized to improve the street and direct the character of material to be used.

Plaintiffs cite the cases of *Beaudry v. Valdez*, 32 Cal. 269, and *Schwiesau v. Mahon*, 128 Cal. 114, 60 Pac. 683, to the effect that no improvement can be made other than that which is specifically described in the resolution and notice. But the California statute of 1863 and 1864, p. 333, by section 2, provides that the council is authorized to order any streets to be paved, repaved, macadamized, piled; to order sidewalks, sewers, manholes, curbing and crosswalks, and other work to be done, which shall be necessary. Section 3 provides that the council may order any work authorized by section 2 to be done after notice of their intention to do so, in the form of a resolution "describing the work," has been published for a period of 10 days. Thus, by the statute, each kind of improvement is specifically designated, and therefore it is held that the resolution and notice of the proposed improvement, naming one kind, does not include the other. The requirements of the resolution and notice therefore are different from those of the Salem charter, which only requires the notice to specify with convenient certainty the "kind of improvement" which is to be made. The curbing in this case, as is shown by the specifications, is only an incident to the macadamizing and a very inconsiderable part of the expense, and may well be deemed essential to the macadamizing within the terms of the notice published.

In *Harney v. Heller*, 47 Cal. 15, it is held that the notice of intention need not set out the specifications of the improvement, and in *Emery v. San Francisco Gas Co.*, 28 Cal. 345, 376, the notice was held sufficient which described the improvement as "grade and macadamize." In *Mason v. City of Sioux Falls*, 2 S. D. 640, 51 N. W. 772, 39

Am. St. Rep. 802, construing a statute, in which paving, macadamizing, and curbing are each mentioned, as a definite kind of improvement, it is held an assessment for curbing is not within the notice which did not mention it, but it is by the terms of the statute that this becomes necessary. The council having acquired jurisdiction to make the improvement, the ordinance adopting the plans and specifications cannot be attacked collaterally, and whether the work was completed according to the contract and specifications does not go to the jurisdiction of the council. It is admitted by plaintiffs that the council accepted the improvement as being made according to the plans and specifications, and this is conclusive in a collateral attack, jurisdiction having been obtained. *Wingate v. Astoria*, 39 Or. 603, 604, 65 Pac. 982; *Clinton v. Portland*, 26 Or. 410, 38 Pac. 407; *Barber Asphalt Pav. Co. v. Edgerton*, 125 Ind. 455, 25 N. E. 436. No objection was raised to the action of the council in making the improvement, except that plaintiffs' grantor filed a protest against the assessment on the ground that the council had no jurisdiction to make it. Whether the improvement was made on the established grade cannot be questioned in this suit, jurisdiction being established and plaintiffs having waived all irregularities in the proceedings. *Wilson v. Salem*, 24 Or. 512, 34 Pac. 9, 691; *Wingate v. Astoria*, 39 Or. 604, 65 Pac. 982.

The decree of the lower court is affirmed.

(57 Or. 551)

SMITH v. POLK COUNTY.

(Supreme Court of Oregon. Jan. 17, 1911.)

1. COUNTIES (§ 168*)—COUNTY WARRANTS—LIMITATIONS.

The statute directing the publication of notice that unpaid county warrants which have been issued more than seven years must be presented for payment within 60 days, or they will be canceled, creates a special limitation, which does not begin to run until the publication has been made.

[Ed. Note.—For other cases, see *Counties*, Cent. Dig. §§ 250-254; Dec. Dig. § 168.*]

2. COUNTIES (§ 167*)—WARRANTS—NATURE OF INSTRUMENT.

A warrant drawn in favor of a claimant whose claim against a county has been audited by the county court is a nonnegotiable instrument payable on demand so far as it is subject to defenses in the hands of an innocent person.

[Ed. Note.—For other cases, see *Counties*, Cent. Dig. § 249; Dec. Dig. § 167.*]

3. COUNTIES (§ 170*)—WARRANTS—ACTIONS.

A county warrant is payable on demand, and, when a request for payment is made to the proper party and payment has not been made, an action lies on it, in the absence of a statute to the contrary.

[Ed. Note.—For other cases, see *Counties*, Cent. Dig. § 257; Dec. Dig. § 170.*]

4. LIMITATION OF ACTIONS (§ 67*)—COUNTY WARRANTS—ACTIONS—LIMITATIONS.

L. O. L. §§ 2898-2900, providing for the publication of notice for presentation of unpaid

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

county warrants which have been issued more than 7 years, or they will be canceled if not presented within 60 days, and section 2939, requiring the county treasurer to pay county warrants on presentation, and providing that, where there are no funds in the treasury, he shall indorse on the warrant "Not paid for want of funds," the date of presentation, and his signature, whereupon the warrant shall draw legal interest until notice is given by publication that there are funds to redeem it, take a county warrant containing the indorsement of the treasurer out of the class of liabilities designated in section 6, declaring that an action on a contract must be commenced within 6 years after the accrual of the action, and make the limitation of 6 years begin with the publication of the notice, and a cause of action on such a warrant is not barred until the expiration of the 60 days after the publication of the notice.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 376-378; Dec. Dig. § 67.*]

5. APPEAL AND ERROR (§ 1176*)—DISPOSITION OF CASE ON APPEAL.

Where the facts as found by the trial court are not controverted, the Supreme Court, on appeal from an erroneous judgment, will remand the case, with directions to correct the conclusions of law, and render proper judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4588-4596; Dec. Dig. § 1176.*]

Appeal from Circuit Court, Polk County; George H. Burnett, Judge.

Action by J. D. Smith against the County of Polk. From a judgment of dismissal, plaintiff appeals. Reversed, with directions.

This is an action to recover money. The complaint alleges, in effect, that defendant is a quasi corporation; that plaintiff is the owner of twenty warrants for the payment of money, duly issued by the county court of the defendant, giving the number of each, and stating when, to whom, and for what sum it was issued, when indorsed, "Not paid for want of funds," and when notice was given of the possession of money for the payment thereof, the first publication being January 20, 1901, and the last August 30th of that year; that by inadvertence each of the warrants had been lost and could not be found; that none of them nor any part thereof had been paid; that plaintiff presented to such county court at its term in September, 1908, a verified petition, setting forth the facts hereinbefore stated, and prayed that in lieu of the original county orders duplicates thereof might be issued and the amounts due thereon paid to him, which application was denied; that such court had never caused to be published any notice; that, unless these warrants were presented for liquidation, each would be canceled and payment thereof refused. Judgment was demanded for \$877.25, the face value of the warrants, and legal interest on each from the time it was indorsed, "Not paid for want of funds," until notice was published that money was on hand to discharge it. The cause was tried without the intervention of

a jury, and from the evidence received findings of fact were made conformable to the averments of the complaint. As conclusions of law, however, it was determined that the cause of action accrued when notice was published that there was on hand money with which to pay the warrants, and, as this action was not instituted until November 10, 1908, it was not commenced within the time limited; that the statute authorizing the publication of notice that, if county warrants were not presented for payment within 60 days, they would be canceled, afforded a cumulative remedy which could be invoked only by a county court; and that the failure to give such notice did not preclude the defendant from interposing the statute of limitations as a bar to the maintenance of the action. Based on these findings the action was dismissed, from which judgment plaintiff appeals.

Jos. E. Sibley, for appellant. Walter Winslow, for respondent.

MOORE, J. (after stating the facts as above). It is argued by plaintiff's counsel that the statute directing notice to be published that all unpaid county warrants which have been issued more than seven years must be presented for payment within 60 days, or they will be canceled, is a special limitation, which does not begin to run until the publication has been made, and that, as no such notice was given respecting the county warrants involved herein, the conclusions of law stated are not deducible from the facts found, and, such being the case, the judgment is erroneous.

The provisions of the statute which were held to furnish an auxiliary remedy that could be invoked only by a county court are, so far as considered material, as follows: "At the last regular term of the county court preceding the first day of July in each year, in each county in this state, the county clerk shall certify to said court a list of all warrants which were issued more than seven years prior to the first day of July of that year, and which have not been paid, stating the amount of each of such warrants, to whom issued, and date of issuance." L. O. L. § 2898. "The court shall thereupon cause to be published in some newspaper published in the county and having a general circulation therein, or if no paper is published in the county, in some paper published in the state and having a general circulation in the county, a notice that if said warrants are not presented for payment within sixty days from said first day of July they will be canceled, and payment thereof refused." Id. § 2899. "At the first regular term of the county court in each county after the expiration of said sixty days from July first of each year the county court shall make an

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

order that all such warrants which have not been so presented for payment, describing them, shall be canceled; and the clerk shall also collect together all other county warrants which have been issued by order of the county court, and which are still remaining in his hands and unclaimed, and in the presence of the county court shall cancel all of such warrants as were issued more than seven years prior to the first day of July of that year, and thereafter no such warrant shall be paid, nor shall the amount thereof be computed in any estimation or computation of county finances." Id. § 2900. Another provision of the statute imposes on a county treasurer the duty to pay all county warrants when presented to him, but, if there be in the treasury no funds for that purpose when such an obligation is tendered, he is required to indorse thereon, "Not paid for want of funds," the date of presentation, and his signature, whereupon the warrant shall thereafter draw legal interest until notice is given by publication that there are funds on hand to redeem such outstanding orders. Id. § 2959.

Construing the clause last adverted to in connection with another provision of the Code, that an action on a contract or liability, express or implied, must be commenced within six years after the cause of action accrued (Id. § 6), the conclusion was reached that, since more than that time had elapsed after publishing notices that there were on hand funds with which to discharge all the warrants mentioned in the complaint before this action was begun, it was not commenced in proper time and the statute of limitations invoked by defendant constituted a bar to any recovery. This conclusion necessarily results from a construction of the provisions of law applicable to the limitation of actions that are appropriate to the class of obligations involved herein (L. O. L. §§ 6, 2959), and is controlling unless an interpretation in connection with such enactments of the clauses of the statute first quoted (Id. §§ 2898-2900) warrants the determination of a different limitation, and demands, as a condition precedent to the termination of the right to a recovery of the amount of unpaid county warrants that have been issued more than seven years, the publication of a notice that unless within 60 days such warrants are presented for payment they will be canceled. No declaration is made in the statute last noted that, if county warrants of the kind specified are presented for payment within the 60 days specified, they will be discharged, but the payment thereof is necessarily implied, for it would be idle ceremony to request the presentation of county warrants if no payment on account thereof were to be made. In this state, when a claim of indebtedness is asserted by any person against a county, the county court thereof is required to audit the demand, and, if approved, to enter in the journal of the trans-

action of county business an order to that effect, whereupon the county clerk is required to draw a warrant in favor of the claimant, directing the county treasurer to pay to the party named, or bearer, the sum of money so allowed. The warrant, so far as being subject to defenses in the hands of an innocent party, is nothing more than a non-negotiable instrument payable on demand. Dillon, Mu. Corp. (4th Ed.) § 503; Daniel, Neg. Ins. (5th Ed.) § 427. If not paid when presented, a county warrant draws legal interest from the time it is indorsed, "Not paid for want of funds," until published notice is given that there is on hand money with which to discharge the obligation. L. O. L. § 2959. If the ordinary limitation (Id. § 6) controls the justification of an action on such paper, it would necessarily follow that, if the required notice were not given within six years after the indorsement of "Not paid for want of funds" was made, no recovery could legally be had in an action instituted for that purpose, because the statute has fully run, for as we view the question an action could be maintained against a county when upon presentation of a warrant no money was in the possession of the county treasurer to discharge it. A county warrant is made payable on demand, and, when request has been made by the proper party for the sum of money evidenced thereby and payment is not made, an action could be maintained on the instrument. Goldsmith v. Baker City, 31 Or. 249, 49 Pac. 973. The cause of action on a county warrant accrues when demand is made for its payment. Evidently, in order to avoid the imposition of costs and expenses which such actions would necessarily entail, the statute wisely provides that a county warrant when indorsed as hereinbefore set out shall draw interest until notice is published that money is on hand with which to pay such outstanding orders. Here is an evident intention of the legislative assembly to take this kind of obligations out of the class of contracts or liabilities designated in the ordinary restrictions governing the maintenance of actions (L. O. L. § 6), and to make the limitation of six years begin with the publication of such notice. As the law (Id. § 2959) manifests a purpose thus to extend the limitation, as to county warrants which have been indorsed, "Not paid for want of funds," until notice is given that there is money on hand with which to discharge them, so, too, in our opinion, the enactment (Id. §§ 2898-2900) evidences a design further to continue the limitation until notice is published that unpaid warrants, which have been issued more than seven years, must be presented for payment within 60 days, and that a cause of action as to such obligations is not barred until the expiration of the days specified. Construing the provision last noted in connection with the other clauses adverted to, it is believed that after county warrants shall have ceased

to bear interest the statute of limitations does not begin to run until the required notice is given, but, after the expiration of the 90 days specified, no action against a county can be maintained to recover either the face value of the warrant or the interest thereon.

In *Wilson v. Knox County*, 132 Mo. 387, 34 S. W. 45, 477, a statute of Missouri provided that a county warrant having been delivered, but not presented for payment within five years from its date, or which having been presented and not paid for want of funds, should not be again presented within five years after the funds should have been set apart for its payment, "shall be barred and shall not be paid nor shall it be received in payment of any taxes or other dues;" it was held that the enactment was a limitation of actions on warrants as well as a direction to the county officers, and governed such action instead of the general statute of limitations. We think the rule announced in that case is controlling herein, necessitating a reversal of the judgment. The facts as found by the court are not controverted, and, such being the case, the cause will be remanded, with directions to correct the conclusions of law as herein indicated, and to render a judgment for plaintiff as demanded in the complaint.

BURNETT, J., took no part in the trial or consideration of this cause on appeal.

(159 Cal. 20)

DUNGAN v. CLARK. (Sac. 1,849.)

(Supreme Court of California. Dec. 23, 1910.)

1. JUSTICES OF THE PEACE (§ 36*)—JURISDICTION—CONTROVERSY INVOLVING TITLE TO LAND.

Under Code Civ. Proc. § 838, providing that no issue involving the title or possession of real property shall be tried in justices' courts, and requiring the certification of such an action to the superior court, an answer in an action in justice's court on a note, which alleged a failure of consideration for the reason that the payee did not own or possess an interest in a pump plant on land which he assumed to sell as a consideration for the note, raised the question of title, as, to maintain the defense, the maker must offer evidence that the payee was not the owner of the plant constituting real property.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 83-97; Dec. Dig. § 36.*]

2. JUSTICES OF THE PEACE (§ 36*)—JURISDICTION—CONTROVERSY INVOLVING TITLE TO LAND.

Where the title or claim of title, the possession or right of possession, of real property, or any right growing out or dependent on either, is alleged in the pleadings in an action before a justice as an issuable fact, the case involves title or possession of real property and must be transferred to the superior court under Code Civ. Proc. § 838.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 83-97; Dec. Dig. § 36.*]

3. JUSTICES OF THE PEACE (§ 75*)—JURISDICTION—TRANSFER TO SUPERIOR COURT.

Where an action begun in justice's court was properly certified to the superior court on the ground that title to real estate was involved by reason of the answer, the fact that the finding on the issue of title urged as a defense was adverse to defendant did not affect the jurisdiction of the superior court.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 243-245; Dec. Dig. § 75.*]

4. COURTS (§ 212*)—JURISDICTION—JURISDICTION OF TRIAL COURT.

Under Const. art. 6, § 4, the Supreme Court has no jurisdiction on appeal from a judgment of the superior court, where the superior court was without original jurisdiction under section 5, on the ground that the action was a simple action at law in which the demand, exclusive of interest, did not amount to \$300.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 511-516; Dec. Dig. § 212.*]

Department 1. Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Action by A. C. Dungan against T. E. Clark. From a judgment for plaintiff and from subsequent orders denying motions to vacate the judgment and to quash an execution, defendant appeals. Affirmed.

T. E. Clark, in pro. per. Bradley & Bradley, for respondent.

SLOSS, J. This action was commenced in a justice's court of Tulare county. The complaint was in two counts, one to recover \$125 together with \$25 attorney's fees on a promissory note, and the other to recover \$53.99 for electrical power furnished to the defendant at his request.

The defendant filed a verified answer, setting up as a defense to the action on the note that said note was delivered in consideration of the sale by plaintiff to defendant of a half interest in a pumping plant situated upon a described tract of land, and a like interest in a pipe line extending from said pumping plant to defendant's premises; that the consideration for the note wholly failed, for the reason that plaintiff did not own or possess the half interest which he undertook to convey. The defendant alleges that in consequence he has never been able to obtain from said pumping plant any water for the irrigation of his land. Upon the coming in of this answer, the justice, finding that the question of title and possession of real property was involved, certified the pleadings to the clerk of the superior court of Tulare county. Code Civ. Proc. § 838. The case was tried by the superior court, which, after making findings to the effect that all the allegations of the complaint were true and that none of the allegations or denials of the answer were true (except that the consideration of the note was the sale of a half interest in the pumping plant and pipe line, and that plaintiff had conveyed such

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

interest to defendant), entered judgment in favor of plaintiff as prayed.

The defendant appeals from the judgment, and from subsequent orders denying motions to vacate the judgment and to quash an execution.

On all three appeals the appellant presents the same point, which is that the action was one within the exclusive jurisdiction of the justice's court, and that the superior court was without jurisdiction to hear and determine it. The suit being one "on an action arising on contract to recover money only," in which "the sum claimed, exclusive of interest, does not amount to \$300," the complaint was properly filed in the justice's court. Code Civ. Proc. § 112. The appellant's argument is that the answer fails to show that the title or possession of real property was involved in such manner as to justify a transfer of jurisdiction to the superior court.

Section 838 of the Code of Civil Procedure provides that "the parties to an action in a justice court cannot give evidence upon any question which involves the title or possession of real property * * *; nor can any issue presenting such question be tried by such court; and if it appear from the answer of the defendant, verified upon his oath, that the determination of the action will necessarily involve the question of title or possession to real property * * * the justice must suspend further proceedings, * * *" etc., and certify the pleadings to the clerk of the superior court, which court shall have the same jurisdiction as if the action had been commenced therein. The purpose of this section is to secure to the superior court the right to hear and determine the causes that are, by the Constitution, placed within its jurisdiction. The defendant, by the verified answer here filed, based his defense upon the proposition that the plaintiff had no title to the pumping plant and pipe line which he assumed to transfer as a consideration for the note sued on. That the pumping plant and pipe line were real property is not questioned. To maintain his defense, the defendant was bound to offer evidence to show that plaintiff was not the owner of this real property, and the court was required, in order to determine the rights of the parties, to decide whether or not plaintiff was such owner. Under the construction given to Code of Civil Procedure, section 838, by this court, the question of title was involved. It is true that in *Schroeder v. Wittram*, 63 Cal. 636, 6 Pac. 737, one of the opinions contained expressions to the effect that the justice's court is not ousted of jurisdiction where the title of real property is only incidentally involved. But, as is pointed out in later decisions (*Copertini v. Oppermann*, 76 Cal. 184, 13 Pac. 256; *Hart v. Carnall, etc., Co.*, 103 Cal. 132,

37 Pac. 196), the opinion in question was not that of a majority of the court, and is not to be regarded as authority. In the *Copertini* Case, the court quoting from the opinion in *Holman v. Taylor*, 31 Cal. 338, adopts this language: "The idea intended to be embodied in the phrase 'cases at law which involve the title or possession of real property' may be expressed by the paraphrase: 'Cases at law in which the title or possession of real property is a material fact in the case, upon which the plaintiff relies for a recovery or the defendant for a defense.' When the title or claim of title, the possession or right of possession, of real property, or any right growing out or dependent upon either, is alleged in the pleadings as an issuable fact, the case is within the meaning of the constitutional provision." Similarly in *Hart v. Carnall, etc., Co.*, supra, it is declared that: "If the issue of title or possession is so involved that it must be decided in order to determine the case, the superior court has original, and this court appellate jurisdiction, whether the involvement may be said to be merely incidental or not." See, also, *Raisch v. Sausalito Land Co.*, 131 Cal. 215, 63 Pac. 346; *King v. Kutter-Goldstein Co.*, 135 Cal. 65, 67 Pac. 10. The justice was therefore right in certifying the pleadings to the superior court, which, under the averments of the answer, had original jurisdiction of the action.

There is clearly no merit in the suggestion of appellant that the superior court lost jurisdiction, because it found against some of the affirmative allegations of the answer. These were the averments that plaintiff had no title to the property which he undertook to convey in consideration of the note, and that thereby defendant lost his opportunity to obtain water. The fact that the finding on the issue of title urged as a defense was adverse to defendant cannot affect the jurisdiction.

It may be noted that appellant's contention that the case is one within the exclusive jurisdiction of the justice's court is destructive of its own purposes. For, if the superior court is without original jurisdiction of the case, because it is a simple action at law in which the demand, exclusive of interest, does not amount to \$300 (Const. art. 6, § 5), the Supreme Court (or the District Court of Appeal) is for the same reason without jurisdiction to entertain the appeal. The appellate jurisdiction of this court and of the Court of Appeal is defined by the Constitution (article 6, § 4), and neither tribunal is given such jurisdiction in a case such as the appellant claims this one to be. Accordingly, the only result of appellant's argument, if it were well founded, would be that the appeals must be dismissed as beyond the jurisdiction of this court. *Sweet v. Tice*, 45 Cal. 71; *Edsall v. Short*, 122 Cal. 533, 55 Pac.

327; *Ralsch v. Sausalito, etc., Land Co.*, supra.

The judgment and orders appealed from are affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.

(158 Cal. 6)

PEOPLE v. LOPER. (Cr. 1,546.)

(Supreme Court of California. Dec. 21, 1910. Rehearing Denied Jan. 19, 1911.)

1. JURY (§ 103*)—QUALIFICATIONS—FORMATION OF OPINION—EFFECT ON VERDICT.

Under Pen. Code, § 1076, providing that no juror shall be disqualified by reason of having formed or expressed an opinion founded upon public rumor or statements in public journals, if it appear upon his declaration that the juror can act impartially, the fact that the juror has conversed with witnesses or interested persons regarding the merits of the cause is immaterial, if the statements of such persons merely amounted to public rumor and was so received by the juror.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 461-479; Dec. Dig. § 103.*]

2. CRIMINAL LAW (§ 1148*)—APPEAL—REVIEW—DISCRETION OF TRIAL COURT—SELECTING JURORS.

An objection to the competency of a juror, that his knowledge of the English language is imperfect, is addressed peculiarly to the trial court's discretion, and his ruling thereon will not be disturbed, in absence of flagrant abuse of discretion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3050-3052; Dec. Dig. § 1148.*]

3. CRIMINAL LAW (§ 1148*)—APPEAL—REVIEW—SELECTION OF JURORS—DISCRETION OF COURT.

Where a juror's voir dire examination is conflicting as to his competency, it is generally for the trial court to decide which of his answers shows his true mental condition in determining whether he is competent.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3050-3052; Dec. Dig. § 1148.*]

4. CRIMINAL (§ 311*)—PRESUMPTIONS—SANITY.

All persons are presumed sane until the contrary is proved.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 742-744; Dec. Dig. § 311.*]

5. HOMICIDE (§ 179*)—ADMISSION OF EVIDENCE.

Evidence that accused was sane at a time long before the commission of the homicide is admissible, as tending to establish his sanity at the time of the homicide.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 380; Dec. Dig. § 179.*]

6. CRIMINAL LAW (§ 1153*)—APPEAL—DISCRETION OF TRIAL COURT—ADMISSION OF TESTIMONY.

In determining whether testimony is admissible in a homicide case, in which insanity is pleaded, as to accused's sanity at a time long before the commission of the offense, the trial court has a wide discretion which will not be interfered with on appeal, in absence of clear abuse.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3061-3066; Dec. Dig. § 1153.*]

7. WITNESSES (§ 188*)—COMPETENCY—FORMER WIFE.

Under Pen. Code, § 1322, providing that neither husband nor wife is a competent witness for or against the other in a criminal action to which one or both are parties, except with the consent of both, which is to be construed as containing substantially the same provisions as Code Civ. Proc. § 1881, rendering the wife incompetent to testify to communications between herself and her husband, accused's former wife, who had lived with him a year after their marriage and had known him a year before the marriage, could testify in a homicide case as to his sanity, basing her testimony on her knowledge of him while she cohabited with and knew him; the mental condition not being a matter subject to communication.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 734, 736; Dec. Dig. § 188.*]

8. CRIMINAL LAW (§ 522*)—CONFESSIONS—VOLUNTARY CHARACTER.

As a confession must be free and voluntary, a confession made a few days after threats were made to induce accused to confess was not admissible unless it clearly appeared that such threats had ceased to operate upon accused's mind when the confession was made.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1189-1195; Dec. Dig. § 522.*]

9. CRIMINAL LAW (§ 532*)—CONFESSIONS—ADMISSION.

Whether a confession is voluntary is a preliminary question for the trial court, in deciding which it has considerable discretion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1218; Dec. Dig. § 532.*]

10. CRIMINAL LAW (§ 519*)—CONFESSIONS—VOLUNTARY CHARACTER.

Accused, without being advised that his confession might be used against him, was cajoled and browbeaten by the prosecuting officials, who called him a "monumental liar," and told him that decedent's friends would have hanged him to the first tree if he had been taken to the place where the body was found. After being talked to in that way for a considerable time, he was put in solitary confinement for the night, and confessed the following morning. *Held*, that the confession was not voluntary, and was not admissible in evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1163-1174; Dec. Dig. § 519.*]

11. CRIMINAL LAW (§ 1169*)—APPEAL—HARMLESS ERROR—ADMISSION OF EVIDENCE—INVOLUNTARY CONFESSIONS.

That the evidence other than the alleged confession was sufficient to justify a conviction did not make the admission of a confession improperly extorted harmless, as it could not be said what weight the jury gave to the confession in forming its verdict.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3137-3143; Dec. Dig. § 1169.*]

12. HOMICIDE (§ 174*)—PROSECUTION—ADMISSION OF EVIDENCE.

In a prosecution for homicide, a printed copy of a notice published in a newspaper, purporting to be signed by decedent and authorizing accused to settle decedent's affairs, was admissible to show actual publication of the notice by accused.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 359-371; Dec. Dig. § 174.*]

13. CRIMINAL LAW (§ 438*)—ADMISSION OF EVIDENCE.

Properly authenticated photographs are admissible in evidence when relevant, so that in

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

a murder case, in which it appeared that decedent's body was dismembered, a photograph showing the nature of the country between decedent's cabin and the place where his body was discovered was admissible in evidence to show the nature of the ground probably traversed by the murderer, and the necessity for dismembering decedent's body.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 803; Dec. Dig. § 438.*]

Angellotti, Shaw, and Sloss, JJ., dissenting.

In Bank. Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Charles H. Loper was convicted of murder, and from the judgment of conviction and an order denying a motion for a new trial, he appeals. Reversed.

Aynesworth & Sprouse, S. J. Hinds, and Henry Brickley, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

MELVIN, J. Appellant was convicted of the crime of murder and was sentenced to receive the death penalty. He prosecutes this appeal from the said judgment of conviction and from an order denying his motion for a new trial.

Loper, the defendant, lived with Joe Vernet on a ranch near Sentinel post office in Fresno county. On July 13, 1908, Chris. Peterson was at Vernet's cabin, and when he departed he left Loper and Vernet there together. On July 17, 1908, defendant took the stage at Sentinel and went to Fresno, but before his departure he told Mr. Rea, in the presence of the latter's mother and sister, that Vernet had gone to Oregon, having started the night before on the walk of 30 miles to Fresno, and that defendant, after settling Vernet's affairs, would join him in Oregon. After his arrival in Fresno Loper put a notice in a newspaper in which was a statement that he was winding up the affairs of Joe Vernet, and had authority to attend to all necessary business. While in Fresno, Loper stated that Vernet had gone to Oregon, leaving him to settle all business affairs. He also offered to sell certain wood belonging to Vernet, and after returning to Sentinel he collected and receipted for certain money due to that individual. He also sold a wagon and two horses from Vernet's place, and performed other acts as the ostensible agent of Vernet. On July 28th defendant was arrested, and while in custody told the sheriff that he was winding up Vernet's affairs. He also admitted that he caused the notice to be printed in the paper in Fresno. When arrested defendant had on his person two certificates of deposit in favor of Vernet on the Fresno National Bank, and a slip of paper on which was a writing supposed to be Vernet's signature. About August 1st the dismembered body of Joe Vernet was found buried in a hole about three-eighths of a mile from the place where he and defendant had lived, and soon afterwards defendant

confessed that he had killed Vernet by shooting him in the back of the head. Insanity was the defense upon which Loper depended.

Appellant's first attack is directed against the selection of the jury. Error is alleged because of the refusal of the court to allow certain challenges proffered by defendant to individual jurors. All of the peremptory challenges allowed by law were exercised by defendant, and that fact makes the errors of the court, if any were committed in ruling upon his challenges for cause, vitally material to defendant and prejudicial to his rights. A number of the challenged talesmen admitted that they had opinions respecting defendant's guilt, and while they all testified that they could put such opinions aside and try the defendant fairly and impartially, it is contended that the prosecution failed to prove affirmatively that the persons with whom they had talked were not witnesses in the action or those deeply interested, and that therefore the opinions of the talesmen were not properly brought within the terms of section 1076 of the Penal Code. *People v. Wells*, 100 Cal. 230, 34 Pac. 718; *People v. Helm*, 152 Cal. 538, 93 Pac. 99. A scrutiny of the evidence of those men called for examination as prospective jurors, however, shows either that the persons with whom they had talked were not witnesses nor interested persons, or that the opinions of the talesmen were based solely upon newspaper reports. An earnest contention is made in the briefs that failure to make proof that the persons with whom these talesmen talked were not witnesses nor interested parties removes the opinions of the prospective jurors from the exceptions expressed in section 1076 of the Penal Code, and that the court therefore erred in refusing to allow the challenges. We do not so understand the rule. Where it appears that a man called into the jury box has an opinion respecting the defendant's guilt, based in part upon statements of purported facts relating to the alleged crime, made to him by individuals, it must be shown, in order that section 1076 of the Penal Code may apply, that the persons who stated the supposed facts, or expressed strong belief in the defendant's guilt, were not witnesses nor interested persons, or that they were not so understood to be by the man under examination. The mere circumstance that the persons with whom he talked were or were not witnesses would be immaterial, if his opinion was not founded wholly or in part on what they said, because the court is seeking to learn his mental attitude toward the defendant and the source and quality of any opinion which he may entertain. If he talked with persons understood by him to be possessed only of such information as he himself obtained from his reading, their conversation would naturally amount to public rumor so far as he was

concerned. If, on the other hand, some one whom he believed would say, "I saw the crime committed and know whereof I speak," the discussion by that person of the manner of the commission of the offense would almost certainly make a deep impression upon the talesman's mind and conduce to the formation of a strong opinion, even if, as matter of fact, the narration were pure fiction.

Two challenges were interposed to Theodore Linden, one based upon his supposed imperfect knowledge of English, and the other upon his admitted opinion which, according to appellant's attorneys, was fixed and was prejudicial to Loper. The first objection was one addressed particularly and peculiarly to the judgment of the trial court, and unless flagrant abuse of discretion clearly appears, rulings of that court on such a subject are seldom disturbed. We cannot say upon reading the juror's answers to the questions propounded to him that he was so deficient in his knowledge of the English language that the court abused its discretion in refusing to entertain a challenge under section 198, subd. 3, of the Code of Civil Procedure. His opinion seems to have been based upon the most casual reading, and he said that he could try the case fairly and impartially, giving to the defendant the benefit of the presumption of innocence.

The statements of those called for jury duty in this case seem quite typical of those given during the selection of a jury in any case about which there has been extensive comment in the daily journals. Almost every person called into the jury box had an opinion of defendant's guilt, based upon what he had read, and some of them stated that such opinion would require evidence for its removal. When, however, they were put to the test of their ability to try the case upon the evidence produced at the trial and uninfluenced by other considerations, each answered that he could and would, if chosen, act fairly and impartially. It was the function of the trial court to determine the true state of mind of each member of the panel who was questioned touching his qualifications to serve as a juror. Frequently there is a conflict between different portions of the testimony given during an examination on voir dire, due not always to the lack of candor on the part of the person examined, but to his misunderstanding of the questions asked and of the duties of a juror, until such duties are explained by the court. When such conflict occurs, the trial court must decide, if possible, which of the answers most truly reveals the state of the talesman's mind. In other words, the questions generally presented are those of fact and not of law. *People v. Ryan*, 152 Cal. 364, 92 Pac. 856; *People v. Ochoa*, 152 Cal. 274, 75 Pac. 847; *People v. Flannelly*, 128 Cal. 86, 60 Pac. 670; *People v. Fredericks*, 106 Cal. 559, 39 Pac. 944.

A number of witnesses testified, as intimate acquaintances, to defendant's sanity, under the rule expressed in subdivision 10 of section 1870 of the Code of Civil Procedure. Objection was made to the admission of their testimony, upon the ground that some of them had not seen defendant within several years of the time of the trial. This objection goes more to the weight than to the admissibility of their testimony. All persons are presumed to be sane until the contrary is proved. Proof that defendant was sane at a time long prior to the commission of the offense would have some tendency to establish his sanity at the time of the homicide; the weight and value of such proof being a matter for the jury. In ruling upon the admission of such testimony, the trial judge is clothed with a wide discretion, which will not be disturbed, unless obviously it has been improperly exercised. *People v. Suesser*, 142 Cal. 361, 75 Pac. 1093; *People v. McCarthy*, 115 Cal. 258, 46 Pac. 1073; *People v. Hubert*, 119 Cal. 221, 51 Pac. 329, 63 Am. St. Rep. 72; *People v. Clark*, 151 Cal. 207, 90 Pac. 549. One of the witnesses who testified, as an intimate acquaintance, to defendant's sanity was his former wife, now Mrs. Hendrickson. She had known him about a year before their marriage, which had lasted about two and a half years, although they had lived together a little more than a year. Objection was made to Mrs. Hendrickson's testimony upon the ground that she was prohibited from being a witness by the provisions of section 1322 of the Penal Code. That section is as follows: "Neither husband nor wife is a competent witness for or against the other in a criminal action or proceeding to which one or both are parties, except with the consent of both, or in cases of criminal violence upon one by the other, or in case of criminal actions or proceedings brought under the provisions of sections two hundred and seventy and two hundred and seventy a of this code, or in cases of criminal actions or proceedings for bigamy or adultery." The above section must be construed as having practically an identical meaning with section 1881 of the Code of Civil Procedure. *People v. Langtree*, 64 Cal. 256, 30 Pac. 813. Authorities have been cited on both sides; but little assistance is to be obtained from such citations, owing to the varied statutory provisions in the different states. In some jurisdictions statutes are so construed that only the sort of testimony is excluded which the statute specifically interdicts. In others no communication made by one spouse to the other may be stated after the marriage relation has ceased to exist, even when the statute by its terms seems to apply the rule only to the period of lawful matrimonial relation. Some of the cases make an exception, from the rule prohibiting one spouse from testifying against the other, of those things which in their nature are "as likely

to have occurred before the public as in private." *Owen v. State*, 78 Ala. 429, 56 Am. Rep. 40. In the case last cited the judgment of conviction in a burglary case was reversed, because the former wife of the defendant had testified that he returned to his home late on the night of the burglary, and that afterwards he had a considerable sum of money in his possession. The authorities which recognize and those which deny the right of a divorced wife to speak on the witness stand of matters not essentially of a confidential nature, coming to her knowledge during the existence of the marriage relation, are collated in *Owen v. State*, supra. Wharton, writing of this subject, states the rule in civil cases thus: "Where the relationship has ceased by death, or by divorce, the wife may be admitted for or against the former husband or his representatives (or the converse), though she is precluded from testifying as to information derived confidentially during marital intercourse. The same distinctions are applicable to the husband. It is otherwise as to nonconfidential information." Wharton, *Law of Evidence*, p. 388. See, also, *Gordon, Rankin & Co. v. Tweedy*, 71 Ala. 210. Professor Greenleaf thus formulates the rule: "After the parties are separated, whether it be by divorce or by the death of the husband, the wife is still precluded from disclosing any conversations with him, though she may be admitted to testify to facts which came to her knowledge by means equally accessible to any person not standing in that relation." 1 Greenleaf on *Evidence* (16th Ed.) p. 393. Again, treating of the subject of marital confidences, the same learned author observes (page 497): "But where such confidences are not involved, the policy of preserving the marital peace does not forbid one spouse from testifying against the other's interests after the latter's death or divorce." While the problem here considered is a matter of first impression in California, this court declared years ago in favor of the liberal construction of section 1322 of the Penal Code, and the admission of testimony not clearly excluded by its terms. In *People v. Langtree*, supra, decided in 1883, the court in bank adopted with approval the following language of Mr. Schouler: "On the whole, the prevailing tendency of late years in both England and America is to regard the domestic confidence or the ties of a spouse as of little consequence compared with the public convenience of extending the means of ascertaining the truth in all cases; such facilities being increased, it is believed, by hearing what each one has to say, and then making due allowance for circumstances affecting each one's credibility." Schouler on *Husband and Wife*, 85. It will be noticed that, construing section 1322 of the Penal Code and section 1881 of the Code of Civil Procedure together, the inhibition of testimony extends to communications made by

one to the other. Mental condition is not a matter of communication, and in view of the broad rule adopted in *People v. Langtree*, supra, we are constrained to hold that the testimony of this witness was admissible.

After his arrest, the defendant was submitted to a rigid examination by the sheriff, the district attorney, and others. On the following morning he made a confession, which his counsel contend was due not to his own voluntary impulse, but resulted from this close examination, characterized by them as "a relentless sweating process." The questions propounded to the defendant were reported, and a transcript, admittedly correct in every particular, was introduced in evidence defendant's counsel making only the objection that the reported conversation was inadmissible as it was induced by threats, the effect of which must have extended to and operated to obtain the subsequent confession. A careful consideration of this matter convinces us that the criticism made by appellant's counsel is just. The transcript does not show that at any time the defendant was instructed with reference to his rights under the Constitution, nor was he told that statements made by him might be used against him at his trial. During the long and searching examination to which he was subjected he did not make a confession, but he admitted that if he did kill Vernet the deed must have been accomplished while he was drunk; that his mind was a blank upon the entire subject. It is a fundamental rule of criminal law that a confession may not be used against a defendant, unless the prosecution can show its free and voluntary character, that it was made without previous inducement, and that neither duress nor intimidation caused defendant to furnish such evidence against himself. *People v. Miller*, 135 Cal. 69, 67 Pac. 12. It is also true that if threats and inducements are made to a prisoner, and within a few days thereafter he makes a confession, such acknowledgment of the commission of the crime may not be introduced in evidence, unless it clearly appears that the threats and inducements had ceased to operate upon his mind to bring about his statement of his own guilt. *People v. Johnson*, 41 Cal. 455. After the searching inquiry of the sheriff, district attorney, and deputy district attorney had closed, defendant was locked up in solitary confinement until the following morning, when he informed the sheriff that he desired to tell everything. Undoubtedly there was strong probability that the occurrences of the previous day had much to do with fixing defendant's final resolution to confess, and if coercive threats were made and inducements offered, then we must, in the absence of a contrary showing, find that the confession made on the following day was inadmissible as evidence. The manner of examination to which defendant was subjected may best be

understood, perhaps, from a reading of the following quotations from the transcript: "Mr. Hawson: Q. Where were you when you cut the legs off of Joe Vernet? A. I don't know about that at all. Q. What did you cut them off with? A. Good God, is Joe dead? Mr. Chittenden: You know he is dead. A. I do not. If I ever told the truth in my life, I didn't know he is dead. There is no man in the world that would feel worse on his loss than I do. He is the only friend I have. Mr. Hawson: You are the most monumental liar I ever knew. * * * How long did you leave the body in the cabin? Confess up and tell the truth entirely. The sooner you tell the truth about this, the better your mind will be. I don't blame you for not wanting to tell this. This is an awful strain, but when you make this confession, you will be a better man. You will feel better in two minutes; just that quick. A. I don't see how I can. Q. Go on and tell us the story. You will feel better and different, and if you have done wrong, go on and be a man. * * * Mr. Church: As far as I am concerned, personally, as district attorney, I don't care whether you say anything or not. The evidence is absolutely and complete against you, unless you want to implicate any one else. The only way you can do yourself any good in the world, if there was any one else in it, is to tell it. A. I will tell you there was no one in it, and Joe was going to Portland, Or. * * * Q. Who was with you in that trick? A. I have told you all about it. Q. I thought you did it all alone. I thought if you didn't it would be an advantage to you, personally, to let us know who it was, is all. I thought it would perhaps. * * * Mr. Church: I don't suppose there was ever a murder committed in the history of the world like this, just for his money and certificates of deposit, and then killed by a man who pretends to be his friend; just for money. It is terrible. Mr. Chittenden: I want him to tell it. It would make him feel better. A. Don't you think if I had done that, there would be some impression on my mind—I done it? Mr. Church: Certainly. A. And there has never been anything. Q. I thought it was a cool, calculated piece of work. He has had it on his mind for a year. I think I have figured it out; how he could murder him, and then get out for good. He had no wife. If you have a wife, I would like for you to tell me. A. No. Q. You couldn't pay your board bill. He boarded you for a year; you borrowed money of old Joe, and, in the face of these things, he had gone down in his pocket and loaned you money. You couldn't pay your board bill; you hadn't done an honest day's work in months; you could get no work to do and, even in the face of all this, you took poor old Joe and butchered him in the same manner as you would have butchered a hog. And you tell us in all so-

berness your mind is a blank, and hasn't been a blank before that time? Mr. Chittenden: There are hundreds of people up there that know him. I think he has been in this line of work for a year. The people up there can tell if his mind has been in a blank; and to think he cut him up and buried him is all bosh. I have got mountains of proof. There isn't anything to it at all. There isn't anything in the case. It has been the easiest thing in the world to hunt, and then for you to sit here and tell us you don't know anything about it—if you want to live in that frame of mind, if you want to live that way—what you are facing at this time right now—I thought it would probably relieve your mind to have that awful truth told. A. I would tell if I could, but I don't see that I done it. * * * Q. (by Mr. Hawson): If you didn't do it, who knows you done it? It was done right at your door, in your house. A. It looks to me if I done that terrible crime, there would be something on my mind. Q. There is something. You have got a load right now. It is as big as that courthouse standing right there. It is heavier than this jail, and the only reason I want you to tell me the truth—there is absolutely nothing to the case—it might be a relief to your mind. Your mind is a little clearer then than it is now, I tell you. Mr. Hawson: If you had been up there yesterday afternoon and seen them dig up that body—some 30 or 40 men who knew Joe Vernet—you wouldn't have had five minutes to tell anything. Sheriff Chittenden: If I had come back and got you—you didn't have any friends up there—they would have strung you up to the first tree, Charlie Loper; a piece of rope would have got to your neck. A. If I had done that deed, they might do it. Q. You did the deed, all right. A. There is nothing in my mind about the thing."

That the rule excluding confessions unless they are free and voluntary was violated in admitting the alleged confession, after such proof of threats, inducements, and coercion, can scarcely admit of a doubt. It has been held in this state that it was sufficient to exclude a confession if, before making it, the defendant had been told that it would be better for him to make full disclosure. *People v. Barric*, 49 Cal. 344. In *People v. Thompson*, 84 Cal. 605, 24 Pac. 386, a confession was held inadmissible, because the sheriff had told the prisoner that he "didn't think the truth would hurt anybody," and that "it would be better for him to come out and tell all he knew about it, if he felt that way." The question whether a confession is free and voluntary is a preliminary one addressed to the trial court (*People v. Miller*, 135 Cal. 99, 67 Pac. 12), and that court is clothed with a considerable amount of discretion in determining it (*People v. Suesser*, supra); but we know of no case in which such potential influences as are shown by this record have been held harmless and not

sufficient to exclude the confession induced by them. So long as the constitutional privilege of a defendant not to give evidence against himself exists, that right must be protected by adherence to the well-established rule intended to guard against undue advantage being taken of his fears, hopes, or mental or physical weakness; and while many thoughtful persons believe that those charged with crime should be compelled, either to testify or to bear an adverse presumption as the result of refusal to take the witness stand, no advocate of that change in the law, we believe, goes so far as to desire the machinery of compulsion to be applied anywhere except in the full publicity of open court. In a recent public address, speaking upon this subject, and advocating a change in the rule whereby a defendant is now enabled to refrain from testifying, Mr. Justice Sloss said: "Side by side with the limitation of the right of the accused to stand mute should go the absolute prohibition of testimony or confessions obtained from persons under arrest, as the result of private questioning by officers of the law. The horrors of the 'third degree' are the direct result of the rule prohibiting the prosecution from calling the accused as a witness, or basing any argument upon his failure to take the witness stand in his own behalf. Surely it is far better to question the accused in open court, where he may have the assistance of counsel and the protection of an impartial judge, than to endeavor to convict him by means of an alleged confession which may never have been made and which, if made, may have been extorted from him in ways that, if known, would throw great doubt upon its reliability."

In *Bram v. United States*, 168 U. S. 532, 18 Sup. Ct. 183, 42 L. Ed. 568, the leading authorities upon the subject of confession are collated and discussed masterfully in the opinion of the court delivered by Mr. Justice White. In that opinion he says: "A brief consideration of the reasons which gave rise to the adoption of the fifth amendment, of the wrongs which it was intended to prevent, and of the safeguards which it was its purpose unalterably to secure, will make it clear that the generic language of the amendment was but a crystallization of the doctrine as to confessions, well settled when the amendment was adopted, and since expressed in the text-writers and expounded by the adjudications, and hence that the statements on the subject by the text-writers and adjudications but formulate the conceptions and commands of the amendment itself." In another part of the opinion he observes that: "There can be no doubt that long prior to our independence the doctrine that one accused of crime could not be compelled to testify against himself had reached its full development in the common law, was there considered as resting on the law of nature, and was embedded in that system as one of its

great and distinguishing attributes." He also quotes with approval part of the opinion of the same court, delivered by Mr. Justice Brown in the case of *Brown v. Walker*, 161 U. S. 596, 16 Sup. Ct. 646, 40 L. Ed. 819. As that quotation, we think, fully illustrates the historical significance of the rule which we have been discussing, we take this opportunity of repeating it: "The maxim, 'Nemo tenetur seipsum accusare,' had its origin in a protest against the inquisitorial and manifestly unjust methods of interrogating accused persons, which has long obtained in the continental system, and until the expulsion of the Stuarts from the British throne in 1688, and the erection of additional barriers for the protection of the people against the exercise of arbitrary power was not uncommon even in England. While the admissions or confessions of the prisoner, when voluntarily and freely made, have always ranked high in the scale of incriminating evidence, if an accused person be asked to explain his apparent connection with a crime under investigation, the ease with which the questions put to him may assume an inquisitorial character, the temptation to press the witness unduly, to browbeat him if he be timid or reluctant, to push him into a corner, and to entrap him into fatal contradictions, which is so painfully evident in many of the earlier state trials, notably in those of Sir Nicholas Throckmorton, and Udal, the Puritan minister, made the system so odious as to give rise to a demand for its total abolition. The change in the English criminal procedure in that particular seems to be founded on no statute and no judicial opinion, but upon a general and silent acquiescence of the courts in a popular demand. But, however, adopted, it has become firmly embedded in English as well as American jurisprudence. So deeply did the iniquities of the ancient system impress themselves upon the minds of the American colonists that the States, with one accord, made a denial of the right to question an accused person a part of their fundamental law, so that a maxim, which in England was a mere rule of evidence, became clothed in this country with the impregnability of a constitutional enactment."

It is suggested that the evidence in this case was so complete without the confession of the defendant that the jury would have found him guilty, even if the confession had been entirely omitted. While this argument serves to emphasize the lack of excuse for the resort on the part of public officers to the methods of the "third degree," it does not abate one whit the defendant's right to all of his constitutional privileges. He was entitled to stand mute, if he chose to do so, and to have no confession save a voluntary statement—one not extorted by fear nor induced by promises—introduced against him at his trial. Of this right he was deprived. Without instruction as to the law appli-

cable to his case, without advice of counsel, without knowing that his utterances might be used against him, he was cajoled, browbeaten, and persuaded; was called "a monumental liar"; was told that Vernet's friends would have hanged him "to the first tree," if the sheriff had taken him to the place where the dead body was found; and, in short, every sort of device was employed to force a confession from him. Then, to enable these persuasions to sink deeply into his mind, he was solitarily confined for the night. To say that the confession of the following morning was not influenced by the conduct and the conversation of the officers would be to contradict all human experience. And it is equally untenable to say that, because the prosecution had a perfect case without the confession, the jury would have imposed the ultimate penalty of the law upon the defendant, whether that confession had been excluded or admitted. No one could say (not even the jurors themselves) just what weight the confession had in fixing the belief of the jury in Loper's guilt, and especially in shaping a verdict involving capital punishment. But every one must conclude that the introduction of the defendant's own statement of his guilt under the circumstances here shown must have been most highly prejudicial to him. It follows that for this reason a new trial must be ordered.

Objection is made that a printed copy of a notice published in a Fresno paper, purporting to be signed by Joe Vernet and authorizing Loper to settle Vernet's business affairs, was introduced in connection with the testimony of Rufus Morrell. It is admitted by appellant's counsel that the original of this notice which the district attorney promised, when examining Morrell, to produce later would be competent. With this we agree, and we think it follows that evidence was admissible, showing actual publication of the notice after its preparation and its filing in the office of the newspaper.

Objection is also made to the ruling of the court admitting certain photographs in evidence. These pictures illustrated the country between Vernet's cabin and the place where the dead body was discovered. They were clearly admissible for the purpose of showing the jury the nature of the ground necessarily or probably traversed by the murderer, and especially for exhibiting the necessity (or lack of it) for dismemberment of the body. Photographs are admissible, when, properly authenticated, just as are other illustrative charts. *People v. Durrant*, 116 Cal. 213, 48 Pac. 75; *People v. Crandall*, 125 Cal. 133, 57 Pac. 785; *People v. Mahatch*, 148 Cal. 203, 82 Pac. 779.

We find no material errors in the matter of giving or refusing instructions. Most of appellant's criticisms are directed at instructions upon the subject of insanity. The jury

was fully and fairly instructed upon this phase of the case.

It follows from the above discussion that the judgment and order must be reversed, and it is so ordered.

We concur: BEATTY, C. J., HENSHAW, J.; LORIGAN, J.

ANGELLOTTI, J. I am unable to concur in the reversal of the judgment and order in this case. The reversal is ordered solely because of the admission in evidence of the so-called confession of defendant, wherein, while admitting the actual killing, he described how it was compelled by an absolutely irresistible influence, commanding him to kill, that had been threatening him for days and that had finally dominated him. This statement is held to have been improperly admitted, on the ground, as we understand the opinion, that it is a confession obtained by threats, intimidation, coercion, and duress. There is no other possible ground of exclusion shown by the record. The law does not require that an accused should be affirmatively instructed as to his right to remain silent, and of the fact that statements made by him will be used against him, to render admissible a voluntary statement subsequently made. While it is better that such warning be expressly given to avoid all suspicion of improper inducement, it is not essential. The evidence of the long interview between the officers and the defendant shows beyond question that no improper inducement was held out to defendant to make the statement; no promise or intimation that it would be in any way better for him, so far as his treatment by the officers or by the court, or by any other person or persons was concerned; no statement, even, that it would be "better" for him, except in the event that some one else was implicated; and that the only thing in the way of an expression of opinion by any officer that it would be beneficial to defendant to confess the truth was expressly limited to the effect on defendant's mind—the relief from the strain of knowledge of unconfessed guilt of an atrocious crime. So that we are left, in excluding this statement, to the objection that it was obtained by threats, coercion, intimidation, and duress. While I do not desire to be understood as approving all that was said and done by the officers with relation to defendant, I do not think that it should be held that the trial court erred in its conclusion that the statement was voluntary. No threats were shown. The question of fact, whether the statement was the result of coercion, intimidation, or duress exerted by the officers, was one for the trial judge in the first instance, and we should not interfere with his conclusion thereon, unless the same be without substantial support in the evidence.

In my opinion the conclusion of the trial judge was sufficiently supported by the evidence.

We concur: SHAW, J.; SLOSS, J.

(1909 Cal. 23)

CARTER v. WASTE, Judge.

(S. F. No. 5,662.)

(Supreme Court of California. Dec. 22, 1910.)

EXECUTORS AND ADMINISTRATORS (§ 314*) — PROCEEDINGS FOR DISTRIBUTION — MOTION FOR NEW TRIAL.

Code Civ. Proc. § 1351, provides that any person interested in the estate of a decedent may file objections to granting letters testamentary to persons named. Section 1666 provides that a decree of distribution is conclusive as to the rights of the parties, subject only to be reversed on appeal; and section 1668 provides that at a hearing in a proceeding for distribution, any person interested may contest the petition by written objections. Sections 1714, 1716, 1717 make applicable to all proceedings for distribution the provision of the Code relative to new trials, "except in so far as they are inconsistent with the provisions of this title," and that all issues of fact in probate proceedings must be tried as contests of wills, and that either party may move for a new trial as provided for civil actions. A petitioner for final distribution alleged that the only heirs of deceased were herself and certain children of a deceased half-brother of deceased, and subsequently two other petitions were filed in which the petitioners alleged that they were entitled to the estate, but not denying in terms any allegation of the first petitioner, and the court held against the original petitioner. *Held*, that an issue of fact was made and determined under the petitions in this case authorizing a motion for new trial.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 314.*]

In Bank. Application by Ella Fleming Carter for a writ of mandate to be directed against William H. Waste, Judge of the Superior Court of Alameda County. Application granted.

F. A. Berlin, for petitioner. A. L. Frick, and A. F. St. Sure, for respondent.

ANGELLOTTI, J. This is an application for a writ of mandate to compel respondent to settle, allow, and sign petitioner's proposed statement on motion for a new trial in the matter of the final distribution of the estate of John J. Fleming, deceased, who died intestate. The matter was submitted to us upon a demurrer to the petition.

The facts, so far as they may be considered material, are as follows: On February 8, 1908, subsequent to the settlement of the final account of the administrator of said estate, petitioner filed her petition for final distribution, alleging, among other things, that the true name of deceased was Richard Fleming, Jr., and that he was a son of one Richard Fleming, that the only heirs at law of deceased were herself (an alleged half-sister) and certain children of a deceased

half-brother of deceased, and that she was entitled to an undivided half of the estate and said children to the other half. On March 20, 1908, Ella Woodbury and three others filed their petitions, alleging therein that they were nephews and nieces of deceased, that he left him surviving no other person who was so nearly related as they, and that they were entitled to the whole estate in the proportion of one-fourth to each. On June 1, 1908, A. F. St. Sure, as assignee of George A. Myles and Ann Myles, filed his petition for distribution, alleging that deceased left no heirs at law other than the said Myles. Due notice was given of the time and place of hearing these petitions. The three petitions were finally heard together, much evidence being submitted in support of the same, and the court made its decree, finding therein that none of the alleged heirs other than George A. Myles and Ann Myles is an heir at law or relative of deceased, and that the said Myles are the sole next of kin and heirs at law of deceased, and distributing all of the property of the estate to the assignee of the latter. It is to be observed that there was in the petitions of Ella Woodbury et al. and A. F. St. Sure no denial in terms of any allegation of the petition of petitioner here; the only denial being such as must necessarily be implied from affirmative allegations that are in conflict with allegations of said petition.

The sole reason advanced for respondent's refusal to settle the statement is that the remedy by motion for new trial does not exist under the circumstances above set forth, and that the only remedy of an aggrieved party under such circumstances is to appeal from the decree of distribution. Respondent's main contention in this behalf is that the law does not authorize a motion for a new trial in proceedings on distribution.

It is true that certain provisions of the title of the Code of Civil Procedure relating to probate proceedings expressly make applicable to all such proceedings, "except in so far as they are inconsistent with the provisions of this title," the provision of part two of the Code relative to new trials. It is equally true that these Code sections declare that all issues of fact joined in probate proceedings must be tried in conformity with the provisions relating to contests of wills, that if no jury is demanded the court must try the issues joined, and that either party may move for a new trial upon the same grounds and errors and in like manner as provided in this Code for civil actions. Code Civ. Proc. §§ 1714, 1716, 1717. But nevertheless, as to certain proceedings under this title, it is well settled that these sections do not apply and that the remedy of motion for new trial is not available; the basis of such ruling being, of course, that it is inconsistent

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

with the provisions of such title. Thus it is held that a motion for a new trial will not lie where the court has made an order granting or refusing a family allowance, or setting apart or refusing to set apart property as exempt, or as a homestead. *Leach v. Pierce*, 93 Cal. 614, 29 Pac. 235; *Shipman v. Unangst*, 150 Cal. 425, 88 Pac. 1090; *Estate of Heywood*, 154 Cal. 312, 97 Pac. 825. The same ruling has been made as to an order settling the annual account of an executor or administrator (*Estate of Franklin*, 133 Cal. 584, 65 Pac. 1081), and also as to an order appointing an administrator where there were petitions on behalf of two several applicants, but, according to the views of this court, "no issue joined as to any fact alleged in either petition or any objection made as to the competency of either of the parties." *Estate of Heldt*, 98 Cal. 553, 33 Pac. 549. On the other hand, it is held that the remedy by motion for new trial exists in the case of a contest of a will, and also in case of a contest based on written objections to an applicant for letters testamentary on the ground of his incompetency (*In re Bauquier*, 88 Cal. 302, 26 Pac. 178, 532), and an order authorizing the sale of real estate of a decedent (*Leach v. Pierce*, 93 Cal. 624, 29 Pac. 238). It has been assumed without question that a motion will lie in proceedings for partial distribution (*Estate of Ryer*, 110 Cal. 556, 42 Pac. 1082) and in proceedings on final distribution (*Estate of Walker*, 148 Cal. 162, 82 Pac. 770), and it has been so held as to the latter proceeding by the Supreme Court of Montana, upon statutes practically identical with ours. *In re Davis' Estate*, 27 Mont. 243, 244, 70 Pac. 721.

A careful consideration of the California cases we have cited leads to the conclusion that the true test to be applied in determining whether the motion will lie in the particular probate proceeding, where an issue of fact has been actually made and determined, is this, viz., Does the law expressly authorize issues of fact to be framed in such proceeding? If the answer be "Yes," the issues must be tried in the manner provided by the sections to which we have referred, and the motion for new trial is expressly authorized. This was the test suggested by the court, through Mr. Justice Temple, in *Estate of Moore*, 72 Cal. 340, 13 Pac. 880, and in *Estate of Herteman*, 73 Cal. 545, 15 Pac. 121. It was the test declared to be applied in *Estate of Franklin*, *supra*, in determining that the motion would not lie in the matter of the settlement of the annual account of an executor, the court having previously held in *Estate of Sanderson*, 74 Cal. 199, 209, 15 Pac. 753, 758, that "exceptions to an account do not create 'issues of fact joined,' such as must be submitted to a jury." The same distinction was observed in *Leach v. Pierce*, 93 Cal. 614, 29 Pac. 235, and *Leach v. Pierce*, 93 Cal. 624, 29 Pac. 238. It was held in the

first of these cases that a motion for a new trial was not authorized in a proceeding for family allowance, even though written objections had been filed and the issues thereby made determined, because there was no provision in the statutes for objections and the framing of issues, and the order was one that might be made by the court *ex parte*. The court distinguished the case before it from another case previously decided (*Estate of Bauquier*) solely on the ground that as to the proceeding involved in such case, the Code provided for notice and the framing of issues of fact. In the second *Leach v. Pierce* Case it was held that a motion for new trial would lie when an order authorizing the sale by the administrator of real estate of a deceased was made, because in such proceeding the Code required a written petition setting forth the necessary facts, and provided that any person interested may file his written objections which must be heard and determined. The court said: "Issues of fact, therefore, are expressly authorized by the Code, and a motion for a new trial is proper to review the decision of the court." In support of this ruling, the court cited *In re Bauquier*, 88 Cal. 302, 26 Pac. 178, 532, in which there was written opposition to the appointment of a person as executrix on the ground of her incompetency. It was held that a motion for a new trial would lie because issues of fact had been framed and tried, and the statute expressly authorized such issues. Section 1351, Code Civ. Proc., provided that any person interested may file objections in writing, and that the objections must be heard and determined by the court. In *Estate of Heldt*, 98 Cal. 553, 33 Pac. 549, a department case, the ruling that a motion for a new trial would not lie in a contest between two persons for letters of administration was avowedly put upon the ground that "no issue was joined as to any fact alleged in either petition," and it was said that in such a proceeding, "when no issues of fact are made by the pleadings, a motion for a new trial is not authorized." It may be that the court was in error in concluding that no issue was joined, for each petitioner alleged that he was the person requested by the widow to act as administrator. But the material thing here is that the court did impliedly recognize that, if issues of fact had been made by the pleadings, the motion would lie, and expressly approved *Estate of Bauquier*, *supra*, saying, also, in effect, that a new trial was only proper "where there are issues of fact arising upon pleadings authorized by the Code." In *Shipman v. Unangst*, 150 Cal. 425, 88 Pac. 1090, the remedy by motion for new trial was refused in proceedings for the setting apart of a homestead, exempt property, and a family allowance, on the authority of *Leach v. Pierce*, 93 Cal. 614, 29 Pac. 235, and the same is true of *Estate of Heywood*, 154 Cal. 312, 97 Pac. 825, a similar

case. We are satisfied that it must be taken as established in this state that, under our law as it now exists, a motion for a new trial of any issue of fact actually made and determined in any proceeding in probate will lie when the law expressly authorizes issues of fact to be framed in such proceeding, and that provisions authorizing written objections on the part of persons interested in the estate and providing for the hearing and determination of those objections do expressly authorize issues of fact to be framed.

Coming to a consideration of the statutory provisions concerning final distribution, we find what, in view of what we have already said, must be held to be express authorization for the framing of issues of fact. The order or decree may be made only on petition, and notice must be given of the time and place of hearing the same. Section 1668, Code Civ. Proc. provides in part: "At the time fixed for the hearing, or to which the hearing may be postponed, any person interested in the estate may appear and contest the petition by filing written objections thereto." This was added to the section by amendment in 1907, and clearly brings proceedings for distribution within those classes of probate proceedings as to which the framing of issues of fact is expressly authorized by the Code.

Respondent relies somewhat upon the provision of section 1668, Code Civ. Proc., that "such order or decree (of distribution) is conclusive as to the rights of heirs, legatees, or devisees, subject only to be reversed, set aside, or modified on appeal," as expressly excluding any remedy except direct appeal from the order or decree. This section is the one providing that in the decree the court must name the persons entitled to share in the estate, and the proportion or part to which each is entitled. It appears clear to us that the provision relied on should not be construed as intended to affect the general provisions of the title which authorize a motion for a new trial in probate proceedings whenever the framing of issues is authorized by the statute, and that its sole object was to make the determination of the court, as evidenced by the decree, final and conclusive as against collateral attack. The provision is reasonably susceptible of such a construction, and any other construction would create an exception to the general rule declared for probate proceedings, for which no reasonable ground could be found. It would certainly be difficult to give any reason whatever why a motion for a new trial should lie as to the proceeding to determine heirship provided for by section 1664, Code Civ. Proc., and at the same time should not lie as to the proceeding for final distribution, a proceeding always involving the questions that are involved in the heirship proceeding.

The only remaining question is whether issues of fact were actually made in this proceeding for distribution. That issues of fact were determined by the lower court upon evidence actually introduced by the respective parties is apparent. If the petitions for distribution presented by Ella Woodbury et al. and A. F. St. Sure constituted such "written objections" to the petition of petitioner here as are contemplated by section 1668, Code Civ. Proc., it would seem to follow that they sufficiently made issues of fact which were determined by the decree. If the papers so filed had been designated "answer" or "objections" to the petition of petitioner here, and had in terms denied the allegations of facts showing petitioner to be an heir of deceased and the other petitioners not to be heirs, it would have to be admitted, in view of what we have said, that issues of fact had been made under express authorization of law. If we wished to be exceedingly strict, we might be able to hold that to sufficiently raise an issue of fact as to any allegation of the original petition, an answer denying the same should have been presented, but to so hold, especially after judgment, it appears to us, would be to unnecessarily sacrifice substance to form. The three petitions were treated by the parties and the court below as creating issues of fact, and the hearing and determination in that court necessarily proceeded upon that theory. In substance they did create issues of fact on the question, who are the heirs of deceased, just as clearly as a formal answer containing express denials would have done. The matters set up in the subsequent petitions in support of the several claims, that the petitioners therein are respectively entitled to the whole estate of deceased, were necessarily in conflict with the allegations of the original petition.

We are of the opinion that petitioner is entitled to the relief sought.

Let a peremptory writ of mandate issue as asked in the petition.

We concur: BEATTY, C. J.; LORIGAN, J.; SHAW, J.; SLOSS, J.; HENSHAW, J.; MELVIN, J.

(14 Cal. App. 662)

THOMAS v. JOPLIN, County Treasurer, et al.
(Civ. 928.)

(Court of Appeal, Second District, California.
Nov. 23, 1910.)

1. COUNTIES (§ 196*)—PAYMENT OF PUBLIC MONEY—TAXPAYERS' SUIT.

Code Civ. Proc. § 526a, providing that an action to restrain any illegal expenditure of public funds may be maintained, either by a citizen resident therein or by a corporation which is assessed, or within one year has paid, a tax therein, enacted after the court had decided that any taxpayer might sue to restrain the illegal payment of public money, restricts the right to sue to resident citizens, or corpora-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

tions who are liable to a tax or who have paid a tax within a year.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 308; Dec. Dig. § 196.*]

2. STATUTES (§§ 174, 175*)—CONSTRUCTION—EFFECT OF STATUTE.

Effect must be given to an act of the Legislature, whenever such effect is permitted on a reasonable interpretation of its terms.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 254; Dec. Dig. §§ 174, 175.*]

3. COUNTIES (§ 196*)—RESTRAINING PAYMENT OF PUBLIC MONEY—RIGHT TO SUE—"RESIDENT"—"CITIZEN."

Under Pol. Code, § 51, defining citizens as persons born in the state and residing within it, and all persons born out of the state who are citizens of the United States and residing within the state, one suing to restrain an illegal payment of county funds, who describes himself as a "resident" of the county, does not show that he is entitled to sue, within Code Civ. Proc. § 526a, authorizing actions to restrain illegal expenditures of public funds, by a "citizen resident" therein; the words "resident" and "citizen" not being synonymous.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 308; Dec. Dig. § 196.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1164-1174; vol. 8, p. 7602; vol. 7, pp. 6161-6166; vol. 8, p. 7788.]

4. CONSTITUTIONAL LAW (§ 42*)—VALIDITY OF STATUTES—PARTY ENTITLED TO QUESTION.

The constitutionality of Code Civ. Proc. § 526a, providing that an action to restrain an illegal expenditure of public funds must be brought, either by a citizen resident therein or by a corporation, on the ground that it deprives nonresident citizens of other states of privileges equal with those of citizens of the state, cannot be raised by one who merely shows that he is a resident, but who does not show that he is not an alien, or that he belongs to the class of persons entitled to sue.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 30, 40; Dec. Dig. § 42.*]

Appeal from Superior Court, Orange County; Frank R. Willis, Judge.

Action by J. C. Thomas against J. C. Joplin, as Treasurer of the County of Orange, and others. From a judgment for defendants, rendered on sustaining a demurrer to the complaint, without leave to amend, plaintiff appeals. Affirmed.

S. M. Davis (E. E. Keech, of counsel), for appellant. Williams & Rutan and Montgomery & Tarver, for respondents.

JAMES, J. Plaintiff brought this action to secure an injunction restraining defendant Joplin, as treasurer of the county of Orange, from paying certain warrants threatened to be issued and presented on account of salaries for deputies appointed by several of the officers of that county. A demurrer was interposed in which general and special grounds of objection to the sufficiency of the complaint were stated. This demurrer was sustained without leave to amend, and judgment followed in favor of defendants, from which judgment an appeal has been taken.

The several county officers of Orange coun-

ty were elected at the general election held in 1906, and their terms of office were for four years, commencing in January, 1907. In 1909 the Legislature amended the county government act as it affected that county, and provided for deputies for several county offices, to be paid by the county. In the act as it existed theretofore, no allowance for deputies for these officers had been made. Under the provisions of the amendment, deputies were appointed by the county clerk, sheriff, auditor, treasurer, tax collector, and superintendent of schools, and these deputies have since their appointment regularly drawn their salaries from the county treasury.

Plaintiff bases his suit for an injunction to prevent a further payment of salaries to these deputies on the claim that the amendment of 1909 could not be made operative during the terms of office of the then county officials who had theretofore been allowed no paid deputies, because the effect in that case would be to increase the compensation of such officers during their term of office in violation of section 9, article 11, of the state Constitution.

One of the grounds of demurrer was that plaintiff had no legal capacity to sue. In the complaint it is alleged, first: "That the plaintiff, at all the times herein mentioned, has been and still is a resident, owner of property, and a taxpayer of the county of Orange, state of California." Defendants insist that this statement is insufficient to show that plaintiff is such a person as is entitled to prosecute an action to restrain the payment of the demands of the deputies affected, and cite section 526a, Code of Civil Procedure. This section provides as follows: "An action to obtain a judgment, restraining and preventing any illegal expenditure of, waste of, or injury to, the estate, funds, or other property of a county, town, city or city and county of the state, may be maintained against any officer thereof, or any agent, or other person, acting in its behalf, either by a citizen resident therein or by a corporation, who is assessed for and is liable to pay, or, within one year before the commencement of the action, has paid, a tax therein. This section does not affect any right of action in favor of a county, city, town, or city and county, or any public officer."

Section 526a above quoted was adopted in 1909 and placed in the chapter of the Code relating to injunctions. Prior to its adoption it had been plainly established by the decisions that any taxpayer might bring an action to restrain the payment of public money under a claim that such payment, if made, would be illegal. *Winn v. Shaw*, 87 Cal. 631, 25 Pac. 968. Section 526a declares what persons or corporations shall be entitled to maintain that kind of an action. The effect of the legislative act must be regarded as one

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

intending to limit the right to prosecute such an action, to suitors of the kind mentioned therein, or it can be given no effect at all. The Legislature must be presumed to have acted with knowledge of the law as established by the decisions, which gave any taxpayer the right to maintain an action for injunction in a case like this, irrespective of his residence or citizenship; and with this knowledge present in the minds of the legislators, it must be further presumed that section 526a was enacted with a view of limiting this right and restricting it to citizens who are residents, or corporations who are liable to pay a tax within the county, or who have paid such a tax within one year prior to the bringing of the action. Otherwise, the section neither confers nor limits any right not existing prior to its adoption. The elementary rule of statutory construction, that effect must be given to an act of the Legislature whenever such effect is permitted upon a reasonable interpretation of its terms, requires neither argument nor authorities to illustrate its application here. It seems clear, therefore, that by section 526a, Code of Civil Procedure, the right to bring an action like the one plaintiff has here brought for an injunction is limited, in so far as it is conferred upon individuals, to citizens resident within the county. Plaintiff nowhere alleges in his complaint that he is a citizen. On his behalf it is argued that the terms "citizen" and "resident" are sometimes considered as synonymous, and refer merely, where not otherwise defined, to persons having an actual, permanent abode at a definite place. General definitions of the word "citizen" might be looked to to determine the sense in which the term is used in the statute, were it not for the fact that in the Political Code, at section 51, a complete definition is given. Citizens of the state are there defined to be: "(1) All persons born in this state and residing within it, except the children of transient aliens and of alien public ministers and consuls; (2) all persons born out of this state who are citizens of the United States and residing within this state." It might be argued that a statute depriving nonresident citizens of other states of privileges equal with those of citizens of our own state would be obnoxious to the federal Constitution; but even though some force should be conceded to this contention, the provisions of the statute considered here would not be wholly inoperative. *Estate of Johnson*, 139 Cal. 532, 73 Pac. 424, 96 Am. St. Rep. 161. For aught that appears from plaintiff's complaint, he may be an alien, and unless he shows that he belongs to the class of persons entitled to prosecute this kind of an action, he cannot be heard at all, especially when he seeks to nullify the effect of an act of the Legislature by raising constitutional questions. He is

not, then, a "party interested" in a legal sense. *Davidson v. Von Detten*, 39 Cal. 469, 73 Pac. 189.

Having determined that it does not appear from his complaint that plaintiff has the legal capacity to sue, it follows that the order sustaining the demurrer of defendants was rightly made. If it were profitable so to do, the merits of the constitutional question presented might also be considered, but any conclusion that might be announced upon that matter would have no binding effect upon the parties.

The judgment is therefore affirmed.

We concur: ALLEN, P. J.; SHAW, J.

(14 Cal. A. 564)

CITIZENS' SECURITIES CO. v. HAMMEL
et al. (Civ. 857.)

(Court of Appeal, Second District, California.
Nov. 21, 1910. Rehearing Denied Dec. 21,
1910; denied by Supreme Court Jan. 16,
1911.)

1. SHERIFFS AND CONSTABLES (§ 128*) — WRONGFUL ATTACHMENT — NECESSITY OF POSSESSION BY PLAINTIFF.

In an action against a sheriff for damages for wrongfully levying upon property claimed to be in plaintiff's possession under a writ of attachment, plaintiff must show right of possession of the property, as well as possession.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. §§ 260-263; Dec. Dig. § 128.*]

2. CORPORATIONS (§ 404*) — OFFICERS — AUTHORITY — PLEDGE OF CORPORATE PROPERTY.

The managing officers of a corporation have not authority without instructions from the board of directors to pledge corporate property for antecedent corporate debts.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 1626-1628; Dec. Dig. § 404.*]

3. CORPORATIONS (§ 477*) — ACTION BY DIRECTORS — NECESSITY OF MEETING.

While a corporate board of directors has power to mortgage corporate property for antecedent debts, it can only do so at a lawfully assembled meeting.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 1857; Dec. Dig. § 477.*]

4. CORPORATIONS (§ 477*) — OFFICERS — BOARD OF DIRECTORS — RESOLUTIONS — NECESSITY.

In mortgaging corporate property for antecedent corporate debts, the board of directors must act in a manner equivalent to a resolution, though such resolution need not be spread upon the minutes of the meeting if actually passed, and a conversation between four of the eleven members of the board, wherein such four decided to pledge the property, is not sufficient to bind the corporation.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 1857; Dec. Dig. § 477.*]

5. LANDLORD AND TENANT (§ 275*) — RIGHTS OF LANDLORD — POSSESSION OF TENANT'S PROPERTY.

A landlord having no reserved lien for rent or the value of the use and occupation of the property cannot, by forcibly taking it, acquire a right of possession thereof.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 1167; Dec. Dig. § 275.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

3 SHERIFFS AND CONSTABLES (§ 98*)—LIABILITY—WRONGFUL LEVY—JUSTIFICATION—NECESSITY.

Where the judgment debtor could have legally taken possession of the goods attached while in plaintiff's alleged possession, the writ of attachment under which the sheriff took possession of the goods was of itself sufficient justification in an action against him for wrongful levy, without proving that the writ was issued upon proper affidavit.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. §§ 143-157; Dec. Dig. § 98.*]

7. SHERIFFS AND CONSTABLES (§ 137*)—LIABILITY—WRONGFUL LEVY—ACTIONS—ALLEGATIONS OF COMPLAINT—"DULY ISSUED."

An allegation of the complaint, in an action against a sheriff for wrongfully levying upon goods under a writ of attachment, that the writ of attachment was "duly issued" means that it was based upon a debt, and upon the affidavit required by statute.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. §§ 280-289; Dec. Dig. § 137.*]

For other definitions, see *Words and Phrases*, vol. 3, p. 2263.]

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by the Citizens' Securities Company against W. A. Hammel and another. From a judgment for plaintiff and an order denying a motion for new trial, defendants appeal. Reversed and remanded for further proceedings.

John C. Stick, for appellants. Frank W. Burnett, for respondent.

ALLEN, P. J. It is alleged in the complaint that plaintiff, the owner of a building in Los Angeles, leased the same to a corporation known as the Ocean View Cemetery Co.; that prior to the 21st of October, 1908, the cemetery company was indebted to plaintiff in the sum of \$395.50 on account of rent of said premises; that before said 21st day of October, as security for such unpaid rent, the cemetery company delivered to plaintiff possession of the office furniture contained in said rooms so leased, and vacated the same; that on the 21st of October the defendant sheriff, by virtue of a writ of attachment duly issued to said sheriff in an action begun in the superior court of Los Angeles county against said cemetery company, levied the same upon the property so in the hands of plaintiff, removed said property from said premises, and converted the same to his own use. The defendants deny that said cemetery company ever or at all delivered said property into plaintiff's possession, denied that any delivery of possession was for the purpose of securing to plaintiff the payment of said unpaid rent, and denied that plaintiff on the date of the levy was in the actual or peaceable possession of said property. Upon the trial of the action, the court found in favor of plaintiff, that the cemetery company was indebted to plaintiff in the sum claimed, and that the cemetery

company, in consideration thereof, delivered to plaintiff possession of the office furniture contained in said rooms and vacated the same, found the property of the value claimed, and rendered judgment accordingly.

Appellants' primary and principal contention is that there is no evidence in the record warranting the finding of the court that the cemetery company ever delivered to plaintiff possession of the office furniture as security for the debt. A careful examination of the record satisfies us that appellants' contention in this regard must be sustained. It was incumbent upon plaintiff to show, in order to maintain this action, not only possession, but some right to the possession. It does show actual possession of the property at the time of the levy, but introduces no evidence from which it can be said that the right to such possession was established. The only evidence tending to show such right of possession is to the effect that, shortly before the levy by defendants and when the indebtedness existed, the plaintiff, as the landlord of the cemetery association, upon failure and refusal to pay the rent, changed the lock upon the door, thus acquiring possession of the furniture contained in the rooms; that within a day or two thereafter, upon the application of the secretary of the cemetery association and upon representations that the association desired to hold a directors' meeting for the purpose of levying an assessment, the plaintiff unlocked the doors of the rooms in which such furniture was contained and permitted certain directors of the cemetery association to hold their meeting therein. It appears from the record that the cemetery association is a corporation governed by a board of eleven directors, seven of whom were present at this meeting. It is not shown that this meeting was a regular meeting of the association, or that it was a special meeting, notice of which had been given as required by law. It does appear, however, that after the seven members of the board had assembled a conversation took place between four of the members, during which "it seemed the sense of the three or four talking about it was that the company (meaning plaintiff) should have the furniture as security for the rent," in which conversation one Nolan, manager of the corporation, took part and acquiesced. After adjournment of the meeting one of the directors notified the plaintiff that it was the sense of the meeting to have the furniture turned over to plaintiff to apply upon the rent of said office past due, and such director further said: "You will please take possession at my suggestion in order to protect myself on the note signed jointly by myself and others, and to verify my verbal instructions made Monday last." Upon the strength of this statement, and after adjournment of the board, plaintiff again took possession of the furniture by changing

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the lock on the door again, and excluded the cemetery association therefrom. It must be conceded that the executive or managing officers of a corporation have not the authority, without instructions from the board of directors, to pledge or mortgage the property of the corporation for antecedent debts. Especially would this be true of one simply a director of such corporation. The right of the board of directors to pledge or mortgage the property, even for antecedent debts, must be admitted; but that such board may authorize such act, it is necessary that they be in session at a meeting lawfully assembled. Plaintiff, relying as it must, upon the right to possession, as conferred upon it by the board of directors, must affirmatively show facts from which such authority may be reasonably inferred. Seven members of the board out of a total membership of eleven, notwithstanding they constitute a majority, would not have authority to pledge the property of the corporation for an antecedent debt, unless they were legally assembled for the purpose of transacting corporate business. There is nothing in the record to indicate that this board was so assembled at the time plaintiff claims the authority was given. In addition to this, we are of opinion that some action in the nature of a resolution would be necessary in order to warrant an officer of the corporation in thus pledging corporate property. The resolution need not necessarily be spread upon the minutes, if actually passed, but a conversation simply between four members—the other three present not being shown to have participated therein, nor in fact to have been aware of such conversation—is far from showing any resolution or authority upon the part of the board. It goes without saying that a landlord having no lien for rent reserved, or for the value of the use and occupation of property (*Hitchcock v. Hassett*, 71 Cal. 334, 12 Pac. 228), cannot acquire right of possession or an interest in the tenant's personal property by forcibly taking possession thereof.

Respondent, however, insists that, waiving all of these matters hereinbefore discussed, the judgment should be affirmed, for the reason that the defendant sheriff did not justify, in that it was neither alleged nor proven that the writ of attachment held by him was issued upon proper affidavit, or that any indebtedness existed warranting the issuance of such writ, and this is claimed upon the authority of *Darville v. Mayhall*, 128 Cal. 617, 61 Pac. 276. It will be observed, however, that this case differs materially from the one just cited. The rule therein laid down applies to cases where there has been a transfer of title, or where the possession is held under such circumstances as to preclude the owner from retaking possession. In *Thornburgh v. Hand*, 7 Cal. 567, the rule

as laid down by *Starkle* on Evidence is approved, which is: "If the assignment and delivery of possession were merely colorable, and the property still remained in the debtor, against whose goods the execution issued, the sheriff, it seems, would be entitled to a verdict without proof of the judgment, the plaintiff having no property in the goods." If, therefore, the owner of the property here under consideration could have retaken possession through claim and delivery, the right of possession remaining in such owner at all times, the writ of attachment would be a sufficient justification, for a writ of attachment or execution as against the debtor is a sufficient justification. In addition to all of this, however, the plaintiff in this case alleges that the writ of attachment was duly issued, which can receive no construction other than that it was based upon a debt and an affidavit required by the statute. In either view of the case, we think the justification was established.

For the reasons above stated, the judgment and order denying a new trial are reversed, and cause remanded for further proceedings.

We concur: SHAW, J.; JAMES, J.

(14 Cal. App. 545)

PEOPLE v. HARRISON. (Cr. 178.)

(Court of Appeal, Second District, California.
Nov. 19, 1910. Rehearing Denied by
Supreme Court Jan. 16, 1911.)

1. INDICTMENT AND INFORMATION (§ 125*)—
DUPLICITY.

Under Pen. Code, § 288, providing that any person committing lewd acts with child under 14, etc., shall be guilty of a felony, an information charging the defendant with the crime, phrased in the language of the statute, is not demurrable as charging two offenses in one count, as the commission of one or all of the acts described constituted the crime.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 334-400; Dec. Dig. § 125.*]

2. CRIMINAL LAW (§ 371*)—OTHER OFFENSES.

In a prosecution for lewdness with a child, evidence of other acts of lasciviousness and their effect is admissible for the purpose of showing intent.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 830-832; Dec. Dig. § 371.*]

3. CRIMINAL LAW (§ 782*)—INSTRUCTIONS.

In a prosecution for lewdness with a child, an instruction asked by defendant to the effect that charges like the one made against the defendant are easy to make and hard to disprove contains no proposition of law for a jury.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 782.*]

4. CRIMINAL LAW (§ 1172*)—INSTRUCTIONS—
ACCOMPLICES.

In a prosecution for lewdness with a boy under 14, an instruction that deals with the subject as though the claimed accomplice was an adult is not prejudicial to the defendant as it might have stated section 26 of the Penal Code, which provides that children under 14, in the absence of clear proof of knowledge of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

its wrongfulness, are incapable of committing crimes.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1172.*]

5. NAMES (§ 16*)—IDEM SONANS.

An information that a crime was committed with William Standberg, when the real name was William Elmer Strandberg, did not contain a fatal variance, as the rule of idem sonans applies.

[Ed. Note.—For other cases, see Names, Cent. Dig. §§ 12-14; Dec. Dig. § 16.*]

6. CRIMINAL LAW (§ 1163*)—TRIAL—MISCONDUCT OF JURY.

While the jury were deliberating on the verdict, a note was sent to them that "Aunt Sophia is dead." It was not shown from what source it came, or whom it was intended for. *Held*, that no prejudice can be presumed to have resulted to the defendant, though the jury shortly after receiving the note reached a verdict against him.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3090-3099; Dec. Dig. § 1163.*]

Appeal from Superior Court, Los Angeles County; George R. Davis, Judge.

R. B. Harrison was convicted of certain lewd and lascivious acts with a boy under the age of 14, and he appeals. Affirmed.

J. C. Cross and Grant R. Bennett (J. H. Ryckman, of counsel), for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

JAMES, J. Defendant was convicted of having committed certain lewd and lascivious acts with a boy under the age of 14 years in violation of the provisions of section 288, Pen. Code. The judgment required that he be imprisoned in the state prison for a period of 5 years. An appeal is taken from that judgment, and also from an order of the trial court denying defendant's motion for a new trial.

On January 30, 1910, defendant, a man of mature years, accompanied by a boy named William E. Standberg, entered a dressing room at the Bimini bathing establishment in the city of Los Angeles. A man occupying an apartment adjoining this dressing room shortly thereafter chanced to look through an aperture between two boards of the intervening partition, and saw the boy engaged in the act of committing sodomy with the man. He called to an attendant, and together they went to the door of the room occupied by the man and boy. Upon demand being made by the bathhouse attendant that the door be opened the door was opened, disclosing the man in a naked state and boy wearing only an undershirt. The physical condition of the boy in other respects indicated that the act observed by the first witness from the adjoining room had been completed. When called to testify at the trial, the boy Standberg, who was then 13 years of age, told of the commission of a series of acts of sodomy between him and the defendant. According to the revolting tale

narrated by him, at different times prior thereto he had been the active participant in the commission of this crime, and at other times the passive subject. He testified that, upon the day when his relations with defendant were discovered at the bathhouse, defendant had first touched with lascivious hand his (the witness') person and the private parts thereof, and had excited his (the boy's) passion. He further testified that upon previous occasions when he had committed similar acts with defendant, it had been the habit of defendant to first use him in a like manner as that last referred to, with the result that his passion would become excited. His whole story was one shocking in its fullness of description of repeated unnatural and disgusting acts committed between himself and the defendant, occurring from a date several months prior to January 30, 1910, and continuing down to the time of the arrest of defendant at the bathhouse.

The information charging defendant with the crime was phrased in the language of the statute. Defendant demurred to it on the ground that two offenses were charged in one count. The demurrer was properly overruled. The commission of any or all of the acts described in, and with the intent stated, by the statute, constituted but one and the same crime or offense. That an information in such a case does not charge different offenses is thoroughly settled by the decisions. We cite *People v. Gosset*, 93 Cal. 641, 29 Pac. 246; *People v. Thompson*, 111 Cal. 242, 43 Pac. 748; *People v. Gustl*, 113 Cal. 177, 45 Pac. 263.

Objection was made at the trial to the admission of evidence showing that at different times prior to the commission of the offense charged acts of sodomy had been committed by the boy with the defendant. Defendant does not contend that proof of the commission of other and prior lascivious acts such as those charged to have been committed might not be competent and relevant, but he claims that the prosecution was allowed to show too much; i. e., that the proof should have stopped short of showing that a different crime than that charged, to wit, sodomy, had been committed on any of these prior occasions. The testimony of the boy Standberg was to the effect that upon each of the former occasions referred to the defendant had first done lascivious things to and with the private members of witness' person which aroused his sexual passion, and that sodomy was the resulting act. These several acts in each case were connected and inseparable. Moreover, as it was concededly competent for the prosecution to show that defendant had on prior occasions committed lascivious acts like those with which he was charged, with the complainant, it would seem also competent to permit it to be shown

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

just what the effect of such conduct was upon the witness Standberg; that is, what he did with and to the defendant when moved by the feeling which defendant's previous acts had excited. Such proof would be very satisfactory as tending to show what the purpose and intent of defendant was on the occasion charged in the information. Mr. Wigmore in his work on Evidence, at paragraph 398, referring to a general class of cases to which this one belongs, makes an observation very pertinent here when he says: "The prior or subsequent existence of a sexual passion in A. for B. is relevant * * * to show its existence at the time in issue. The circumstance that the prior or subsequent conduct exhibiting the passion is criminal does not alter the case nor affect the admissibility of the evidence." In so far as the record shows that the boy Standberg was permitted to testify to acts of sodomy committed by the defendant upon him at times when they were unaccompanied by other lascivious acts like those described in the information, no objection appears to have been made to his so testifying. And even though there had been such objection, the evidence was merely by way of showing the complete course of depraved conduct of defendant toward the boy, as evidencing the intent with which he committed the lascivious acts charged. For this purpose the proof was competent.

Instructions of the court defining who may be an accomplice, and charging the jury that the testimony of an accomplice requires corroborating proof to support it, were full and fair. The instruction asked by defendant to the effect that charges like the one made against defendant were easy to make and hard to disprove was not an instruction upon a matter of law required to be presented by the court to the jury. Instructions given on the question of an accomplice were even more favorable than the defendant was entitled to, in that they all dealt with the subject as though the claimed accomplice was an adult. The boy Standberg was a child of the age of 13 years, and the instructions might well have contained a statement of the provisions of section 26 of the Penal Code, which recite that children under the age of 14, in the absence of clear proof that at the time of committing the act charged against them, they knew of its wrongfulness, are incapable of committing crimes.

The further point is presented that while in the information it was stated that the improper acts were committed with one William Strandberg, the proof showed the boy's name to be William Elmer Standberg, and that this variance vitiates the judgment. These names were so similar as to make the doctrine of *idem sonans* applicable, and the variance was not such as to affect the

validity of the judgment. *People v. Smith*, 103 Cal. 567, 37 Pac. 516; *People v. James*, 110 Cal. 158, 42 Pac. 479; *People v. Flick*, 89 Cal. 148, 26 Pac. 759; *People v. Clausen*, 120 Cal. 383, 52 Pac. 658.

The jury sitting at the trial of defendant retired at the hour of 4 o'clock on June 16, 1910, to deliberate upon a verdict. At about 5 p. m. on the following day, when called into the courtroom, they announced that no agreement had been reached, and were again returned to the jury room. At 9:30 o'clock p. m. of the same day they reached an agreement and rendered their verdict. In an affidavit used at the hearing of his motion for a new trial, and in support of his claim that there had been misconduct on the part of the jury, defendant alleged that after the jury had been called into court on June 17th, according to his information and belief, "there was sent to said jury and delivered to said jury a certain writing, note, or card, stating, among other things, 'that Aunt Sophia is dead'; that within a short time after the receipt of said writing by said jury they agreed upon the verdict." It was not shown from what source the note or card came, or from whom it was intended, and in the absence of a showing that some improper effect was had upon the minds of the jury, or some of its members, which tended to induce an agreement upon the verdict, no prejudice can be presumed to have resulted to defendant. *People v. Kramer*, 117 Cal. 648, 49 Pac. 842.

Appellant presents no other points meriting serious consideration.

The judgment and order are affirmed.

We concur: ALLEN, P. J.; SHAW, J.

(14 Cal. App. 570)

WILSON v. CARSON. (Civ. 838.)

(Court of Appeal, Second District, California.
Nov. 22, 1910.)

1. LANDLORD AND TENANT (§ 291*)—UNLAWFUL DETAINER—ACTION—EVIDENCE.

In an action of unlawful detainer, evidence held to show that defendant, who moved in after the tenant had moved out at the end of the term, was not in under the tenant and did not claim through the lease.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Dec. Dig. § 291.*]

2. LANDLORD AND TENANT (§ 64*)—ESTOPPEL TO DENY TITLE.

The rule that the tenant is estopped to deny the landlord's title does not bind a stranger who claims the land in his own right, and does not enter under the tenant or use the tenant's possession as a means of acquiring the possession himself.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 177-180; Dec. Dig. § 64.*]

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action of unlawful detainer by I. L. Wil-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

son against G. W. Carson. From a judgment for defendant, plaintiff appeals. Affirmed.

Shaw & Dyke, for appellant. Conkling & Brown, for respondent.

SHAW, J. Action of unlawful detainer. Judgment went for defendant, from which, and an order denying plaintiff's motion for a new trial, he prosecutes this appeal.

It appears that plaintiff, on or about January 1, 1907, leased the premises in question to one M. J. Alexander; that on September 25, 1907, and after the termination of the period for which the premises were leased to Alexander, he removed therefrom, leaving the premises vacant and unoccupied; that two days later, to wit, on September 27, 1907, and while the premises were thus vacant and unoccupied, defendant entered upon and took possession of the premises and continued to hold possession thereof down to the time of the institution of this action, more than a year thereafter. The action is based upon the theory that defendant acquired possession through collusion with Alexander. The complaint alleged: "That on said last-mentioned day defendant entered into possession of said premises by the consent and inducement of said M. J. Alexander, and with full knowledge of said lease and of the circumstances under which said Alexander entered into possession of said property, and of said tenancy, and the defendant ever since said last-mentioned date has been in possession of said premises, and said defendant continues to hold and occupy the same." This allegation was denied.

The court made findings to the effect that defendant knew that during the time that Alexander held and occupied the land such possession was under and by virtue of the lease from plaintiff, but that defendant's entry and occupancy thereof was not by reason of being induced so to do by Alexander, nor with the latter's consent, and that defendant's entry and occupancy bore no relation whatever to the lease. The only evidence offered touching the subject is that of defendant. His testimony not only fully supports the finding, but, in the absence of any contradiction thereof, the court could not have well found otherwise. The contention that the findings are unsupported by the evidence is wholly without merit.

Conceding the finding not obnoxious to the objections urged, appellant insists upon a reversal of the judgment upon the principle of estoppel which prevents a tenant and those holding under him from denying the landlord's title. Such estoppel, however, "does not bind a stranger who claims the land in his own right, and does not enter under the tenant or use the tenant's possession as a means of acquiring the possession himself." Volume 18, Am. & Eng. Ency. of Law, p. 418. From all that appears to the contrary, de-

fendant may have owned the land by fee-simple title, and the entry have been made under an assertion of a rightful claim thereto. At all events, the findings negative any interpretation which would justify the conclusion of the existence of collusion between defendant and the tenant, whereby the latter's possession was used as a means of defendant's acquiring possession of the premises. The case of *Porter v. Murray*, 12 Pac. 425¹, cited by appellant, was a proceeding in forcible entry and detainer, an action which would not lie in this case, for the reason, if for no other, that it appears defendant had been in the quiet possession of the premises for a period of more than one year prior to the institution of the suit (section 1172, Code Civ. Proc.); and hence that case is not in point.

The record discloses no error, and the judgment and order appealed from are therefore affirmed.

We concur: ALLEN, P. J.; JAMES, J.

(14 Cal. A. 668)

STARKWEATHER v. DAWSON. (Civ. 893.)

(Court of Appeal, Second District, California. Nov. 23, 1910. Rehearing Denied by Supreme Court Jan. 19, 1911.)

1. ELECTIONS (§ 305*)—OBJECTIONS—ADMISSION OF EVIDENCE—NECESSITY—SPECIFIC OBJECTIONS.

A statement by defendant's attorney in an election contest made during the recount, that they ought to consider the spoiled ballots, and that counsel thought the spoiled ballots were returned with the rejected ballots, did not amount to an objection to the introduction of such ballots as rejected ballots for noncompliance with Pol. Code, § 1257, requiring all ballots rejected for illegality to have indorsed upon the ballot the cause of their rejection and strung upon a string, and defendant cannot complain on appeal of the admission in evidence of rejected ballots.

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 305.*]

2. ELECTIONS (§ 291*)—CONTEST—BURDEN OF PROOF.

In order to rely upon ballots inclosed in an envelope marked "spoiled, cancelled and unused ballots," contestant was bound to show that such ballots were rejected ballots, and that they had been erroneously rejected.

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 291.*]

3. TRIAL (§ 105*)—OBJECTIONS TO EVIDENCE—PRELIMINARY PROOF—WAIVER.

Where in an election contest plaintiff offered in evidence ballots contained in an envelope marked "spoiled, cancelled and unused ballots," stating that they were rejected ballots, and defendant did not object to the sufficiency of the evidence to show that they were rejected ballots, but received the benefit of those ballots favorable to him, he thereby waived proof of

¹ Reported in full in the Pacific Reporter; reported as a memorandum decision without opinion in 70 Cal. xx.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

their character as rejected ballots, which was necessary to make them admissible.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 105.*]

4. TRIAL (§ 92*)—RECEPTION OF EVIDENCE—STRIKING IMPROPER EVIDENCE—NECESSITY.

Where in an election contest defendant did not object to the admission in evidence of certain ballots as rejected ballots, on the ground that the evidence did not sufficiently identify them as such to make them admissible, a motion, made at the close of plaintiff's testimony, to strike out such ballots as evidence on that ground was properly overruled, since plaintiff could have made the necessary preliminary proof of the character of the ballots had timely objection to their admission been made on that ground.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 245, 252; Dec. Dig. § 92.*]

5. ELECTIONS (§ 299*)—CONTEST—RECOUNT—PROCEEDINGS—STATUTES.

Pol. Code, § 1207, requires the ballot clerk before any ballot is taken from the box to deface the unused and spoiled ballots by a cross drawn over their face in ink, and to immediately place such defaced ballots in an envelope and seal it, and that a majority of the election officers shall write their names across the sealed part of the envelope; and section 1257 requires all ballots rejected for illegality to be indorsed with the cause of such rejection, and signed by a majority of the election board, and strung upon a string. *Held*, that the statutes were merely directory, so that failure to comply therewith did not vitiate the election; and hence, if ballots were erroneously rejected, the court should count such ballots upon a recount, regardless of the failure of the election board to comply with the statutes in marking the ballots.

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 299.*]

6. ELECTIONS (§ 205*)—RETURN—CONCLUSIVE—PRIMA FACIE CORRECTNESS.

The prima facie correctness of the returns and the canvass thereof, showing certain ballots to have been rejected ballots, cannot be overthrown upon recount, except upon satisfactory evidence that such ballots were good.

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 205.*]

7. ELECTIONS (§ 305*)—CONTESTS—APPEAL—CONCLUSIVENESS OF FINDINGS.

While ballots marked as rejected ballots by the election board should only be admitted in an election contest upon clear and satisfactory evidence that they are good ballots, the appellate court will not disturb a ruling admitting them, unless it is clearly satisfied that the evidence does not warrant their admission.

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 305.*]

Appeal from Superior Court, Kings County; J. W. Mahon, Acting Judge.

Action by Grant Starkweather against John H. Dawson to contest an election. From a judgment for contestant, defendant appeals. Affirmed.

Dixon L. Phillips, J. L. C. Irwin, Maurice E. Power, and Robt. W. Miller, for appellant. Choynski & Humphreys and H. Scott Jacobs, for respondent.

SHAW, J. This is an election contest. At the municipal election held in the city of Hanford on April 11, 1910, Starkweather and

Dawson were opposing candidates for the office of city trustee. The canvass of the returns of the election made by the city trustees resulted in Dawson being declared elected by a majority of nine votes. Thereupon, Starkweather instituted this contest in the superior court of Kings county, praying for a recount of the votes. Upon a recount thereof by the court, Starkweather was declared elected by a majority of two votes, and a judgment accordingly rendered in his favor, from which the defendant or contestee appeals.

The only point upon which appellant relies for a reversal is his contention that the trial court erred in counting certain ballots, which were claimed by plaintiff to have been wrongfully rejected by the election officers of the Fourth precinct. These ballots, 17 in number, were inclosed in a sealed envelope upon which the words "envelope for spoiled, cancelled and unused ballots" were printed. Upon the completion of the recount of the ballots returned as accepted and counted by the precinct election officers, counsel for plaintiff said: "If the court please, we now ask the court to make an order opening this envelope inclosing the spoiled, canceled, and unused ballots. I presume the rejected ballots will be contained in there, and we would like to have it opened for the purpose of ascertaining that, and then we will proceed to inspect the rejected ballots"; whereupon counsel for defendant said: "Our same objection goes to this offered evidence. By the Court: Yes, same objection." The objection referred to was one theretofore interposed, at the commencement of the recount, to the opening of the envelopes containing the voted ballots accepted by the election officers, and the recounting thereof. This objection in full is as follows: "Mr. Phillips (attorney for defendant): The defendant Dawson objects to the offered evidence and the application for an order to direct the clerk to open the Exhibit No. 8 for identification, on the ground and for the reason that the same is not the best evidence of what the votes were cast at the election; that the certificate of the board of election is the best evidence under the circumstances, as presented by the evidence here introduced in court, that the evidence shows from the city clerk, Hill, former city clerk, the present city clerk, and present and former city marshal, A. M. Fredericks, that the custody and control of the offered evidence, together with all of the other envelopes and exhibits introduced in the case, have not been under the control exclusively of either the former city clerk, James A. Hill, or the present city clerk, D. C. Williams, at any time since the 11th day of April, 1910, but, on the contrary, the evidence shows without conflict that the offered evidence, together with all the exhibits marked for identification, have been in the joint

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

control, and in the joint possession, of the city marshal, Fredericks, who was a witness on the stand, at all the times, together with James A. Hill, the former city clerk, and the present city clerk, D. C. Williams, and that, besides, the evidence shows affirmatively that one M. B. Washburn, who was a former deputy city clerk, had knowledge of the combination of the vault in which the offered evidence was subsequently kept; and that also one Z. D. Johns was a deputy city clerk at all the times from the time that James A. Hill, the former city clerk, was in office, up to and including the 18th day of April, 1910; and in addition to that, that certain packages of these election returns were opened by the board of trustees of the city of Hanford at the canvassing of the returns, and that it is in evidence from Mr. Hill that certain of those returns were cracked; that the seals were cracked and broken when they were delivered to him and afterwards when they were delivered to the city board of trustees, and as to the certain or particular ones, the seals of which were broken, that he couldn't say which ones they were." This objection was overruled. Thereupon, the court ordered the clerk to open the envelope marked "spoiled and unused ballots," whereupon the following colloquy occurred: "Counsel for defendant: Have you counted these, Mr. Clerk? Mr. Clerk: No, sir. Counsel for defendant: Well, you had better count them. The Court: What are those? Counsel for plaintiff: Ballots that were rejected by the election board." The clerk thereupon counted the ballots and announced that there were 17. As the recount of these 17 ballots proceeded, objections were interposed by each party upon the ground of the manner of marking some of the ballots, and defendant asked that certain of the ballots be counted for him, which was done. The recount thereof resulted in Starkweather getting 10 additional votes and Dawson getting two; the other five, for reasons unnecessary to here mention, being rejected by the court.

In addition to these ballots being inclosed in the envelope so marked for "spoiled, cancelled and unused ballots," none of them were indorsed as required by section 1257, Pol. Code, but defendant, at the time of counting the same, interposed no objection upon such ground, nor did he question their being rejected ballots, unless the lengthy objection heretofore quoted can be regarded as an objection raising the question.

Section 1257, Pol. Code, provides that "all ballots rejected for illegality must be endorsed upon the ballot the cause of such rejection, and signed by a majority of the election board, and thereafter strung upon a string." It is conceded the election board failed to comply with this provision. A critical examination of defendant's lengthy objection, however, discloses nothing calculated to acquaint plaintiff or the court with the fact that defendant raised any objection to

the introduction of the ballots on account of such neglect of duty on the part of the election board. It is true, that at one stage during the recount defendant's attorney stated: "There is another point that should be considered. We ought to take into account the spoiled ballots. I think the spoiled ballots were returned with the rejected ballots." To which and other like suggestions the court replied: "You gentlemen may raise that point when you get to your part of the case." The suggestion made cannot be regarded as an objection to the count of the ballots, upon the ground that they were not in fact rejected ballots.

The duty devolved upon plaintiff to establish the fact that these ballots inclosed in the envelope marked and intended for "spoiled, cancelled and unused ballots" were rejected ballots, and to show to the satisfaction of the court that they had been erroneously rejected. When, however, they were offered by plaintiff, with a statement to the effect that they were rejected ballots, and defendant not only failed to question the correctness of the statement, but permitted them to be introduced without objection to the sufficiency of proof establishing their character, claiming and receiving the benefit of those appearing in his favor, it was equivalent to a stipulation of the fact, or at least a waiver of proof, which a proper objection would have otherwise rendered necessary as a condition of introducing them in evidence.

Waiving the sufficiency of the record as affording sufficient evidence that the ballots were rejected, and not unused and canceled ballots, we are of opinion that appellant, having at the time when they were offered neglected and failed to interpose any objection to the introduction of the ballots in evidence, upon the ground that they were not in fact rejected ballots or indorsed as required by section 1257, Pol. Code, he should not now be heard to complain upon such ground. "The general rule is that a party objecting to the admission of evidence must specify the ground of his objection when the evidence is offered, and will be considered as having waived all objections not so specified." *People v. Manning*, 48 Cal. 338; *Crocker v. Carpenter*, 98 Cal. 418, 33 Pac. 271; *Wise v. Wakefield*, 118 Cal. 107, 50 Pac. 310; *Bundy v. Sierra Lumber Co.*, 149 Cal. 772, 87 Pac. 622; *Bass v. Leavitt*, 11 Cal. App. 582, 105 Pac. 771.

For like reason, that defendant had waived objection upon the grounds referred to, the court did not err in denying his motion made at the close of plaintiff's testimony to strike out the evidence afforded by these ballots, upon the ground that "there has been nothing shown to identify the ballots returned as spoiled and rejected ballots." Had the objection been made at the proper time, plaintiff would no doubt have been given opportunity to call the election officers to the witness stand and meet such objection by proof

of the character of the ballots. *Bass v. Leavitt*, supra. To have granted the motion without again traversing the ground would, in effect, have deprived plaintiff of the right to make such proof.

Section 1207, Pol. Code, directs that before any ballot shall be taken from the ballot box the ballot clerk must proceed to deface the unused and spoiled ballots by drawing across the face thereof in writing ink with a pen two lines which shall cross each other, and shall immediately place all such defaced ballots within an envelope and seal such envelope, and a majority of the election officers shall write their names across the sealed portion of the envelope. The fact that none of the ballots were so defaced is unimportant and signifies little, for the reason that the provisions of this section, as well as those contained in section 1257, are merely directory. Electors of the precinct should not be disfranchised, because the election officers fail to comply with provisions which do not go to the substance of the election. "Mere irregularity on the part of election officers or their omission to observe some merely directory provisions of the law will not vitiate the poll." *McCrary on Elections*, § 225. Says the same author (section 228): "Those provisions of a statute which affect the time and place of the election and the legal qualifications of the election are generally of the substance of the election, while those touching the recording and return of the legal votes received and the mode and manner of conducting the mere details of the election are directory." Therefore, it was the duty of the court, if in fact voted ballots had been erroneously rejected, and such fact duly established or proof thereof waived, to count them for the person for whom they were voted, regardless of such acts or omissions on the part of the election board. *McCarthy v. Wilson*, 146 Cal. 328, 82 Pac. 243; *Bourland v. Hildreth*, 26 Cal. 161; *Stinson v. Sweeney*, 17 Nev. 309, 30 Pac. 997; *Russell v. McDowell*, 83 Cal. 71, 23 Pac. 183. It is true that the prima facie correctness of the returns and canvass thereof should not be overturned by a resort to a recount of the ballots, save and except upon sufficient and satisfactory evidence of the integrity of the ballots. There is nothing, however, disclosed by the record which would justify us in disturbing the conclusion of the trial court in this regard. As said in *Tebbe v. Smith*, 108 Cal. 108, 41 Pac. 455 (29 L. R. A. 673, 49 Am. St. Rep. 68): "While the ballots should be admitted only after clear and satisfactory evidence of their integrity, yet, when they have been admitted, this court will not disturb the ruling, unless we in turn are as well satisfied that the evidence does not warrant it."

Defendant offered in evidence the certificate of the election officers, whereby they

certified that the number of ballots voted was 134, and that the number of ballots spoiled was 17. This statement to the effect that 17 ballots were spoiled is entitled to little weight, in view of the fact that all of these ballots had the numbers torn therefrom, indicating that they had passed through the ballot box, and the further fact that in the same document the election officers certify that only 119 votes were cast for the opposing candidates, which fact tends to show that 15 of the 17 votes certified as spoiled must have been voted and passed through the ballot box, and were included in the count of 134 ballots certified as having been voted.

Upon the facts as disclosed by the record, the judgment of the lower court should be affirmed, and it is so ordered.

We concur: ALLEN, P. J.; JAMES, J.

(83 Kan. 634)

WITSCHY v. SEAMAN.

(Supreme Court of Kansas. Jan. 7, 1911.)

(Syllabus by the Court.)

1. TAXATION (§ 511*)—SALE OF MERCHANDISE—LIEN.

Where a stock of merchandise is sold and transferred in bulk by the owner to another person, after it has been assessed for taxation, and before the taxes thereon are paid, without retaining sufficient to pay the taxes thereon, the statute fixes a lien upon the stock therefor. *Gen. St. 1909, § 9236.*

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 947-949; Dec. Dig. § 511.*]

2. TAXATION (§ 514*)—TAX LIEN—EXTINGUISHMENT.

The failure of the county treasurer in such a case to issue a tax warrant at once does not operate to extinguish the lien.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 956-961; Dec. Dig. § 514.*]

3. TAXATION (§ 511*)—LEVY—VALIDITY.

The fact that taxes upon other property of the former owner of the stock so transferred are included in the gross sum for which the warrant was issued against him does not make void a levy upon a part of the stock for the collection of taxes due thereon.

[Ed. Note.—For other cases, see *Taxation*, Dec. Dig. § 511.*]

4. TAXATION (§ 612*)—LEVY—TENDER OF TAXES—REPLEVIN.

The purchaser of a stock of goods subject to a lien for taxes, under the statute referred to, must pay or tender the taxes due thereon before he can maintain replevin for a part of the same stock levied upon under a warrant for the collection of such taxes.

[Ed. Note.—For other cases, see *Taxation*, Dec. Dig. § 612.*]

Appeal from District Court, Brown County.

Action by John Witschy against George W. Seaman. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

A. B. Crockett, for appellant. Jas. Falloon, for appellee.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

BENSON, J. The appellant, as sheriff, levied a tax warrant on personal property, part of a stock of merchandise and fixtures which was sold and transferred to the appellee on April 15, 1907, after taxes for that year had been assessed thereon. These taxes were not paid, and a tax warrant was issued therefor January 25, 1908, against the former owner. The appellee treated the levy as void, replevied the property from the sheriff, and recovered judgment for possession. The sheriff appeals.

The statute under which the appellant claims that his proceedings should be upheld provides: "If any person in this state, after his personal property is assessed and before the tax thereon is paid, shall sell all of the same to any one person, and not retain sufficient to pay the taxes thereon, the tax for that year shall be a lien upon the property so sold, and shall at once become due and payable, and the county treasurer shall at once issue a tax warrant for the collection thereof, and the sheriff shall forthwith collect it as in other cases. The one owing such tax shall be civilly liable to any purchaser of such property for any taxes he owes thereon, but the property so purchased shall be liable in the hands of the purchaser or purchasers for such tax; provided, however, if the property be sold in the ordinary course of retail trade it shall not be so liable in the hands of the purchasers." Gen. St. 1909, § 9236.

The language of this statute, while not absolutely clear in its terms, sufficiently discloses the legislative purpose to secure the payment of taxes which otherwise might be lost upon the transfer of the property taxed without retaining enough to pay the taxes. If it should be construed to apply only when all of a person's property of every kind including property exempt from execution is sold, its field of operation would be so restricted as to deprive it of practical utility, and the mischief, which it must be presumed the Legislature intended to prevent, would remain. If however, it is held to apply to sales in bulk of all of a class of personal property, such as a stock of goods or a herd of cattle, without retaining sufficient of the stock or herd or other property sold to pay the tax, its reasonable operation is manifest, and the statute should be construed to cover such transactions. Doubtful cases may arise concerning the operation of the statute, but the facts of the present case are fairly within its terms.

It is argued that, because the county treasurer did not issue his warrant at once when the transfer of the goods was made, the goods should not be bound for the tax. The lien, however, is expressly given by the statute and does not rest upon the will of the treasurer. This lien cannot be extinguished by mere delay in enforcing it. The provision for the prompt issuance of the warrant is to

facilitate collection while the property can be found. The collection of taxes cannot be enjoined on account of any mere irregularity nor because of the failure of an officer to perform the duties assigned to him upon the day specified in the statute. *Bank of Garnett v. Ferris*, 55 Kan. 120, 39 Pac. 1042. The purchaser of the goods who took them subject to the lien was not injured by delay in enforcing it. He might have discharged it by making payment, and the statute gave him the right to recover from the party owing the tax.

The tax warrant was for one gross sum, which, it appears from oral evidence, included taxes upon household goods, and perhaps some other personal property, with the taxes upon the stock of goods, the latter being the principal item. The return of the owner made to the assessor was not placed in evidence by either party, and it is now insisted that a valid levy could not be made for the whole sum upon the property in question. The sheriff, however, testified that in making the levy he cut out the tax upon the other property, and levied only for the taxes on the stock of goods. The appellee, therefore, was not prejudiced. A mere irregularity which does not injuriously affect a substantial right cannot defeat the collection of taxes. *Missouri River, F. S. & G. R. Co. v. Morris*, 7 Kan. 210; *Challiss v. County of Atchison*, 15 Kan. 49; *Ryan v. Com'rs of Leavenworth Co.*, 30 Kan. 185, 2 Pac. 156; *Life Association v. Hill*, 51 Kan. 636, 33 Pac. 300. Even if it should appear that through inadvertence or mistake the levy was for more than the true amount of the lien, the owner before resorting to proceedings to prevent collection ought to have paid or tendered the amount actually due on the stock purchased. *City of Lawrence v. Killam*, 11 Kan. 499; *Miller v. Ziegler*, 31 Kan. 417, 2 Pac. 601; *Wilson, Treas., v. Longendyke*, 32 Kan. 267, 4 Pac. 361. While these principles are more frequently illustrated by cases where an injunction is sought it applies with equal force where the levy is treated as a nullity and replevin is resorted to to recover property upon which there is a lien for taxes.

The sheriff was rightfully in possession of the property to satisfy the lien for taxes, and should have been allowed to proceed to make collection. The judgment is reversed, and the cause is remanded for further proceedings in accordance with these views. All the Justices concurring.

(83 Kan. 735)

STOVALL v. ATCHISON, T. & S. F. RY. CO.
(Supreme Court of Kansas. Jan. 7. 1911.)

(Syllabus by the Court.)

RAILROADS (§ 412*) — FENCES — ANIMALS ON TRACK.

Where the road of a railway company which runs through the farm of plaintiff was le-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

gally fenced through the farm, except for a distance of 30 feet, over which the owner built a fence, including gates, for his own convenience, which fence diverged about 15 feet from the right of way and connected at each end with the fence of the railway company, thus leaving a passageway between his fields and also to a private crossing of the railroad, it will be deemed to be a substantial inclosure of the railroad with a fence, within the statute; and the owner cannot recover for the killing of an animal, which passed through a gate on his land, where the only negligence alleged is the failure of the railway company to perform the statutory duty of fencing its road through his farm.

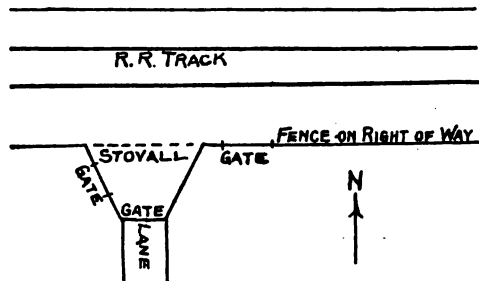
[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1451-1458; Dec. Dig. § 412.*]

Appeal from District Court, Marion County.

Action by O. B. Stovall against the Atchison, Topeka & Santa Fé Railway Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Wm. R. Smith, O. J. Wood, A. A. Scott, and H. S. Martin, for appellant. C. M. Clark, for appellee.

JOHNSTON, C. J. O. B. Stovall brought an action against the appellant to recover damages for running an engine upon and killing a mare of his, which had escaped from his pasture and gone upon the track of the railway company. The negligence alleged was that the railway company failed to inclose its road with a lawful fence, and upon that ground a recovery was had. The following diagram illustrates the situation at appellee's farm, through which the railroad runs:



At the south end of the lane there was water for appellee's stock. On the north end was a private crossing leading to his land on the other side of the track. Upon the left side of the lane was his pasture, and on the right his alfalfa field. As the diagram shows, there is a slight divergence of the railroad fence at the north end of the lane, with three gates arranged for the convenience of the landowner, and which furnish a passageway from one field to another, and from the land to either field, as well as to the private crossing. The fence on the south side of the railroad, except where the di-

vergence occurred, was legal and sufficient, and the bend in the fence at the end of the lane was only 15 feet south of the right of way of the railroad; but it returned to the true line of the right of way after passing a distance of about 30 feet. With the gates closed, the fence was complete on the south side of the track, and except for this slight departure from the right of way was such a fence as the law requires. Appellant does not know who originally built the fence and erected the gates around this irregular piece of ground; but it had been there about nine years, and it was clear from his testimony that it was built and maintained in this way for the convenience and benefit of the landowner, and to enable him to use this short strip of land, about 15 feet wide, as a passage way to his fields and to the crossing.

Now the only wrong that is attributed to the railroad company by the appellee is its failure to perform its statutory duty of fencing its road through appellee's farm, through which the mare entered upon the road. A gate was found to be open, through which the mare probably passed; but no attempt was made to prove that the railway company was responsible for the opening of the gate. These gates, too, came up to the requirements of the law and were provided with secure fastenings. The act which makes the railway company liable for animals killed or wounded by the operation of its engines or cars specifically provides that it shall not apply to a railway company whose railroad is inclosed with a good and lawful fence. In this instance there was a practical inclosure of the railroad by a good and lawful fence. Ordinarily a railway company would have no right to put its fence upon the land of an adjoining owner; but if it deviates a little from the line of the right of way, and builds its fence there with the consent of the landowner, it could hardly be said that the road was unfenced; and where for the convenience of such owner there is a slight departure of the fence from the true line, and it is built and connected with that of the railway company, so that it forms a continuous fence, as in this case, the landowner at least cannot well insist that the railway company has violated its statutory duty, or make that alone the basis of a charge of negligence. No other ground of negligence having been alleged or proven, appellee was not entitled to recover.

The judgment will therefore be reversed, and the cause remanded, with directions to sustain appellant's demurrer to the evidence of appellee. All the Justices concurring.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

(83 Kan. 797)

HARRIS v. BURBERRY et al.

(Supreme Court of Kansas. Jan. 9, 1911.)

1. APPEAL AND ERROR (§ 662*)—TRANSCRIPT OF EVIDENCE—CONCLUSIVENESS.

The stenographer's transcript of the evidence is conclusive on appeal as to what evidence was introduced in the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2850-2852; Dec. Dig. § 662.*]

2. APPEAL AND ERROR (§ 665*)—RECORD—CORRECTNESS.

Where the accuracy of the copies of judgments set forth in the original abstracts on appeal is not questioned, the copies will be taken as correct, and the court on appeal will regard them for whatever use may properly be made of them.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2860; Dec. Dig. § 665.*]

3. APPEAL AND ERROR (§ 1047*)—QUESTIONS REVIEWABLE—EVIDENCE.

The omission to introduce formally in evidence records of judgments relied on is immaterial where the records were treated as in evidence.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1047.*]

Appeal from District Court, Kearny County.

Action by J. M. Harris against Thomas Burberry and another. From a judgment for defendants, plaintiff appealed, and defendants moved, in advance of hearing of the merits, for the settlement of disagreements between the original and counter abstracts. Denied.

John D. Davis and J. M. Harris, for appellant. C. T. Clark and Emery & Emery, for appellees.

PER CURIAM. The appellees ask that in advance of the hearing on the merits the court settle certain disagreements between the original abstract and the counter abstract. In the counter abstract two errors (apparently clerical) of the original abstract in setting out the details of the judgment complained of are corrected, and the contents of the amended answer and the testimony of a witness are set out in greater detail. There is no real dispute as to these matters, and no order with regard thereto is necessary at this time.

The case involves the title to real estate. The defendants relied upon two judgments quieting title. The plaintiff challenged the validity of the judgments upon the ground that they were based on void service. The original abstract shows the proceedings on which the judgments were founded, and says that the records thereof were all introduced in evidence. The counter abstract says that nothing was introduced in this connection except the journal entries of the judgments. The stenographer's transcript of the evidence sustains the latter statement, and must be regarded as conclusive. Therefore the case

will be heard upon the theory that the affidavits for service by publication and other proceedings leading up to the two judgments were not in fact formally offered in evidence. Nevertheless, as the accuracy of the copies of the records as set out in the original abstract is not questioned, they will be taken to be correct, and will be regarded as being before this court for whatever use may properly be made of them. The occasion for such use may arise in two ways. Copies of the briefs presented by both parties in the district court seem to show that the case was argued there as though all the proceedings referred to were before the court. The omission formally to introduce the records was, of course, immaterial if they were treated as though in evidence. Again, the plaintiff asks that although the records may not have been introduced, or considered as introduced, at the trial, that they be admitted here under the statute (Gen. St. 1909, § 6175 [Code Civ. Proc. § 580]), authorizing this court to receive further testimony on appeal. If it is demonstrated by conclusive evidence in this court that the judgments which the trial court held good were in fact void, the language of the new Code seems to justify a reversal, although the decision below may have been in accordance with the evidence there presented. However, no decision upon these matters is made at this time. The effect of the records referred to may be argued upon the final hearing.

The same situation arises with respect to the record of a tax deed which the original abstract erroneously says was introduced in evidence. The case will be heard upon the understanding that such a tax deed was issued and recorded, but not introduced in evidence.

(61 Wash. 626)

CROWDER v. MORPHY et ux.

(Supreme Court of Washington. Jan. 20, 1911.)

1. LIMITATION OF ACTIONS (§ 85*)—ABSENCE FROM STATE—EFFECT.

Under Rem. & Bal. Code, § 226, providing that service of summons may be made upon the defendant personally or by leaving it at the house of his usual abode, with some person of suitable age, etc., the actual whereabouts of a husband is immaterial, so long as he maintains a home at which service may be made, when it appears that his absence was of a temporary or casual nature.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 449-455; Dec. Dig. § 85.*]

2. LIMITATION OF ACTIONS (§ 166*)—EFFECT OF BAR OF PRINCIPAL DEBT—INTEREST.

Though when interest is payable in installments, an independent action may be brought, and where the interest is evidenced by coupon notes, they become independent obligations and fix the time for the running of the statute from the date of their own maturity, yet where the contract is merged in judgment, the interest is a

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

mere incident to the debt, and where the statute of limitations has run against the judgment, interest on the original debt is also barred.

[Ed. Note.—For other cases, see Limitation of Actions, Dec. Dig. § 166.*]

Department 2. Appeal from Superior Court, Pierce County; John A. Shackelford, Judge.

Action by A. S. Crowder against W. J. Morphy and wife. From a judgment for defendants, plaintiff appeals. Affirmed.

John C. Stallcup and J. W. A. Nichols, for appellant.

CHADWICK, J. This action was brought on a judgment entered December 11, 1893, in favor of plaintiff and against defendant W. J. Morphy. No part of the judgment has ever been paid. This action was begun on the 19th day of April, 1907. It is alleged in the complaint that, some time during the year 1897, respondent W. J. Morphy left the state of Washington and became a resident of the city of Chicago in the state of Illinois, that the judgment was taken upon a community debt, and that defendants have accumulated a large amount of property in Pierce county which is properly chargeable with the judgment. The prayer of plaintiff's complaint is for the original indebtedness and accumulated interest, and for equitable relief. The trial judge found that respondents had continued to reside in this state until after the statute of limitations had run, and accordingly gave judgment for the defendants.

The testimony fairly shows that, while respondent W. J. Morphy had business which kept him out of the state of Washington to some extent between the years 1897 and August, 1900, he was in the state a part, if not the greater part, of the time; that he maintained a home at which his wife and children resided at all times, either in Seattle or Tacoma; and that service could have been had under the statute at any time prior to August 15, 1900. Counsel seek to draw a distinction between domicile and residence. While the discussion is engaging, it can have no bearing on this case; the question being fully covered by the statute (section 226, Rem. & Bal. Code). The whereabouts of the husband is wholly immaterial, so long as a home is maintained at which service may be made, when it appears that his absence was of a temporary or casual nature: the better rule being that the statute will operate without the saving clause, if process might be served.

"If the defendant is domiciled or resident within the state, although he may be temporarily absent therefrom, provision is made by our laws by which the plaintiff may commence a personal action against him, in which a judgment may be obtained, which will be binding and conclusive between the

parties to all intents and purposes; and therefore, in such a case, no setting of the right of the plaintiff to commence such suit is necessary." *Sage v. Hawley*, 16 Conn. 100, 41 Am. Dec. 128; *Penley v. Waterhouse*, 1 Iowa, 498; *Blodgett v. Utley*, 4 Neb. 25.

It is further contended that, although the principal debt be barred by the statute, the interest being payable annually under the original contract, appellant should have had judgment for the annual installments of interest accruing within six years prior to August 15, 1900. *Amy v. Dubuque*, 98 U. S. 470, 25 L. Ed. 228, *Koshkonong v. Burton*, 104 U. S. 668, 26 L. Ed. 886, and 25 Cyc. 1103, are cited to sustain the proposition that, where interest is payable in installments, an independent action may be brought, and where the interest is evidenced by coupon notes, they become independent obligations and fix the time for the running of the statute from the date of their own maturity. It is argued that, in principle, these authorities govern here; but this action is brought on the judgment and not on the contract. When the original action was brought, the contract was merged in the judgment, and the interest became a statutory incident only. The statute having run against the judgment, we know of no rule that would save the interest, or any part thereof.

Judgment affirmed.

DUNBAR, C. J., and RUDKIN, MORRIS, and CROW, JJ., concur.

(61 Wash. 662)

WATKINS et al. v. DAVISON.

(Supreme Court of Washington. Jan. 21, 1911.)

1. VENDOR AND PURCHASER (§ 21*)—CONTRACTS—SUFFICIENCY—FORM.

A written receipt showing payment on the purchase price of land, made through the vendor's agent, containing the terms of sale and followed by the vendor's written acceptance, constitutes a valid agreement to sell, though the names of the purchasers were not disclosed.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 25, 26, 89; Dec. Dig. § 21.*]

2. CONTRACTS (§ 10*)—MUTUALITY—VENDOR AND PURCHASER.

Any lack of mutuality in a contract to sell for want of obligation by the purchasers was supplied by their making part payment, tendering timely performance and commencing suit to specifically perform.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 21-40; Dec. Dig. § 10.*]

3. SPECIFIC PERFORMANCE (§ 117*)—PLEADING—DEFENSES.

Fraud, being an affirmative defense, should be pleaded.

[Ed. Note.—For other cases, see Specific Performance, Dec. Dig. § 117.*]

4. SPECIFIC PERFORMANCE (§ 121*)—CONTRACT TO SELL—FRAUD—EVIDENCE—SUFFICIENCY.

Evidence in a suit to specifically perform a contract to convey held insufficient to show

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

fraud by defendant's agent, through which the contract was made.

[Ed. Note.—For other cases, see Specific Performance, Dec. Dig. § 121.*]

Chadwick, J., dissenting.

Department 2. Appeal from Superior Court, Spokane County; J. Stanley Webster, Judge.

Action by J. M. Watkins and others against Anna Davison. Decree for plaintiffs, and defendant appeals. Affirmed.

Frederick W. Dewart and Guy Brockway, for appellant. Danson & Williams, for respondents.

CROW, J. Action by J. M. Watkins, Maud Watkins, his wife, and John Bigham, against Anna Davison, to enforce specific performance of a contract to sell real estate. From a decree in their favor, the defendant has appealed.

Respondents alleged that, on August 12, 1909, the appellant, being the owner of certain real estate in the city of Spokane, entered into a written agreement to convey the same to M. C. Hunter Company, a corporation, agent, as follows: "Spokane, Wash., August 12, 1909. Received of M. C. Hunter Co., agent, \$50.00 as deposit on account of the purchase of Lot 15, Block 70, of Central Addition to Spokane, Washington. Purchase price is \$2,100. Full initial payment to be \$1,000.00 of which the above \$50.00 is a part; balance of initial payment to be made at our office when settlement shall be made, on or before, September 1, 1909; Deferred payments of \$1,100.00 to be paid as follows: On or before eighteen months from Sept. 1, 1909, with interest from Sept. 1, 1909, at 8 per cent. per annum payable semiannually. Purchaser to assume prior incumbrances as follows: None. * * * Purchaser shall have abstract certified down to date for examination. After deal is closed, abstract to remain with selling party until property is paid for, when purchaser shall have the same. It is agreed that the purchaser shall have a clear merchantable title to said property, clear of all incumbrances, except as aforesaid, and in case he shall find any defects in title as it now is, the seller shall have a reasonable time in which to perfect the same, but if it cannot be so corrected, the deposit shall be returned and deal declared off. It is agreed that in case the purchaser fails or refuses to take said property as above outlined, we shall, at our option, retain the above deposit in lieu of services rendered. Money paid by the purchaser may be used in paying off existing incumbrance. This sale is subject to owner's approval. In closing this deal usual legal blanks used by us shall be used. Purchaser shall have contract for warranty deed. Purchaser agrees to take said property, and pay for the same as above outlined. M. C. Hunter Co., Agents. Incorporated.

Per M. C. Hunter. I accept above sale and agree to pay you a commission of _____ per cent. \$110.00. Anna Davison, Owner;" that the agreement was made on behalf of respondents as purchasers; that an abstract was furnished, which disclosed a defect of title for want of the record of certain probate proceedings; that appellant directed M. C. Hunter Company to procure and record a certified copy of the proceedings, which was done; that the initial payment was made and tendered by respondents in accordance with the agreement; that they executed on their part the contract for a warranty deed as therein provided, but that appellant refused to execute the same, or complete the sale. Appellant answered with denials only. The trial court made findings in accordance with the allegations of the complaint.

There is some contention in the briefs, regarded by us as immaterial, relative to the proper location and purpose of the words "purchaser agrees to take such property and pay for the same as above outlined," which appear in the receipt. These words are followed in the original by blank lines, manifestly intended for signatures of the purchasers. M. C. Hunter Company did not at first disclose the names of respondents to appellant, and the lines remained blank. The receipt upon its face, however, shows that the offer to buy was made through M. C. Hunter Company on behalf of an undisclosed purchaser, and that the offer was accepted in writing by appellant, which made it her complete and valid agreement to sell. She now contends that the receipt was an option only; that no mutuality of contract existed, and that her unilateral acceptance did not bind the purchasers. Respondents made the payment of \$50, thereafter tendered timely payment and performance, have at all times been ready, willing, and able to close the deal, and commenced this equitable action on September 15, 1909, to compel specific performance. These acts on their part supplied any lack of mutuality. *Western Timber Co. v. Kalama, etc., Co.*, 42 Wash. 620, 85 Pac. 338, 6 L. R. A. (N. S.) 397, 114 Am. St. Rep. 137; *Connor v. Clapp*, 42 Wash. 642, 85 Pac. 342.

It will be observed that the receipt for the \$50 earnest money was executed by M. C. Hunter Company, as agent, and that appellant as owner appended thereto her written acceptance of the sale. The evidence discloses that she had listed the property with M. C. Hunter Company, as her agent, for sale at \$2,100; that shortly thereafter the respondents offered \$2,050, advancing \$50 in cash with the offer; that M. C. Hunter Company drew the receipt above set forth, reciting a sale for \$2,050, and communicated the offer to appellant who refused to accept the same, but did agree to sell for \$2,100;

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

that this modification was accepted by respondents, and that the purchase price was changed in the receipt to correspond therewith; that M. C. Hunter Company thereupon delivered its \$50 check to appellant, who, without demanding the names of the purchasers, signed the acceptance and delivered her abstract of title for examination; that at her request the title was promptly perfected; that M. C. Hunter Company made certain disbursements for extending the abstract, recording probate papers, and paying taxes and special assessments; that respondents delivered their check to M. C. Hunter Company for \$950, in settlement of the remainder of the initial payment of purchase money; that they as vendees executed a contract of sale calling for a warranty deed in accordance with the agreement; that M. C. Hunter Company, at their request and for the purpose of closing the deal, tendered the money and contract to appellant, who refused to execute the contract or complete the sale; that M. C. Hunter Company did not represent respondents, the purchasers, in any manner other than appeared on the face of the receipt, their identity being then undisclosed to appellant; and that M. C. Hunter Company did not receive, nor was it at any time to receive directly or indirectly remuneration or profit from the respondents or from any person other than the appellant who had agreed to pay it a commission on the sale. We do not understand that appellant now denies her written acceptance of the contract, or that she denies that she had an opportunity to read and learn its contents; that it was made to her by M. C. Hunter Company; that the \$50 check was left with her; that she delivered an abstract of title to M. C. Hunter Company, or that the initial payment was tendered her in accordance with the terms of the receipt, from which tendered payment M. C. Hunter Company deducted its commission, and the disbursements it had made at her request. Appellant's contention seems to be that she has in some manner been defrauded by M. C. Hunter Company, her selling agent; that, in the language of her counsel, it has attempted to serve two masters. She testified that she told the agent she would sell for \$2,100 to \$2,200; and contends that it originally offered the lots to respondents for \$2,050; that M. C. Hunter Company did not disclose the names of the purchasers, but as her agent executed the receipt to M. C. Hunter Company as agent for the purchasers; that she did not at the time know a check for \$50 earnest money had been left with her, when she accepted the sale, she thinking the check was a receipt for her abstract of title. She now resorts to the defense of fraud, although no such defense was pleaded in her answer. Respondents objected to evidence which she offered for the purpose of showing

fraud, which defense when pleaded could only be available to avoid a contract already executed. By her answer she had denied its execution. Fraud being an affirmative defense should be pleaded. This being an equitable action, the trial judge was very liberal in admitting evidence offered by appellant, upon which she relied to show fraud, and were it to be conceded that she was entitled to that defense without pleading it, we nevertheless conclude that she has failed to sustain it. She herself testified that a duplicate copy of the written receipt was delivered to and left with her, by M. C. Hunter Company, and that about September 1, 1909, after some delay had occurred in perfecting the title, she informed M. C. Hunter Company that she did not care to close the deal. If there had been any fraud or deceit on the part of M. C. Hunter Company, she must have been aware of it on the date last mentioned. The original check for \$50 which was given her by M. C. Hunter Company on August 12, 1909, when she first ratified the sale, is attached to the statement of facts as an exhibit, and shows that she indorsed and cashed it on September 7, 1909, several days after the date on which she says she attempted to repudiate the agreement. There is no evidence that she offered to return the check or its proceeds to Hunter Company. The evidence unquestionably shows that the sale had been made to respondents by M. C. Hunter Company as appellant's agent, on August 12, 1909. It also appears that respondents insisted on closing the deal, and that M. C. Hunter Company, at appellant's instance, perfected the title, and made disbursements for expenses, taxes, and assessments. We see no impropriety on the part of M. C. Hunter Company in making tender to appellant and requesting her to execute the contract for a warranty deed in accordance with the terms of the receipt, after the purchase money and the proposed contract had been tendered and delivered to it as appellant's agent for that purpose. In view of the attitude of appellant and her continued opportunities for informing herself as to the terms of the sale, we find no improper, unconscionable, or inconsistent conduct on the part of her selling agent, sufficient to deprive the respondents of their right to a specific performance.

The judgment is affirmed.

DUNBAR, C. J., and RUDKIN and MORRIS, JJ., concur.

CHADWICK, J. In my opinion the Hunter Company was dealing on its own account and not for another, and that appellant should not be bound to her contract over her protest and attempt to rescind.

(61 Wash. 623)

STATE ex rel. BRUNN v. STATE BOARD OF MEDICAL EXAMINERS.

(Supreme Court of Washington. Jan. 20, 1911.)

MANDAMUS (§ 4*)—RIGHT TO REMEDY—ADEQUATE REMEDY BY APPEAL.

Rem. & Bal. Code, § 8399, expressly providing for an appeal from an order of the State Board of Medical Examiners refusing a license to practice medicine, and providing for a trial de novo on appeal, which would secure as adequate a remedy as could be obtained by mandamus, one whose application for a license has been refused by the board cannot after expiration of the statutory period for an appeal obtain relief by mandamus.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 9-34; Dec. Dig. § 4.*]

Department 2. Appeal from Superior Court. King County; Wilson R. Gay, Judge.

Mandamus by the State on relation of Christian Brunn against the Board of Medical Examiners to compel issuance of a license to practice osteopathy. From an order of dismissal, relator appeals. Affirmed.

Pruyn, Streff & Hoeffler and Milo A. Root, for appellant. Howard G. Cosgrove and Higgins, Hall & Halverstadt, for respondent.

CROW, J. Christian Brunn applied to the superior court of King county for a writ of mandamus directed to the Board of Medical Examiners of the state of Washington, compelling it to issue a license to him to practice osteopathy. In his amended affidavit he alleged that for more than seven years prior to March 18, 1909, he had been continuously treating the sick and afflicted under the system and method of osteopathy, within this state, being located at and residing in Ellensburg for more than three years last past; that more than two weeks prior to July 6, 1909, he made due application to the Board of State Medical Examiners for a license to practice osteopathy, furnishing all required evidence; that the board refused him a license by its decision filed and entered in the following words: "The Board of Medical Examiners of the state of Washington in regular session having duly considered the application of Christian Brunn for a license from said board to practice osteopathy in said state, does hereby refuse to grant said license for the reason that the said Christian Brunn did not file any osteopathic diploma with this board or its secretary as provided by law. Dated this 10th day of July, 1909." That the relator was not by law required to file any such diploma, and that no other reason for refusing a license was assigned by the board. To this amended affidavit the board interposed a demurrer, which was sustained. Thereupon the relator refused to plead further, and has appealed from an order dismissing his application.

It is conceded that no appeal was taken from the order of the board refusing the license, and the controlling questions now be-

fore us are whether the appellant had a complete and adequate remedy by appeal from the order of the board, and if he had, whether mandamus will lie to compel the issuance of a license. There can be no doubt but that the first question must be answered in the affirmative. The right of appeal was expressly granted by section 8399, Rem. & Bal. Code, the same to be taken within 30 days after the filing of the decision of the board. This court has sustained such right of appeal. In *re Littlefield*, 112 Pac. 234.

It is a well-established doctrine, repeatedly recognized and announced by this court, that mandamus will not lie in favor of a relator who has an adequate remedy at law, by appeal or otherwise. Section 8399, supra, provides for a trial de novo, on appeal from the order of the board, and such a trial de novo would secure to a complaining party as complete an investigation and as adequate a remedy as could possibly be obtained in a mandamus proceeding. It is manifest that the appellant was afforded an adequate remedy by appeal, had he sought the same within the statutory period. This being true, he cannot now obtain relief by mandamus. In *State ex rel. Young v. Denney*, 34 Wash. 56, 74 Pac. 1021, this court, citing numerous authorities, said: "It is urged that an appeal will not afford a sufficiently speedy and adequate remedy, for which reason review by certiorari is sought. It has been the uniform rule of this court to deny the writ of certiorari, and the other extraordinary writs of mandamus and prohibition, when it appeared that there was an adequate remedy by appeal. It has also been determined that the delays and annoyances incident to an appeal do not affect the adequacy thereof." See, also, *State ex rel. Brown v. McQuade*, 36 Wash. 579, 79 Pac. 207; *State ex rel. Miller v. Superior Court*, 40 Wash. 555, 82 Pac. 877, 2 L. R. A. (N. S.) 395, 111 Am. St. Rep. 925; *State ex rel. Gillette v. Clausen*, 44 Wash. 437, 87 Pac. 498; *State ex rel. La Furgey v. Superior Court*, 47 Wash. 154, 91 Pac. 639.

The order of the board refusing the license was made and entered on July 10, 1909. Appellant in his brief concedes that more than 60 days thereafter he filed his original affidavit in this proceeding to obtain a writ of mandamus. His time for appeal had then expired. He now contends that as no remedy by appeal now remains to him, he should obtain a writ, insisting that his license was illegally refused. The adequacy of his remedy by appeal cannot be affected by his failure to avail himself of such remedy within the statutory period. In *State ex rel. Washington D. & I. Co. v. Moore*, 21 Wash. 629, 59 Pac. 505, we said: "The order of the court, then, being appealable, under the decisions of this court in *State ex rel. Light Co. v. Superior Court*, 20

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Wash. 502, 55 Pac. 933, and State ex rel. Vincent v. Superior Court, filed November 13, 1899, 21 Wash. 571 [58 Pac. 1066], the action for mandamus will not lie, whether the court was acting with or without jurisdiction. Of course, the fact that the appeal is not available to the relator now cannot be taken into consideration, as it was through his fault that the appeal to which he was originally entitled failed."

The judgment is affirmed.

DUNBAR, C. J., and RUDKIN, CHADWICK, and MORRIS, JJ., concur.

(61 Wash. 636)

STATE v. JAHNS.

(Supreme Court of Washington. Jan. 20, 1911.)

1. INDICTMENT AND INFORMATION (§ 110*)—REQUISITES AND SUFFICIENCY—"MURDER IN FIRST DEGREE."

Under Rem. & Bal. Code, § 2392, defining "murder in the first degree" as the killing of a human being with the premeditated design to effect death, an information alleging that accused did, with a premeditated design to effect her death, kill and murder a specified person, is sufficient, without alleging that the person died.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 289-294; Dec. Dig. § 110.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4637-4641; vol. 8, p. 7727.]

2. JURY (§ 142*)—COMPETENCY—OBJECTION—WAIVER.

Where a juror in a murder trial stated that he believed a murder had been committed, but was not so biased that his belief could not be changed by testimony, and was challenged by the defendant, but the challenge was denied, and afterwards the trial judge gave defendant an opportunity to renew the challenge and reject the juror, but the defendant did not avail himself of the opportunity and went to trial, the error, if any, was waived.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 500, 630; Dec. Dig. § 142.*]

3. JURY (§ 51*)—JUROR—TAXPAYER.

Under Rem. & Bal. Code, § 94, providing that an elector and taxpayer of the state of Washington is a qualified juror, a juror need not be a taxpayer within the county in which he may be called.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 257; Dec. Dig. § 51.*]

Department 2. Appeal from Superior Court, Stevens County; D. H. Carey, Judge.

Frederick William Jahns was convicted of murder, and he appeals. Affirmed.

H. N. Martin and Jesseph & Grinstead, for appellant. H. G. Kirkpatrick and Merritt, Oswald & Merritt, for the State.

MORRIS, J. Appeal from a conviction of murder in the first degree. The first assignment of error is insufficiency of the information in that it does not allege that the person upon whom the crime is charged to have been committed died as a result there-

of. The language of the information touching this point is: "Did then and there unlawfully and feloniously, and with a premeditated design to effect her death, kill and murder Agnes Jensen, by then and there unlawfully and feloniously and with a premeditated design to effect the death of the said Agnes Jensen as aforesaid, beating and mortally wounding the said Agnes Jensen." Rem. & Bal. Code, § 2392, defines murder in the first degree, in part, as follows: "The killing of a human being, unless it is excusable or justifiable, is murder in the first degree when committed either (1) with a premeditated design to effect the death of the person killed." The information followed the statute in defining the crime charged, and was sufficient.

The information is also attacked upon the ground that it is verified upon information and belief. We do not so find it. The verifying clause is "that the foregoing information is true."

The other assignments are in relation to jurors. Juror Field was challenged, upon the ground that he had a fixed opinion as to the guilt or innocence of the accused, requiring evidence to remove. The record discloses that the juror was questioned touching any opinion he might have as to the guilt or innocence of the defendant, based upon what he had heard or read; to which he answered, he had none. He was then asked if he believed a woman was murdered in Stevens county on October 28th. He answered, "Yes, I do believe that;" and further answered that it would take evidence to remove that belief from his mind; that such an opinion was not a fixed opinion or belief, but "is an impression," which would readily yield to the evidence, and that he could render as impartial a verdict as if he had never read of the case before. Thereupon, the state resisting, the court denied defendant's challenge to the juror upon the ground of actual bias. Subsequently the state, doubtless desiring to eliminate any possibility of error from the case, withdrew its opposition to the challenge, and the court then offered to permit the defense to again exercise its challenge to this juror, if desired, which offer the defense refused to avail itself of, and would only answer, "We refuse to say whether we do or not." Whereupon the trial proceeded with the juror in the box; the defense refusing to again challenge the juror for cause, or to exercise a peremptory challenge upon him. We find no error in this situation. If the first ruling of the court was wrong, it was withdrawn for the benefit of defendant, and in refusing to take advantage of the court's ruling and interpose a challenge to the juror, any error in the first ruling was waived and cannot now be taken advantage of.

It is next urged that Juror Warner was not a qualified juror, in that it appeared by affidavit upon motion for a new trial that he was not a taxpayer in Stevens county. The examination of the juror on his voir dire disclosed that he was an elector and taxpayer in the state of Washington, paid no taxes on real property, but did pay taxes on personal property. Under Rem. & Bal. Code, § 94, "An elector and taxpayer of the state of Washington" is a qualified juror; and it appearing that the juror did pay taxes within the state, he was qualified. There is no requirement that a juror, to be qualified as such, must be a taxpayer within the county in which he may be called. The payment of taxes within the state is sufficient.

Finding no error, the judgment is affirmed.

DUNBAR, C. J., and RUDKIN, CROW, and CHADWICK, JJ., concur.

(61 Wash. 629)

STATE v. LETICA.

(Supreme Court of Washington. Jan. 20, 1911.)

1. INDICTMENT AND INFORMATION (§ 189*)—INCLUDED OFFENSES—ASSAULT IN SECOND DEGREE.

An information that accused unlawfully and feloniously with intent to kill a certain person by means likely to produce death, namely, by stabbing and wounding him with a knife, etc., is broad enough to comprehend the included crime of assault in the second degree; the charge being equivalent to if not comprehensive of an assault with intent to do grievous bodily harm, and a charge that the weapon was likely to produce bodily harm within Rem. & Bal. Code, § 2414, subd. 4, making one guilty of assault in the second degree who under circumstances not amounting to assault in the first degree shall willfully assault another with a weapon likely to produce bodily harm.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 582-595; Dec. Dig. § 189.*]

2. CRIMINAL LAW (§ 1172*)—APPEAL AND ERROR—REVIEW—INSTRUCTIONS.

Where there are two instructions, the one opposed to the other in principle, and submitting two conflicting theories of law, the result may be such as to require a reversal, but where an instruction, considered as a whole, and in the light of other instructions, fairly states the law, an appellate court will not detach a sentence or paragraph which when considered alone might be prejudicial and reverse the case for that reason.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3154-3163; Dec. Dig. § 1172.*]

Department 2. Appeal from Superior Court. Pierce County; W. O. Chapman, Judge.

Mat Letica was convicted of an assault in the second degree, and he appeals. Affirmed.

R. L. Sherrill and Gordon & Askren, for appellant. J. L. McMurray, A. O. Burmeister and F. G. Remann, for the State.

CHADWICK, J. Defendant was charged with the crime of an assault in the first degree. The charging part of the information is as follows: "That the said Mat Letica, in the county of Pierce, in the state of Washington, on or about the 19th day of June, nineteen hundred and ten, then and there being unlawfully and feloniously did then and there with intent to kill one Paul Viskich, by means likely to produce death, namely, by stabbing and wounding him, the said Paul Viskich, with a knife." From a verdict and judgment of conviction of assault in the second degree, the defendant has appealed, and, by timely exception to the instructions, has raised the following questions for our decision:

(1) That the information is not sufficient to charge an assault in the second degree, in that it does not charge that "grievous bodily harm" was inflicted, as required by subdivision 3, § 2414, Rem. & Bal. Code, nor that the assault was a willful assault with a "weapon or other instrument or thing likely to produce bodily harm," as required by subdivision 4 of the same section. The case is brought here on a short record, and we cannot say that the defendant is not guilty of the crime of assault in the second degree, as was held in the case of State v. Kruger, 111 Pac. 769, which is cited and relied on by appellant. The information in this case seems to us to be clearly broad enough to comprehend the included crime of assault in the second degree. The charge of assault with intent to kill by stabbing with a knife, an instrument likely to produce death, is equivalent to, if not comprehensive of, an assault with intent to do "grievous bodily harm," and a charge that the "weapon or other instrument or thing [was] likely to produce bodily harm."

(2) The cutting was admitted, and the plea of self-defense interposed. When instructing the jury upon this defense, the court said, "Unless you first find that the use of the weapon or means likely to produce death shall justify either the necessity or apparent necessity to preserve his own life," etc., the plea should be disregarded. It is admitted that, in other instructions, the law was correctly given to the jury, but that line of authority holding that "it is no answer to the objection that an erroneous instruction was given, for the prosecution to show that in another part of the charge another instruction was given in which the law was correctly stated," is cited to sustain the charge of error. Where there are two instructions, the one opposed to the other in principle and submitting two conflicting theories of law, the result may be such as to require a reversal; but where an instruction is given, as in this case, which, considered as a whole and in the light of other instructions, fairly

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

states the law, this court has adopted the rule that it will not detach a sentence or paragraph which, when considered alone, might be prejudicial, and reverse the case for that reason. The use of the expression "justified by necessity" was inapt, but under the rule declared in *Hoseth v. Preston Mill Co.*, 49 Wash. 682, 96 Pac. 423, and *Engelking v. Spokane*, 110 Pac. 25, will not be held to be error warranting a reversal of the case.

(3) It is finally contended that the court, in instructing the jury as to the credit to be given to the testimony of the witnesses, singled out and made the testimony of appellant unduly prominent. The instruction complained of is unnecessarily long, and bears the vice of needless repetition. But passing upon it in the abstract, unaided by the light the evidence might throw upon it, we are unwilling to say it was prejudicial as a matter of law. An instruction of somewhat the same character was allowed to pass the test of the law. *State v. Melvern*, 32 Wash. 7, 72 Pac. 489.

Judgment affirmed.

DUNBAR, C. J., and RUDKIN, MORRIS, and CROW, JJ., concur.

(61 Wash. 614)

PETTICREW et al. v. GREENSHIELDS.

(Supreme Court of Washington. Jan. 17, 1911.)

1. ADVERSE POSSESSION (§ 83*)—GOOD FAITH IN ASSERTION OF TITLE—SUFFICIENCY OF EVIDENCE.

In a suit to quiet title, evidence held sufficient to show that the plaintiffs when taking a conveyance on which they relied as color of title had actual knowledge of a previous unrecorded conveyance to the defendant's grantor, and that their own grantor had no title or right to convey the land in suit, and hence that plaintiffs' color of title was not asserted in good faith.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 503; Dec. Dig. § 85.*]

2. ADVERSE POSSESSION (§ 84*)—STATUTORY REMEDIES TO DETERMINE ADVERSE CLAIMS—TITLE OF PLAINTIFF—"GOOD FAITH."

Section 788, Rem. & Bal. Code, provides that seven years' actual possession of land under claim and color of title made in good faith with payment of all taxes assessed on the land shall vest title according to the purport of the paper title. Plaintiffs, at the time of taking of a quitclaim deed, knew that defendant's grantor was the owner under a previous unrecorded deed, and that their own grantor had no title or right to convey the land. Held, that plaintiffs' possession was not in good faith within the meaning of the statute, and hence did not ripen into title by seven years' possession with payment of taxes.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 489-500; Dec. Dig. § 84.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3117-3121; vol. 8, p. 7672.]

3. ADVERSE POSSESSION (§ 23*)—VACANT OR UNOCCUPIED LAND—CHARACTER OF POSSESSION.

Where a tract of 640 acres was wholly unoccupied and unimproved, the occasional taking of firewood from it for domestic use is not such an act of adverse possession as to indicate that the parties hauling the wood were claiming title to the tract of land.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 112, 113; Dec. Dig. § 23.*]

4. DEEDS (§ 208*)—EVIDENCE—WEIGHT AND SUFFICIENCY OF EVIDENCE.

In an action to quiet title, evidence held sufficient to show that the defendant's grantor accepted and ratified a deed of the land procured for him prior to the conveyance under which the plaintiffs claimed, although he did not actually receive such deed.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 631; Dec. Dig. § 208.*]

5. QUIETING TITLE (§ 29*)—LIMITATIONS—LACHES—EQUITIES.

The defendant intervened within the period fixed by statute in a suit to quiet title asserting a right to the whole tract of land in dispute, and the plaintiffs claimed under their possession and payment of taxes and under a conveyance constituting color of title, but which was taken by them at a time when they had actual knowledge of a prior unrecorded conveyance to defendant's grantor. Held, that the equities involved did not call for the exercise of that discretion of a court of equity to refuse to enforce claims not technically barred by statutes of limitation.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 63; Dec. Dig. § 29.*]

Department 1. Appeal from Superior Court, Lincoln County; Wm. A. Huneke, Judge.

Suit to quiet title by A. J. Petticrew and another against Belle Greenshields. Judgment for the defendant, and the plaintiffs appeal. Judgment affirmed, with directions to allow respondent 90 days from the filing of the remittitur upon this decision in the superior court to pay the sums awarded to appellants by that court.

H. J. Hilschman, for appellants. Sessions & Warren and Mark F. Mendenhall, for respondent.

PARKER, J. This is a suit to quiet title to a section of land in Lincoln county. It was originally commenced by A. J. Petticrew and Anna B. Hamilton as plaintiffs against Charles Greenshields and others as defendants. Before the trial Anna B. Hamilton died, and prior to her death she had conveyed her interest in the land to her husband, W. F. Hamilton, who was substituted as plaintiff in her place. The defendant Charles Greenshields conveyed his interest in the land before the trial to his daughter, Belle Greenshields, when she intervened, claiming to be the sole owner of the land. This controversy is now being waged between A. J. Petticrew and W. F. Hamilton, each claiming to be the owner of an undivided half of the land, and Belle Green-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

shields, claiming to be the sole owner of the land. All questions touching the present rights of the other parties to the cause have been eliminated. A trial upon the merits resulted in a decree in favor of the intervenor, Belle Greenshields, decreeing her to be the owner of the land and quieting her title thereto as against the claims of the plaintiffs, upon condition, however, that she pay to the plaintiffs within 90 days from March 4, 1910, certain sums found to have been paid out by them and Anna B. Hamilton on account of purchase price of the land and taxes. From this decree the plaintiffs have appealed.

The material facts upon which the rights of the parties depend may be summarized as follows: Charles Greenshields came to Lincoln county from Michigan in the fall of 1888; his object being to purchase land. In November of that year he acquired by assignment from one Weaver a contract for the purchase of this land from the Northern Pacific Railway Company, the first payment only having been made thereon. He then returned to Michigan, and came back to Lincoln county in February, 1889. Soon thereafter he was joined by Anna B. Monarch, who lived with him there as his wife, and became there known as Mrs. Greenshields, and some years later became Anna B. Hamilton, the wife of appellant Hamilton. Greenshields and Mrs. Monarch lived on another tract of land in Lincoln county, which had been bought in her name. This is referred to by some of the witnesses as "her place" or "the home place." When they went to the home place to live, the appellant Petticrew went there to work for Greenshields. In the fall of 1889 Greenshields and Mrs. Monarch had a falling out, when he went away and never returned. Appellant Petticrew stayed and worked for Mrs. Monarch for several years thereafter. Mrs. Monarch conducted her farming business in the name of Anna B. Greenshields, and appellant Petticrew acted to a considerable extent as her agent, attending to the marketing of crops, depositing proceeds thereof in the bank at Davenport, and even signing her name to checks upon the bank. One C. C. May was the cashier of the bank. He looked after some interests of Greenshields after he went away, and was also a friend and business advisor of Mrs. Monarch. In June, 1891, May paid to the railway company the balance due upon the land contract, when the railway company issued a deed therefor in Greenshields' name, delivering it to May. This deed was not recorded until 1907. In the meantime the bank had become insolvent and passed into a receiver's hands, and May became a fugitive from justice. The deed was found thereafter among the bank's papers, and recorded at the instance of Greenshields. Some correspondence between May and Greenshields about the time of and after the final payment to the railway com-

pany by May convinces us that May made this final payment for Greenshields. Whether with funds of his own or with funds of Greenshields is not clear. In any event, he then informed Greenshields that he had settled with the railway company, had received "the papers," evidently meaning the deed, and that he would soon send a statement. Greenshields appears to have made efforts to procure a settlement with May thereafter, but was never able to do so. Prior to the spring of 1899, the land was wholly unimproved and wholly unoccupied. No physical use had ever been made of the land by any one, save appellant Petticrew had occasionally hauled some firewood from it for Mrs. Monarch for domestic use. The taxes accruing on the land prior to 1899 were paid either by May or the respondent. These payments we think were made for Greenshields. On June 23, 1899, May executed and delivered to Mrs. Monarch a quitclaim deed for the land reciting a consideration of \$1. It is claimed that she then paid him \$665 for it. This deed is relied upon by appellants as constituting their color of title. Under it and subsequent conveyances from Mrs. Monarch, they claim that she and they have held the physical possession of the land, claiming title thereto in good faith, and paid taxes thereon for a sufficient length of time to perfect their title thereto under the seven-year statute of limitations. At about the time of acquiring this deed, the land was fenced by appellant Petticrew for Mrs. Monarch; he being then still in her employ. It was thereafter used for pasture and a considerable portion of it was cultivated, and crops raised on it by Petticrew for Mrs. Monarch and himself; she having deeded to him an undivided half interest therein. The use and possession of the land has, since June, 1899, been continuous in Mrs. Monarch, who later became Mrs. Hamilton, and appellants. Since June, 1899, the taxes have been paid by Petticrew or Mrs. Hamilton. It is clear that Petticrew knew that Greenshields owned the land at the time of and prior to the giving of the quitclaim deed by May to Mrs. Monarch. He not only knew this from his conversations with May at that time, but he evidently knew it from his acquaintance and association with Greenshields some years before. The knowledge which Mrs. Monarch had of Greenshields' interest in the land at the time she received the quitclaim deed from May in June, 1899, does not appear by direct and positive evidence; but it seems to us there is sufficient evidence of a circumstantial nature to warrant the conclusion that she did then know of Greenshields' title to the land. Let us notice some of these circumstances. We have noticed that Petticrew was acting as agent for Mrs. Monarch to a considerable extent. He marketed her crops, received and deposited the money therefor, and even paid out money by signing checks for her. The talk he had with May in which

he admitted that he learned of Greenshields' ownership of the land evidently occurred on the day that May gave the quitclaim deed to Mrs. Monarch. He does not seem to remember whether or not she was present at that conversation, but his testimony renders it highly probable that she was present and learned all that he did at that time as to Greenshields' title, if she did not know it already. Petticrew testified on direct examination in part, about this conversation, as follows: "By Mr. Hilschman: Q. Did you say anything further at that time to Mr. May about the payments on the land? A. When they made final payments and made this deed, why she wanted him to send that deed to Greenshields, and have it signed to her, which he said he did, and he wrote back here, and said that he would not sign it unless she paid him his first payment back. Q. Now you know this of your own knowledge? A. Yes. * * * Q. This is what May told you? A. Yes. * * * Q. Where were you at the time this conversation took place in which Mr. May told you there was a deed to Greenshields? A. I was in May's bank. Q. Was Mrs. Monarch there? A. I don't remember as she was. Q. Did he say anything more than just tell you there was a deed there from the railroad to Greenshields? A. He said he would sign the deed, provided she paid this payment that he had paid, and she said she would not do it unless— * * * Mrs. Monarch said she would not pay that back because her money made the first payment. Q. She said this to May? A. She said it to May and said it to me, and May had told me that. Q. May had told you too? A. Yes. Q. Was that the reason you said a moment ago you thought the land belonged to Mrs. Greenshields? A. Yes. Q. Did May say anything as to whether or not the deed to Greenshields had been recorded? A. He said it had never been recorded. Q. Did he say why not? A. No; he did not. Q. Did he tell you why he happened to have it? A. He said because there were several payments, and the deed was to go to him. When the railroad deed was issued, he got it, and he said he had an equity of it at that time." On cross-examination Petticrew testified in part as follows: "A. I brought the checks into the bank, and Mrs. Greenshields was there. Q. Mrs. Greenshields was there? A. She was there and got the deed. Q. Was Mrs. Greenshields there when you took that money there? A. She certainly was. Q. Mrs. Monarch? A. Yes. Q. Didn't you say a moment ago that she was not there when you brought the money for Mrs. Greenshields and put it in the bank. She was in there at that time? A. She was at the bank. * * * Q. You say now that Mrs. Monarch was there? A. On the date she got the deed. Q. I mean the day you sold the crop you testified about a while ago? A. The same date." The intimate relations existing between Mrs. Mon-

arch and Greenshields after he had acquired the contract for this land also indicates that she knew of his claim to it. Petticrew and Mrs. Monarch may have had some reason for believing that May had some claim upon the land to secure the repayment of money advanced by him for Greenshields, but we cannot escape the belief that they both knew that May had no title to or right to convey the land as he then attempted to do by the quitclaim deed to Mrs. Monarch.

The principal contention of learned counsel for appellants is that they have acquired title to this land by actual possession under claim and color of title made in good faith, under the seven-year statute of limitations, which provides: "Every person in actual, open and notorious possession of lands or tenements under claim and color of title, made in good faith, and who shall for seven successive years continue in possession and shall also during said time pay all taxes legally assessed on such lands or tenements, shall be held and adjudged to be the legal owner of said lands or tenements, to the extent and according to the purport of his or her paper title." Section 788, Rem. & Bal. Code. It may be conceded that the quitclaim deed from May to Mrs. Monarch under which appellants claim constitutes upon its face color of title, and that the possession thereunder and the payment of taxes has extended over the period of seven years. The only remaining question under this contention, then, is that of the good faith of Mrs. Monarch and Petticrew in acquiring the quitclaim deed from May and making their claim of title thereunder. This question depends upon the knowledge possessed by them at the time of procuring this deed on June 23, 1899, touching the right and title of the real owner of the land at that time. We have seen that Greenshields was then the owner, that May had no right whatever to convey the land, and that Mrs. Monarch and Petticrew then knew these facts. This renders the law of this branch of the case comparatively a simple matter. In the case of *Brodack v. Morsbach*, 38 Wash. 72, 74, 80 Pac. 275, 276, discussing this seven-year statute, we said: "While under the general statute of limitations the elements of good faith may not enter into the claim of the party holding adversely, yet the appellants are claiming under a special statute which makes the bona fides of their claim a prerequisite to a recovery. Under this statute, a mere notice of an adverse claim, which the party in possession believes in good faith to be ill founded, will not bar a recovery, but when, as in this case, the parties claiming by adverse possession have actual notice that there is an adverse claim to the property, or an interest therein, and that such claim is superior and paramount to the claim or interest which they acquire under their paper title, their possession is not 'under claim and color of title, made in good faith.' Arnold

v. Woodward, 14 Colo. 164, 23 Pac. 444; *Latta v. Clifford* [C. C.] 47 Fed. 614; *Hunt v. Dunn*, 74 Ga. 120; *Templet v. Baker*, 12 La. Ann. 658." *May v. Sutherland*, 41 Wash. 609, 84 Pac. 585; *Compton v. Newton*, 129 Ga. 619, 59 S. E. 270, 15 L. R. A. (N. S.) 1248, note, 88 Am. St. Rep. 716, note. We are of the opinion that appellants' claims to this land are not made in good faith within the meaning of this statute, and hence have not ripened into title, though their possession and payment of taxes appears to have covered a period of more than seven years.

Some contention is made that appellants have acquired title by adverse possession under the 10-year statute. But clearly 10 years did not elapse from the commencement of the actual physical possession of Mrs. Monarch to the filing of respondent's complaint in intervention, which for the purpose of this inquiry may be considered the commencement of her action to recover the land. The exercising of the alleged acts of ownership by Petticrew and Mrs. Monarch prior to the spring of 1899 about the date of the quitclaim deed from May in no event consisted of anything but an occasional hauling of wood for domestic use from the land. This was clearly not such an act of adverse possession as to indicate that they were claiming title to this large tract of land consisting of 640 acres.

It is contended that Greenshields never accepted the deed from the railway company, and for that reason never acquired title to the land. We think the relationship existing between May and Greenshields fully warrants the conclusion that May procured the deed for Greenshields, that Greenshields ratified May's acts in procuring the deed, and thereafter tried to procure a statement from and settle with May on account of the money paid by May to the railway company.

It is contended that Greenshields and his daughter, the respondent, have been guilty of such laches in asserting their right to this land as to preclude recovery in this action. We are unable to see any sound reason for the application of the doctrine of laches to this controversy. The Legislature has fixed the limit of time by statutes of limitation within which rights may be asserted, such as respondent here claims by her intervention. The period so fixed by statute had not expired when she intervened. The equities here involved do not in our opinion call for the exercise of that discretion of a court of equity sometimes exercised in its refusal to enforce claims which may not be technically barred by statutes of limitation.

On the question of the amount of money required by the decree to be paid to appellants by respondent on account of purchase price paid by Mrs. Monarch to May, and on account of taxes paid since then, we think the learned trial court has done them full

justice, especially in view of the use which Petticrew and Mrs. Monarch had of the land for several years. We are of the opinion that the rights of the parties have been properly determined. The judgment is affirmed, with directions to allow respondent 90 days from the filing of the remittitur upon this decision in the superior court to pay the sums awarded to appellants by that court.

RUDKIN, MOUNT, GOSE, and FULLERTON, JJ., concur.

(61 Wash. 651)

LASITYR v. CITY OF OLYMPIA.

(Supreme Court of Washington. Jan. 20, 1911.)

1. APPEAL AND ERROR (§ 1039*)—HARMLESS ERROR—PLEADINGS—RULINGS—RULINGS ON PLEADINGS.

Where the defendant municipality in an action for injuries received by reason of a defective street pleaded that the street in question had been closed to travel, and that notices to that effect were disregarded by the plaintiff who was a trespasser when injured, and, on the plaintiff's failure to reply thereto, moved for a judgment on the pleadings, and it appeared that the case had been fully tried on the merits, that no competent testimony had been rejected, and no incompetent testimony received because of pleadings, the error, if any, in denying the motion, was not prejudicial.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 1039.*]

2. JURY (§ 51*) — COMPETENCY OF JURORS — STATUTORY PROVISIONS—"TAXPAYER."

Under Rem. & Bal. § 94, providing that no person shall be competent to serve as a juror in the superior courts of the state unless he be an elector and a taxpayer of the state, a "taxpayer" is a person owning property in the state subject to taxation and on which he regularly pays taxes, but a showing that a juror was not a taxpayer of the county in which the trial was held was not sufficient to disqualify him.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. § 257; Dec. Dig. § 51.*]

3. MUNICIPAL CORPORATIONS (§ 777*) — DEFECTS IN STREETS—PRECAUTIONS AGAINST INJURIES—NOTICES, WARNINGS, AND LIGHTS.

Where a sidewalk was laid by permission of a municipality under a private contract with the abutting owner, and, in the course of the work, a wire netting three feet in height was extended across the newly constructed sidewalk for the protection of the walk, and there were no lights or other warnings to protect passengers, except the street lights in the vicinity, under which it could not be seen, it was an obstruction of the character of a trap, and its maintenance was culpable negligence on the part of the municipality.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1631; Dec. Dig. § 777.*]

4. MUNICIPAL CORPORATIONS (§ 821*)—ACTION FOR INJURIES—QUALIFICATIONS FOR JURY—CONTRIBUTORY NEGLIGENCE.

In an action for injuries alleged to have been received by falling over an obstruction across a newly constructed sidewalk of a city, whether the plaintiff had notice of such obstruction or should have discovered it held on the evidence a question for the jury.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 821.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

5. MUNICIPAL CORPORATIONS (§ 762*)—DEFECTS IN STREETS—SIDEWALKS—SIDEWALKS BUILT BY ABUTTING OWNERS.

Where a municipal corporation permits an abutting owner to construct a sidewalk, in the doing of which he obstructs the street, the city is not relieved from its duty in respect to the safety of the street, but its duty is the same as if the obstruction was made under its immediate direction and control, and it is liable for personal injuries caused thereby.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1605-1611; Dec. Dig. § 762.*]

6. MUNICIPAL CORPORATIONS (§ 788*)—DEFECTS IN STREETS—NOTICE OF DEFECTS—UNSAFE CONDITION UNDER AUTHORITY OF MUNICIPALITY.

Where the municipal authorities permit a defect in a street or sidewalk to be created, the granting of the permit is notice to the authorities that the work is in progress, and it charges them with the responsibility for its proper conduct.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1641-1643; Dec. Dig. § 788.*]

7. EVIDENCE (§ 150*)—COMPETENCY—RESULTS OF EXPERIMENTS—DISCRETION OF TRIAL COURT.

Experiments made out of court may be competent evidence, but it must appear before they are admitted that they were made under substantially the same conditions as exist at the time of the transaction in question; and where the defendant in an action for personal injuries, alleged to have been caused by an obstruction in its streets, offered evidence as to experiments, tending to show that the place of the accident was well lighted, the exclusion of the evidence is not such an abuse of the discretion of the trial court as to render it erroneous.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 439; Dec. Dig. § 150.*]

8. APPEAL AND ERROR (§ 1060*)—HARMLESS ERROR—ARGUMENT AND CONDUCT OF COUNSEL—APPEAL TO CORRECT ERRONEOUS ARGUMENT.

In an action against a municipal corporation for injuries by falling over an obstruction in the street, the court charged that it was the duty of the city by day or night to properly guard any obstruction placed upon a sidewalk during construction or improvement by proper and efficient signals or special lights or barriers and warnings, and that the foot passer has the right to assume that the sidewalk is safe, in the absence of reasonable barriers, lights, or warnings to the contrary, and unless cautioned by some sign or notice, and the counsel for plaintiff in argument contended that the court had charged that it was the city's duty in all cases to place signal or beacon lights on barriers or obstructions in the street, and the defendant thereupon requested the court to correct the counsel and instruct the jury to the contrary. This the court refused to do on the ground that the jury had the written instructions. *Held*, that the refusal of the court to correct counsel or further instruct the jury was not prejudicial error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4135; Dec. Dig. § 1060.*]

9. COSTS (§ 238*)—ON APPEAL—FAILURE TO FILE BRIEFS.

Where respondent on appeal does not aid the court by brief or otherwise, the affirmance will be without cost to the appellant.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 908-919; Dec. Dig. § 238.*]

Département 2. Appeal from Superior Court, Thurston County; John R. Mitchell, Judge.

Action by James Lasityr against the City of Olympia. Judgment for the plaintiff; and the defendant appeals. Affirmed.

George R. Bigelow and G. O. Israel, for appellant.

RUDKIN, J. This was an action to recover damages for personal injuries. On the 8th day of October, 1908, contractors were engaged in laying a cement sidewalk on the south side of West Fourth street, in the city of Olympia, between Main street and Columbia street. The walk in question was laid by permission of the city, but under a private contract with the abutting property owner. The walk was completed, or at least unobstructed, from Main street to a point about 30 feet east of Columbia street. At the latter point three plank, one foot in width and two inches in thickness, were laid from the entrance to a store building, a foot or eighteen inches above the walk, to the curbing at the outer edge of the walk, for the purpose of giving access to and from the building, without walking over the green cement. Immediately west of these plank fine wire netting about three feet in height extended from the store building along the edge of the plank to the outer edge of the walk, and thence along the curbing to and around the corner at Columbia street, to protect the newly constructed walk until it should season or harden. There were no barriers across the walk other than those mentioned, and no lights or other warnings to admonish or protect foot passengers, except the street lights in the vicinity. There was an arc light at the intersection of Columbia and West Fourth streets about 70 feet distant from the place of the accident, another arc light at the intersection of Main and Fourth streets about 270 feet distant from the place of the accident, and certain other lights on the opposite side of the street in front of business houses. About 8 o'clock on the evening of the above date the plaintiff left his home to visit a lodgeroom on Columbia street west of the obstruction in question. In so doing he passed westerly along the sidewalk on the south side of Fourth street, and tripped or fell over the wire netting stretched across the sidewalk in front of the store building above described, causing the injury for which a recovery was here sought. From a judgment in favor of the plaintiff the city has appealed.

In addition to denials and a plea of contributory negligence, the answer as a second affirmative defense alleged that prior to the accident complained of the appellant had closed West Fourth street between Main street and Columbia street to public travel,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

and had caused notice thereof to be posted in public places in the vicinity of the closed portions of the street, and that the respondent disregarded said notices, and was a trespasser in the street at the time he met with the accident complained of. This latter defense was not denied by reply, and by reason of that fact the appellant at the commencement of the trial moved for judgment on the pleadings. The first error assigned is based on a denial of this motion. The case was twice tried in the court below, and at each trial the court ruled that this defense amounted to nothing more than a denial of the allegation in the complaint to the effect that the respondent had no notice of the dangerous and unsafe condition of the sidewalk. Waiving the question whether this ruling was technically correct when made, the case has been fully tried out on the merits, no competent testimony was rejected, and no incompetent testimony received because of the state of the pleadings, and, if error was committed in that regard, it was error without prejudice to the substantial rights of the parties, and must be disregarded here.

The next assignment is based on the denial of a challenge for cause interposed to one of the jurors on the ground that he was not a taxpayer of the state. Section 94, Rem. & Bal. Code, provides that: "No person shall be competent to serve as a juror in the superior courts of the state unless he be (1) an elector and taxpayer of the state of Washington. * * *" We are inclined to agree with the respondent that a taxpayer, within the meaning of this statute, is a person owning property in the state, subject to taxation and on which he regularly pays taxes (*State ex rel. Sutton v. Fasse* [Mo. App.] 71 S. W. 745), but, conceding such to be the rule, the appellant merely showed that the juror in question was not a taxpayer of Thurston county, and this was not sufficient to disqualify. *State v. Jahns*, just decided.

The next error assigned is based on the denial of a motion for a nonsuit interposed at the close of the respondent's testimony, on the ground that the second affirmative defense was not denied by reply, and on the further ground that the respondent was guilty of contributory negligence. We have already disposed of the first ground of the motion under the first assignment of error, and the second ground is equally without merit. The obstruction in the street which caused the injury in this case was the wire netting, and, unless it could be seen, there was nothing whatever to give notice or warning of its presence. The plank walk leading into the storeroom was no barrier, because a foot passenger could readily step over it, as the respondent did in this case, at the outer edge of the walk where the plank were but a few inches high. If the wire netting could not be seen—and there was ample tes-

timony tending to show that it could not—it was a trap for the unwary, and its maintenance was culpable negligence on the part of the city. Whether the respondent had notice of its presence or should have discovered it upon his approach were clearly questions of fact for the jury under the circumstances disclosed by this record. *Sutton v. Snohomish*, 11 Wash. 24, 39 Pac. 273, 48 Am. St. Rep. 847; *Mischke v. Seattle*, 26 Wash. 616, 67 Pac. 357.

The next error assigned is based on the claim that the city had neither actual nor constructive notice of the obstruction in the street, and on the refusal of certain requests for instructions bearing upon that question. The court instructed the jury, in effect, that if the city permitted an abutting property owner to obstruct the street it was not relieved from the obligation to see that the street was kept in a reasonably safe condition for public travel. "but that its duty was the same as if such obstruction, if any there be, were being done under the immediate direction and control of the city or its officers." "There are some authorities which hold a municipality responsible for the negligence of one who, acting under its license or permission lawfully granted, creates any defect or obstruction which endangers the safety of persons using the streets. These cases proceed upon the theory that, being charged with the care of its streets, it is the duty of the city to supervise the work permitted to be done and to use suitable precautions to prevent accidents; and notice of the defect or obstruction in the street is not necessary in such case to fix the city's liability." 28 Cyc. 1355. Such is the rule adopted in this state. In *Sutton v. Snohomish*, supra, the court said: "The fact that a permit was granted was notice to the authorities that the work was in progress, and they were then charged with the duty of seeing it was properly conducted."

The appellant offered testimony tending to show that the lamp at the intersection of Fourth street and Columbia street on the night preceding the trial of this action was identical with the lamp at the same point on the night of the accident, that the voltage passing through the arc light system on the night of the accident was greater than the voltage on the night preceding the trial, and that on the night preceding the trial witnesses could readily read newspapers on the sidewalk at the place of the accident by the light of the lamp in question. The appellant further offered to prove by an electrical expert the quantity of light in candle power cast on the sidewalk at the place of the accident on a dark and cloudy night. These several offers were rejected, and the ruling of the court is assigned as error. Experiments made out of the presence of the court are competent evidence in a proper case, but, before they can be admitted, it must appear that they were made under substantially the

same conditions as existed at the time of the transaction in question, and the trial court is necessarily vested with a large discretion in determining the preliminary questions of fact upon which their admissibility depends. Jones on Evidence (2d Ed.) § 410; Chicago City Ry. Co. v. Brecher, 112 Ill. App. 106; Chicago & Eastern Ill. Ry. Co. v. Crose, 113 Ill. App. 547; City of Ord v. Nash, 50 Neb. 335, 69 N. W. 964; De Loach Mill Mfg. Co. v. Tutweiler Coal, Coke & Iron Co., 2 Ga. App. 493, 58 S. E. 790; Augusta Ry. & Electric Co. v. Arthur, 3 Ga. App. 513, 60 S. E. 213; Huggard v. Glucose Sugar Refining Co., 132 Iowa, 724, 109 N. W. 475. In City of Ord v. Nash, supra, the court said: "Finally, it is argued that the trial court erred in rejecting as evidence the result of certain experiments made a year or more subsequent to the accident. The witnesses named were, according to the offer in the record, on a cloudy night, with the assistance of a light in an adjoining house, similarly situated to one burning at the time of the accident, able to plainly see the footpath, and also the surface of the ground, for a radius of several feet from the point where the injury was received. There is, as all agree, some room for the exercise of discretion by the trial court in the receiving and rejecting of evidence of this character; and we are unable to say that there has in this instance been an abuse of such discretion. We must not be understood as intimating that it would have been reversible error to receive the evidence offered. But the rejecting of evidence tending to prove that the condition of the premises was at a subsequent time discernible by witnesses whose attention was specially directed to the subject, and under circumstances in some respects at least materially different from those surrounding the plaintiff below at the time of the accident affords no ground of complaint by the city." While we are not prepared to say that it would have been error to admit proof of these experiments, we do not think that the quantity of light given out by an arc light at all times and under all conditions is so certain and unvarying as to render the ruling of the court erroneous or manifest an abuse of sound judicial discretion.

Error is assigned in the refusal of the court to give certain instructions on the question of contributory negligence, and also an instruction defining the duty of the city in regard to placing and maintaining signal lights and beacons, but we think these questions were fully covered in the general charge of the court. It appears from an objection interposed by the appellant during the opening argument of counsel for respondent to the jury that counsel for respondent was contending that the court had charged the jury that it was incumbent on the ap-

pellant in all cases to place signal or beacon lights on barriers or obstructions in the street, and the appellant requested the court to correct counsel and instruct the jury to the contrary. The court replied that it had already charged the jury in writing, and that the jury would have the instructions before them in their room, but refused to further interfere with the course of the argument. There is nothing in the record to indicate the nature of the argument made by counsel for respondent, to which exception was taken, aside from the language of the objection itself, but assuming that it was such as counsel allege we do not think that the failure of the court to correct counsel or further instruct the jury was prejudicial error; for in at least two different places in its charge the court defined the duty of the appellant in that regard, and its language was not susceptible or open to the construction placed upon it by counsel. Thus the court said: "It is the duty of the city in order to guard and protect the public, by day or by night, to properly guard any obstruction that may be placed upon any sidewalk, being constructed or improved, by proper and sufficient signals or other general or special lights or barriers and warnings to protect travelers from injury; the law being that the traveler upon a sidewalk has the right to assume that it is safe for him to pass along such sidewalk or highway in the absence of reasonable barriers, lights, or warnings to the contrary." And again: "Unless, as already stated, he is cautioned by some sign or notice that would attract the attention of the ordinary person exercising the usual degree of care, caution, and prudence." While we do not think that prejudicial error was committed in the matter complained of, the practice of permitting counsel to misstate or misconstrue the instructions of the court in argument before the jury is not to be approved or commended.

This disposes of all the assignments of error which merit discussion, and finding no reversible error in the record the judgment is affirmed. The respondent has failed to aid the court in the consideration of this case by brief or otherwise, and the affirmance will therefore be without cost to the city.

DUNBAR, C. J., and CHADWICK, CROW, and MORRIS, JJ., concur.

(61 Wash. 632)

DEMPSEY v. DEMPSEY.

(Supreme Court of Washington. Jan. 20, 1911.)

1. MORTGAGES (§§ 36, 37, 38*) — ABSOLUTE DEED AS MORTGAGE—EVIDENCE.

The common-law rule that evidence would not be received to show that a deed was in fact a mortgage, and the chancery rule that it will only be received to show fraud and mis-

take, does not obtain in this state, but the true intent of the parties may be shown by any competent testimony, but the evidence relied on should be of the most clear, cogent, and convincing character, as the presumption is strong that a deed regular in form voices the intention of the parties.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 95-111; Dec. Dig. §§ 36, 37, 38.*]

2. WITNESSES (§ 139*)—COMPETENCY—REPRESENTATION.

Under Rem. & Bal. Code, § 1211, providing that, in an action where the adverse party sues or defends as the representative of a deceased person, no party in interest can testify as to any transactions with the deceased, in an action by a son to obtain property deeded to him at the request of his father, who afterwards died, testimony as to statements made by plaintiff's father to his stepmother, the defendant, that the property was to be the father's, and the advance by the son was a loan, and the property was community, intended for a home for himself and wife, out of the presence and hearing of the plaintiff were incompetent.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 582-597; Dec. Dig. § 139.*]

3. EVIDENCE (§ 271*)—COMPETENCY—REPRESENTATION.

The testimony of third persons as to such statements of deceased must likewise be rejected for the reason that they are self-serving.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1068-1079, 1081-1104; Dec. Dig. § 271.*]

4. WITNESSES (§ 163*)—COMPETENCY—REPRESENTATIONS.

Nor in such a case are the statements of the deceased part of the *res gestæ*, as the rule of *res gestæ* does not apply when the transactions and declarations of a deceased person are under scrutiny to the extent of overcoming the statute which would otherwise exclude the evidence.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 670; Dec. Dig. § 163.*]

Department 2. Appeal from Superior Court, Thurston County; John R. Mitchell, Judge.

Action by John M. Dempsey against Mary L. Dempsey. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

Geo. H. Funk, for appellant. Gordon Mackay and Troy & Sturdevant, for respondent.

CHADWICK, J. Patrick Dempsey married respondent on February 17, 1908. They lived together until the time of his death, which occurred on October 27, 1908. Patrick Dempsey, so far as the testimony shows, had but little available property, although he was the owner of an undivided interest in 320 acres of land situate in Thurston county, yielding a rental return of \$35 or \$40 a month, all of which was used by him with the consent of his cotenants, two sons by a former marriage, one of whom is the appellant. In June, 1908, appellant gave Patrick Dempsey \$540. The purpose of this advance was to enable the older Dempsey to purchase a lot in the city of Olympia upon which he might build a home. This he

did, paying for the lot \$475 out of the money advanced by appellant. The deed was made to the appellant, as grantee, and was probably retained by Patrick Dempsey up to the time of his death. The deed was afterwards recorded by appellant. The erection of a dwelling house upon the lot so purchased was begun about July 4, 1908. Pending its construction, appellant advanced \$85, and later Patrick Dempsey and his two sons executed a mortgage upon a part of the 320-acre tract for the sum of \$1,400. This sum with the previous advances met the whole cost of the lot and building, unless it be that respondent paid for clearing and grading a part of the lot at some cost the exact amount of which is left uncertain, but is admittedly under \$50. After the death of Patrick Dempsey, respondent continued to remain in possession of the property, and in March, 1909, filed a declaration of homestead thereon. Appellant has paid the taxes, and in furtherance of his claim of ownership says—and in this he is sustained by his brother—that as between him and his brother and his father he was to assume and pay the mortgage out of his own earnings. It is the theory and claim of appellant that the property was purchased and the house erected, pursuant to an understanding that the property was to be his property with a right of occupation in his father during his lifetime. Respondent contending and the lower court holding that the purchase price of the lot was advanced as a loan, a decree was accordingly entered, establishing a lien for the sum of \$475 and \$33.70 taxes, and directing the execution of a quitclaim deed. It may be set down as a premise, from which a correct judgment must flow, that a deed regular in form is presumptive evidence of the highest character that it voices the intention of the parties. Devlin on Deeds (2d Ed.) § 1136. This court, acting in harmony with that sentiment that would arrive at the truth of each controversy, has rejected from the first the common-law rule that testimony would not be received to show a deed to be in fact a mortgage, as well as the earlier rule of the chancery courts that it would only be received to show a fraud or mistake, and declared that the true intent of the parties may be shown by any competent testimony; but in such cases the evidence relied upon should be of the most clear, cogent, and convincing character. Dabney v. Smith, 38 Wash. 40, 80 Pac. 199; Reynolds v. Reynolds, 42 Wash. 107, 84 Pac. 579. However, evidence is a means to ascertain the truth, and, where declarations of a deceased person are involved, rules have been declared by statute, for it is as important that the truth be protected as it is that it be declared.

As against the form of the deed, respondent relies upon statements made by Patrick Dempsey to her, and to the scrivener who

made out the deed, and to her daughter. These statements are to the general effect that the property was to be his, that the advance was in fact a loan, and that the property was of a community character, being intended for a home for himself and wife. In no instance was appellant present at the time these declarations are said to have been made. Nor are any circumstances shown that would bind appellant to the acknowledgment of anything testified to by these witnesses. The testimony of respondent is clearly incompetent under the statute. Rem. & Bal. Code, § 1211. She is not only a party to the record, but is also a party in interest. The testimony of third persons tending to prove declarations on the part of the deceased must likewise be rejected, for the reason that they are self-serving and therefore incompetent, or to restate the proposition, they would not be competent if Patrick Dempsey were alive and a party to the action—hence cannot be received after his death. Testimony cannot be given a higher degree of credit than it is entitled to because of the death of a party in interest.

Counsel for respondent contends that statements made at the time the deed was executed were at least declarations against interest, and should be received because they show that deceased had become the debtor of appellant. But this declaration of indebtedness, if received, must be measured in the light of the whole transaction, and the most that could be claimed for it is that it would raise a doubt. In such cases the doubt is resolved in favor of the deed as written, under the rule requiring clear and convincing evidence, and the statements if held to be competent would be unavailing to respondent. Nor do we think, considering the same rule, that the fact that the deed was kept in the possession of Patrick Dempsey is sufficient to overcome the presumption that the deed speaks its true intent. It is a circumstance, but, if true, it would not be inconsistent with the lodgment of title in appellant.

Counsel further insist that the declarations of Patrick Dempsey should be received as a part of the *res gestæ*. We do not understand the rule of *res gestæ* to apply when the transactions and declarations of deceased persons are under scrutiny to the extent of overcoming the statute which would otherwise exclude the evidence. We have given no heed to the testimony of the same character offered by appellant, but it may be pertinent to say that, if all of the declarations offered by respondent be received, they are met by like declarations testified to by appellant and his witnesses. So that, if the testimony on either side were competent, we would be brought back to the original proposition that the deed will not be held to be

a mortgage where the testimony is doubtful or conflicting.

The judgment of the lower court is reversed, and the cause remanded, with instructions to enter such decree as may be consistent with this opinion.

DUNBAR, C. J., and RUDKIN, MORRIS, and CROW, JJ., concur.

(24 Okl. 848)

SHANKS v. PINKSTON.

(Supreme Court of Oklahoma. Nov. 2, 1909.)

1. COSTS (§ 264*)—APPEAL—COMPENSATION OF CLERK OF SUPREME COURT.

The court on hearing a motion to retax costs charged by the clerk of the Supreme Court, and not fixed by law, must pass on the reasonableness of each charge, and fix a reasonable fee for the services rendered.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 1008; Dec. Dig. § 264.*]

2. COSTS (§ 264*)—APPEAL—COMPENSATION OF CLERK OF SUPREME COURT.

The court in hearing a motion to retax costs in favor of the clerk of the court, and not fixed by law, may, in determining the reasonableness of various items, ascertain the fees allowed by the law of other states for like services.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 1007; Dec. Dig. § 264.*]

3. COSTS (§ 254*)—ON APPEAL—TRANSCRIPT—STATUTES.

The practice of filing separately each paper in the transcript or case-made and taxing a fee therefor is in conflict with Wilson's Rev. & Ann. St. 1903, § 4739, requiring plaintiff in error to attach and file with the petition in error the original case-made filed in the court below, or a certified transcript of the record in the court below.

[Ed. Note.—For other cases, see Costs, Dec. Dig. § 254.*]

On motion to retax costs. Granted in part and denied in part.

For former opinion, see 24 Okl. 82, 103 Pac. 705.

PER CURIAM. This is a motion filed in this court in this cause on September 1, 1909, to retax certain items of costs set forth in said motion. As the fees taxed at which this motion is leveled are not fixed by law, it is our duty to pass upon the reasonableness of each charge and fix a reasonable fee for the service rendered. In *Bohart v. Anderson*, 24 Okl. 82, 103 Pac. 742, this court in the syllabus said: "When the compensation of an officer is not fixed by law at the time he renders a service, but it clearly appears that it was the intention of the lawmakers that he should receive a reasonable compensation to be fixed by law, until it is so fixed he is entitled to a reasonable compensation to be determined by the proper tribunal."

In passing on the same, in order to determine the reasonableness of the various

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

items of charge, we have ascertained the fees allowed by law to be charged for like services by the clerks of the Supreme Court of the other states.

The following items set forth in the assailed cost bill are allowed to stand as taxed, and as to them the motion is overruled; the remaining items taxed as cost and not herein allowed as modified are disallowed, and as to them the motion is sustained:

1908.		
April 30.	To indexing, docketing, etc.....	\$ 3 00
April 30.	To filing, entering petition in error	25
April 30.	To filing præcipe for summons in error	25
April 30.	To filing, entering, and issuing summons in error.....	1 00
April 30.	To filing case-made.....	25
May 23.	To issue certificate of appeal.....	1 00
June 4.	To return summons showing service	25
Aug. 17.	To filing defendant's motion to dismiss	25
Sept. 23.	To filing service not accepted, pl'ff briefs	25
Jan. 13.	J. E. overruling motion to dismiss	50
Jan. 13.	2 notices.....	50
Feb. 17.	Reply of pl'ff to motion to dismiss	25
April 6.	Motion to advance cases.....	25
April 6.	Aff. as to facts, F. R. Brennan.....	25
April 13.	J. E. overruling motion to advance	50
April 13.	2 notices.....	50
May 12.	J. E. submission.....	50
	Making and certifying fee bill.....	50
	Sheriff's costs.....	4 75
	For filing 15 copies of defendant's briefs, in lieu of the amount charged, a fee will be allowed of.....	75
	For issuing mandate, in lieu of the amount charged for filing same and furnished copy of syllabus, a fee will be allowed of.....	2 00
		\$17 75
	Making the total amount of taxable costs herein, less deposit of \$15.....	15 00
	Leaving amount due.....	\$ 2 75

In the further taxation of costs the following fees will, in the absence of further showing, be deemed to be reasonable:

	For filing petition in error.....	\$ 25
	For filing case-made or transcript.....	25
	For entering, indexing, and docketing each cause and taxing costs.....	3 00
	For entering each rule, motion, or pleading....	25
	For entering each order of the court upon any motion or rule, or entering interlocutory judgment	50
	For administering an oath to each person.....	25
	For administering an oath and giving certificate with seal.....	1 00
	For entering each continuance.....	25
	For making out and transmitting mandate.....	2 00
	For making copies of any papers or records in the clerk's office, with or without certificates, for each 100 words.....	10
	For recording each order and bond, for each 100 words	10
	For making and certifying fee bill.....	50
	For filing any paper or instrument not herein included	25
	For issuing and transmitting notice to parties	25
	For filing briefs in chief.....	75
	Supplemental briefs (each party).....	50

The practice of filing separately each paper in the transcript or case-made and taxing a fee therefor, is, in the opinion of this court,

in conflict with Wilson's Rev. & Ann. St. 1903, § 4739, and is disapproved. All the Justices concur.

(4 Okl. Cr. 637)

BUTLER v. STATE.

(Criminal Court of Appeals of Oklahoma.
Jan. 9, 1911.)

(Syllabus by the Court.)

CRIMINAL LAW (§ 1131*)—APPEAL—DISMISSAL—ABANDONMENT—APPLICATION FOR PARDON, COMMUTATION, OR PAROLE.

Where an appeal is pending in this court, and the appellant applies to the Governor of the state for a pardon, commutation, or parole, such application amounts to an abandonment of the appeal; and, this fact being shown to the court, the appeal will be dismissed.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1131.*]

Appeal from District Court, Choctaw County; D. A. Richardson, Judge.

A. J. Butler was convicted of murder, and he appeals. Dismissed.

Utterback & Hayes, G. W. Richardson, and Jas. R. Armstrong, for plaintiff in error. Chas. West, Atty. Gen., and Chas. L. Moore, Asst. Atty. Gen., for the State.

FURMAN, P. J. It has been made known to this court that appellant has applied to the Governor of the state for a pardon, commutation, or parole. Such action upon the part of appellant amounts to an abandonment of the appeal. An appellant cannot invoke the judgment of this court upon the merits of his appeal, and while such appeal is pending apply to the Governor of the state for a pardon, commutation, or parole. Such action is simply trifling with this court, and will not be permitted.

It having been known to us that the appellant in this case has applied to the Governor of the state for a pardon, commutation, or parole, the appeal is dismissed.

DOYLE, J., concurs.

RICHARDSON, J., presided at the trial of this case in the court below, and took no part in the consideration or disposition of the case in this court.

(4 Okl. Cr. 638)

BARNARD v. UNITED STATES.

(Criminal Court of Appeals of Oklahoma.
Jan. 9, 1911.)

(Syllabus by the Court.)

CRIMINAL LAW (§ 1131*)—APPEAL—DISMISSAL—ABANDONMENT—APPLICATION FOR PARDON, COMMUTATION, OR PAROLE.

Where an appeal in a criminal case is pending in this court, and the appellant applies to the Governor of the state for a pardon, commutation, or parole, such action on the part of appellant amounts to an abandonment of the appeal, and the appeal will be dismissed.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1131.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Appeal from District Court, Marshall County; D. A. Richardson, Judge.

Joe Barnard was convicted of assault with intent to commit rape, and he appeals. Dismissed.

Hardy & Franklin and Kennamer & Coakley, for plaintiff in error. Chas. West, Atty. Gen., and Smith C. Watson, for the State.

PER CURIAM. It has been made known to this court that the appellant in this case has applied to the Governor of the state of Oklahoma for a pardon, commutation, or parole. Such action on his part amounts to an abandonment of the appeal. See *Butler v. State* (decided at the present term) 112 Pac. 758.

The appeal is therefore dismissed.

RICHARDSON, J., presided at the trial of this case in the court below, and took no part in the consideration or disposition of the case in this court.

4 Okl. Cr. 634)

RASBERRY v. STATE.

(Criminal Court of Appeals of Oklahoma.
Jan. 9, 1911.)

(*Syllabus by the Court.*)

CRIMINAL LAW (§ 1133*)—APPEAL—REHEARING—OBJECTIONS NOT PREVIOUSLY RAISED.

An objection that there was a change in the presiding judge during the trial of a cause comes too late when this objection is urged for the first time after the cause has been affirmed and upon motion for rehearing, and when the appellate court has judicial knowledge that the judge presiding during such change was the regular judge of the court in which the trial was had.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2984; Dec. Dig. § 1133.*]

On motion for rehearing. Motion denied.

For former opinion, see 103 Pac. 805.

John Embry, for the motion. Charles L. Moore, Asst. Atty. Gen., for the State.

PER CURIAM. One of the grounds relied upon in the motion for a rehearing is that the record discloses the fact that the Honorable W. N. Mabon presided over the court in which appellant was tried during part of the time when the testimony was being received and also at the time the verdict was rendered. This objection was not relied upon in the motion for a new trial and was not incorporated in the petition in error, and was not presented upon appeal when the case was first submitted to this court, and the record fails to show that an objection was made in the lower court upon the part of appellant to the fact that Judge Mabon presided over any part of his trial. The great weight of authorities is to the effect that there cannot lawfully be a change of the presiding judge during the trial of a cause, but the authorities are not all to this ef-

fect. "A change of the presiding judge during the trial of a cause is not necessarily a cause for reversal, unless some special harm or prejudice has resulted by reason of such change." 21 Ency. Pl. & Pr. p. 1002. See, also, *Hendrik v. Bell*, 84 Ill. App. 523; *Pegallow v. State*, 20 Wis. 61; *Lamphere v. State*, 114 Wis. 193, 89 N. W. 128; *Bullock v. Neal*, 42 Ark. 279.

We take judicial notice of the fact that Judge Mabon was the regular judge of the district court of Lincoln county, and as such he had authority to preside over the trial of all cases therein pending. In view of the fact that the objection now urged was made for the first time upon motion for rehearing, we are of the opinion that it comes too late. The other grounds relied upon in the motion for rehearing were all fully considered in the original opinion of this court.

Motion for rehearing is denied.

(4 Okl. Cr. 659)

TYDINGS v. STATE.

(Criminal Court of Appeals of Oklahoma. Jan. 5, 1911.)

(*Syllabus by the Court.*)

CRIMINAL LAW (§ 1131*)—APPEAL—DISMISSAL.

Where a plaintiff in error in a criminal case becomes a fugitive from justice, and puts himself in such place or condition that he cannot be made to respond to any order or judgment of the appellate court made in his case on appeal, his appeal will be dismissed.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2975; Dec. Dig. § 1131.*]

Appeal from Ottawa County Court; W. Y. Quigley, Judge.

Walter Tydings was convicted of crime, and brings error. Dismissed.

O. L. Rider, for plaintiff in error. Fred S. Caldwell and Vern E. Thompson, for the State.

RICHARDSON, J. The state has filed a motion to dismiss this appeal on the ground that plaintiff in error is a fugitive from justice, and is not now where he can be made to respond to any order or judgment, which may be made or rendered in this court. In support of this motion a certified copy of the journal entry of the district court of Mayes county has been introduced, showing that plaintiff in error stands charged with robbery in that court upon a change of venue from Ottawa county, and that on the 14th day of June, 1910, the case being called, plaintiff in error made default and a forfeiture was taken on his bond. The affidavit of one of his bondsmen in that case has also been filed, showing that plaintiff in error is a fugitive from justice; that diligent search has been made for him; that his bondsmen have offered a reward for his apprehen-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep.'s Indexes

sion; and that all efforts to apprehend him and to ascertain his whereabouts have proved futile. No response to the motion has been filed and no counter showing has been made.

It was held in *Jacobs v. State*, 3 Okl. Cr. 648, 108 Pac. 429, and in *Tyler v. State*, 3 Okl. Cr. 179, 104 Pac. 919, 26 L. R. A. (N. S.) 921, that where a plaintiff in error becomes a fugitive from justice, and puts himself in such place or condition that he cannot be made to respond to any order or judgment of this court made in his case on appeal, his appeal will be dismissed. It therefore follows that the motion in this case should be sustained. Further, an examination of the case-made discloses no proof of notice of appeal, and this also is fatal to the appeal.

The appeal is therefore dismissed. All concur.

(4 Okl. Cr. 660)

JONES v. STATE.

(Criminal Court of Appeals of Oklahoma. Jan. 5, 1911.)

(Syllabus by the Court.)

CRIMINAL LAW (§ 1069*)—APPEAL—TIME FOR TAKING.

Under section 6948, Snyder's Comp. Laws Okl., an attempt on the part of the trial judge or court to extend the time for taking an appeal in a misdemeanor case, so as to permit the filing of the case in the appellate court after the expiration of 120 days from the date of the judgment below, is inoperative and void.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2691-2699; Dec. Dig. § 1069.*]

Appeal from Jackson County Court; W. T. McConnell, Judge.

D. R. M. Jones was convicted of violating the prohibition law, and he appeals. Dismissed.

Johnson, Morrill & Riegel, for plaintiff in error. Fred S. Caldwell, for the State.

RICHARDSON, J. The judgment appealed from in this case was rendered on September 15, 1909, at which time the trial court made an order allowing plaintiff in error 120 days to make and serve a case, and allowing the county attorney 10 days in which to suggest amendments, and requiring that the case be settled upon 5 days' notice, and be filed in the Criminal Court of Appeals within 20 days after settlement and signing. The case-made was filed in this court on March 12, 1910.

Section 6948, Snyder's Comp. Laws, provides that in misdemeanor cases the appeal must be taken within 60 days after judgment is rendered, except that the trial court or judge, for good cause shown, may extend the time for the taking of such appeal, not exceeding 60 days. Under this provision the trial judge cannot extend the time more than 60 days, and any attempt on his part to extend the time for filing the petition in error

and case-made in this court, so as to permit its being filed herein after the expiration of 120 days from the date of the rendition of judgment, is inoperative and void. In this case the petition in error and case-made were not filed in this court until March 12, 1910, 178 days after the rendition of judgment. The state has filed a motion to dismiss the appeal on that account, and the motion will be sustained.

It is therefore ordered that the appeal herein be and the same is hereby dismissed, and that a mandate issue to the county court of Jackson county directing said court to enforce its judgment and sentence in this case. All concur.

(5 Okl. Cr. 1)

JOHNSON v. STATE.

(Criminal Court of Appeals of Oklahoma. Jan. 18, 1911.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 1087*)—APPEAL—RECORD—PLEA TO INDICTMENT.

Where the record shows that the defendant was duly arraigned and that he demanded time in which to plead to the indictment, and when the case was subsequently called for trial he announced ready for trial and participated in the selection of the jury, and the county attorney, after reading the indictment to the jury, stated that the defendant had pleaded not guilty thereto, and where the instructions of the court informed the jury that the defendant had pleaded not guilty, this sufficiently shows that the defendant had pleaded to the indictment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2770, 2771; Dec. Dig. § 1087.*]

2. RAPE (§§ 52, 54*)—CRIMINAL LAW (§ 304*)—EVIDENCE—JUDICIAL NOTICE—BOUNDARIES OF COUNTIES AND LOCATION OF CITIES THEREIN—SUFFICIENCY OF EVIDENCE.

(a) For evidence sustaining a conviction for statutory rape, see opinion. (b) A defendant may be convicted for the crime of rape upon the uncorroborated testimony of the prosecuting witness. (c) Courts of Oklahoma take judicial notice of the boundaries of the counties and the location of the cities and towns therein.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 71-76, 83, 84; Dec. Dig. §§ 52, 54; Criminal Law, Cent. Dig. § 705; Dec. Dig. § 304.*]

3. CRIMINAL LAW (§ 954*)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE—SUFFICIENCY OF MOTION—SHOWING OF DILIGENCE.

(a) Where a defendant filed a motion for new trial based upon alleged newly discovered evidence, it is not sufficient for him to assert that he had used due diligence to discover this evidence prior to the trial; but he should state the facts with reference to the question of diligence, so that the court can determine as to whether or not the diligence used was sufficient. (b) For a motion for new trial based upon the ground of alleged newly discovered evidence, which was altogether insufficient, see opinion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2363-2367; Dec. Dig. § 954.*]

Appeal from District Court, Marshall County; D. A. Richardson, Judge.

Riley Johnson was convicted of rape, and he appeals. Affirmed.

F. E. Kennamar, Chas. A. Coakley, and I. O. Lewis, for appellant. Smith C. Matson, Asst. Atty. Gen., for the State.

FURMAN, P. J. First. The defendant's first assignment of error is as follows: "The plaintiff in error was not required or allowed to plead before the trial of the cause." The record does not sustain this assignment of error. On the contrary, it shows that on the 26th day of April, 1909, the defendant was duly arraigned and demanded 24 hours within which to plead to the indictment. On the 3d day of May, 1909, this cause was called for trial and both the state and the defendant announced ready for trial, and a jury was duly impaneled, and that the county attorney thereupon read the indictment to the jury and stated that the defendant had pleaded not guilty. The county attorney then stated the case in behalf of the state to the jury, and counsel for the defendant stated the case to the jury in behalf of the defendant. The court instructed the jury that the defendant had pleaded not guilty. These recitals in the record are sufficient to show that the defendant entered a plea of not guilty. See *Sam Wood v. State*, 4 Okl. Cr. —, 112 Pac. 11.

Second. After the state introduced its evidence, the defendant moved the court to inform the jury that the evidence was not sufficient to warrant a conviction, and to advise the jury to find the defendant not guilty. This motion was overruled by the court, to which the defendant excepted. This prosecution was brought under the first paragraph of section 2353, Snyder's Comp. Laws Okl. 1909, which is as follows: "Rape is an act of sexual intercourse with a female not the wife of the perpetrator under either of the following circumstances: First. When the female is under the age of 16 years." Nettie Fisher, the prosecuting witness, testified that she did not know just exactly how old she was, but that she thought that she was 14 years of age. This evidence was introduced without objection or exception on the part of the defendant. She further testified that she was living with her father, Alex Fisher, and that she was acquainted with Robert Johnson, and had known him for about a year; that about a year ago before the trial the witness, in company with her sister and brother, took supper with Robert Johnson, the appellant; that after supper Robert Johnson carried her home to her father's house, and while on the road he had sexual intercourse with her; this occurred at night; that Robert Johnson had had sexual intercourse with her twice before in the woods near the home of the witness' father. She testified that as the result of this sexual intercourse she became pregnant with child; that Robert Johnson at this time was living with his father in the

town of Woodville. Alex Fisher testified that he was the father of the complaining witness and that he lived about two miles from Woodville; he remembered the circumstances of Nettie's going to supper with Robert Johnson about a year before the trial began, and that Robert Johnson came back home with her. He also testified that at this time Robert Johnson was paying attention to and was going with his daughter. He testified that he did not know how old the prosecuting witness was; that all he had to go by was what the doctor said, and that Dr. Jones had waited on his wife when Nettie was born, and that this was the only time that Dr. Jones had attended his wife during childbirth. Dr. E. A. Jones testified that he lived at Woodville and was a physician; that he knew Alex Fisher and Nettie Fisher; that the witness would have resided at Woodville 16 years from the 6th of next June; that in the fall or the next spring after he came to Woodville he was the physician of Alex Fisher's wife when her girl baby was born; and that he never waited upon Alex Fisher's wife at any other time. We think that this evidence clearly makes a case against the defendant. This court takes judicial notice of the boundaries of the counties and of the location of the cities and towns therein, and we therefore know that Woodville is in Marshall county, Okl. The evidence of the doctor is clear as to the age of the prosecuting witness, and brings her within the protection of the statute, whether or not she consented to her defilement. The party ravished is a competent witness. How far she is to be believed must be left to the jury, and a conviction may be had for this offense upon her uncorroborated testimony. See *Reeves v. Territory*, 2 Okl. Cr. 358, 101 Pac. 1039. It would indeed be a harsh and unjust rule of law that would require corroboration of that which in the very nature of things in many cases could not be corroborated. We therefore hold that the court did not err in refusing to advise the jury to acquit the defendant.

Third. The defendant filed a motion for new trial upon the ground of newly discovered evidence, and claims that if a new trial were granted him, he would be able to prove by Mollie Ingram and Lou Johnson that the prosecuting witness in this case was over 16 years of age at the time of the commission of this offense. Defendant alleges that since his arrest on the charge of this case he has been confined in jail and been unable to make any inquiries with reference to the testimony in the case; that he has used all reasonable diligence in procuring evidence in his behalf; and that he did not discover the testimony of the said Lou Johnson and Mollie Ingram until after his conviction. Defendant stated that he had exercised due diligence in procuring testimony in his behalf before the trial began. This is merely the statement of a conclusion. Such

an affidavit should state the facts, so as to enable the court to see that due diligence had been exercised. The record shows that the father of the defendant resided at Woodville. With the least effort on the part of the defendant or his counsel he should have been in possession of the alleged facts set up in his motion for new trial long before the trial of this case took place. The record further shows that the verdict was rendered against the defendant the same day on which the motion for new trial was filed. No explanation was made as to how or why it was that the defendant could discover this testimony as soon as he was convicted, but could not find it out before the trial. Defendant had had a preliminary trial at which the state's evidence was introduced, and in which he was represented by the same counsel who represented him in the final trial. The town of Woodville is about 15 miles from the county seat where the trial took place. It is not alleged that counsel for the defendant even visited Woodville to make any investigations in behalf of their client; that the defendant or his counsel ever even requested the father of the defendant, who resided at Woodville, to make any investigations as to the facts of the case. They rested their defense entirely upon the hope that the jury would believe the testimony of the defendant rather than the testimony of the prosecuting witness. Under these circumstances it was too late, after the conviction, to begin to exercise that diligence which should have been exercised before the trial. Counsel cannot remain idle before a trial and after there has been a conviction discover evidence which they could have discovered prior to the trial by the exercise of diligence, and thereby obtain a new trial. The trial of a criminal case is a very serious matter, and the law requires that defendants and those representing them must be diligent in preparing to defend their cases. It is their duty to prepare their cases for trial before a conviction has been had. The jury saw and heard all of the witnesses in this case. They accepted the testimony for the state and rejected that for the defense. We cannot say that they were not justified in so doing.

The judgment of the lower court is therefore in all things affirmed.

ARMSTRONG and DOYLE, JJ., concur.

(4 Okl. Cr. 585)

BOUCHER v. STATE.

(Criminal Court of Appeals of Oklahoma. Jan. 5, 1911.)

(Syllabus by the Court.)

CRIMINAL LAW (§ 1038*)—TRIAL—OBJECTIONS—INSTRUCTIONS.

When the evidence in a criminal case is concluded, the judge should give counsel for the

state and counsel for the defendant an opportunity to submit any written instructions which they may desire to be given to the jury, and should also give counsel an opportunity to be heard either in support of or in opposition to instructions to be given to the jury, and the court should require counsel for the defendant, upon such hearing, to point out what objections, if any, they have to the instructions given to the jury, and these objections should be incorporated in the record.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2846; Dec. Dig. § 1038.*]

On motion for rehearing. Motion denied.

For former opinion, see 111 Pac. 1006.

PER CURIAM. Counsel for the appellant on motion for rehearing insist that the instructions in this case were properly excepted to, and they refer to the case-made for the verification of this statement.

After the court had given its charge to the jury, counsel for the defendant stated in open court: "The defendant desires to except to each and every paragraph of the court's instructions to the jury." It is true that in the case of Frank Buck v. Terr., 1 Okl. Cr. 517, 98 Pac. 1017, this court did consider similar exceptions to the instructions given, but upon more mature reflection we are satisfied that we were in error in this particular. The action of the court in considering Buck's Case could not have operated to the injury of appellant in this case, because that case was not decided by this court until the 11th day of January, 1909, while the exceptions which are presented here were taken by the defendant on the 17th day of October, 1908, nearly three months before the rendition of the opinion in the Buck Case. We think that paragraph 5, § 6823, Snyder's Comp. Laws Okl. 1909, is decisive of this question. Said paragraph is as follows: "When the evidence is concluded, the attorneys for the prosecution may submit to the court written instructions. If the questions of law involved in the instructions are to be argued, the court shall direct the jury to withdraw during the argument, and after the argument, must settle the instructions, and may give or refuse any instructions asked, or may modify the same as he deems the law to be. Instructions refused shall be marked in writing by the judge, if modified, modification shall be shown in the instructions, and by refusal to give instructions or the modification thereof, shall be deemed to be excepted to. When the instructions are thus settled, the jury, if sent out, shall be recalled and the court shall thereupon read the instructions to the jury."

This section clearly contemplates that instructions to juries in criminal cases should be settled before they are read to the jury, and that if counsel have any instructions which they desire to be given, or if they have any objections to any instructions proposed to be given by the court, it is the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

privilege and duty of counsel to point out such matters to the court before the instructions are read to the jury. This is fair to all parties concerned, and is necessary to the proper administration of justice. It gives the judge an opportunity to correct any errors which he may have made, and it gives the county attorney an opportunity, if he thinks the charge of the court is erroneous, to join with the defendant in requesting that such error be corrected. If counsel desire to make objections to the instructions which the court proposes to give to the jury and requests permission to do so, it would be error on the part of the trial court to refuse to give counsel such opportunity; but, in the absence of any such request appearing in the record in this case, we are of the opinion that the exceptions attempted to be taken by counsel for the defendant are altogether insufficient. The instructions given are not above criticism, but in the light of the evidence they are not such as should work a reversal of the verdict. The evidence in the case would support a verdict for murder, and we think that the appellant should congratulate himself upon the zeal and ability of his counsel in securing a verdict of manslaughter with the lowest possible punishment.

The motion for rehearing is therefore denied.

(4 Okl. Cr. 636)

O'BRYAN, County Judge, v. STATE.

(Criminal Court of Appeals of Oklahoma. Jan. 9, 1911.)

(Syllabus by the Court.)

COURTS (§ 240½, * New, vol. 8, Key No. Series)—JURISDICTION—REMOVAL FROM OFFICE.

The Supreme Court has jurisdiction of appeals in prosecutions for the removal of officers.

Appeal from District Court, Woodward County; R. H. Loofbourrow, Judge.

Proceedings against T. L. O'Bryan, County Judge, to remove him from office. Judgment of removal, and defendant appeals. Dismissed.

C. W. Herod, S. M. Smith, and D. P. Marum, for appellant. Smith C. Matson, Asst. Atty. Gen., for the State.

FURMAN, P. J. This case has been passed upon by the Supreme Court. 26 Okl. 470, 109 Pac. 304. There being doubt as to which court had appellate jurisdiction of this class of cases, an appeal was prosecuted to both courts. The Supreme Court took jurisdiction of the case, and reversed the judgment of conviction upon the merits. We concur in the opinion that the Criminal Court of Appeals has no jurisdiction in this class of cases. See *State v. Alexander*, 111 Pac. 655.

This appeal is therefore dismissed.

DOYLE and RICHARDSON, JJ., concur.

(4 Okl. Cr. 657)

SCOTT v. STATE

(Criminal Court of Appeals of Oklahoma. Jan. 5, 1911.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 1069*)—APPEAL—TIME OF TAKING.

When the time fixed by statute or designated by the court for taking an appeal has expired, the court or judge has no power thereafter to extend the same.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1069.*]

2. CRIMINAL LAW (§ 1099*)—APPEAL—CASE-MADE—SIGNING AND SETTLING.

A case-made cannot be settled and signed by a judge who did not try the case.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2866-2880; Dec. Dig. § 1099.*]

Appeal from Washita County Court; J. A. Duff, Special Judge.

W. P. Scott was convicted of a misdemeanor, and appeals. Dismissed.

Burnette & Beets, for plaintiff in error. Fred S. Caldwell, for the State.

RICHARDSON, J. This cause was tried by a special judge, and judgment was rendered on October 27, 1909. No extension of the time for serving a case and for taking the appeal was requested and none was made at that time; but on November 6, 1909, the court made an order giving plaintiff in error 50 days to make and serve a case, the county attorney 10 days to suggest amendments thereto, and requiring that the same be settled and signed within five days thereafter. The time for taking the appeal was not extended. On December 27, 1909, plaintiff in error applied to L. R. Shean, the regular judge of the county court, for an extension of time in which to file his petition in error and case-made in this court, alleging that on December 24, 1909, within the time theretofore fixed by the court, he had attempted to present his case to the regular judge for settlement and signing, but, on account of the absence of said judge from his office, it was impossible to have the same settled and signed within the time fixed. Thereupon, on December 27, 1909, the regular judge made an order extending the time for filing the petition in error and case-made in this court to January 7, 1910. The regular judge, L. R. Shean, settled and signed the case-made, stating in his certificate, which is dated December 24, 1909, that it contains a true and correct statement of all the evidence, findings, and proceedings had in said cause. It was not settled and signed by the special judge who tried the cause. The appeal was filed in this court on January 6, 1910.

The appeal must be dismissed for two reasons. The court not having extended the time within which the appeal could be taken before the expiration of the statutory period,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

under section 6948, Snyder's Comp. Laws Okl. 1909, requiring appeals in misdemeanor cases to be taken within 60 days after rendition of judgment unless the time be extended, it was imperative that the appeal be filed in this court within 60 days from October 27, 1909, and said 60 days expired on December 26, 1909. After the same had expired, the court or judge could not on December 27, 1909, extend the time for taking the appeal. In the next place, the case-made is not certified by the judge who tried the cause. The regular judge of the county court, who did not try the case, could not officially know and had no power to certify to this court what the evidence and proceedings in said cause were. It was necessary that the case-made be settled and signed by the special judge who tried the cause.

The appeal is therefore dismissed, and a mandate will issue, directing the county court of Washita county to enforce its judgment herein.

FURMAN, P. J., and DOYLE, J., concur.

(19 Idaho, 150)

MONICAL v. NORTHERN PAC. RY. CO.
(Supreme Court of Idaho. Dec. 31, 1910.)

(Syllabus by the Court.)

RAILROADS (§ 411*)—KILLING STOCK—LIABILITY FOR.

Under the provisions of section 2815, Rev. Codes, *held*, that the evidence in this case is sufficient to support the verdict of the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1409-1450; Dec. Dig. § 411.*]

Appeal from District Court, Shoshone County; W. W. Woods, Judge.

Action by James Monical against the Northern Pacific Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

E. J. Cannon and Featherstone & Fox, for appellant. Walter H. Hanson, for respondent.

SULLIVAN, C. J. This action was brought under the provisions of section 2815, Rev. Codes, to recover for the killing of a horse by the appellant railway, because of the failure of appellant to fence its right of way where the accident occurred. All of the material allegations of the complaint were put in issue by the answer. The case was tried first in a justice's court, and judgment there rendered against the defendant, and was then appealed to the district court, and judgment there rendered in favor of the plaintiff, who is respondent here. This appeal is from the judgment and order denying a new trial.

The question of negligence in the operation of appellant's train of cars by which the animal was killed is not raised. The only

question presented on this appeal is whether under the evidence the railroad company was required by the provisions of section 2815, Rev. Codes, to fence its track at the point where the animal was killed. Said section is in part as follows: "Every railroad company operating any steam or electric railroad in this state, shall erect and maintain lawful fences not less than four feet high on each side of its road, where the same passes through, along or adjoining enclosed or cultivated fields or enclosed lands, with proper and necessary openings and gates therein, and farm crossings; and also construct and maintain cattle guards at all highway crossings where fences are required as aforesaid, suitable and sufficient to prevent horses, cattle, mules or other animals from getting on the railroad. * * * If any corporation aforesaid fail, neglect or refuse for and during the period of three months after the completion of its road through or along the fields or enclosures hereinbefore named, to erect and maintain any fence, opening gates, farm crossings or cattle guards as herein required, and after having received not less than thirty days' notice requiring them so to do, then the owner of such fields or enclosures may erect and maintain such fences, opening gates, farm crossings, and cattle guards, and shall thereupon have a right to sue and recover from such corporation in any court of competent jurisdiction, the full value of the same."

The question whether, under the provisions of said section and the evidence in the case, the railroad company was required to fence its railroad right of way at the place where the said horse was killed, was submitted to the jury by the court under proper instructions, and we think, from all of the evidence contained in the record, that the jury was justified in finding for the plaintiff. The evidence shows that at the place where the horse was killed the plaintiff had an inclosure containing two or three acres of ground, and that there were other small inclosures along said track.

The judgment must therefore be affirmed, and it is so ordered, with costs in favor of the respondent.

AILSHIE, J., concurs.

(19 Idaho, 95)

HOME LAND CO. v. OSBORN et al.
(Supreme Court of Idaho. Dec. 27, 1910.)

(Syllabus by the Court.)

1. BILLS AND NOTES (§ 220*)—TRANSFER—VALUITY—ACTION ON NOTE.

Where bank N. transmits a promissory note owned by it to bank E., and guarantees the payment thereof, and bank E. thereupon pays to bank N. the face value of such note, with the further agreement that the transferee shall receive 8 per cent. interest on the same.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

and that bank N. shall receive the difference between 8 per cent. and the rate of interest which the note bears, and, when installments of interest fall due, bank E. charges the same to bank N., and draws for the amount, and bank N. responds by paying the same and collects from the maker of the note, and thereafter and prior to the payment of the principal bank E. sells and transfers the note to H. & Co., held, that the title to the note had passed to bank E., and that it had a right to sell and transfer the note, and that the holder thereof may maintain its action for the collection of the same.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 491; Dec. Dig. § 220.*]

2. BILLS AND NOTES (§ 524*)—RIGHT OF ACTION—POSSESSION—PRESUMPTIONS.

Under the provisions of sections 3508, 3648, Rev. Codes, the person in possession of a negotiable promissory note is presumed to be the owner and holder thereof, and may sue thereon.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1826-1831; Dec. Dig. § 524.*]

3. BILLS AND NOTES (§ 527*)—ACTION ON NOTE—EVIDENCE—CREDITS.

The facts in this case examined, and held to show the defendant and appellant entitled to a credit of \$400 more than was allowed by the jury.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1847, 1852; Dec. Dig. § 527.*]

Appeal from District Court, Nez Perce County; Edgar C. Steele, Judge.

Action by the Home Land Company against J. E. Osborn and the Bank of Nez Perce. Judgment for plaintiff, and defendant bank appeals. Modified and affirmed.

This is an action upon a promissory note instituted by the respondent as the holder thereof against the defendants J. E. Osborn as the maker and the bank of Nez Perce as guarantor. The note was executed and delivered by Osborn for the sum of \$2,500, payable to the order of J. A. Schultz. Schultz assigned and transferred the note to the First National Bank of Nez Perce. The bank thereafter discounted, or, as stated in the pleadings and by the witnesses, "rediscounted," the note to the Effingham State Bank of Effingham, Ill. This transaction according to the evidence occurred as follows: The First National Bank of Nez Perce had an arrangement with the Effingham State Bank whereby it sent promissory notes to the latter bank and guaranteed the payment of the same, and thereupon received from the Effingham bank the face value of the notes. It was further understood that, where a note bore interest at 12 per cent., the Effingham bank should receive 8 per cent. and the difference should go to the First National Bank of Nez Perce; and, where a note bore 10 per cent., the Effingham bank should receive 7 per cent., and the difference should go to the Nez Perce bank. This note was held by the Effingham bank for some time, and as interest would fall due it was charged up to the First National Bank of Nez Perce, and the latter

bank would charge itself with the amount of interest and credit the Effingham bank accordingly. In the meanwhile it collected from the maker of the note either \$800 or \$1,200. As to which sum it collected, there is at least an apparent conflict in the evidence. Prior to the maturity of this note, the First National Bank of Nez Perce surrendered its charter, but prior to doing so the bank of Nez Perce was organized under the state law as a state banking institution, and took over all the assets of the First National Bank, and agreed to assume all the liabilities of the First National Bank, which included its guaranty on this note. About that time or soon thereafter the Effingham bank sold, assigned, and transferred the note to the plaintiff herein, Home Land Company. This action was thereafter instituted against the bank of Nez Perce on its guaranty, and Osborn, the maker of the note, for the collection thereof. No service of process was had on the defendant Osborn, and the action proceeded against the bank alone. Judgment was entered in favor of the plaintiff, and the bank appealed.

Eugene O'Neill, for appellant. Charles L. McDonald, for respondent.

AILSHIE, J. (after stating the facts as above). A great number of errors have been assigned on the admission and rejection of evidence and the giving of certain instructions by the court and the refusing to give others, but they all revolve about the leading and decisive question presented by appellant to the effect that the note sued on was merely a pledge in the hands of the Effingham bank, and that the title to the same never passed to the bank, and that the bank was unable to pass title to the respondent in this case. If that question should be resolved against the contention of appellant, the other assignments of error can prove of no avail. The Effingham bank took the paper and paid the face value thereof. The transaction was not accompanied by any pledge agreement. The assignor and holder of the paper, the First National Bank of Nez Perce, guaranteed the payment of the note. The collections of interest were made through the First National Bank of Nez Perce. In other words, the Effingham bank did not call directly on the maker of the note for interest, and presumably did not expect to call directly on the maker for the principal when due, but it called on the guarantor, the First National Bank of Nez Perce, which responded in the payment of interest as the same fell due, and it accordingly called on the maker for the same. The guarantor therefore performed the duties of a collecting agent solely for the protection of its guaranty on the paper and a profit of 4 per cent. interest, which repre-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

sented the difference between the rate the note bore and the rate the Effingham bank was to accept.

These facts, however, did not reduce this transaction involving negotiable commercial paper to the mere condition of a pledge. In applying the law governing pledges of goods and chattels to that of negotiable paper, some distinctions must be observed in the matter of presumptions growing out of the transactions. A deposit of the ordinary personal property as collateral for the payment of a loan carries with it certain presumptions which would not arise on the transfer of commercial paper where the face value thereof is paid for the same. In other words, in the absence of a specific agreement or understanding that it should be a pledge, the law of negotiable instruments raises the presumption that title has passed, and that the holder thereof is the owner and entitled to maintain his action thereon for the recovery thereof. See sections 3508, 3648, Rev. Codes; *Craig v. Palo Alto Stock Farm*, 16 Idaho, 701, 102 Pac. 393. Under the facts as disclosed by the record in this case, it is clear to us that the bank of Effingham took title to the note sued upon and was entitled to maintain its action thereon for the collection of the same. It had a right to sell and transfer the paper to the respondent. We find no error of law which would either call for or justify a reversal of the judgment in this case.

One question of fact, however, would seem to require a modification of the judgment. It is contended by appellant that \$1,200 had been paid on the note, while the respondent claims that only \$800 was paid, and the jury allowed only \$800 on interest. The indorsements on the note as pleaded are as follows: "Interest paid to March 4, 1907; interest paid to March 4, 1909." The note bears date March 4, 1905, and bears interest at the rate of 12 per cent. per annum. The cashier of the Bank of Nez Perce testified that the bank books showed under date of March 2, 1908, a deposit in favor of the Effingham State Bank of \$800 received from Osborn. He further testified that the books showed that in January, 1909, "there was charged to the account of the Effingham State Bank on account of Osborn \$400." The witness further says: "The record shows that there was \$400 deposited for the benefit of the Effingham State Bank. * * * The record shows that Effingham for Osborn got \$400 for interest about that time." The record is somewhat confusing as to the date. At one place it states January 18 and at another place January 6, 1909. The witnesses seem to adhere substantially to these statements, but on cross-examination there is some confusion intro-

duced into the record which evidently had the tendency to lead the jury to conclude that only \$800 had been paid on the note. As we read the record, however, we do not find any substantial dispute or denial of the proposition that \$1,200 was received on account of this note.

We have concluded to order a conditional modification of the judgment by reducing it in the sum of \$400, provided the plaintiff herein within 30 days after the going down of the remittitur file a waiver of that sum and an acceptance of the judgment reduced in the sum of \$400. Upon failure to do so, a new trial will be granted. Judgment modified as above stated. The total costs of printing the transcript, brief of respondent, and 40 pages of appellant's brief, and the other taxable costs in the case will be divided equally between the appellant and respondent.

SULLIVAN, C. J., concurs.

(19 Idaho, 176)

BLACK CANYON IRR. DIST. v. MARPLE.
(Supreme Court of Idaho. Jan. 13, 1911.)

(Syllabus by the Court.)

1. WATERS AND WATER COURSES (§ 225*)—IRRIGATION DISTRICTS—PROCEEDINGS FOR ESTABLISHMENT—PETITION—SIGNATURE BY ATTORNEY IN FACT.

An attorney in fact, duly appointed in writing in the name, place, and stead of the principal, to sign a petition to the county commissioners for the organization of an irrigation district, has the power and authority to sign such petition for his principal, and the signing of such petition by said attorney in fact will bind the principal as fully and to all intents and purposes as if he had personally signed the same.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 317; Dec. Dig. § 225.*]

2. WATERS AND WATER COURSES (§ 225*)—IRRIGATION DISTRICTS—ESTABLISHMENT—PETITION—HEARING.

Held, that the special session of the board of county commissioners for the consideration of said petition was properly and regularly called.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 317; Dec. Dig. § 225.*]

3. EVIDENCE (§ 333*)—DOCUMENTARY EVIDENCE—PUBLIC RECORDS.

Where the original order signed by the members of the board of county commissioners calling a special session of the board has been lost, the record copy thereof may be introduced in evidence and is prima facie evidence of what the original order contained.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1247, 1248; Dec. Dig. § 333.*]

4. EVIDENCE (§ 333*)—DOCUMENTARY EVIDENCE—PUBLIC RECORDS.

Under the provisions of section 5979, Rev. Codes, entries in public or official books or records, made in the performance of his duty by a public officer of this state or by any other

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

person in the performance of a duty specially enjoined by law, are prima facie evidence of the facts therein stated.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1247, 1248; Dec. Dig. § 333.*]

5. EVIDENCE (§ 333*)—DOCUMENTARY EVIDENCE—PUBLIC RECORDS.

The clerk of the board, under the provisions of section 1915, Rev. Codes, is required to enter the order calling a special meeting upon the records of said board, and under the provisions of said section 5979 the record copy becomes prima facie evidence of the facts stated in such order.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1247, 1248; Dec. Dig. § 333.*]

Appeal from District Court, Canyon County; Ed. L. Bryan, Judge.

Action by the Black Canyon Irrigation District against George Marple. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Affirmed.

Smith & Scatterday, for appellant. Rice, Thompson & Buckner, for respondent.

SULLIVAN, J. This is an action brought under the provisions of section 2401, Rev. Codes, to secure the confirmation of the proceedings in connection with the organization of the Black Canyon Irrigation District, a corporation. The action was commenced in the district court by filing a petition in and for the county of Canyon. By said petition the plaintiff asked for a decree of the court, adjudging its incorporation and organization to be regular and valid. The defendant, being a party in interest as provided by section 2402, Rev. Codes, appeared and filed a demurrer to the petition, which demurrer was overruled and an exception allowed. The defendant thereupon filed his answer, putting in issue all of the material allegations of the complaint. The hearing was had and proof introduced showing the various steps taken in the organization and in the completion of the organization of said district, whereupon the court made finding of facts and conclusions of law and rendered a judgment approving and confirming each and all of the proceedings for the organization of said district and adjudging the same to be regular and valid. After the judgment confirming the organization was rendered, a motion for a new trial was made and overruled, and this appeal is from the order overruling the motion for a new trial and the judgment entered.

The first error assigned is in regard to the admission of certain powers of attorney, whereby certain parties were constituted and appointed attorneys in fact by the respective owners of land in said district, to sign the petition for the organization of said irrigation district. The following is the form used for such power of attorney:

"Know All Men by These Presents: That T. E. Winsor and Emma Winsor of Issaquah, county of King, state of Washington, have

made, constituted and appointed, and by these presents do make, constitute and appoint Hugo A. Graef, of Caldwell, county of Canyon, state of Idaho, my true and lawful attorney for me and in my name, place and stead to sign that certain petition to the county commissioners of the county of Canyon, state of Idaho, for the organization of an irrigation district including lands between Boise river and Payette river in Canyon county, Idaho, within what is now known as the proposed Black Canyon Irrigation District and included within the North Side Project of the Payette-Boise Reclamation Project.

"Giving and granting unto my said attorney full power and authority in the above premises to sign said petition for all my lands within said proposed district as fully and to all intents and purposes as I might or could do if personally present.

"Witness my hand and seal this 16th day of May, 1910."

Said powers of attorney were signed and duly acknowledged as transfers to real estate are required to be acknowledged under the provisions of our statute, and it is contended that said powers of attorney simply give authority to sign a petition for the organization of said irrigation district, but do not provide what shall be the boundaries of said district nor the plan of watering the same. There is nothing in that contention. Said power of attorney gives the attorney in fact full power for the principal and in his name, place, and stead to sign that certain petition to the county commissioners for the organization of an irrigation district, including certain lands between the Boise and Payette rivers in Canyon county, and constitutes what is now known as the Black Canyon Irrigation District within what is known as the North Side Project of the Payette-Boise Reclamation Project. It is presumed that the person who executed said power of attorney fully understood that matter and authorized his attorney in fact to sign the petition that was presented to the board for the organization of said district. An attorney in fact may be appointed under the laws of this state to do any act in regard to real estate that the owner may legally do, and the owner of land in said district has the authority and power to appoint an attorney in fact to look after his interests in said matter and sign a petition for the organization of said district, which acts would be as valid and binding upon the principal as if he did them himself. The attorneys in fact were therefore legally authorized under said powers of attorney to sign said petition, and their signatures are as valid and binding on those who executed the powers of attorney as though they had signed the petition themselves.

It is next contended that under section 2374, Rev. Codes, it is provided that, when

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

such petition is presented to the board of county commissioners, said board shall set a time for the hearing upon the same, and that the notice of the time of such hearing shall be published by the board at least three weeks before the time of such hearing in a newspaper, etc. The meeting at which said petition was presented was a special meeting, and the original order calling such meeting was not introduced in evidence, said original order having been lost or mislaid; but the fact that such order was made was testified to by several witnesses and was also shown by a certified copy of the records of said board. Said order, as spread upon the minutes of the board containing the proceedings of said board, is as follows: "Whereas, George Marple and others have filed a petition with the clerk of the board of county commissioners of Canyon county, Idaho, for the organization of an irrigation district, and the clerk has given notice that said petition will be presented to the board of county commissioners of Canyon county, Idaho, on the 28th day of June, 1910, at the hour of ten o'clock a. m. of said day; and it appearing that it is necessary to have a special meeting of the board of county commissioners of Canyon county, Idaho, on said 28th day of June, 1910, at ten o'clock a. m. of said day for the purpose of having said petition presented to said board: Therefore, it is hereby ordered: That there shall be a special meeting of the board of county commissioners of Canyon county, Idaho, on Tuesday, the 28th day of June, 1910, in order that the petition filed by George Marple and others, and other papers connected therewith for the formation of an irrigation district as in said petition set forth may be presented to the said board of county commissioners of Canyon county, Idaho. And the clerk is hereby directed to give five (5) days' public notice of this special meeting, stating the business to be transacted as above specified, as required by law. [Signed] Jas. Vanderdassen, Otto G. Reinhardt, J. E. Kerrick, Board of County Commissioners of Canyon County, Idaho."

Section 1915, Rev. Codes, provides, among other things, that the order calling a special meeting must be entered of record, which was done. The record shows that notice of said meeting was given as directed in said order, and the following is an entry made in the minutes of the proceedings of said

board, to wit: "The board of county commissioners of Canyon county, Idaho, met in special session, pursuant to the order heretofore made and entered on page 560 of Book 3 of Commissioners Proceedings of Canyon County, Idaho, to which reference is hereby made." Under the provisions of section 5979, Rev. Codes, it is provided as follows: "Entries in public or other official books or records, made in the performance of his duty by a public officer of this state, or by another person in the performance of a duty specially enjoined by law, are prima facie evidence of the facts stated therein." As the order calling the special session of the board was entered on the minute record of the board in compliance with the provisions of said section 1915 and was an entry made by the clerk of said board in the performance of his duty and as provided by said section 5979, it is prima facie evidence of the facts stated therein.

The loss of the original order calling said special meeting having been shown, the record copy thereof is prima facie evidence of what said order contained, and in this case the record copy was supplemented by the evidence of the clerk of the board of county commissioners and his deputy that said record copy was an exact copy of the original order. And the deputy further testified that he was acquainted with the signature of each of the members of the board of county commissioners, and that said order so entered of record was signed by the individual members of said board. This testimony was in no manner contradicted and was sufficient to establish the fact that an order for a special session had been made as required by law.

It is admitted by counsel for appellant that they find no irregularity in the proceedings except in the two particulars above referred to. We conclude that the proof was conclusive; that the order calling said special meeting of the board was made as required by law; that all of the proceedings required by law to be taken for the organization of said irrigation district have been complied with and are regular; and that the judgment of the district court approving and confirming said proceedings must be affirmed, and it is so ordered. Costs of this appeal are awarded to respondents.

STEWART, C. J., concurs.

(49 Colo. 312)

KRUSCHKE v. QUATSOE.

(Supreme Court of Colorado. Jan. 3, 1911.)

1. CONTRACTS (§ 186*)—PARTIES.

A stranger to a contract cannot become a party to it, without the consent of both the original parties.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 790-797; Dec. Dig. § 186.*]

2. ACTION (§ 50*)—MISJOINDER—PARTIES.

In an action on a written agreement for the sale of a piano, the plaintiff set up a separate agreement of one month later, indorsed on the back of the original contract, guaranteeing for a separate consideration the payment of the original contract when due, and assuming joint liability with the maker. *Held*, that the original contract and contract of guaranty were separate and distinct contracts between different parties, and hence an action on the original contract and an action on the guaranty could not be joined.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 511-547; Dec. Dig. § 50.*]

3. ACTION (§ 50*)—JOINDER—PARTIES—SURETIES.

Code, § 13, providing that persons jointly and severally liable upon the same obligation, including parties to bills of exchange and promissory notes, and sureties on the same or separate instruments, may all or any of them be included in the same action, at option of plaintiff, does not authorize joinder of an action on a separate contract of guaranty, indorsed on an original agreement, with an action on the original agreement.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 511-547; Dec. Dig. § 50.*]

Error to District Court, City and County of Denver; Greeley W. Whitford, Judge.

Action by J. E. Quatsoe, doing business as the Piano Advertising Company, against Isaac Kruschke and another. From a judgment for plaintiff, defendant Kruschke brings error. Reversed and remanded.

Perkins & Main and Rogers, Ellis & Johnson, for plaintiff in error. C. F. Miller, for defendant in error.

HILL, J. The defendant in error, as plaintiff, filed his complaint in the district court of the city and county of Denver, making Isaac Kruschke and W. M. Jones defendants. The material part of the complaint, in substance, is that at La Plata county the plaintiff and Isaac Kruschke, one of said defendants, entered into a contract. Then follows a copy of the contract, which includes matters pertaining to pianos, certain schemes of advertisement, publication in newspapers, etc., in connection therewith; all to be performed at Durango, in La Plata county. Under certain conditions named the defendant Kruschke agreed to pay to the plaintiff at the city of Lamar, Colo., the sum of \$204. It was dated August 10, 1906, and purported to be signed at Durango, Colo. The complaint further alleged that upon the 11th day of September, 1906, for value received from this plaintiff by said defendant W. M. Jones, he guaranteed and agreed to

pay plaintiff the amount due or to become due upon said contract; said guaranty being in writing and upon the back of the Kruschke contract, as follows: "9/11/06. For value received I hereby guarantee payment of within contract, when due, and I assume joint liability with the maker, I. Kruschke." Performance of the contract by the plaintiff was alleged, and judgment prayed for the amount due.

The defendant W. M. Jones accepted service of the summons at Denver. The defendant Kruschke was served in La Plata county, and he thereafter filed his motion for a change of venue, and upon the same day filed a demurrer to the complaint. The former prayed to change the place of trial from the city and county of Denver to La Plata county, and for grounds set forth that this defendant has been for more than 20 years last past, and is now, a resident of La Plata county; that service of summons was made upon him in said county, as shown by the return; that the alleged contract sued upon is not specifically made payable in Denver. The plaintiff filed his answer to the motion for change of venue, setting forth that there are two defendants, and only one had made application for said change, etc. The motion for change of venue was overruled. The demurrer was also overruled. The defendant Kruschke elected to stand upon his motion and demurrer. Judgment was entered in favor of the plaintiff, and the action is here for review upon error.

The second and third grounds of demurrer were: "(2) That it appears on the face of said complaint that there is a misjoinder of parties defendant therein. (3) That it appears on the face of said complaint that there is a misjoinder of causes of action therein." The questions raised by the demurrer are decisive of the other. It will be noted that the guaranty was executed some time after the execution of the contract, and, so far as the pleadings disclose, had no connection with it and was for a separate consideration; hence the question is whether the original contract and the contract of guaranty constitute two separate and distinct contracts, to which there are different parties which and who cannot be joined in one action. There can be no question that at common law they were separate and distinct contracts; but it is urged that section 13 of our Code is authority for this action, and counsel claim that the statement in the guaranty written on the contract, as follows: "I assume joint liability with the maker, I. Kruschke"—makes the defendant Jones liable upon the same instrument with the defendant Kruschke, as he thereby assumes joint liability. We cannot agree with this conclusion, nor do we think that section 13 of our Code was intended to cover a case of this kind. Mr. Jones was not a party to this

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instrument, nor assignee of any one connected with it. So far as the pleadings disclose he was a stranger to the transaction. The contract between the plaintiff and the defendant Kruschke was complete upon the date of its delivery. It made no provisions for sureties or joint liability by others, and none were to be furnished or assumed. The contract between the plaintiff and the defendant Jones, executed one month later, was a separate contract. Its language implies this, for it says: "For value received I hereby guarantee payment of within contract, when due"—which refers to another contract from that which he was entering into. The fact that his contract is written upon the back of the other does not make it a part of the same obligation. A stranger to a contract cannot become a party to it without the consent of both parties, nor can he become a surety without such consent within the meaning of section 13 of our Code, which, in this respect, applies only to persons jointly or severally liable upon the same instrument, including parties to bills of exchange and promissory notes, and sureties on the same or separate instruments, and not to the independent volunteer guarantor of the payment of the instrument executed by other parties. *Shropshire v. Smith et al.* (Tex. Civ. App.) 37 S. W. 470.

Cases pertaining to parties, including the indorsers of negotiable instruments, sureties furnished by the makers of contracts, the assignors thereof, etc., brought under our, or similar, Code provisions, have no application to the facts here. It follows that the court erred in overruling the demurrer, as well as the motion to change the place of trial. Similar conclusions have, in substance, been approved in the following cases: *Mowery v. Mast*, 9 Neb. 445, 4 N. W. 69; *Harris v. Eldridge*, 5 Abb. N. C. (N. Y.) 278; *Barton v. Speis*, 5 Hun (N. Y.) 60; *Stewart et al. v. Glenn*, 5 Wis. 14; *Adams v. Wallace*, 119 Cal. 67, 51 Pac. 14; *Brewster v. Silence*, 8 N. Y. 207; *Shropshire v. Smith et al.* (Tex. Civ. App.) 37 S. W. 470.

The judgment is reversed, and the cause remanded, with directions to sustain the demurrer and grant the motion.

Reversed and remanded.

CAMPBELL, C. J., and MUSSER, J., concur.

(49 Colo. 275)

BASSICK GOLD MINE CO. v. BEARDSLEY.

(Supreme Court of Colorado. Jan. 3, 1911.)

1. INTEREST (§ 39*)—TIME FROM WHICH INTEREST RUNS—BOOK ACCOUNT—SERVICES.

In an action on a book account under a contract for services and materials, to be paid for on or before the 15th of each month following that in which they were furnished, plaintiff

can recover interest on the amounts included in statements rendered, from the 15th of each month when they were due until the date of payment, and is not confined to interest from the date of the last item.

[Ed. Note.—For other cases, see *Interest*, Cent. Dig. § 87; Dec. Dig. § 39.*]

2. INTEREST (§ 62*)—DISTINCT CAUSE OF ACTION—DEBT OR DAMAGES.

Where interest is due by agreement, it is an integral part of the debt, and the right to recover it may exist after the principal is paid, but where it is sought as damages for the nonpayment of a debt when due, it is a mere incident to the debt, and if the principal is paid and accepted without interest, the right to interest is extinguished.

[Ed. Note.—For other cases, see *Interest*, Cent. Dig. §§ 140, 143; Dec. Dig. § 62.*]

3. INTEREST (§ 67*)—AGREEMENT TO PAY—EVIDENCE.

In an action on a book account for services and materials, where plaintiff claimed an express agreement for interest, on payments made after the 15th of each month, evidence held insufficient to prove such an agreement.

[Ed. Note.—For other cases, see *Interest*, Cent. Dig. § 155; Dec. Dig. § 67.*]

4. ACCOUNT STATED (§ 5*)—ACCORD AND SATISFACTION—RECEIPT OF BILL RENDERED.

When one party presents to another a bill for a book account of a certain amount, and the other returns the bill with his check in payment, which is accepted and returned with the indorsement that the first party receives it in full of the account, it establishes a complete settlement of the account, barring fraud and mistakes.

[Ed. Note.—For other cases, see *Account Stated*, Cent. Dig. §§ 13, 19; Dec. Dig. § 5.*]

Appeal from District Court, Custer County; M. S. Bailey, Judge.

Action by George B. Beardsley against the Bassick Gold Mine Company. From a judgment for plaintiff, defendant appeals. Modified and affirmed.

Cranston, Pitkin & Moore, for appellant. John R. Smith and Karl E. Steinhauer, for appellee.

HILL, J. The right to collect interest, under certain conditions, is the question involved. The action is upon a book account provided for by a written contract, by which it was agreed that the appellee should furnish certain supplies and perform certain services to and for the appellant at certain fixed prices and under certain conditions. In consideration therefor the appellant agreed and bound itself to pay, on or before the 15th day of each and every calendar month, the amount due and owing to the appellee for such supplies furnished and services rendered during the preceding month. Under this contract a large amount of coal was furnished and freight hauled during a period of about four years. Statements were regularly rendered upon the first of each month, and with the exceptions of the last three or four they were paid, but at periods considerably after the 15th of the month. This action was brought to recover

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the amount left unpaid in the aggregate of \$1,442.53, with interest, and also to recover interest upon the amounts included in all statements theretofore rendered from the 15th of each month, when they were due, until the date of payment. Judgment was for the amount claimed.

The appellant's first contention is that the transaction constitutes but one book account; that the suit was brought upon it as such; hence no interest could be charged until the date of the last item. We cannot accept this conclusion. The written contract provides that the bills for each month shall be paid upon the 15th of the following month; in default thereof under our statutes the appellee was entitled to interest on the amount then due. *Florence O. & R. Co. v. McRae*, 40 Colo. 303, 90 Pac. 507.

The second assignment pertains to the interest allowed upon the monthly payments from the dates they were due until paid. These payments had all been made long prior to the bringing of this action, some of them nearly four years prior thereto. As we understand the law governing such cases, and which the appellant seeks to invoke is, that where interest is due because the debtor has expressly agreed to pay it, the interest is considered as an integral part of the debt, and the right to recover it may remain, even after the principal has been paid. But where interest is claimed as damages by virtue of the nonpayment of a debt when due, and for that reason is allowed by law, it is then considered not an integral part of the debt, but merely as an incident to the debt, and in such cases, when the principal is paid and accepted without interest, the right to interest is extinguished. *Stewart v. Barnes*, 153 U. S. 456, 14 Sup. Ct. 849, 38 L. Ed. 781; *Southern Ry. Co. v. Dunlop Mills*, 76 Fed. 505, 22 C. C. A. 302; *Chandler v. People's Savings Bank*, 61 Cal. 401; *Canfield v. School District*, 19 Conn. 529; *Davis v. Harrington*, 160 Mass. 278, 35 N. E. 771; *Am. Bible Society v. Wells, Ex.*, 68 Me. 572, 28 Am. Rep. 82; *Arnold v. Sedalia Nat. Bank*, 100 Mo. App. 474, 74 S. W. 1038; *King v. Phillips*, 95 N. C. 245, 59 Am. Rep. 238. Some cases hold that a protest for the nonpayment of the interest does not change this rule. *Cutter et al. v. Mayor, etc.*, 92 N. Y. 166; *Graves v. Saline Co.*, 104 Fed. 61, 43 C. C. A. 414; 22 Cyc. 1573; 16 Am. & Eng. Enc. of Law (2d Ed.) pp. 1030-1033.

Counsel for the appellee contend that this interest can be recovered, provided there was, either before or after the supplies were furnished, an express agreement to pay it. We agree with this, but do not think the record shows the existence of such an agreement. The only testimony concerning interest was given by the appellee, who admits that there was nothing said upon the subject at the time of the execution of the contract, and that the question was not mentioned for over two years thereafter, at which time

the greater portion of the interest claimed had accrued, if at all. He also stated that he never made a claim for interest on the bills rendered, and that he never did present a bill to the company which contained an item of interest; that no items of interest were charged against the defendant upon his books of account. He stated the reason he did not carry this item of interest on the next bill rendered, etc., was, "Well, I had not been in the habit of doing that, and it was a matter of whether—I expected to collect the interest all in a bunch when I got through with them—if I could collect the interest." Another reason he gave for his delay in the presentations of bills for interest was that he was not so anxious to have the interest paid as to have the other items paid, as the others were larger.

The evidence shows that these statements were paid by voucher checks of the company, upon which was a copy of the original statement as rendered by the appellee. At the bottom of this voucher was a receipt which the appellee signed. They read: "Received (with date inserted) from the Bassick Gold Mine Co. (amount inserted) dollars, in full payment of above account." 'Tis true, the appellee testified that the matter of interest was left open and he expected to collect it all at once, if he could collect it at all. He also stated that he spoke to the superintendent several times concerning the question of interest, and when this action was brought to recover the balance of the principal due upon this book account, he included the interest upon each of the items covered in the statements theretofore rendered, which items had been paid. He further said that during this time the question of their liability for interest was kept open between him and the defendant company. He says: "I asserted the right to get this interest two or three times to Mr. Radel. I made that claim a couple of years ago, probably earlier in this course of dealings. I cannot say that he understood that I was claiming this right to collect interest on these past due statements. I say I do not know whether he agreed to it or not. I told him that the interest up to such a date was so much money; he could not have misunderstood that the question of interest and my right to recover it was left open." Referring to his receipts, he said: "When I signed these voucher checks the question of this unpaid interest on these balances was an open matter between myself and the defendant. I think it was so to their knowledge, so far as I understood it." We do not think his testimony sufficient to overcome the rule laid down in the foregoing authorities, and his receipts, wherein he has said that it was "in full payment of above account."

A somewhat similar state of facts are those in the case of *Ryan Drug Company v. Hvambahl*, 92 Wis. 62, 65 N. W. 873, where goods were sold on 60 days' time and state-

ments rendered from time to time, in which no interest was included. These statements were kept by the vendee, and drafts were drawn upon him at intervals and paid. No other demand or payment was ever made. Later a certain amount was due, for which an action was brought. A verdict was directed to include interest on the monthly balances throughout the whole period of account. This ruling was held erroneous and the rule above quoted approved, and it was held that no interest should have been allowed, except upon the items of account included in the action, which were then unpaid.

It is true, the appellee claims that there were no settlements of this interest account, and the evidence shows that some two years after the account was started, and after a large portion of it had been made and paid, he made lead pencil memorandums concerning interest upon the margin of his books. We cannot agree that this or his statements disprove a settlement of these monthly accounts at the time of their payment. When one party presents to another a bill for a book account of a certain amount and the other thereafter returns the bill with his check in payment, which is accepted and the bill returned with the indorsement thereon that he receives the amount as payment in full of above account, we think this establishes a complete settlement of the account (barring fraud and mistakes). The fact that the appellee admits he never mentioned the question of interest to the officer of the appellant until two years after these accounts had been running and at least over half of them had been paid, which he now seeks to collect interest upon, to our minds, is conclusive that so far as the greater portion of this interest is concerned it was an afterthought, and was not intended to be charged or collected at the time the bills were paid.

In the case of *Chandler v. People's Savings Bank*, 61 Cal., at page 403, that court said: "When parties themselves settle their accounts without charging each other with interest, it is not in accordance with law or equity to go behind such settlements for the purpose of allowing interest in favor of one party against the other. Such settlements are considered conclusive, unless impeachable for mistake or fraud. * * * Transactions anterior to them, and included in them, are not interest-bearing."

Referring to the cases above cited, which hold that even where the amount is accepted under protest, it is not sufficient to reserve the question; also to the following: *Chase v. Manhardt*, 1 Bland, 333; *Burr v. Burch*, Ex., 5 Cranch (C. C.) 506, Fed. Cas. No. 2,187; *Snowden et al. v. Thomas et ux.*, 4 Har. & J. (Md.) 335; *Nat. Bank of Commonwealth v. Mechanics' Nat. Bank*, 94 U. S. 437, 24 L. Ed. 176—which hold that where it is clearly established that the question is expressly

reserved for future disposition, it can be thereafter litigated or adjusted—it is unnecessary here for this court to approve or disapprove either rulings, and we express no opinion pertaining thereto, as it is only necessary to hold that in this action interest cannot be collected upon these paid items, unless there was an express contract to that effect, and from our examination of the record we find no agreement of this kind, nor one which comes within the rule of the authorities last referred to, that the question was expressly reserved for future disposition. The evidence is insufficient to support the contention that there was an agreement upon the question at all.

It follows that the findings and judgment of the court as to the items of the unpaid principal in the sum of \$1,442.53 and the interest thereon are right; the remainder of the findings and judgment, which was for interest upon that portion of the account which had been paid, is erroneous. The judgment should be modified. The cause will be remanded, with directions to modify the judgment in accordance with the views herein expressed and, as so modified, it will stand affirmed. The appellant is entitled to recover its costs for this appeal.

Modified and affirmed.

CAMPBELL, C. J., and GABBERT, J., concur.

(49 Colo. 303)

MILLER et al. v. YOCKEY.

(Supreme Court of Colorado. Jan. 3, 1911.)

1. APPEAL AND ERROR (§ 896*)—AMENDMENT OF ANSWER—CONDITION OF CAUSE AND THE TIME FOR AMENDMENT—LACHES.

Where defendants' amended answer was prepared before trial in the county court in August, their request, for leave to file the answer made just before trial on appeal in the district court in the following January, without any showing of excuse for the delay, was properly denied.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3655-3658; Dec. Dig. § 896.*]

2. APPEAL AND ERROR (§ 896*)—AMENDMENT OF BILL OR ANSWER—CONDITION OF CAUSE AND TIME FOR AMENDMENT.

Defendants' motion for leave to file an amended answer, made at the end of a trial in the district court on appeal from the county court, to conform the allegations to the facts proven, alleging surprise and inadvertence, was properly denied, where matters sought to be put into the answer were known to defendants before the commencement of the action, and there was no showing as to inadvertence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3655; Dec. Dig. § 896.*]

3. ALTERATION OF INSTRUMENTS (§ 2*)—TERMS OF NOTE ALTERED IN COPY.

Defendant made a written contract with plaintiff to furnish material and make repairs on plaintiff's ranch, and to enable defendant to purchase the materials plaintiff loaned to defendant \$300, taking defendant's note, to which there was a reference in the contract. Plain-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

tiff kept the original contract, which was silent as to the time of completion, and also the original note, and sent defendant a copy of the note, across the top of which was written, "This agreement to be completed within ninety days." *Held*, that the original note was defendant's contract, and hence that the insertion of the words on the copy was not an alteration of the contract.

[Ed. Note.—For other cases, see *Alteration of Instruments*, Dec. Dig. § 2.*]

4. SET-OFF AND COUNTERCLAIM (§ 24*)—SUBSISTING RIGHTS OF ACTION IN DEFENDANT.

Where defendant contracted in writing to furnish material and make repairs on plaintiff's ranch, and, to enable defendant to purchase the material, plaintiff loaned him money, taking his note therefor, defendant was not entitled to interpose a counterclaim against the note for material and labor furnished where he failed to perform the contract without excuse.

[Ed. Note.—For other cases, see *Set-Off and Counterclaim*, Cent. Dig. §§ 39-42; Dec. Dig. § 24.*]

5. CONTRACTS (§ 319*)—BREACH BY FAILURE OF PERFORMANCE—RECOVERY ON PARTIAL PERFORMANCE.

A party cannot recover for what he may have done toward carrying out a contract which he has, without cause, abandoned and failed to perform.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1494, 1495; Dec. Dig. § 319.*]

Appeal from District Court, City and County of Denver; Greeley W. Whitford, Judge.

Action by Ada M. Yockey against Joseph N. Miller and another. Judgment for plaintiff, and defendants' appeal. Affirmed.

F. D. Taggart, for appellants. Ernest Morris, for appellee.

MUSSER, J. This is an action on a promissory note. In the county court and in the district court on appeal, judgment was rendered against the defendants, who are appellants here, for the amount of the note.

Now, after careful study of the abstract and briefs, as well as what was said in oral argument, it is impossible to discover such error as would warrant a reversal. Just before entering into the trial in the district court on January 16th, the defendants moved for leave to file an amended answer. This answer was prepared in July preceding and before the trial in the county court in August. No showing of any kind appears why the defendants ought to have been permitted to file this, and no ground is apparent to excuse the keeping of it for six months without an effort to file it. The court denied the motion and it cannot be said that error was committed in doing so under the circumstances. At the end of the trial, the defendants moved for leave to amend their answer, in several particulars, by interlineation to conform to the facts proven, alleging surprise and inadvertence. This motion was denied. A careful study of the request reveals that the several matters sought to be put into the answer were, in their very nature, such as must have been known to the

defendants before the commencement of the action and surprise could not exist, nor is it made to appear wherein or how the omission of these matters from the original answer was due to inadvertence. If the court had permitted the interlineation, it does not appear that the answer would have been any better. Under these circumstances, it cannot be said that the court committed any error in refusing the request to amend. Miller entered into a written contract with Mrs. Yockey to furnish material and perform labor in making certain repairs about buildings and fences on her ranch. In order to enable him to purchase the material, she loaned him \$300, and he gave her the note sued on. The note was mentioned in the written contract. There was but one original copy of the contract. She took the contract and note, and it was arranged that a copy should be given Miller, which he received about three weeks later. Across the top of this copy, Mrs. Yockey wrote the words: "This agreement to be completed within 90 days." The contract was silent as to the time of completion, and these words were not inserted, nor written on it. The answer alleges that the contract was materially altered by the insertion of these words, and that thereby the note and contract became void and of no effect. It was the theory of the defense that the copy was a duplicate original of the contract, and that it—the other duplicate original—and the note were three papers forming one entire contract, and that a material alteration of the one by Mrs. Yockey, without Miller's consent, avoided all. The note was one contract, the written agreement signed by Miller another, and the copy was not a duplicate original. The defendants' theory is untenable. A letter from Mrs. Yockey, offered in evidence by the defendants, shows that her construction of the contract was that, inasmuch as it was silent as to the time of completion, it was to be performed in a reasonable time, and that 90 days was a reasonable time. The defendants endeavored to counterclaim against the note the amount of certain material and labor, which the answer alleged was furnished towards the completion of the contract. It does not appear that Miller ever completed the contract, or that Mrs. Yockey ever prevented him from doing so. The only excuse he appears to offer for not proceeding with it was that Mrs. Yockey put a different construction on it than he did. A party cannot recover for what he may have done toward the carrying out of a contract, which he has, without cause, abandoned and failed to perform. The judgment is affirmed. Judgment affirmed.

CAMPBELL, C. J., and GABBERT, J., concur.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

(49 Colo. 290)

LAVELLE et al. v. TOWN OF JULESBURG.
(Supreme Court of Colorado. Jan. 3, 1911.)

1. APPEAL AND ERROR (§ 672*)—DISMISSAL—GROUNDS—INSUFFICIENT RECORD.

A writ of error will not be dismissed for defects in the bill of exceptions, where the record proper may disclose matters constituting reversible error which plaintiffs in error are entitled to have considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2867-2872; Dec. Dig. § 672.*]

2. EMINENT DOMAIN (§ 187*)—ORDER FOR IMMEDIATE POSSESSION—AFFIDAVIT—SUFFICIENCY.

An affidavit by a mayor was sufficient to sustain an order for immediate possession of land to be condemned by the town, and to show inferably that he was authorized to make the required deposit, where it appeared that the electors had authorized the trustees to construct a waterworks system, and construction had been commenced, and that the particular land had been selected as a power house site, and where the affidavit showed that the town authorities had ordered condemnation of the particular land for immediate construction of a power house.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 505, 507; Dec. Dig. § 187.*]

3. EMINENT DOMAIN (§ 187*)—PLEADING—REQUISITES.

On application by a city in a condemnation proceeding for an order for immediate possession, it is only necessary to plead the ultimate facts respecting authority to proceed and not the evidence to prove it.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 505, 507; Dec. Dig. § 187.*]

4. APPEAL AND ERROR (§ 169*)—REVIEW—MATTERS NOT PRESENTED BELOW.

The Supreme Court may refuse to consider questions not raised below.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1018; Dec. Dig. § 169.*]

5. EMINENT DOMAIN (§ 262*)—ERRONEOUS INTERLOCUTORY ORDERS—REVIEW.

Interlocutory orders in a condemnation proceeding such as an order for immediate possession, though erroneous, do not warrant reversal of the final judgment, unless it appears that they prejudicially affected the substantial rights of the complaining party.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 686; Dec. Dig. § 262.*]

6. EMINENT DOMAIN (§ 198*)—EXERCISE BY MUNICIPALITIES—DETERMINATION AS TO NECESSITY.

In condemnation proceedings under Rev. St. 1908, § 6525, subd. 70, authorizing towns to condemn private property in constructing waterworks, it is proper to refuse to appoint commissioners or for the court to determine the necessity for taking the particular land; the municipal authorities' determination being conclusive in the absence of fraudulent or unreasonable action.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 525, 526; Dec. Dig. § 198.*]

7. EMINENT DOMAIN (§ 68*)—EXERCISE OF DISCRETION—CONCLUSIVENESS.

The exercise of discretionary power and judgment of municipal officers when acting within the scope of their authority in such matters as condemnation proceedings is conclusive, unless it clearly appears that their action was fraudulent or unreasonable.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 168-170; Dec. Dig. § 68.*]

8. PLEADING (§ 8*)—CONCLUSIONS.

An allegation that town authorities did not act in good faith in condemning land for a municipal purpose is bad as stating a mere conclusion.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 12-28; Dec. Dig. § 8.*]

9. EMINENT DOMAIN (§ 198*)—PLEADING—NECESSITY.

In a proceeding by a town under Rev. St. 1908, § 6525, subd. 70, it was proper to refuse to determine the question of necessity for taking, where the answer did not raise that issue.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 525, 526; Dec. Dig. § 198.*]

10. EMINENT DOMAIN (§ 68*)—USE—NATURE—DETERMINATION.

The provision of the state Constitution, which makes the question whether the contemplated use of land sought to be condemned is really public a judicial one, is intended to prevent a legislative declaration that a use is public which in law and in fact is not, and does not apply to a proceeding by a town under Rev. St. 1908, § 6525, subd. 70, to condemn private property in constructing a waterworks.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 167-170; Dec. Dig. § 68.*]

11. EMINENT DOMAIN (§ 195*)—MUNICIPAL WATERWORKS—PLEADING—SUFFICIENCY.

In a condemnation proceeding by a town under Rev. St. 1908, § 6525, subd. 70, to condemn property for waterworks, a mere denial that the purpose for which the land was sought to be taken was public, or that the town had power to condemn, did not raise a question of law or fact respecting a public use or the town's power in the premises.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 524; Dec. Dig. § 195.*]

12. EMINENT DOMAIN (§ 198*)—POWER OF PETITIONER—DETERMINATION.

A petitioner's right to exercise power of eminent domain or to take a particular tract should be determined by the court in limine.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 525, 526; Dec. Dig. § 198.*]

13. APPEAL AND ERROR (§ 934*)—REVIEW—PRESUMPTIONS—FINDINGS.

In the absence of specific and unambiguous findings to the contrary, appellate courts must assume that the lower court found those facts which are responsive to the issues and essential to the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3777; Dec. Dig. § 934.*]

14. MUNICIPAL CORPORATIONS (§ 20*)—ORGANIZATION—VALIDITY—PRESUMPTIONS.

Under Rev. St. 1908, § 6746, providing that a municipality shall be deemed to be legally incorporated, where the legality has not been questioned within one year from the date of organization, a town is conclusively presumed to have been regularly organized, where it appears that it has had a full complement of town officials for more than two years, exercising their respective duties, and that the town has for more than 12 years exercised the powers of a municipality.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 49, 51; Dec. Dig. § 20.*]

15. EMINENT DOMAIN (§ 262*)—HARMLESS ERROR—EXCLUSION OF TESTIMONY.

In condemnation proceedings by a town, refusal to hear testimony under the answer was harmless, where the testimony was subsequently

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

heard, though not until after the jury called to assess damages had retired for deliberation.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. § 686; Dec. Dig. § 262.*]

16. EMINENT DOMAIN (§ 262*)—CURE OF ERROR—STRIKING ANSWER.

Any error in striking an answer in condemnation proceedings by a town was cured by subsequently hearing evidence on the issues made thereby.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. § 686; Dec. Dig. § 262.*]

17. EMINENT DOMAIN (§§ 111, 104*)—MUNICIPAL WATERWORKS—DAMAGES—ELEMENTS.

Damages to an owner's remaining and contiguous lots to be caused by noise, smoke, vapors, and increased dangers from fire held not subject to an award in a proceeding by a town to condemn a lot as a power house site.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 294, 278-281; Dec. Dig. §§ 111, 104.*]

18. EMINENT DOMAIN (§ 91*)—DAMAGES—RECOVERABLE ELEMENTS.

The owner of property condemned is not entitled to recover for damages to the residue for annoyance and inconvenience suffered by the general public, his damages being limited to some right or interest not shared nor enjoyed by the public generally.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 234, 235; Dec. Dig. § 91.*]

19. EMINENT DOMAIN (§ 106*)—DAMAGES—RECOVERABLE ELEMENTS—INJURY TO REMAINING LAND.

If several contiguous tracts in reality constitute one entire parcel used for one general purpose by the common owner, on the taking by a town of one of the tracts as a power house site, the owner could recover for damage to remaining and contiguous lots caused by being deprived of means of ingress and egress from the rear.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 282-289; Dec. Dig. § 106.*]

20. EMINENT DOMAIN (§ 124*)—DAMAGES—ASCERTAINMENT—TIME.

Under the express term of Rev. St. 1908, § 2431, property condemned should be valued as of the time of appraisal, and not as of the time of taking possession.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 332-344; Dec. Dig. § 124.*]

21. APPEAL AND ERROR (§ 643*)—BILL OF EXCEPTIONS—OBJECTIONS TO CERTIFICATE—TIME TO OBJECT.

Objection to the trial judge's certificate to a bill of exceptions comes too late, where the transcript including the bill has been lodged in the Supreme Court nearly 2½ years, and the abstract of record and briefs of defendants in error have been served for nearly 2 years.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2791-2794; Dec. Dig. § 643.*]

Error to Sedgwick County Court; A. H. Miller, Judge.

Condemnation proceedings by the Town of Julesburg against G. Lavelle and another. Judgment for petitioner, and respondents bring error. Reversed and remanded, with directions.

Franklin & Tedrow, for plaintiffs in error.
C. H. Pierce, for defendant in error.

GABBERT J. Plaintiffs in error were respondents in a proceeding instituted by the town of Julesburg to condemn a lot as a site upon which to erect a power house for the operation of a waterworks system then being constructed by the town. The jury impaneled assessed the value of the lot at \$720, and a judgment or decree was entered to the effect that on payment of this sum the town be permitted to take possession of the lot, and appropriate it to the public use for which it was sought to be condemned. The respondents have brought the case here for review on error.

Defendant in error has filed a motion to dismiss the writ of error and affirm the judgment, based upon the grounds that a proper bill of exceptions is not filed; that the pretended bill of exceptions was not approved, allowed, and certified to be full, correct, and complete, as required by law and the rules of this court, and that it fails to state that it contains all the evidence. The motion to dismiss must be denied. Even if the bill of exceptions is defective, there may be matters disclosed by the record proper constituting reversible error which plaintiffs in error are entitled to have considered, independent of the bill of exceptions. It will be time enough to consider the grounds urged against the bill of exceptions when we come to consider the argument of counsel for respondents, relating to matters which must appear by the bill of exceptions.

When the petition was presented, the court granted an order for the immediate possession of the lot sought to be condemned upon the deposit of the sum of \$800. The deposit was made and possession taken. The order is claimed to be erroneous for the reason that the affidavit upon which it was granted, although made by the mayor, does not disclose that he was authorized by the town authorities to take this step, or that he assumed to represent the town in making request for immediate possession, and that it does not appear he had any authority to appropriate the funds of the town for the purpose of making the deposit required. This contention is clearly without merit. The requisite petition was on file, from the allegations of which it appears that the legal voters of the town had authorized the board of trustees to construct a system of waterworks for fire and domestic purposes; that the trustees had begun the construction of the system; that they had selected the lot in question upon which to erect a power house to operate it; and from the affidavit it is made to appear that the party making it is the mayor of the town; that the town authorities had ordered that the possession of the lot in question be secured by condemnation proceedings for the immediate construction of a power house. The affiant also prays on behalf of the petitioner for an or-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

der of possession pending the final determination of the condemnation proceedings. We think this is sufficient from which to fairly infer, when the mayor, the chief executive officer of the town, is acting in its behalf, that he is duly authorized to represent it and take such steps in detail as were necessary to prosecute and carry out the purpose for which the condemnation proceedings were instituted, and that the money deposited as a condition precedent to taking possession had been duly appropriated for that purpose. It was only necessary to plead the ultimate facts with respect to these various matters, and not the evidence to prove them. So far as advised from the record, it does not appear that any of the questions just considered were presented to the trial court, and for this reason alone we might well refuse to consider them here.

It is next urged that the statute authorizing possession of property sought to be condemned to be taken possession of *ex parte* is a violation of the Constitution of the United States and of this state, which provide that no person shall be deprived of property without due process of law. It is wholly unnecessary to consider this question. The order for possession was interlocutory. Such orders, even if erroneous, will not justify a reversal of the final judgment, unless it appears that they prejudicially affected the substantial rights of the complaining party on the final adjudication. *Colo. F. & I. Co. v. Four Mile Ry. Co.*, 29 Colo. 90, 66 Pac. 902. No such showing is made here.

Respondents requested the appointment of a board of commissioners to determine the necessity for taking the lot in question, which was denied. Thereupon they requested the court to determine all questions presented by their answer, except damages, which was refused. Neither of these rulings, when the entire record is considered, was erroneous. The trustees of towns are expressly authorized to condemn so much private property as may be necessary for the construction of waterworks for the town which they represent. Subdivision 70, § 6525, Rev. St. 1908. The compensation for land so taken is to be paid by the town. It is the province of the town authorities to determine what property shall be taken and condemned upon which to construct a plant to operate a waterworks system belonging to the town. As applied to the facts of this case, the exercise of discretionary power and judgment of municipal officers, when acting within the scope of their authority, is conclusive, unless it clearly appears their action was fraudulent or unreasonable. *Kirkwood v. School District*, 45 Colo. 368, 101 Pac. 343; *Warner v. Town of Gunnison*, 2 Colo. App. 430, 31 Pac. 238; *City of Denver v. Kennedy*, 33 Colo. 80, 80 Pac. 122, 467.

Could the action of the town authorities in such matters be submitted to either a court or commission, it might be that the

judgment of the former would be regarded as not sound; but to permit this question to be gone into could result in substituting the judgment of others for those to whom the statute has specially delegated the power to determine what property shall be taken for the public use under consideration, how much, and its location. The results which would follow any inquiry whatever on the subject, and a consideration of the varied questions which town officials must settle in selecting a site for such a public use, stamps it as unsound, unless the case presented falls within the exceptions. No showing is made by the answer which states a case within any of such exceptions. Not a fact is stated from which it could be inferred that the town authorities had acted fraudulently, or in bad faith, or unreasonably. True, it is alleged in the answer that the selection of the lot in question was not made in good faith, but that is merely a conclusion of the pleader, instead of stating facts which might disclose such a condition. It is also true the answer alleges in substance that the town of Julesburg is possessed of other property which is more suitable and proper for the location of a power house; that there is vacant and unoccupied land in close proximity which could better be used for this purpose; that the selection of the lot in question was extraordinary and unnecessary, and that there is no necessity for taking this particular lot as a site upon which to construct a power plant, in that it is neither suitable, proper, nor necessary for that purpose. This is nothing more nor less than requesting that the judgment of a court or commission be substituted for the judgment of the town authorities. The latter must select a site for a power house. Neither a court nor a commission can do this for them. If it were possible to attack the acts of municipal officers in selecting a site for a power house to operate a waterworks system on the averments of the answer to which we have referred, then each time they did so their judgment might be interfered with to such an extent as to practically deny them the exercise of that authority and discretion with which they are exclusively invested by statute. As commissioners would have had no function to perform if they had been appointed, it was not error to refuse to appoint them. We must not be understood, however, as indicating what questions, under a proper answer, might be submitted to the determination of commissioners on the subject under consideration. That proposition is not presented.

We shall next consider the action of the court in refusing the request to determine all questions except damages. It certainly did not err in refusing to determine the question of necessity for taking, as the answer did not tender that issue. The answer of the respondents was in two parts, the first of which, so far as necessary to consider at present, in view of what has already been de-

terminated, denied that Julesburg was an incorporated town or municipal corporation, or that it had the right of eminent domain, and denied that the purpose for which the lot was sought to be taken was public, within the meaning of the Constitution of the state, or that such purpose was within the power conferred by law upon petitioner.

The further and separate answer, in addition to the averments before referred to, alleged, upon information and belief, that the proceedings authorizing the trustees of the town to construct a waterworks system were illegal and void. Under our Constitution, whenever private property is sought to be taken for an alleged public use, the question whether the contemplated use be really public shall be a judicial one; but that provision is intended to prevent the Legislature declaring that a use is public which, in law and in fact, is not, and has no application to any question involved in the case at bar. Land sought to be condemned by a town, upon which to construct a power plant to operate a waterworks system belonging to the town is undoubtedly to be devoted to a public use. The Legislature has conferred upon the town the authority to condemn land for this purpose. Merely denying that the purpose for which the lot was sought to be taken as set out in the petition was public, or that petitioner was without power to condemn the lot for that purpose, did not raise a question of either law or fact, with respect to a public use, or the power of the petitioner in the premises. It is true, as said in *U. P. R. Co. v. Colorado Postal T. C. Co.*, 30 Colo. 133, 69 Pac. 564, 97 Am. St. Rep. 106, that if for any reason the petitioner is not entitled to exercise the right of eminent domain, or take a particular tract, these questions should be determined by the court in limine. The right to condemn the particular lot or the question of good faith of the town is not involved, for reasons already given.

The only questions which can be said to be presented by the answer for the court to determine were whether the town was incorporated, and the proceedings authorizing the construction of the waterworks system regular. Conceding, for the sake of the argument, that the answer was sufficient to raise these questions, and that respondents were entitled to raise them, the record discloses that they were determined by the court on evidence introduced by the petitioner. There may not be any special findings on these subjects, but evidence touching them was heard, and there is nothing in the record to indicate that the court did not find in favor of petitioner on these issues. In the absence of specific and unambiguous findings of fact to the contrary, appellate courts must assume that the lower court did find those facts which are responsive to the issues made by the pleadings, and essential to the judgment rendered. *Fanny Rawlings M. Co. v. Tribe*, 29 Colo. 302, 68 Pac. 284.

But counsel contends that petitioner failed to prove that Julesburg was a municipal corporation. The evidence on this subject is to the effect that it had a full complement of town officials, and that it had had such officers for more than two years previous to the date of trial, exercising the duties of their offices; and that the town, as such, had for upwards of 12 years exercised the rights and powers of a municipal corporation. Under such a state of facts, the town, by virtue of section 6746, Rev. St., was conclusively presumed to be a regularly organized and legally incorporated municipality; and respondents were precluded from questioning the legality of its formation, organization, or incorporation. *People ex rel. v. Curley*, 5 Colo. 412. Without expressing any opinion thereon, we merely suggest that it may be doubtful if respondents were entitled to question the legality of the incorporation of petitioner. *U. P. R. Co. v. Colo. Postal T. C. Co.*, supra; *Eddleman v. Union Co. Traction & P. Co.*, 217 Ill. 409, 75 N. E. 510.

It is also claimed that the evidence is insufficient to establish that the proceedings authorizing the trustees to construct a waterworks system were legal. Without entering into details, we think it is sufficient to say that the testimony introduced by petitioner prima facie established that the preliminary proceedings were regular. No testimony was offered by respondents to overcome it. The court at first refused to hear any testimony on any issue raised by the answer, but subsequently did hear the testimony on the questions just considered, although not until after the jury called to assess damages had retired for deliberation. This was irregular, but not prejudicial. In this connection the action of the court in sustaining a motion to strike the whole of the further and separate answer, based upon the grounds that it was incompetent, uncertain, immaterial, and insufficient, and set forth no sufficient allegation to establish, or tending to establish, a defense, and also a demurrer to the remaining portion of the answer, upon the ground that it was insufficient to constitute a defense, will be considered. Technically, this was probably error, because some portions of the answer, so far considered, may have tendered issues which it was necessary for the court to determine, but inasmuch as it subsequently heard evidence on the issues thus made, the error committed was cured and respondents were in no wise prejudiced or precluded from offering testimony which, perhaps, they were entitled to offer, or which the petitioner, by reason of the issues made, was required to, and did, establish.

On behalf of respondents it is contended that the jury to assess damages was summoned in an irregular manner, and that the motion to quash the venire and panel should have been sustained instead of overruled. Under decisions of this court and the statutes, parties ought not to have any trouble in

securing a legal jury in a lawful manner, and as the cause must be reversed for errors which we will next consider, we shall not determine whether there was any such irregularity in summoning the jury, or such error in overruling the motion to quash, as would entitle the respondents to successfully complain.

The further answer alleged that Lucas was the owner of contiguous property upon which buildings used for stores and other purposes were erected, to which there was no means of ingress or egress except over the premises sought to be condemned, and that taking this lot would damage such contiguous property. Counsel for respondents offered to prove by deed that respondent Lucas was the owner of an interest in lots 7, 8, and 9 in the same block as the one sought to be condemned, which was denied. As we understand the record, the portions of the lots mentioned in the deed immediately adjoin lot No. 10, the one in controversy. Respondents then offered to prove that this lot and the part of lots 7, 8, and 9 described in the deed constituted one continuous tract, used together by Lucas for a common purpose, and that the taking of lot 10 and the erection and maintenance thereon of a pumping station would cause damage to the part of lots 7, 8, and 9 in which Lucas was interested, by depriving this tract of the means of ingress and egress from the rear, and by reason of the noise, smoke, noxious vapors, and increased danger from fire, to which petitioner objected, and the objection was sustained. It is clear that damages for noise, smoke, vapors and increased dangers from fire were not proper to consider. This inconvenience and injury would be common to all other property owners adjoining or adjacent to the power plant. The owner of property condemned is not entitled to recover damages to the residue for annoyance and inconvenience suffered by the general public. The damage to such residue is limited to some right or interest therein enjoyed by the owner, and not shored or enjoyed by the public generally. *Gilbert v. Greeley*, S. L. & P. Ry. Co., 13 Colo. 501, 22 Pac. 814; *Denver & S. F. Ry. Co. v. Hannegan*, 43 Colo. 122, 95 Pac. 343, 16 L. R. A. (N. S.) 874, 127 Am. St. Rep. 100. For such special damages the owner is as much entitled to compensation as he is for the value of the property actually taken. Whether or not when one tract is taken damages to another immediately adjoining shall be assessed, is not always easy to determine. The rule, however, as applicable to this case, is that, if several contiguous tracts in reality constitute one entire parcel used for one general purpose by the common owner, the particular and special injury which will result to the part not taken should be determined, and compensation made accordingly. 15 Cyc. 720.

As we understand the record, Lucas is the owner of an interest in part of lots 7, 8, and

9, upon which improvements are located, and that lot 10 affords, and is used by him, as a means of ingress and egress to the rear of these improvements, of which he will be deprived. This is a right peculiar to him. The extent, then, the market value of his interest in part of lots 7, 8, and 9 will be depreciated, if any, by being deprived of lot 10, is compensation which should be awarded in addition to the value of the property actually taken. *Denver & S. F. Ry. Co. v. Hannegan*, supra; *Colo. M. Ry. Co. v. Brown*, 15 Colo. 193, 25 Pac. 87. The court not only erred in striking the portion of the answer claiming damages to the part of lots 7, 8, and 9, but also erred in refusing to permit respondent Lucas to introduce testimony to establish them.

Possession of the property was taken March 15, 1907. Over the objection of counsel for respondents, a witness on behalf of petitioner was asked to state the value of the lot as of that date. Counsel for respondent also offered to prove the value of the lot at the time of the trial, which was denied. Later the court instructed the jury that the measure of damages to which the owners were entitled was the market value of lot 10 at the time of taking. Both the ruling and the instruction are erroneous. The statute (section 2431, Rev. St.) particularly provides that in estimating the value of property actually taken, the true and actual value at the time of the appraisal shall be allowed and awarded. Under this statute this court has repeatedly decided that the true and actual value of the property condemned belonging to the respondent at the time of the appraisal is the measure of compensation in condemnation proceedings for the property actually taken. *Colo. Central Ry. Co. v. Allen*, 13 Colo. 229, 22 Pac. 605; *Colo. M. Ry. Co. v. Brown*, supra; *Twin Lakes-H. G. Min. Synd. v. Colo. M. Ry. Co.*, 16 Colo. 1, 27 Pac. 258; *Lamborn v. Bell*, 18 Colo. 346, 32 Pac. 989, 20 L. R. A. 241.

Numerous other errors are assigned which do not appear to justify discussion, or are of that character that can readily be avoided at another trial. In considering the case we have not been unmindful of the grounds assigned by counsel for petitioner in support of the contention that the bill of exceptions should not be considered. None of these objections have merit, unless it be the one relating to the certificate of the trial judge. In some respects the certificate is faulty, but not so much so as the one considered in the case of *Big Kanawha Leasing Co. v. Jones*, 45 Colo. 381, 102 Pac. 171, to which attention is now directed as prescribing the formalities to be observed in the preparation and certification of a bill of exceptions. In the circumstances of this case, however, petitioner is not in a position to have the alleged defects in the certificate considered. The transcript, which included the bill of exceptions, was lodged in this court and writ of error

served nearly two years and five months, and scire facias served more than two years, before the motion under consideration was made. The abstract of record and briefs of respondents were filed and served upon counsel for petitioner nearly two years before such motion was filed. In such circumstances the objection to the certificate, that it does not fully comply with all the requirements of the Code, comes too late. *Reynolds v. Campling*, 21 Colo. 86, 39 Pac. 1092; *Mason v. Seiglitz*, 22 Colo. 320, 44 Pac. 588; *Mackey v. Monahan*, 13 Colo. App. 144, 56 Pac. 680; *Bd. Co. Com'rs v. Tulley*, 17 Colo. App. 113, 67 Pac. 346; *Merriner v. Jeppson*, 19 Colo. App. 218, 74 Pac. 341.

The judgment of the county court is reversed and the cause remanded, with directions to assess the compensation and damages in accordance with the views expressed in this opinion. From the record before us we are of the opinion that a new trial should be limited to these questions on the pleadings relating to these subjects as originally filed.

Reversed and remanded, with directions.

CAMPBELL, C. J., and HILL, J., concur.

(49 Colo. 256)

DENVER N. W. & P. RY. CO. v. HOWE et al.
(Supreme Court of Colorado. Jan. 3, 1911.)

1. EMINENT DOMAIN (§ 262*)—PROCEEDINGS—APPEAL—HARMLESS ERROR—INSTRUCTIONS.

Any error in an instruction in condemnation proceedings that, if the land taken had no market value, the jury must find the actual value thereof and assess damages on such basis, on the ground that the evidence showed a market value, was harmless to petitioner, if the verdict was within the market value of the land as shown by the evidence.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. § 686; Dec. Dig. § 262.*]

2. EMINENT DOMAIN (§ 136*)—PROCEEDINGS—ASSESSMENT OF COMPENSATION—EVIDENCE—PECULIAR VALUE OF PROPERTY.

In condemnation proceedings to take part of a ranch and the ranch buildings, the jury could, in assessing damages, consider the adaptability of the site on which the buildings were located for the purpose of a building site; the evidence showing that the other parts of the ranch were either too low or too rough for a building site.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. § 366; Dec. Dig. § 136.*]

3. EMINENT DOMAIN (§ 205*)—PROCEEDINGS—SUFFICIENCY OF EVIDENCE.

In condemnation proceedings to take a part of a ranch and the buildings thereon, evidence held to sustain the verdict as to the value of the property taken.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. § 544; Dec. Dig. § 205.*]

4. EMINENT DOMAIN (§ 220*)—PROCEEDINGS—DAMAGES—EVIDENCE—VIEW.

Whether the jury's view of the premises taken be considered as evidence on its value, or be merely for the purpose of better understanding and applying such evidence, the market value of the land is to be determined from the

evidence, so that it is proper to instruct that the market value should be determined from the evidence and to refuse an instruction that it should be determined from the evidence and the jury's view of the premises.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. § 559; Dec. Dig. § 220.*]

5. EMINENT DOMAIN (§ 222*)—PROCEEDINGS—"MARKET VALUE"—INSTRUCTIONS.

Since the market value of the land condemned should be determined from sales actually made so as to necessitate a demand, it was proper for an instruction defining "market value" to include a demand for the land as a requisite to the existence of a market value (citing *Words and Phrases*, vol. 5, tit. "Market Value").

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. § 565; Dec. Dig. § 222.*]

6. TRIAL (§ 296*)—INSTRUCTIONS—CURE.

Any error in an instruction in condemnation proceedings requiring, in order to establish a market value for the land, that there be purchasers and sellers willing to buy and sell "at a well-known and generally understood price," was cured by another instruction that the value of the land which the jury should consider as the market value was its value if sold in the open market under ordinary circumstances for cash.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 705-718; Dec. Dig. § 296.*]

7. TRIAL (§ 260*)—INSTRUCTIONS—REQUESTS—INSTRUCTIONS ALREADY GIVEN.

Requested instructions in eminent domain proceedings, which merely consisted of different definitions of market value which the court had already defined, were properly refused.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

8. TRIAL (§ 296*)—INSTRUCTIONS—REPETITION.

An instruction in eminent domain proceedings as to the amount of damages to be assessed was not erroneous for not mentioning benefits which the statute requires the verdict to find, where that item was dealt with in a separate instruction.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 705-718; Dec. Dig. § 296.*]

9. EMINENT DOMAIN (§ 223*)—PROCEEDINGS—FINDINGS.

Rev. St. 1908, § 2432, requiring the verdict in eminent domain proceedings to state separately, first, the description of the land, second, its value, third, damages to the residue, and, fourth, the amount and value of the benefits, requires the damages to the residue and the benefits to be separately stated in the verdict, so that a requested instruction permitting the jury to offset the benefits against the damages if they were equal, in which case the verdict need not mention either, was properly refused.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 568-573; Dec. Dig. § 223.*]

10. EMINENT DOMAIN (§ 192*)—PROCEEDINGS—PLEADINGS—ANSWER—ADMISSIONS.

Defendant in eminent domain proceedings is bound by his answer, filed by way of cross-petition, asking that a certain amount be allowed in damages so that he cannot claim a larger amount.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 519-521; Dec. Dig. § 192.*]

Appeal from District Court, Grand County; A. H. De France, Judge.

Proceedings by the Denver Northwestern & Pacific Railway Company against Crosby O. Howe and another to condemn property.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Judgment awarding damages, and petitioner appeals. Reversed and remanded, with instructions.

David P. Howard, Charles J. Hughes, Jr., Gerald Hughes, and John Q. Dier, for appellant.

MUSSER, J. This action was brought by the appellant, as petitioner, under our eminent domain statutes, to condemn a right of way for its railroad through the land of appellees. The trial was to a jury. The verdict fixed the value of the property actually taken at \$3,089.08, and the damages to the land not taken at \$1,000, and found that no benefits accrued. The right of way sought is about a mile and a half long and runs diagonally from the northeast corner of respondents' ranch to a point on the west line, a short distance north of the southwest corner, cutting the ranch in about two equal parts. It is 200 feet wide for about two-thirds of its length and 300 feet wide the rest of the way, and embraces 46.06 acres. It included the buildings and improvements on the ranch, which consisted of a main log ranchhouse with five rooms and other buildings connected with it, a bunkhouse, 40 by 18 or 20 feet, fences, corrals, etc. The ranch, to the north of the right of way, contains bluffs along the entire length and on the right of way, and to the south the land is lower and level, consisting of bottom lands. The evidence tended to show that there was no convenient and suitable building site north of the right of way owing to the bluffs; that the bottom lands overflowed at times; and that owing to its elevation, location, and area the land upon which the improvements stood was the most advantageous building site there was on the ranch and possessed a special value for that purpose.

The first assignment of error noticed in the brief of the appellant relates to instruction No. 1. In that instruction the jury were told that, in assessing the value of the land and property actually taken, its true and actual value, at the time of the appraisalment, must govern; that, where land has a market value, that value must govern, and in such a case the market value is the true and actual value. The jury were then told that, if they believed from the evidence that the land had a market value, they should be governed thereby; but, if they believed from the evidence that the land had no market value, they must find, from all the evidence in the case, the true and actual value of the property actually taken and assess its value accordingly. The appellant complains of the part of the instruction which told the jury what they should do if they found that the land had no market value. Section 2431, Rev. St. 1908, provides that, in estimating the value of all the property actually taken, the true and actual value thereof, at the time of the appraisalment, shall be allowed

and awarded. The appellant claims that the market value of the land was the criterion by which the jury were to determine the true and actual value; that it had a market value; that there was testimony showing such a value; and in consequence that the court erred in giving the jury liberty to find that it had no market value. Viewing the matter in the light of the testimony and the actual verdict of the jury, it is not necessary to enter into a discussion of the legal questions presented by this assignment of error.

In the brief, after stating the purport of the testimony of the witnesses relative to the value of the land, it is said: "Unconsciously, however, the amount so fixed by these witnesses represented to each the true market value of the land, being the amount in the opinion of each witness which the land would bring if it were offered for sale by one who desired, but was not obliged to sell and was bought by one who was willing, but not obliged to buy." The appellant is right in this view of the testimony of the witnesses, except that the term "unconsciously" cannot be applied to all the witnesses. And again the brief says: "Examination of the evidence contained in the bill of exceptions discloses that, according to the testimony of all the witnesses, the right of way sought to be condemned had a market value capable of ascertainment by the jury." If the verdict of the jury was within the market value thus shown by the evidence, then, even under the view taken by appellant, the instruction relative to no market value was harmless. As said before, the evidence on the part of respondents tended to show that the building site upon which the improvements were erected, owing to the natural conditions of the ranch, was peculiarly advantageous as a building site, and that, taken in connection with the ranch, it had a special value for that purpose. In section 479, vol. 2, Lewis on Eminent Domain (2d Ed.) it is said: "The market value of property includes its value for any use to which it may be put. If, by reason of its surroundings, or its natural advantages, or its artificial improvements, or its intrinsic character, it is peculiarly adapted to some particular use, all the circumstances which make up this adaptability may be shown, and the fact of such adaptation may be taken into consideration in estimating the compensation. Some of the cases hold that its value for a particular use may be proved, but the proper inquiry is: What is its market value in view of any use to which it may be applied and of all the uses to which it is adapted?" And after quoting from the case of *Boom Co. v. Patterson*, 98 U. S. 403, 25 L. Ed. 206, wherein it was held that it was proper, in estimating the value of the land taken, to consider its special adaptability for boom purposes, the author continues: "So it is proper

to show that property possesses a peculiar value for railroad purposes, for dock purposes, for mill site purposes, for a ferry, for market gardening, for raising cranberries, for warehouse purposes, or for a bridge site."

So, in the case at bar, it was proper for the jury to take into consideration the peculiar adaptability of the building site for that purpose under all the circumstances. Petitioner's witnesses fixed the value of the improvements at from \$450 to \$600. The respondents' witnesses placed it at from \$1,200 to \$1,800; most of them fixing it at \$1,500. All of the testimony shows that the land taken consisted of meadow land, uncleared pasture land, and rough broken land. The witnesses, as is usual in such cases, varied greatly in their estimation of value. The meadow land was valued at from \$20 to \$50 an acre and some of it as high as \$60; the pasture land and uncleared hay land at from \$15 to \$25; and the rough land at from \$1.25 to \$10. Then there was a variance as to the number of acres of each of the different kinds of land. The jury viewed the premises and were better able to judge of the number of acres in each, as well as other conditions affecting the land. The facts ascertained by the view of the premises are not in the record, whether they were regarded as so much additional evidence, or were used to better understand and apply the evidence adduced at the trial. Keeping in view the evidence relating to the special value of the building site, the value of improvements, and of the ground, it will be found that the verdict is within and supported by the values as testified to, and these values, as fixed by the several witnesses, represented to each the market value, as conceded by appellant. The verdict is supported by the evidence of market value, and on that ground would have to be sustained if the matter complained of in the instruction had been entirely omitted. If there was error, it was, therefore, without prejudice.

Complaint is also made because the court, in its instructions, confined the jury to the evidence in ascertaining the market value. It is claimed that the court should have instructed the jury that this value was to be found "from a preponderance of the evidence and their view of the premises," and an instruction was tendered containing that idea. In *Lewis on Eminent Domain* (2d Ed.) § 425, it is said that some courts regard the facts, learned upon a view of the premises, as so much additional evidence, while others hold that the object of the view is to enable the jury to better understand and apply the evidence given at the trial. Now it matters not which of these two effects is given to the view, for in either case the value is to be ascertained from the evidence. If the facts learned by the view is so much additional evidence, then these facts are included

in the word "evidence," and the value is to be found from the evidence. If the facts learned upon the view are to enable the jury to better understand and apply the evidence, nevertheless the value is to be found from the evidence. The question raised is not a practical one in this case, for whether it is said the effect of the view is the one or the other of the positions taken by courts, as above indicated, the value is to be ascertained from the evidence as the trial court instructed.

2. The appellant objects to instruction No. 2, wherein the term "market value" is defined. Standing alone, this instruction may not conform strictly to each of the numerous decisions on this subject or to the meaning of the term "market value" in some particular cases under peculiar facts. The instruction says that the market value is such a price as property will sell for in open market for cash, "when there is a demand therefor, and a purchaser or purchasers and a seller or sellers ready and willing to buy and sell at a well-known and generally understood price, and where the purchaser is not obliged to buy and the seller is not obliged to sell." The objection goes to the quoted portion first, because it says that there must be a demand in order to make a market value. Literally, this is true. Before property can be sold, somebody must want it. The mere fact that it is sold to some one indicates there is a demand or want for it. In all of the definitions of market value gathered together in volume 5 of *Words and Phrases*, it appears that it is to be ascertained from sales that are made from sellers to purchasers. In order to have a purchaser at all, some one must want the property, and to that extent there must be a demand or want for it, else it would never be sold. The fact that demands for like property may be infrequent does not establish that there can be a market value for property without a demand or want for it. Market value implies a want or demand. Objection is also made to the words "at a well-known and generally understood price," because, as the brief says, there may be a market value when there is not a well-known and generally understood price. That may be true in the abstract, but in this case the witnesses and jury seemed to think that they well knew and generally understood the price of land in that vicinity. If there was error in the instruction, it perhaps would have been better, under the authorities, if the reference to a well-known and generally understood price had been omitted; but the error, if any, is cured by instruction No. 8, wherein the price that the jury is to consider is said to be the value, if sold in the open market, under ordinary circumstances, for cash, assuming that the owners are willing to sell and that the purchasers are willing to buy. Under this instruction, the jury no doubt

understood the sense in which the price was to be well known and generally understood. The brief seems to desire that courts shall reduce this question of market value and its application to the certainty of a mathematical demonstration. Until the human mind is cleared of the many infirmities that enshroud it, this consummation is impossible.

3. In the third subdivision of the brief, complaint is made of the refusal of the court to give the second, third, and fifth instructions requested by the appellant. Each of these instructions, when analyzed, is but a different way of expressing what is meant by market value. The court, as has been seen, sufficiently explained this to the jury, and nothing but confusion could result from a multiplication of words.

4. In the fourth subdivision of the brief, the appellant objects to instruction No. 3. In that instruction the court told the jury what the true inquiry is in assessing the value of the strip of land taken and the damages to the residue. The instruction does not mention anything about benefits, and that is the reason for the objection. The objection is not at all tenable. Section 2432, Rev. St., requires that the verdict shall separately state: First, an accurate description of the land taken; second, the value of the land or property actually taken; third, the damages, if any, to the residue of such land; fourth, the amount and value of the benefits. The third instruction deals only with the second and third items showing when the requirements of the law are satisfied as to those items. The fourth instruction deals with the fourth item or benefits.

5. Appellant complains because the court refused to give the sixth requested instruction. The brief itself says that appellant's sixth requested instruction corresponds, in a general way, with the court's substitute therefor, which told the jury what their verdict should state, as required by section 2432, *supra*. The requested instruction gave to the jury the right to offset the benefits against the damages when the two are equal, in which case the verdict would be silent as to each. This is not the law. Section 2432, prescribing the form of the verdict, is mandatory. The damages to the residue of the land and the benefits must be separately stated in the verdict. *P. & A. V. R. Co. v. Rudd*, 5 Colo. 270; *D. & R. G. R. Co. v. Stark*, 16 Colo. 291, 26 Pac. 779. After the verdict is in, proper deductions can be made under section 2431. The testimony referred to in the brief, to the effect that the land of the respondents was benefited by reason of the construction of the railway and the location of a switch and stockyards thereon, has been carefully examined. The witnesses stated that they thought the stockyards would benefit the ranch. That is all they said. No amount of benefit in dollars and cents was mentioned. It is impossible to

fix any amount from such testimony. The jury viewed the premises and found no benefit. There is nothing definite in this record to show wherein they were wrong.

6. The respondents filed an answer to the petition. In this answer, after denials and admissions of the several allegations of the petition, it was alleged, by way of cross-petition, that the lands within the right of way were worth, on an average, \$25 per acre, exclusive of improvements, and that they ascertained this value by inquiry. It was also alleged that the respondents were damaged in the sum of \$1,500 by reason of the taking of the buildings and other improvements. The other damages alleged in the answer are damages to the residue of the land. No withdrawal or amendment of these allegations was made or requested, and thus the case was tried. The value of the land and property actually taken, as thus fixed by the respondents, was \$2,666.50, and their prayer shows that this is what they asked to be allowed therefor. The verdict fixed the value at \$3,089.68, or \$423.18 more than the amount fixed by the respondents. The appellant claims that the respondents are bound by the allegations contained in their answer. The respondents have not filed any brief in this case. It would be better for litigants, if their cases are of any interest to them, to appear in this court and endeavor to defend judgments in their favor, and not leave it to the court to grope about in darkness as to their side. Whether an answer is permissive or improper in a proceeding under the eminent domain statute need not be determined. The respondents filed the one in this case. The first part of it consisted of admissions and denials. The second part, containing the allegations as to the value of the property taken, was denominated a further answer and affirmative defense, and was in effect a cross-petition with a prayer plainly asking for the amount fixed by them. They filed it with the intent and for the purpose of such a pleading in an ordinary action, and, as they thought, to better enable them to get as large a verdict as they could reasonably expect. They stood ready and willing to receive and accept any benefit or advantage which the answer might afford them, and they ought to be held to take whatever disadvantage it might bring. It is true that the value is but a relative matter. It is also true that an owner may underestimate, as well as overestimate, the value of his property. Here the owners definitely limited the issue of value and asked for the amount so voluntarily limited by them. Why should they be given more than they fixed and asked for? They ought not be heard to say that the value fixed by them advisedly was not the fair value, when they do not seek to withdraw or amend it. Speaking generally, a petitioner, in a case like the present, might conclude that he is

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willing to pay for the property the amount fixed in the answer of respondents and might come to the hearing wholly unprepared with evidence as to its value, but prepared only with evidence relative to damages and benefits. The petitioner might be willing to concede that the jury might find the value as fixed in the answer. Would it be fair, in such a case, to permit the respondent to repudiate his answer and put in testimony with which he came prepared when the petitioner was not prepared with testimony on account of the answer? The petitioner would, at least, have the right to conclude that no greater value than that fixed in the answer would be attempted to be shown. As said before, the respondents filed this answer for purposes of a pleading by way of cross-petition, asking that a definite amount be allowed in the case, and why should they now be heard to say that what they did was not necessary, and that the paper filed by them contained only the expression of an opinion? They treated it as a pleading. They did not withdraw or amend it, but let it in the case. It is certainly not unfair to them to hold them to what they did and prayed. In *Emerson v. Atwater*, 12 Mich. 314, it is said: "Pleadings would avail little or nothing if parties were not bound by them. They would be worse than useless, if parties were permitted to allege one thing in them and to prove another on the trial or at the hearing. Instead of aiding the court and parties in the subsequent investigation, by narrowing the field of controversy, they would serve as a lure to mislead and entrap an adversary. That the evidence must be confined to the issue between the parties is a rule so well settled as to admit of no controversy."

In this view of the matter, the verdict of the jury as to the value of the property taken should be reduced in the sum of \$423.18. The judgment of the lower court is therefore reversed, and the cause remanded, with instructions to amend the decree so that the compensation and damages to be paid respondents shall be \$423.18 less than fixed in the decree—that is, \$3,006.50, instead of \$4,080.68—and, when so amended, the decree shall, in the respect as amended, and in all other respects as it was originally entered, be the judgment of the court as of the former date thereof, to wit, August 10, 1906. On the authority of *Land & Canal Co. v. Hartman*, 17 Colo. 138, 29 Pac. 378, and section 559 et seq., 2 Lewis on Eminent Domain (2d Ed.), it is ordered that the appellant shall not recover any of the costs of this appeal.

Reversed and remanded, with instructions.

CAMPBELL, C. J., and WHITE, J., concur.

CREE v. BECKER et al.

(Supreme Court of Colorado. Jan. 3, 1911.)

1. WITNESSES (§ 142*)—COMPETENCY—TESTIMONY OF PARTIES OR PERSONS INTERESTED AGAINST REPRESENTATIVE OF PERSON DECEASED—PARTIES OF RECORD.

Under Mills' Ann. St. § 4816, providing that no party to any civil action, or person directly interested in the event thereof, shall be allowed to testify therein of his own motion, or on his own behalf, when any adverse party sues or defends as executor or administrator of any deceased person, with certain specific exceptions, a corporate stockholder, in a suit by him for the benefit of the company on a bond against the administrator of the principal obligor, is disqualified unless he comes within one of the exceptions.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 580, 581; Dec. Dig. § 142.*]

2. WITNESSES (§ 139*)—COMPETENCY—TESTIMONY OF PARTIES OR PERSONS INTERESTED AGAINST REPRESENTATIVE OF PERSON DECEASED—PARTIES AS AGAINST WHOM TESTIMONY IS EXCLUDED.

In a suit against the administrator of the principal obligor on a bond, the fact that a surety on the bond is still living does not remove the disqualification of the plaintiff as a witness on his own behalf against the administrator.

[Ed. Note.—For other cases, see *Witnesses*, Dec. Dig. § 139.*]

Error to District Court, El Paso County; Louis W. Cunningham, Judge.

Action by Isaac B. Cree, for the use and benefit of the Shurtloff Consolidated Gold Mining Company, against Jacob Becker and others. Lee Becker, as administrator of the estate of Jacob Becker, was substituted as party defendant. From a judgment of dismissal the plaintiff brings error. Affirmed.

Harris & Price, for plaintiff in error. Orr & Cunningham (H. M. Mason, of counsel), for defendant in error.

BAILEY, J. The plaintiff, Isaac B. Cree, as a stockholder in the Shurtloff Consolidated Gold Mining Company, instituted this action for the use and benefit of the company, upon a bond given to it for the payment of \$10,175.55, signed by Jacob Becker, as principal, and John Nolon, as surety. The two were originally joined as parties defendant. After the commencement of the suit, but before trial, Jacob Becker died and his administrator was substituted in his stead and defends in that capacity. At the trial the plaintiff himself was offered as a witness. Objection was made to his testifying, on the ground of his disqualification, under section 4816 of Mills' Annotated Statutes, as he is the plaintiff, and also because of his interest in the result of the suit, being a stockholder in the corporation, as appears from the pleadings, for whose use and benefit the suit is brought.

Thereupon, and before the court had passed upon the objection, the plaintiff moved, was permitted to, and did dismiss the action

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

as to the defendant Nolon. Thereafter, and at the proper time, plaintiff again made formal offer of proof, by his own testimony, to support and maintain all the material allegations of the complaint. To this offer the original objection was renewed and upheld by the court. The plaintiff made no further offer and, on motion, the jury was instructed to return a verdict for the defendant, upon which verdict a judgment of dismissal was entered. To review that judgment, and the ruling of the court in rejecting plaintiff as a witness and in directing a verdict, the case comes here on appeal.

The pleadings show that the plaintiff was the owner of one-third of the entire capital stock of the Shurtloff Company; also that Nolon, the surety on the bond, is likewise a stockholder in the company, also owning one-third of its entire capital stock, and so entitled to share equally with plaintiff in the proceeds of any judgment that might be obtained against the estate of Becker. The genuineness, due execution and delivery of the bond, with all other averments of the complaint, except mere formal matter, were put in issue by the administrator through verified answer.

Upon the record the case must be treated as one against the administrator as the sole defendant, for such was the fact at the time of the formal offer of proof by plaintiff. The question is upon the propriety and correctness of the court's ruling, on the record as it then stood, in rejecting plaintiff as a witness. He was proffered to prove every fact necessary to be shown to establish a right of recovery, including the genuineness, the due execution and delivery of the bond by the administrator's decedent, and as well generally what Becker in his lifetime said and did in reference to the entire transaction.

The section of the statute involved and for consideration in this case is as follows:

Section 4816, Mills': "That no party to any civil action, suit or proceeding, or person directly interested in the event thereof, shall be allowed to testify therein, of his own motion, or in his own behalf, by virtue of the foregoing section, when any adverse party sues or defends as the trustee or conservator of an idiot, lunatic or distracted person, or as the executor or administrator, heir, legatee or devisee of any deceased person, or as guardian or trustee of any such heir, legatee or devisee, unless when called as a witness by such adverse party so suing or defending;
* * *

Then follow five specific exceptions, and unless the plaintiff comes within one of them he manifestly is within the inhibition of the statute. This has been held over and over again by our court and by the court of last resort in Illinois, from which latter state this provision was borrowed.

In the case of *Whitsett v. Kershow et al.*, reported in 4 Colo., at page 419, where the

plaintiff sued the defendants as heirs at law, we find the first pronouncement of our court upon this statute, in which case, "against a general objection to his competency as a witness in the case, the complainant testified before the master in his own behalf, in support of all the material allegations in the bill, and the first question presented for our consideration is as to the competency of this testimony." The court there held, in absence of a showing that plaintiff had brought himself within some one or more of the exceptions covered by the statute, that he was incompetent to testify as a witness in the case.

In the case of *Jones v. Henshall*, reported in 3 Colo. App., at page 448, 34 Pac. 254, where Jones, as administrator of an estate, brought suit against the defendants, Henshall and his wife, to recover the sum of \$3,000, alleged to be due on a promissory note executed by them in favor, and found among the assets, of the decedent. When the defendant Henshall was offered as a witness in his own behalf, plaintiff, as administrator, objected to his giving testimony because incompetent under this provision, which objection was overruled and Henshall allowed to testify. In reversing that judgment for error in permitting Henshall to testify, the court said:

"It is needless to quote the section or state the exceptional circumstances under which a party may give evidence. In general it may be said that a party is absolutely incompetent to give evidence on any subject when he brings an action against an administrator or defends a suit brought by one. The character of his testimony and the subject-matter about which he testifies are totally unimportant. If the evidence which he gives is relevant to any issue made in the case, it is error to permit him to give it at his own instance, and if the objection be properly interposed in apt time, it must be sustained."

Again in the case of *Williams v. Carr*, Adm'r, reported in 4 Colo. App., at page 363, 36 Pac. 644. There Carr and another, as administrators, sued Williams and another on a note given to their decedent. It was sought to prove by one of the defendants, Ulman, who was not served, that the defendant Williams was a mere surety on the note, and Ulman, the other defendant, the sole beneficiary. The court, in holding Ulman disqualified as a witness under the statute, although a joint defendant, said:

"A large part of the argument of plaintiff in error is devoted to an attempt to establish the competency of Ulman as a witness and many authorities are cited, but this being a statutory prohibition but little aid can be gained from text-writers or state decisions where the statutes are not identical or at least analogous. This section of our statute was taken from that of the state of Illinois, and the language is identical. The

statute has been frequently construed in that state adverse to the contention of counsel.
* * *

"Although the statute may, in this instance, and in some others, work a hardship and prevent parties from establishing honest defenses, it is a salutary one and necessary for the protection of estates, widows and minor heirs, who, without some rule of evidence of this kind, would find themselves at the mercy of any unprincipled debtor, and while the rule need not be unnecessarily extended, it should not be so restricted as to fail in its intention."

The latest expression by this court on the subject appears in the case of *Temple v. Magruder*, reported in 36 Colo., page 390, 85 Pac. 832, wherein it is said:

"By the plain and positive provision of this statute, the appellee was incompetent to testify in the cause of his own motion, and over the objection of appellant, upon any matter, or at all. That this is the purpose and meaning of this statute is settled by previous decisions of this court and of the court of appeals."

Beside the foregoing these additional decisions in our state support this contention: *Gilham v. French*, 6 Colo. 196; *Levy v. Dwight*, 12 Colo. 101, 20 Pac. 12; *Rathvon v. White*, 16 Colo. 41, 26 Pac. 323; *Palmer v. Hanna*, 6 Colo. 55; *Rogers v. McMillen*, 6 Colo. App. 14, 39 Pac. 891; *Cooper v. Wood et al.*, 1 Colo. App. 101, 27 Pac. 884.

Also the following decisions from Illinois are in point, and abundantly support the conclusion here reached: *Lowman v. Aubrey*, 72 Ill. 619; *Whitmer v. Rucker*, 71 Ill. 410; *Bragg v. Geddes*, 93 Ill. 39; *Langley v. Dodsworth*, 81 Ill. 86; *Miller v. Craig*, 16 Ill. App. 139.

An examination of the record shows conclusively that the plaintiff is within none of the exceptions to the statute, and equally plainly that he is within the inhibition thereof. This provision is free from all possible doubt as to its purpose. Its terms are plain, clear and direct. It evidently means just what it says and says just what it means, and needs no construction. It is not even pretended that plaintiff is within any of these express exceptions. The contention is for a new rule, and another and different construction of the statute, as applied to the case at bar. We do not apprehend the force of the argument that, as Nolon is a co-obligor on the bond, and yet living, the inhibition of the statute against the plaintiff as a witness is thereby removed. These facts do not appear to us as in any sense qualifying him to testify against the administrator. The statute indicates no such exception, and none such should be read into it.

If Nolon could have properly been joined with the administrator as a party, and were actually so defending, then it may well be

that the plaintiff would have been a qualified witness at least against him, and possibly for all purposes, though we do not decide this, since no such case is presented. If a state of facts such as is above indicated were here, then the authorities cited by plaintiff seem in point, and are certainly persuasive to, if indeed they do not compel, his view. These are, however, all cases involving actions, in one way or another, between the legal representative of a deceased person, joined with a surviving partner or co-obligor, where the testimony of the adverse party seems, in any event, competent against the survivor. In this case the sole defendant is the administrator, and there is nothing, either in the statute or adjudicated cases, which, under the facts here shown, qualify the adverse party as a witness. The authorities relied upon by plaintiff are not applicable, and we find nothing in any of them which, under the conditions and circumstances disclosed by this record, conflict, in the slightest degree, with the views we express.

The ruling of the court in rejecting plaintiff as a witness, being in harmony with our conclusions, and the judgment of dismissal, which necessarily followed, appearing to be correct, is affirmed.

Judgment affirmed.

HILL and WHITE, JJ., concur.

(49 Colo. 316)

REAGAN v. PEOPLE.

(Supreme Court of Colorado. Jan. 3, 1911.)

1. CRIMINAL LAW (§ 517*)—EVIDENCE—CONFESSIONS.

In order to be admissible, extrajudicial statements or confessions of one on trial for crime must be voluntary.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1146; Dec. Dig. § 517.*]

2. CRIMINAL LAW (§ 520*)—EVIDENCE—CONFESSIONS.

The mere fact that a police officer stated to accused that he wanted nothing but the straight facts, to tell him what he knew about the matter, and not keep anything back, did not imply that accused was to secure any advantage if he confessed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1176; Dec. Dig. § 520.*]

3. CRIMINAL LAW (§ 519*)—EVIDENCE—CONFESSIONS.

That accused's confession was obtained in response to questions involving no threats, intimidation, menace, or inducement did not render it inadmissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1172; Dec. Dig. § 519.*]

4. CRIMINAL LAW (§ 518*)—EVIDENCE—CONFESSIONS—WARNING.

It is not the duty of a police officer to caution a prisoner as to the consequences of making a statement which is voluntary, but merely to refrain from inducing him to make one, though the better course is to warn the prisoner that the statement may be used against him.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1158; Dec. Dig. § 518.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

5. CRIMINAL LAW (§ 519*)—EVIDENCE—CONFESSIONS.

That accused was in custody when he made his statement did not render it incompetent if voluntary.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1167; Dec. Dig. § 519.*]

6. HOMICIDE (§ 223*)—EVIDENCE—STATEMENTS AT CORONER'S INQUEST.

Where one under arrest voluntarily testifies at a coroner's inquest, after being advised of his rights and duly cautioned, his evidence is admissible against him.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 466; Dec. Dig. § 223.*]

7. CRIMINAL LAW (§ 703*)—TRIAL—REMARKS OF DISTRICT ATTORNEY.

Where confessions of accused were properly admissible in evidence, it was not error to permit the district attorney to refer to them, or to give the substance of their contents in his opening statement to the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1659; Dec. Dig. § 703.*]

8. HOMICIDE (§ 29*)—MURDER—COCONSPIRATORS.

Though accused did not take deceased's life with his own hands, he was guilty of murder under the statutes, where those with whom he entered into a conspiracy to rob deceased killed the latter in carrying out the common purpose to rob him.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 47; Dec. Dig. § 29.*]

9. HOMICIDE (§ 305*)—ACCESSORY—INSTRUCTIONS.

In a homicide case, where it appeared that accused entered into a conspiracy with those who actually murdered and robbed deceased to rob him, and that in carrying out this common design deceased was killed, the court properly instructed on the subject of an accessory to a crime as defined by statute, and when an accessory shall be regarded as a principal.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 637; Dec. Dig. § 305.*]

10. CRIMINAL LAW (§ 814*)—INSTRUCTIONS—APPLICABILITY TO FACTS.

In a criminal case it is not error to refuse instructions which are not applicable to any facts or testimony in the case.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1979; Dec. Dig. § 814.*]

11. HOMICIDE (§ 340*)—APPEAL—INSTRUCTIONS—HARMLESS ERROR.

In a murder case, where it appeared that deceased was killed by a blow with a hammer, that the trial judge in an instruction illustrating or defining in the abstract what is meant by deliberation, referred to "the fatal shot," and that the "shot was fired," could not have misled the jury, and did not prejudice accused.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 716; Dec. Dig. § 340.*]

12. CRIMINAL LAW (§ 824*)—TRIAL—INSTRUCTIONS—FAILURE TO REQUEST.

In a criminal case, failure to instruct as to confessions and circumstantial evidence is not error where instructions relating thereto are not requested.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1996-2004; Dec. Dig. § 824.*]

13. HOMICIDE (§ 339*)—APPEAL—HARMLESS ERROR.

In a murder case, the exclusion of a question asked a witness if accused had not requested witness to look for the two men directly concerned in the murder, and if he found them to cause their arrest, was not error as

precluding accused from showing that he acted at the first opportunity to have such men answer for the crime, it appearing that accused knew before talking with witness that deceased was murdered by such two men, and knew where they lived.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 339.*]

Error to District Court, City and County of Denver; Carlton M. Bliss, Judge.

Daniel Reagan was convicted of murder, and he brings error. Affirmed.

J. K. P. McCallum, for plaintiff in error.
John T. Barnett, Atty. Gen. (George H. Thorne, of counsel), for the People.

GABBERT, J. Plaintiff in error, defendant below, was convicted of murder of the first degree. The jury fixed the penalty at imprisonment in the penitentiary, at hard labor, for life. From a sentence accordingly, the defendant has brought the case here for review on error.

In his opening statement the district attorney detailed, in substance, the contents of signed statements of the defendant purporting to be a confession of the part he took in the commission of the crime for which he was on trial. Counsel for defendant interposed an objection to these statements, which was overruled. Later, these statements, over the objection of the defendant, were admitted in evidence. Upon these rulings of the court two errors are assigned. The first is based upon the proposition that it is error to permit the district attorney to make statements of alleged facts in opening the case on behalf of the prosecution which he is precluded from proving; and, second, that the confessions were inadmissible for the reason that they were not voluntary. We shall consider the second first, for the reason that if the confessions were properly admitted in evidence, then, of course, it was not error to permit the district attorney to refer to them, or to give the substance of their contents in his opening statement to the jury.

Extrajudicial statements or confessions of one on trial for the commission of a crime must be voluntary; otherwise, they are not admissible against him. This rule is so well recognized, and the reasons therefor so well understood, that a discussion of the proposition or citation of authorities is not necessary. Many cases have decided the question of when statements were to be regarded as voluntary or involuntary, and conclusions, pro and con, reached from the circumstances under which the statement or confession was made or secured. In all cases where the question is material, the inquiry must be, Was the statement voluntary? For the purpose of ascertaining this fact, no inflexible rule can be promulgated. It must be determined from the facts and circumstances relating to how the confession was made or obtained. In order, then, to determine the vital ques-

tion involved, it becomes necessary to consider the testimony bearing on the circumstances under which the defendant made the statements connecting him with the murder for which he was convicted, prefaced by a brief history of the murder and the theory of the prosecution with respect to the part the defendant took in the commission of the crime.

John Bronk, the victim of the homicide, was an old man who lived in a shack on the banks of Cherry creek, in the city of Denver. The ground in the near vicinity of his place was used for dumping refuse. Bronk kept a few chickens by which means he supported himself and accumulated some money, which he appears to have secreted at his house or carried on his person. The defendant was engaged by the city to direct the dumping of refuse, and was ordinarily stationed not far from the Bronk shack. He became acquainted with the deceased, and frequently went there at noon to eat his midday lunch, which he carried with him. He suggested to Bronk that improvements soon to be made would compel him to remove his shack, and that he had better secure some insurance, and then burn his place. Previous to this suggestion, the defendant had taken two other persons into his confidence, who were to visit Bronk, pretend to insure him by the issuance of an insurance policy, secure the premium, divide it with the defendant, and later, having by their visit learned where Bronk kept his money and the amount, rob him, and then burn his place. The plan was carried out, \$30 being secured for an insurance policy, one-third of which was given the defendant. Later, these two men went to Bronk's shack and robbed him of \$150, and, in doing so, killed him. Fifty dollars of this money was also given the defendant. The murder occurred on a Monday, but was not discovered by the authorities until Wednesday following. Shortly after the discovery the defendant was taken to the office of the chief of police, for the reason, it was thought, in view of the fact that as he was stationed near Bronk's place, he might be able to give some clue which would lead to the detection of the guilty parties. At this interview the defendant stated that he had been in Bronk's place as late as 4 p. m. of the day Bronk was murdered, and that the old man was alive at that time. A day or so later the defendant was arrested and placed in jail. He denied that he was guilty. He was kept in jail for about three days, when he was visited by his son-in-law, a police officer by the name of Wilson. According to the testimony, the statement of the defendant was secured under the following circumstances: Chief of Police Armstrong testified that the first intimation he had that defendant had said anything about the murder was when Wilson told him that defendant said he knew the two men who committed the crime, and that

the defendant wanted to see him; that he then went to the jail and said to the defendant, "If you know these people that did this job, tell us so that we can go and get them," and that then the statement was made which was afterwards reduced to writing and signed by the defendant. This statement was brought out by Interrogatories propounded by Chief of Police Armstrong, and began: "Q. Now, Mr. Reagan, will you give us the correctness of this thing? I want the straight facts. I don't want anything but the straight facts. A. I will give you the straight facts. Q. Now, tell me what you know about this—what there is to it. Don't keep a thing back, but tell the truth." The witness then proceeded with his statement, and, in answer to other interrogatories, gave the details of the insurance scheme, the robbery and murder, and his connection with these crimes, which conform substantially with the theory of the prosecution, as outlined to the jury and upon which it was tried. It concludes with the following questions and answers: "Q. Now, this is absolutely the truth, Mr. Reagan? A. So help me God, it is. Q. And you are willing to swear to it? A. Yes, sir. Q. And you are making this statement of your own free will, are you not? A. Yes, sir. Q. Now, is there anything else you can say in connection with this that you have not told me? A. No, sir; I do not believe there is. Q. You think we have got everything pretty well? A. I believe we have; yes, sir." This is one of the statements or confessions which was referred to by the district attorney in his preliminary outline to the jury, and which was afterwards admitted in evidence.

In addition to the conditions under which the foregoing statement was obtained, there is the following: The court asked a witness, who was present when it was made: "Were there any threats made by the defendant or any officer in the presence of and against the defendant, in case he did not state the truth concerning the matter? A. No, sir. Q. Were there any promises made to him? A. There were not. There was not even an oath. I was in the office all during the evening, and not an oath by anybody." On cross-examination by defendant's counsel this witness was asked: "Was there, from your observation, any pressure whatever used on Reagan that night to wring from him any confession? A. There was not."

So far as we are advised from the record, there is not a word of testimony contradicting the signed statement of the defendant, to the effect that he made it of his own free will. The testimony of Chief of Police Armstrong, and other witnesses, bearing on the subject of the circumstances under which the defendant made the statement, is not controverted. No threats or promises were made, nor were any inducements held out to the defendant to make the statement he did. By the officer merely stating to the defendant

that he wanted nothing but the straight facts, to tell him what he knew about the matter, and not keep anything back, did not imply that the defendant was to secure any advantage if he confessed. *State v. Kornstett*, 62 Kan. 221, 61 Pac. 805; *Commonwealth v. Preece*, 140 Mass. 276, 5 N. E. 494. The mere fact that the confession was elicited by questions is not sufficient to render it inadmissible. The questions were not of a character, or propounded under circumstances and in a manner either to coerce or persuade. In other words, the fact that the confession was obtained in response to questions involving no threats, intimidation, menace, or inducement to the prisoner, which is the case at bar, did not render the confession inadmissible. *Tidwell v. State*, 40 Tex. Cr. R. 38, 47 S. W. 466, 48 S. W. 184. The defendant was not warned by the Chief of Police that his confession might be used against him, but that is of no moment when it appears that it was voluntary. We do not understand that it is the duty of a police officer to caution a prisoner as to the consequences of making a statement which is voluntary, but merely to refrain from inducing him to make one. 12 Cyc. 463. Undoubtedly, however, the better and safer course for an officer to pursue, when a prisoner is about to make a statement, is to warn him that it may be used against him. Defendant was in custody at the time he made the statement, but that does not render it incompetent when it was voluntary. *Id.* 466.

Shortly after the foregoing statement was obtained, an inquest was held over the body of John Bronk. The defendant was taken before the coroner, who informed him that any statements he might make before the coroner's jury would be used in court later on, to which he replied, in substance, that he so understood it. The coroner also told him that it was not compulsory for him to testify; that he did not have to do so, and advised him that if he did it would be used as evidence. He was also told by the coroner that they wanted to know the truth, and only the truth, because whatever he said would be taken down by a stenographer, who was present, and made a record in the case, and that he was not required to tell anything that would be against him if he did not want to; that he advised the defendant he was accused of murder, and that any statement he made could be used against him; and that the coroner then asked the defendant if he wanted to testify, and that if he did, it would be of his own free will, to which he replied he wanted to testify. Afterwards the defendant was sworn, made a statement, and in response to interrogatories propounded, stated, substantially, the same facts that he had previously detailed in his statement to Chief of Police Armstrong. Statements made at a coroner's inquest are admissible in evidence against the

person making them in a subsequent prosecution for the homicide if they were voluntary. *Tuttle v. People*, 33 Colo. 243, 79 Pac. 1035, 70 L. R. A. 33. From a consideration of what occurred prior to the time when the defendant made his statement to the coroner's jury, it is clear that what he stated at that time was of his own free will, and that he was not induced to make it from any extraneous disturbing cause. He was told that he was accused of murder, and fully and fairly warned what consequences might follow if he chose to make any statement to the coroner's jury; so that his rights in this respect were fully protected, and he knew that he could decline to testify if he saw fit. In such circumstances we do not see how it was possible to reach any other conclusion than the one that the statement of the defendant made to the coroner's jury was voluntary, and that he did so with full knowledge of his rights in the premises. It seems to be settled by the great weight of authority that, where a person under arrest voluntarily testifies at a coroner's inquest, after being advised of his rights and duly cautioned, his evidence is admissible against him.

Much stress is laid upon the Tuttle case, by counsel for the defendant, but it is entirely different from the one at bar. In the Tuttle Case the conclusion was reached that the statements of the defendants made to the coroner's jury were not voluntary, for the reason stated in the opinion, which was to the effect that the defendants did not feel at liberty to decline to testify because they knew that at that time they were suspected of the crime of murdering the person over whose body the inquest was being held, and for which they were afterwards tried and convicted, and to have claimed their privilege would have tended to increase suspicion against them instead of allaying it. No such conditions were present at the time the defendant testified before the coroner's jury. He had already admitted to Chief of Police Armstrong the part he took in the murder of Bronk, and to have refused to testify would not have changed his situation in the slightest degree. We are of the opinion that each of the statements he made was admissible in evidence. Having reached this conclusion, it, of course, follows that the reference by the district attorney to these statements in his opening to the jury could not have been error. The most that can be claimed for the defendant is that probably he did not contemplate or anticipate that in the robbery of Bronk his life would be taken; but that does not relieve him. True, he did not take the life of the old man with his own hands, but those with whom he entered into the conspiracy to rob Bronk in carrying out the common purpose to rob him did; and, under our statutes, he is just as guilty as though he had struck the fatal blow.

Complaint is made that the court should

not have given an instruction on the subject of an accessory to a crime, as defined by statute, and when an accessory shall be regarded as a principal for the reason there was no testimony connecting the defendant with any crime therein mentioned. The objection is untenable. The theory of the prosecution was that the defendant had entered into a conspiracy with those who actually murdered and robbed Bronk to rob him, and that in carrying out this common design the life of Bronk was taken. The defendant's statements show this theory to be correct. He says he did, and admits having received from his coconspirators his share of the money taken from Bronk. This testimony clearly called for the instruction given.

Error is assigned upon the refusal of the court to give two instructions requested by the defendant. One of them was to the effect that the term "lunatic" includes persons who, by reason of intemperance or any disorder or unsoundness of mind is incapable of managing or caring for his own estate; and the other defines the crime of manslaughter. If the first instruction would be proper under any circumstances, it was not applicable to the facts. There was testimony tending to prove that defendant frequently became intoxicated, but it does not appear that he was in that condition when he entered into the conspiracy to rob Bronk; neither does it appear that at this time or when he made the statements introduced in evidence, his mind was so disordered from any cause that he was unable to comprehend what he was doing. Manslaughter was not involved. The defendant was on trial for a murder committed in perpetrating a robbery. Taking human life in such circumstances was murder of the first degree, so that defendant was either guilty of that degree of homicide, or not guilty at all. It is not error to refuse instructions which are not applicable to any facts or testimony in the case.

It appears that Bronk was killed by a blow on the head with a hammer. Complaint is made that the trial judge, in one of the instructions refers to "the fatal shot," and that the "shot was fired." These expressions with respect to means employed in taking human life were in an instruction illustrating or defining in the abstract what was meant by "deliberation," and could not possibly have misled or confused the jury. At most, it was an inadvertence, which did not prejudice the defendant.

Error is also assigned on the failure of the court to instruct the jury that where confessions are introduced they are to be taken together, and if they contain exculpatory or mitigating statements, the state is bound by them unless they are shown to be untrue; and also in not instructing to the effect that circumstantial evidence must always be acted on with caution. No such instructions

were requested. Mere nondirection in such circumstances is not error.

The final error urged is the refusal to permit counsel on cross-examination to ask witness Beeds if defendant had not requested him to look for the two men directly concerned in the murder of Bronk, and if he found them to cause their arrest. It is urged that this is error because the defendant ought to have been permitted to show that he acted at the first opportunity to have these parties answer for their crime. The exact time when defendant made such a request of the witness is not shown, but it was some time after the murder was committed. However, he cannot complain on the ground stated because, from his own statement, he knew that Bronk was murdered before he talked with Beeds, by the two men he claims to have wanted arrested, and knew where they lived.

This disposes of all questions urged by counsel for defendant. There is no doubt but that Bronk was murdered by the two men who robbed him, and that the fatal blow was struck in the perpetration of that crime by one of these parties. The only question about which there could be any dispute was, whether defendant entered into a conspiracy with these two men to rob the old man. From his own statements he did, and he must, therefore, suffer the consequences. He may not have been present when Bronk was robbed and killed, but where a homicide is committed in carrying out a common purpose to commit a robbery, the accessory is guilty of murder. *Noble v. People*, 23 Colo. 9, 45 Pac. 376.

The judgment of the district court is affirmed.

Judgment affirmed.

CAMPBELL, C. J., and MUSSER, J., concur.

(49 Colq. 244)

CITY AND COUNTY OF DENVER et al. v.
STATE INV. CO. et al.

(Supreme Court of Colorado. Jan. 3, 1911.)

1. CONSTITUTIONAL LAW (§ 290*)—DUE PROCESS OF LAW—STREET IMPROVEMENTS.

Denver City Charter 1893, which expressly requires that landowners affected by a street improvement be given opportunity to complain of a proposed assessment, impliedly requires notice of the specific time of the hearing, and hence is not invalid as a deprivation of property without due process of law, as failing to make adequate provision for hearing objections.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 871-875; Dec. Dig. § 290.*]

2. MUNICIPAL CORPORATIONS (§ 486*)—STREET IMPROVEMENTS — OBJECTIONS — NOTICE OF HEARING—SUFFICIENCY.

In a street improvement proceeding under Denver City Charter 1893, a notice that, before adopting an ordinance assessing the cost, the city council would hear objections, was insuffi-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

cient for failing to give notice of the time and place of hearing on the objections.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1086; Dec. Dig. § 486.*]

3. MUNICIPAL CORPORATIONS (§ 491*)—STREET IMPROVEMENTS—OBJECTIONS—HEARING.

Even if, in a street improvement proceeding under Denver City Charter 1893, notice that the city council would hear objections to the assessment sufficiently designated the time, the city authorities could not make the assessment, unless the property owners waived their right to, or actually had, a hearing.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 491.*]

4. MUNICIPAL CORPORATIONS (§ 491*)—IMPROVEMENTS—ASSESSMENTS—"HEARING."

The essence of a "hearing," such as on a taxpayer's objections to a street improvement assessment, is the right, not merely the privilege, to support one's contention or position by argument, however brief, and if need be by proof, however formal, before a tribunal authorized to act and willing and ready to do so.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 491.*]

For other definitions, see *Words and Phrases*, vol. 4, pp. 3236-3238.]

5. MUNICIPAL CORPORATIONS (§ 491*)—STREET IMPROVEMENT ASSESSMENT—HEARING.

Taxpayers in a street improvement proceeding under Denver City Charter 1893 were not given a legal hearing on their objections to the assessment, where the council, acting on the mistaken belief that the assessment could not be changed, refused to hear evidence.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1153-1155; Dec. Dig. § 491.*]

6. CONSTITUTIONAL LAW (§ 290*)—STREET IMPROVEMENT ASSESSMENTS—DUE PROCESS OF LAW.

It is essential to the constitutionality of street improvement assessment provisions that the council or other tribunal be empowered to modify an improper assessment and grant proper relief, as well as to give notice of the time and place for hearing taxpayers' objections; otherwise such provision constitutes a deprivation of property without due process of law.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 871-875; Dec. Dig. § 290.*]

7. MUNICIPAL CORPORATIONS (§ 491*)—STREET IMPROVEMENT ASSESSMENTS—DENIAL OF HEARING—EFFECT.

Refusal to hear a taxpayer's objections to a street improvement assessment is, in legal effect, a recall of the citation to him.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 491.*]

8. MUNICIPAL CORPORATIONS (§ 519*)—ASSESSMENT LIENS—VALIDITY.

The lien of an invalid street improvement assessment falls with the assessment.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 519.*]

9. MUNICIPAL CORPORATIONS (§ 513*)—INVALID STREET IMPROVEMENT ASSESSMENTS—TENDER.

A taxpayer need not tender the amount which in his judgment his property is benefited by a street improvement, as a condition to suing to restrain a void assessment.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 513.*]

10. MUNICIPAL CORPORATIONS (§ 513*)—INVALID STREET IMPROVEMENT ASSESSMENTS—TENDER.

A taxpayer's tender as a condition to a suit to restrain an excessive street improvement assessment need not exceed the sum then due and payable.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 513.*]

11. MUNICIPAL CORPORATIONS (§ 513*)—INVALID STREET IMPROVEMENT ASSESSMENTS—TENDER—SUFFICIENCY.

A taxpayer's offer, on suing to restrain an illegal street improvement assessment, to pay any part properly chargeable against him and to do equity, and subsequent payment into court of the full amount which could be justly established against him, were sufficient as a basis for equitable relief.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 513.*]

En Banc. Error to District Court, City and County of Denver; F. T. Johnson, Judge.

Action by the State Investment Company and others against the City and County of Denver and others. Judgment for plaintiffs, and defendants bring error. Affirmed.

H. A. Lindsley, Charles R. Brock, and H. L. Ritter, for plaintiffs in error. Joshua Grozier (Arthur Ponsford, of counsel), for defendants in error.

WHITE, J. Defendants in error, as plaintiffs in the district court, prosecuted a suit against plaintiffs in error, as defendants, to relieve lands owned by the former from the assessment of a tax for the cost of paving a street upon which the lands abutted, in Colfax Avenue paving district No. 3 in the city of Denver. The tax or assessment was imposed, or the attempt thereto made, under the law known as the 1893 charter of the city of Denver. The provisions of the charter regulating the exercise of the power, and the procedure thereunder essential to a valid assessment, are sufficiently set forth in *Londoner v. City and County of Denver*, 210 U. S. 373, 28 Sup. Ct. 708, 52 L. Ed. 1103, and it is unnecessary to embody them herein.

Upon the trial of the cause it was admitted, or the undisputed evidence showed, each plaintiff to be the owner of a lot, or fractional part thereof, abutting upon the street paved; that the paving tax assessed on each of these lots was from two to five times the value of the lot, including the improvement, and from six to fourteen times the value of the special benefit. The court found and decreed that the assessment exceeded the special benefits to the respective lands or lots of plaintiffs, fixed the amount of the benefit as to each tract, and, after the same had been paid into court, canceled the balance of the assessment and relieved the lots of the lien. To reverse that judgment, the defendants have brought the controversy here.

The principal contention of plaintiffs as to the invalidity of the tax assessment was (1)

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

that the charter under which the improvements were made contained no adequate provisions for hearing and determining the objections of property owners to the assessments for public improvements, before the board of public works or the city council; (2) that there was in fact no notice to the property owners of a time for hearing, or hearing had upon their objections in writing properly made to such assessments; (3) that the assessments made against the property of the respective plaintiffs exceeded the special benefits thereto accruing from the paving, and to the extent of such excess the assessments were invalid.

The defendants contend (1) that the hearings provided for by the charter, either expressly or by implication, were adequate and, if the procedure was followed, were in accordance with due process of law; (2) that plaintiffs had adequate notice and hearings in all matters of which complaint was made; (3) that the plaintiffs failed to make a tender, before the bringing of the suit, of an amount which, in their judgment, equaled the special benefits to their respective properties by reason of the pavement, and are therefore precluded from questioning the validity of any portion of such assessments.

1. That the charter under which the assessments were made contained, either expressly or by implication, adequate provisions for the hearing and determination of the objections interposed by the property owners to the proposed assessments, and in all respects complied with the constitutional requirements and the principles embodied in what is called "due process of law," has been heretofore determined by this court and approved by the Supreme Court of the United States, as appears from the authorities herein cited.

Under the charter the lien upon the abutting land for the cost of the improvement is initiated by, and finds its support in, the assessment. Before the assessment can be legally fixed, the cost of the work and its provisional apportionment must be certified to the city council, and the landowners affected be afforded an opportunity to be heard before the city council, sitting as a board of equalization, upon the validity and amount of the assessment. Not only must the property owners, as required by statute, be given a notice and have time in which to file complaints and objections to the proposed assessment, but, under the implied power vested in the city by the charter, the city authorities must fix the specific time for hearing and give notice thereof, or in some proper way afford the property owners the opportunity to be heard, and likewise "hear the parties complaining, and such testimony as they may offer in support of their complaints and objections as would be competent and relevant." *City of Denver v. Kennedy*, 33 Colo. 80, 80 Pac. 122, 467; *City of Denver v. Dumars*, 33 Colo. 94, 80 Pac. 114;

City of Denver v. Londoner, 33 Colo. 104, 80 Pac. 117; *Londoner v. City and County of Denver*, 210 U. S. 373, 28 Sup. Ct. 703, 52 L. Ed. 1103.

2. In the case at bar, after the paving was completed, a statement of the cost thereof and an apportionment of it to the lots or land abutting upon the street was certified to the city clerk, who thereupon, in compliance with the provisions of the charter, published a notice to the effect that the written complaints or objections of the owners, if any, should be filed within 30 days, and that before the passage of an ordinance assessing the costs of said improvements, "the city council, sitting as a board of equalization, shall hear and determine all such complaints and objections." This notice complied with the express statutory requirements, but it is not so certain that it fixed the time for hearing with any certainty, and therefore probably failed in one of the essential requirements without which, or a waiver thereof, no valid assessment could have been made. The city authorities, under the implied powers vested in them by the charter, should have given a notice of the time and place of hearing. The notice given seems to be no different in substance and effect from the notice under consideration in the *Londoner* Case, supra, and, as therein said, "the notice purported only to fix the time for filing the complaints and objections, and to inform those who should file them that they would be heard before action," and "did not fix the time for hearing."

However, should we be mistaken in our view of the effect of the notice given, and it could be held to properly mean that immediately after the expiration of the 30 days in which objections could be filed, the council, sitting as a board of equalization, would hear and determine such objections, yet the city authorities had no power to impose the lien for the assessment upon the lands benefited, unless the property owners by some act waived their right to have, or actually had, a hearing upon their objections to the assessment.

Defendants contend, in effect, that the property owners in fact had a hearing as contemplated by the charter; that, after filing their written complaints and objections to the assessment, they appeared before the city council, sitting as a board of equalization, either in person or by attorney, and orally presented their testimony and views concerning the assessment. As declared by the Supreme Court of the United States in the *Londoner* Case, supra, "Many requirements essential in strictly judicial proceedings may be dispensed with in proceedings of this nature." If, after filing their complaints and objections to the assessment, the parties without further notice appeared before the tribunal, authorized to act, and assuming to exercise the power, and were permitted to present their testimony and other evidence competent

and relevant to the matter under consideration, and to support their contentions by argument, it may be, though as to that we do not determine, such procedure was "a hearing within the meaning of the law." The very essence of a hearing, however, is the right, not simply the privilege, "to support one's contention or position by argument, however brief, and, if need be, by proof, however informal," before a tribunal authorized to act and willing and ready to do so. *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289.

We are unable to agree with counsel that plaintiffs appeared and had a hearing. The complaint alleges that, without hearing, or opportunity for hearing, though requested, none of the plaintiffs were afforded or given any opportunity to present any testimony or evidence whatsoever; but, on the contrary, the written protests were, without hearing thereon, disregarded, and the confiscatory assessments made without due process of law. A fair interpretation of the evidence seems to support and establish these allegations, and the court in its decrees found "that the allegations of the complaint are, and each of them is, true." A recitation of some of the evidence of the property owners will disclose the nature of the alleged hearing, to wit: "The board of equalization permitted me to talk, as they also did Col. Swallow and possibly one or two other property owners present, but refused to take any testimony, and no testimony under oath or otherwise was taken or hearing had. * * * This permission to talk was granted as a matter of favor and not as a matter of right. * * * Several members of the board of equalization also spoke," and said "they had no such power (to make any change in the amount of the assessment as fixed by the board of public works), and gave that as a reason for declining to take testimony."

The conclusions most favorable to defendants' contention as to what occurred are that plaintiffs, or some of them, appeared before the council in response to a notice from that body to present in writing any objections or complaints they might have to the assessment, and then and there claimed that the proposed assessment was confiscation of their property; that there was an informal talk or protest made by the plaintiffs, or in their behalf, against the assessment; that the council, from its own membership, appointed a committee to examine the property; that such committee, or some member thereof, made a verbal report to the effect that the lots, including the benefit thereto by the paving, were worth about one-half of the amount of the assessment on such lots, respectively, and the council took the position that neither it, nor the members thereof, sitting as a board of equalization, had the power to in any manner change the assessment as certified by the board of public works; that while recognizing it would be just and proper to grant the relief to plain-

tiffs, the board of equalization and the city council were powerless to act in the premises, as it would invalidate the assessment in the entire district, and there was no reason for hearing evidence thereon. It is certain that such procedure did not constitute a hearing within the meaning of the law. The record discloses that then, and for some time prior thereto, the general impression maintained, and such is said to have been the holding of the nisi prius courts, that the provisions of the charter rendered the city and the city council, as a board of equalization, powerless to do otherwise than assess the entire cost of a public improvement made thereunder upon the property benefited, as directed by the board of public works, without change, and not otherwise. It is clear that it was by reason of this mistaken view of the power of the council that prevented that body from hearing evidence and argument, and granting the relief demanded by the plaintiffs.

It was essential, in order to uphold the constitutionality of the assessment provisions of the charter, and the Supreme Court of the United States so held in the *Londoner Case*, supra, that there be vested in the city council implied power to not only fix the time and place for a hearing and notify the complaining property owners thereof, but likewise implied power vested in such body to alter the apportionment and grant proper relief in the premises.

Unless the law authorizing the assessment, expressly or by implication, provides for notice to the owner of the property to be affected and gives him an opportunity to be heard at a specified time and place, before a board or tribunal competent and ready to administer proper relief, concerning the correctness of the charge before it is made conclusive, the constitutional guaranty, that no person's property shall be taken without due process of law, has been infringed. *Brown v. City of Denver*, 7 Colo. 305, 3 Pac. 455. Notice or citation of the time and place for hearing, or possibly a waiver thereof by the property owner, was therefore essential to vest in the council the power to create a valid lien for the cost of the improvement, and it was likewise essential that the hearing be before a tribunal competent to act. The denial to a party in such a case of the right to appear and to be fully heard is, in legal effect, a recall of the citation to him. *Windsor v. McVeigh*, 93 U. S. 274, 23 L. Ed. 914. And to notice or cite a party to appear, or the appearance of such party before a tribunal competent to administer proper relief, but which assumes that it does not possess the power—that though it be commanded by law to hear, it is by the same law rendered deaf to the appeals of justice and refuses to take evidence and act—is in no sense affording the party a hearing within the meaning of the charter, and is not a compliance with the constitutional require-

ment of "due process of law." It is, in effect, saying to a person, "Appear, and you shall be heard," and when he has appeared, saying, "Your appearance shall not be recognized, and you shall not be heard." A judgment, finding, or decree rendered under such circumstances is an arbitrary edict without the sanction of law. As stated by Brannon, in his work on the Fourteenth Amendment, page 251: "Though there be service of process, yet, if the defendant is not allowed to make his defense, it is a withdrawal of the summons, 'a denial of the benefit of a notice, and would in effect be to deny that he was entitled to notice at all, and the sham and deceptive proceeding had better be omitted altogether,' because judgment without hearing is void."

The city council admitted, and the defendants concede, the assessment amounted to confiscation of the property of plaintiffs, and that the owners were entitled to a reduction of the assessment, and the council "stated they would like to remedy it, but did not know how they could do so without themselves violating the charter assessment provisions." It certainly cannot be said that a party has had a hearing when he has been called to appear, or appears, before a tribunal with power to act and grant relief, and which recognizes that such party is entitled to the relief for which he prays, yet disclaims in itself power and authority in the premises, and refuses to hear evidence and act upon the matter. The right to property and the guaranty that it shall not be taken without due process of law, does not rest upon a basis so unsubstantial.

3. As the lien rests upon the assessment, and the latter, as we have seen, is invalid, the lien must necessarily fall. And as there can be no obligation to pay until there is a legal assessment, the doctrine of tender before suit brought has no application. No one is under obligation to pay, or tender payment, until there be something due. This is not a case where the procedure was lawfully followed, and the authority exceeded by an excessive assessment, but it is a case showing such a departure from the prescribed procedure that the assessment attempted to be made had no validity as against the property of plaintiffs. The language of the court in *Norwood v. Baker*, 172 U. S. 269, 19 Sup. Ct. 187, 43 L. Ed. 443, is peculiarly applicable to this case. It is there said: "The present case is not one in which—as in most of the cases brought to enjoin the collection of taxes or the enforcement of special assessments—it can be plainly or clearly seen, from the showing made by the pleadings, that a particular amount, if no more, is due from the plaintiff, and which amount should be paid or tendered before equity would interfere. It is rather a case in which the entire assessment is illegal. In such a case it was not necessary to tender, as a condition of relief being granted to the plaintiff, any sum as

representing what she supposed, or might guess, or was willing to concede, was the excess of cost over any benefits accruing to the property. She was entitled, without making such a tender, to ask a court of equity to enjoin the enforcement of a rule of assessment that infringed upon her constitutional rights."

We have never held that a tender of the amount of the special benefit was a condition precedent to a property owner maintaining a suit in equity, to relieve his property from an alleged lien arising out of a void assessment. On the contrary, in *City of Denver v. Londoner*, supra, and other cases herein cited, the owners of the property upon which the assessments were made were held not to be entitled to relief in the suit instituted by them, because the assessment against their property was merely erroneous by being excessive, and they had not, prior to bringing the suit, tendered to the proper authorities the amount due, which would have been a valid assessment against their property; and it is therein expressly pointed out that the assessment was not void, but merely erroneous. The Supreme Court of the United States, to which that case was carried, and hereinbefore cited as *Londoner v. City and County of Denver*, determined that a hearing, or an opportunity therefor, to the property owners had not been allowed, and that the assessment was therefore void, and the property owners were entitled to a decree discharging their lands from a lien on account of it, notwithstanding they had made no tender of the amount of the special benefits accruing to their property by reason of the improvement.

The trial court held that the testimony showed that the plaintiffs, either by themselves or their representatives, made protest to the city authorities against the excessive assessment, but were informed that the front footage plan had been recommended by the board of public works and that the city authorities had no authority to change it, and were unable to render any relief whatever by way of decreasing the amount of assessment contemplated, and, under the circumstances, a tender would have been useless, and, as the parties had offered to do equity by paying into court the amount of benefits which the court should adjudge reasonable, there was a sufficient tender to meet the requirements of law and equity. Whether this view was correct is not necessary to determine, as the assessment was void for the lack of a hearing.

Furthermore, it is apparent there was no necessity upon the part of plaintiffs, at or prior to the institution of this suit, to make a tender, even though we were to assume that the assessment was merely erroneous, and not void. While it has been held by this court that where property is excessively assessed for public improvements, but the procedure in making the assessment was regular,

the owners, in order to maintain an action to annul the excessive part of the assessment, must first tender to the proper authorities the amount that should have been assessed, we do not understand that such tender should be of any greater sum than is then due and payable. In the case at bar, the record discloses that no part of the assessment was due, nor could any portion thereof presently become due, except by action of the property owners, exercised under the provisions of the charter. Section 34. The assessing ordinance went into effect on the 29th day of August, and the suit for relief was filed on the 31st day thereof. Plaintiffs in their complaint, while denying the validity of the entire assessment, nevertheless alleged their willingness to pay any part thereof that was properly chargeable, or was a special benefit accruing to their property by reason of the improvement, and further "offers and tenders the same to said defendant, * * * or into court at any time, and to keep said tender and offer good whenever the same shall be ascertained or on demand, and to do equity in the premises." Plaintiffs thereafter paid into court, for the defendants, the full amount which the latter could justly have established as a lien upon the former's property, and, under the circumstances, sufficiently complied with all the rules of equity to entitle them to maintain their suit for relief.

The judgment of the court was manifestly just and proper, and we can perceive no reason why it should be disturbed. It is therefore affirmed.

Judgment affirmed.

(49 Colo. 219)

TOLLIFSON et al. v. PEOPLE.

(Supreme Court of Colorado. Nov. 14, 1910. Rehearing Denied Jan. 3, 1911.)

1. CRIMINAL LAW (§ 511*)—CORROBORATIVE EVIDENCE.

Corroborative evidence may be circumstantial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1127-1137; Dec. Dig. 511.*]

2. CRIMINAL LAW (§ 510½*)—WITNESSES—ACCOMPLICES—CORROBORATION—CONFESSION AND ADMISSIONS.

A confession or admission of accused is admissible to corroborate an accomplice.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1127-1136; Dec. Dig. § 510½.*]

3. CRIMINAL LAW (§ 511*)—WITNESSES—ACCOMPLICES—CORROBORATION—SUFFICIENCY OF EVIDENCE.

In a criminal case, evidence held sufficient to corroborate an accomplice.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1127-1137; Dec. Dig. § 511.*]

4. CRIMINAL LAW (§ 400*)—LARCENY FROM CORPORATION—CORPORATE CAPACITY—EVIDENCE.

While it is necessary to show the corporate capacity of a corporation from which goods

are alleged to have been stolen, it suffices for the prosecution to prove that the company was de facto organized and acting as a corporation, and, in the absence of objections, this may be proved by one who, of his own knowledge, is acquainted with the fact, or it may be proved by reputation.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 884; Dec. Dig. § 400.*]

5. CRIMINAL LAW (§ 567*)—LARCENY FROM CORPORATION—CORPORATE EXISTENCE—SUFFICIENCY OF EVIDENCE.

In a trial for larceny from a corporation, evidence held sufficient to establish de facto the corporate existence of the company.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1276; Dec. Dig. § 567.*]

6. BURGLARY (§ 28*)—VARIANCE—"STOREHOUSE"—"STOREROOM."

In a burglary trial, where the information alleged the breaking into a storehouse belonging to a mining corporation, that some of the witnesses stated that the ore stolen was stored in a storeroom, instead of a storehouse, or in the storeroom of the shafthouse, instead of the storeroom of the storehouse, was immaterial, and there was no variance, the evidence as a whole showing that the buildings were similar to those on other mining properties, and that the building or that portion broken into was used to store machinery, supplies, and ore, thus making it a storehouse; the word "storehouse" being defined by Webster as a building for keeping goods of any kind, a repository, a warehouse, and a "storeroom" as a room in a storehouse or repository; a room in which articles are stored.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. §§ 67-78; Dec. Dig. § 28.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6076-6078; vol. 8, p. 7805.]

7. WITNESSES (§ 372*)—CREDIBILITY—CROSS-EXAMINATION.

Great latitude is allowable and should always be given in the cross-examination of a witness regarding his connection with the subject-matter being tried, and about which he is called to testify, as to whether it is of a nature to awaken in him a lively and possible interest in the outcome of the trial, and as a general rule everything affecting his credibility may be shown, including any evidence tending to show he is interested in procuring a conviction.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1192-1199; Dec. Dig. § 372.*]

8. WITNESSES (§ 329*)—ACCOMPLICE—CROSS-EXAMINATION.

Where an accomplice testifies, a liberal and full cross-examination for the purpose of testing the truth of his statements should be permitted, and it is erroneous to restrict such cross-examination within unreasonable limits.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1104, 1105; Dec. Dig. § 329.*]

9. WITNESSES (§ 350*)—CREDIBILITY—CROSS-EXAMINATION.

As a general rule, it is not proper in a criminal case to ask a witness on cross-examination, for the purpose of affecting his credibility, if he has been arrested, informed against, or imprisoned, prior to conviction for such an offense.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1140-1149; Dec. Dig. § 350.*]

10. CRIMINAL LAW (§ 742*)—WITNESSES—ACCOMPLICES—CREDIBILITY—JURY QUESTIONS.

The credibility of an accomplice, like that of any other witness, is exclusively for the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1719-1721; Dec. Dig. § 742.*]

11. WITNESSES (§ 350*)—ACCOMPLICE—CREDIBILITY—CROSS-EXAMINATION.

In a criminal case, questions asked on cross-examination of an accomplice, to test his credibility, referring to an outside distinct offense, and showing that a criminal charge was pending against him, were properly excluded.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1140-1149; Dec. Dig. § 350.*]

12. WITNESSES (§ 349*) — PAST HISTORY — CROSS-EXAMINATION—DISCRETION OF COURT.

As a general rule, the limits of the cross-examination of a witness in a criminal case as to his past is a matter resting largely within the sound discretion of the trial judge, which discretion is to be exercised in view of all the circumstances.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1135-1139; Dec. Dig. § 349.*]

13. WITNESSES (§ 345*)—ACCOMPLICES—CREDIBILITY—CROSS-EXAMINATION—EVIDENCE.

In a burglary trial, where an accomplice testifying as a witness admitted on cross-examination that he had been arrested and bound over on the same charge for which defendants were being tried, but that he had not been informed against; that he had been arrested several times for larceny, but stated that he had no understanding with the district attorney that if he testified in the case on trial all charges against him would be dismissed, it was not an abuse of discretion to refuse to allow the witness to answer as to whether he had not been bound over to answer a charge of assault with intent to kill, or to exclude records showing that the district attorney had failed to file an information against him, or to further prosecute the charge, such evidence being offered to test the credibility of the witness, and to show a hope of immunity from prosecution if he testified.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1126-1128; Dec. Dig. § 345.*]

14. CRIMINAL LAW (§ 1090*)—APPEAL—MATTERS REVIEWABLE—OBJECTIONS TO INSTRUCTIONS.

Objections to instructions in a criminal case are not a part of the record proper, and unless made at or before the giving thereof, and saved and presented in the bill of exceptions, will not be reviewed.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2818; Dec. Dig. § 1090.*]

15. CRIMINAL LAW (§ 1129*)—QUESTIONS REVIEWABLE—FAILURE TO ASSIGN ERROR.

A ruling of the trial court as to which there is no assignment of error is not properly before the appellate court.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2954-2964; Dec. Dig. § 1129.*]

16. CRIMINAL LAW (§ 1186*)—APPEAL—HARMLESS ERROR.

Under Sess. Laws 1907, c. 163, providing that no judgment shall be reversed or affected for any defect which does not tend to prejudice defendant's substantial rights, etc., where defendants failed to object on return of the verdicts that they were signed by W. H. H. Morris as foreman instead of by Wm. H. Morris, the name such foreman answered to when the jury was impaneled, the question being raised for the first time on motion for new trial, and it did not appear that defendants were in any way prejudiced, there was no error.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3215-3219; Dec. Dig. § 1186.*]

Error to District Court, Teller County; W. S. Morris, Judge.

T. F. Tollifson and another were convicted of crime, and they bring error. Affirmed.

E. G. Vanatta, Orr & Cunningham, and F. B. Lambert, for plaintiffs in error. John T. Barnett, Atty. Gen. (George H. Thorne, of counsel), for the People.

HILL, J. The plaintiffs in error were convicted of burglary and larceny; from a sentence accordingly, they have brought the case to this court for review on error.

The first point urged is that it was error to allow a conviction upon the uncorroborated evidence of a confessed accomplice. The witness Wiley, a boy 17 years of age, participated in the commission of the crime, turned state's evidence, and it is contended that his evidence has been in no degree corroborated.

The witness Morton testified that the defendant Tollifson made admissions to him that this ore was stolen by himself, the other defendant, and Wiley, as testified to by Wiley. He further stated that he saw the ore that was brought to the assay office, as related by the witness Wiley; that the defendant Tollifson informed him that it was the ore stolen, and that he (Tollifson), the defendant Mattox, and the witness Wiley were there and participated in the treating of the high grade ore, as stated by Wiley. This witness further stated that the defendant Mattox admitted that he took the ore up to the assay office, where, when it was settled for, \$5 that he owed them was taken out for such indebtedness. Also this witness stated that he was engaged in high grading for some time with the defendant Tollifson, and that they had a quarrel and dissolved their partnership. Another witness testified to seeing Wiley and another man go to the assay office at the time stated by Wiley. Other witnesses testified to the description of the property, where the ore was taken from, and the condition of the place after the robbery, and to other facts which go to corroborate the testimony. Corroborative evidence may be circumstantial. 12 Cyc. 456. A confession or admission of the accused is admissible to corroborate an accomplice. 12 Cyc. 458. It is unnecessary in this case to pass upon the question whether a conviction should stand on the uncorroborated evidence of an accomplice or to review former decisions of this court upon that question, for the reason that the testimony of the witness Wiley is sufficiently corroborated by other competent evidence. We find no error in this respect.

Second. It is claimed that there is a variance between the information and the proof, in this: that there is no evidence to sustain the charge that the building alleged to have been burglarized belonged to the Vindicator Consolidated Gold Mining Company. We cannot agree with this contention, and think

that the testimony, when taken as a whole, is sufficient to establish this fact.

The third point urged is a similar contention pertaining to the ownership of the property; but, when considered as a whole, we think the evidence sufficient. The witness Whitney, when he was asked, "Q. Whose ore was that?" answered "Vindicator Consolidated Gold Mining Company." While it is true his testimony shows that there were leases on a royalty, he also stated that the company owned the ore until it was settled for; that it was being shipped in the company's name; and that the agreement between the company and the lessee was to the effect that the ore produced should remain the property of the company until settled for. All the testimony on this subject tended to show that the property being mined was that of the Vindicator Consolidated Gold Mining Company, that the buildings were upon its land, and that the ore taken was the property of the company.

The fourth assignment pertains to an alleged variance between the information and the proof in regard to the owner of the property. It is claimed that there is no legal evidence to show that it was ever a duly organized corporation, or a corporation in fact and acting as such. The witness Whitney testified that he was acquainted with the property of the Vindicator Consolidated Gold Mining Company, and that the ore stolen belonged to that company. The following question was asked him: "Q. What is the Vindicator Consolidated Gold Mining Company?" His answer was: "A corporation." There were no objections to this testimony. The witness Trevarrow stated that he was the superintendent of the Vindicator Consolidated Gold Mining Company; that it was operating its properties under leases, etc.; that he looked after the company's interest; that the checks were sent to the Vindicator Consolidated Gold Mining Company at Denver, where royalty is deducted, and the remainder sent to the mine and turned over to the lessee; that the ore was shipped as the property of the company; that the company's agents settle for the ore with the lessees. There was other testimony along the same line showing the method and manner of the company in the transaction of its business; all of which tended to show that it was generally recognized as a corporation. While it is necessary to show the corporate capacity of the party (if a corporation) from which goods are alleged to have been stolen, the weight of authority is to the effect that it is only necessary for the prosecution to prove that the company was de facto organized and acting as a corporation. In the absence of objections this may be proved by one who, of his own knowledge, is acquainted with the fact, or it may be proved by reputation. *Miller v. People*, 13 Colo. 166, 21 Pac. 1025; *Perry et al. v. People*, 38 Colo. 23, 87 Pac. 796; *Reed v. State*, 15 Ohio, 217; *People v. Barric*, 49 Cal. 342. We are of opinion that

the evidence was sufficient to establish de facto the corporate existence of the company.

Contention is made that the evidence is not sufficient to show that the building broken into was a storehouse, as alleged in the information; the proof shows that some of the witnesses called it the "shafthouse." The witness Wiley stated he knew the storehouse was broken into on the 17th of March by Mattox, Tollifson, and himself. He also stated, "On this particular night the arrangement was to go to the shafthouse and get this ore." He stated further, "The door of the storehouse was open"; also, "No talk before we went over to the shafthouse to break it in." Again, he said: "The ore was brought to the Vindicator shafthouse door." Upon redirect examination, he stated, "Mattox broke open door of the storehouse; saw storehouse by daylight afterward; door next morning was torn; whole panel out." The witness Morton testified in the alleged confessions of the defendant Tollifson that, in substance, Tollifson stated to him that they went up about 2:30 in the morning, and waited until the shift went off and pried the outside door of the shafthouse open. The testimony of the witness Whitney is to the effect that the ore was stored in the storeroom, and that the door going from the shafthouse into the storeroom was ordinary cheap pine panel door. The evidence of the witness McMullin as to where the ore was taken from is to the effect that it was in the room used for the purpose of storing machinery, supplies, and high-grade ore that had been sorted. From this, counsel say: "To say the least, there is a great confusion in the plaintiff's testimony as to what was really broken into, and the preponderance of the evidence seems to be that it was a shafthouse, instead of a storehouse." For which reasons they urge that the fact that the storehouse was broken into could not be considered as being proven beyond a reasonable doubt. At common law, burglary was defined to be "a breaking and entering of a mansion house of another in the night with the intent to commit some felony within the same, whether such felonious intent be executed or not." *Russell on Crimes*, 785. It will thus be seen that common-law burglary and the statutory burglary of this state have but few elements in common, and consequently English cases and others, in some states, give us but little light upon the question under examination. Under our statute many acts constitute burglary, which, but a few years ago, were a different offense or no offense whatever. The information is in the exact language of the statute, and the fact that some witness may have used a different expression and stated the building was a storeroom, in our opinion, is not material. To a certain extent the words "storeroom" and "storehouse" are synonymous. Webster's Dictionary. And it must

have been so understood from the manner in which the witnesses used the words, interchangeably, referring to the same building.

The evidence as to what kind of a building was broken into was before the jury. The action was tried, where the property is situate, in Teller county, by a jury, presumably residents of that county, and familiar with the general phrases and language used in connection with such buildings and property. The fact that some witnesses have stated the ore was stored in a storeroom, instead of a storehouse, or in the storeroom of the shafthouse, instead of the storeroom of the storehouse, and others referred to the door as the one from the storeroom, others into the shafthouse, in our opinion, is immaterial. The evidence, as a whole, shows that the buildings were similar to those upon many other mining properties, and establishes the fact that the building, or that portion of the building which was broken into, was used for the purpose of storing machinery, supplies, and high-grade ore after it had been sorted out; *thus making of it a storehouse*. Webster defines a "storehouse" as a building for keeping goods of any kind, especially provisions; a magazine; a repository; a warehouse—and a "storeroom" as a room in a storehouse or repository; a room in which articles are stored. From the evidence, the jury were justified in finding that the defendants were guilty of breaking and entering a storehouse, as alleged in the information. When considered as a whole, we think that the evidence shows that the burglary and larceny were both committed without the consent of the owner. The assignment of error pertaining thereto is not well taken.

It is claimed that it was error to curtail the cross-examination of the witness Wiley concerning his character in general, and in not allowing him to be cross-examined as to his being bound over to the district court upon a charge for assault and attempt to murder. This witness admitted on cross-examination that he had been arrested at numerous times, and, in substance, that he had been arrested and bound over to the district court upon the same charge for which the defendants were being tried, and that he had not been informed against or tried for this charge. He also admitted that he had been arrested several times upon charges for larceny, and had but recently been arrested and was under bonds upon a similar charge. He also stated that he did not have any understanding with the district attorney's office that if he gave evidence in this case all charges against him would be dismissed. He further stated that it was not a fact that he was telling this story with the understanding that he would not be prosecuted in this or any other case, and that he had no promises of any kind or character concerning immunity for this or any other crime. He was thereafter asked, in substance, if he was not

under arrest for an assault with intent to kill, and if he was not bound over by a justice of the peace in Victor on such charge, and if he was not at that time under bond to appear in the district court on the other charge; to which questions, objections were sustained.

The defendants, later, as a part of their case, offered to prove by the records that the witness Wiley was, on the 20th of March, 1909, bound over to that court by a justice of the peace from said county upon the charge of an assault with attempt to kill and murder, said to have taken place about March 20, 1909, and that the district attorney had failed to file any information against him or in any manner further prosecute said charge; that the transcript of the justice was filed in the clerk's office on the 30th of March, 1909. Counsel for defendants then stated that this offer is made for the purpose of testing the credibility of the witness Wiley, and to further show that there is an arrangement between the said Wiley and the district attorney not to prosecute on said charge. The court, on objection, excluded this offered proof. Great latitude is allowable and should always be given in the cross-examination of a witness in his connection with the subject-matter being tried and about which he is called to testify, as whether it is of a nature to awaken in him a lively and possible interest in the outcome of the trial; and, as a general rule, the party against whom the witness is produced has a right to show everything which may affect his credibility. This should include any evidence tending to show the witness is interested in procuring a conviction, and as placing him in his real attitude towards the prisoner before the jury by which they could better judge his testimony, and it is proper to bring this out on cross-examination. *Blenkinson v. State*, 40 Neb. 11, 58 N. W. 587; *State v. Collins*, 33 Kan. 77, 5 Pac. 368; *Kellogg v. Nelson*, 5 Wis. 125; *State v. Krum*, 32 Kan. 372, 4 Pac. 621; *Lee v. State*, 21 Ohio St. 151; 3 Ency. of Evid. 853. We agree with counsel that where an accomplice testifies as a witness, a liberal and full cross-examination for the purpose of testing the truth of his statements should be permitted, and it is error to restrict such cross-examination within unreasonable limits; but we cannot concede there was any abuse of such discretion in this case. This witness, the accomplice Wiley, was subjected to a cross-examination of about 20,000 words, by counsel of experience and ability, in which they appear to have covered the entire field, including more than the average number of innuendoes upon all possible subjects permitted. But it is earnestly urged that both the questions asked and the record offered were competent for the purpose of testing the credibility of the witness. From an examination of many authorities on this subject, we find that the rule is not uniform, and that

there is a conflict upon the question, but we are of opinion that the great weight of authority is to the effect that, as a general rule, for the purpose of affecting the credibility of a witness, it is not proper to ask the witness on cross-examination if he has been arrested, informed against, or imprisoned, prior to conviction for such an offense. *Caples v. State*, 3 Okl. Cr. 72, 104 Pac. 493, 26 L. R. A. (N. S.) 1033; *Keys v. U. S.*, 2 Okl. Cr. 647, 103 Pac. 874; *Slater v. U. S.*, 1 Okl. Cr. 275, 98 Pac. 110; *Nelson v. State*, 3 Okl. Cr. 468, 106 Pac. 647; *People v. Hamblin*, 68 Cal. 101, 8 Pac. 687; *State v. Bryant*, 97 Minn. 8, 105 N. W. 974; *Eads v. State*, 17 Wyo. 490, 101 Pac. 946; *Leslie v. Commonwealth*, 42 S. W. 1095, 19 Ky. Law Rep. 1201; *State v. Huff*, 11 Nev. 17; *State v. La Mont*, 23 S. D. 174, 120 N. W. 1104; *Parker v. Commonwealth*, 21 Ky. Law Rep. 406, 51 S. W. 573; *People v. Crapo*, 76 N. Y. 288, 32 Am. Rep. 302; *Jackson et al. v. Osborn*, 2 Wend. (N. Y.) 555, 20 Am. Dec. 649; *People v. Cascone*, 185 N. Y. 317, 78 N. E. 287; *People v. Morrison*, 194 N. Y. 175, 86 N. E. 1120, 128 Am. St. Rep. 552; *Ryan v. People*, 79 N. Y. 593; *People v. Morrison*, 195 N. Y. 116, 88 N. E. 21, 133 Am. St. Rep. 780; *Anderson v. State*, 34 Ark. 257; *Bates v. State*, 60 Ark. 450, 30 S. W. 890; *Glover v. U. S.*, 147 Fed. 426, 77 C. C. A. 450; *Miller v. Territory*, 149 Fed. 330, 79 C. C. A. 208; *State v. Wigger*, 106 Mo. 90, 93 S. W. 390; *People v. Casey*, 72 N. Y. 393; *People v. Irving*, 95 N. Y. 541; *Blissell v. Starr*, 32 Mich. 297; 1 Greenleaf on Evid. (16th Ed.) 579-580.

The degree of credit which is to be given to the testimony of an accomplice is a matter exclusively for the jury, the same as any other witness. To a certain extent an accomplice goes upon the stand under a cloud; he admits his participation in a criminal offense; his testimony is, therefore, looked upon with suspicion and distrust, probably correctly so in a great many cases; but if every witness in a criminal case may be subjected to a cross-examination upon every incident of his past life and every charge of vice or crime which may have been made against him, and which has no bearing upon the crime for which the defendant is being tried, his testimony may be so prejudiced in the minds of the jury as to prevent them from convicting upon evidence which otherwise would be deemed sufficient, and it is not legitimate to allow his entire testimony to be thus destroyed by mere probabilities based upon other accusations against him of which the law presumes him innocent until convicted. The same rule applies to a defendant himself, as well stated by the Supreme Court of Missouri, in the case of *State v. Wigger*, supra: " * * * Nothing is more common than for the court to instruct the jury that the indictment or information against the defendant is a mere formal charge, and is no evidence of the guilt of the defendant of the charge therein contain-

ed, and no juror should permit himself to be in any way biased or prejudiced on account of the filing of the information against him.

* * * This being so, how can it be logically or in good reason said that the mere filing of an information or indictment against a party, upon which no conviction has been had, ought to be admitted as affecting the credibility of such witness?" Also, as stated by the Supreme Court of New York, in the case of *Ryan v. People*, supra: " * * * On principle it seems equally incompetent when applied to any other witness. An indicted person is presumed innocent, and yet the fact of an indictment is sought to impeach him as a witness. We do not think it is a legitimate fact for that purpose." From the reasoning presented in the foregoing authorities, the conclusion must follow that the evidence in this case which referred to an outside distinct offense showing that a criminal charge was pending against the witness to affect his credibility, was properly excluded.

The second reason for which the record was offered was, namely, "to show that there is an arrangement between the said Wiley and the district attorney not to prosecute on said charge." This offered proof had no connection with the crime for which the defendant was being tried. The witness was allowed to answer all questions concerning this crime and his connection therewith, his arrest therefor, and his not being prosecuted; also concerning any hope or promise of immunity assured him by the district attorney or any one else, directly or indirectly. He was also compelled to testify as to other alleged crimes for which he had been arrested, similar to the one for which the defendants were being tried. All this was before the jury. From this condition of facts, we cannot concede that there was anything in this record, if admitted, which showed, or tended to show, an arrangement or intention upon behalf of the district attorney not to prosecute him upon this other charge; but if the fact could be deduced therefrom that he did not intend to prosecute the charge it would not follow as tending to show the reason was that the witness was giving evidence of the alleged crime for which the defendants were being tried. There may have been other reasons, namely, that in the judgment of the district attorney, the evidence was not sufficient to justify its prosecution; upon investigation the actions of the complaining witness might have been such that, in the opinion of the district attorney, the complaint was not made in good faith. Many other reasons may have existed outside of any promise of immunity why the case should not have been tried. Another fact may have existed, namely, that the case might not yet have been reached by the district attorney, and he may, in due season, have intended its prosecution and so intended at the time. It will be noted this offer pertains to an al-

leged crime having no bearing to the one under consideration. The witness was compelled to give answers to all questions pertaining to the crime, for which the defendants were being tried, and as to his thus far not having been informed against or prosecuted therefor, all matters in connection therewith were fully before the jury, and the cases cited by counsel for the defendants which hold that it was error to refuse the admission of such testimony concerning the crime for which the defendant is being tried, when offered for the purpose of showing the witness may have an expectation or hope of immunity from prosecution because of his testifying, are not applicable to this case. As a general rule, the limits of the cross-examination of a witness as to his past is a matter which rests largely within the sound discretion of the trial judge, and that discretion is to be exercised in view of all the circumstances. 3 Ency. of Evid. 873. When these questions were asked and record proof offered, the witness had already been examined at length concerning his past history, numerous arrests, blind-overs, etc. In sustaining these objections, the court stated: "It occurs to the court * * * that I have given you a good big license, and you must not take too much advantage of it." Under the facts as shown here, it was not an abuse of discretion in refusing to allow the witness to further answer on cross-examination as to this outside charge or in refusing the record pertaining to it.

Complaint is made to the giving of certain instructions. No objections were made to them when given, nor in time to make any change before the jury retired. The case went to the jury on June 8th. On June 9th verdicts were returned. On June 24th the motion for a new trial was heard and overruled. July 27th a motion in arrest of judgment was overruled, and the defendants sentenced. Upon July 30th counsel for defendants made application to have their objections and exceptions to instructions entered as if taken at the time they were given. This application was denied. It is not claimed that any objections were made in apt time, but affidavits are filed to the effect that it was the custom in that court to make objections and save exceptions to instructions after the jury had retired. It is stated in some of them that this system was well nigh universal, so much so that rarely was the record made upon the questions of giving and refusing instructions in any other manner. This court has repeatedly held that objections to instructions are not a part of the record proper, and that unless such objections are made at or before the giving thereof, and saved and presented in the bill of exceptions, they will not be reviewed. This is the law; it is not a rule of court. If, when a case is being tried, counsel may sit

idly by and allow improper instructions to be given without proper and specific objections thereto in time for the court to be aided thereby, they would be permitted to invite error, as stated in the case of *State v. Clough*, 70 Kan. 510, 79 Pac. 117: "They should not, however, lie in wait to catch the court in error for the purpose of obtaining reversals." The record discloses nothing concerning objections to the instructions until after judgment and sentence, when a motion was made to allow objections and exceptions to the instructions theretofore given, as if taken at the time given. This motion was overruled by the court, but no assignment of error is based thereon; therefore, the question as to the correctness of this ruling is not properly here for consideration.

Error is claimed in the manner the verdicts were signed by the foreman of the jury. When the jury was being impaneled, one of the jurors, who was accepted, answered under the name of Wm. H. Morris. Upon the return of the verdicts, it appears that this Mr. Morris had been elected as foreman of the jury and signed the verdicts "W. H. H. Morris, foreman." No objections were made at the time to the manner in which the verdicts were signed by the foreman, nor any exceptions taken. The question was raised for the first time upon motion for a new trial, when it was claimed that the verdicts were not signed by any member of the jury as foreman, and that the verdicts are a nullity for the reason that the records do not show the name of "W. H. H. Morris" as appearing as a member of the jury. No attempt is made to show, nor is it claimed, that the Wm. H. Morris called into the box and who acted as a juror throughout the trial under the name of Morris, is not the same and identical person who acted as the foreman of the jury and signed the verdicts as "W. H. H. Morris." The defendants fail to show any injury they suffered by reason of the extra initial in the name. When the verdicts were rendered had they desired and called the attention of the court to the fact, it would have undoubtedly had the juror make the corrections. But the defendants should not be allowed to stand idly by until after the errors complained of could not be corrected. If anything had occurred in this respect prejudicial to the defendants, or in any way irregular, it could have been shown when the verdicts were returned and in time for their correction. Such matters, without any showing of injury to the defendants, do not constitute error. *Sess. Laws 1907*, p. 353; *State v. Duffield*, 49 W. Va. 274, 38 S. E. 577.

The judgment is affirmed.
Affirmed.

GABBERT and MUSSER, JJ., concur.

(49 Colo. 308)

MUSTANG RESERVOIR, CANAL & LAND CO. v. HISSMAN.

(Supreme Court of Colorado. Jan. 3, 1911.)

1. TRIAL (§ 255*)—INSTRUCTIONS—NECESSITY.

The court should instruct the jury as to the measure of damages, including the elements of damage involved; and hence, in an action for damages to the land by flooding through the breaking of defendant's reservoir, the court should have instructed on its own motion as to plaintiff's measure of damages.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 627-641; Dec. Dig. § 255.*]

2. WATERS AND WATER COURSES (§ 178*) — FLOODING LANDS—MEASURE OF DAMAGES.

The measure of damages for injury to land, by its being covered with sediment and debris by being flooded by the breaking of a reservoir, is the difference between the value of the land before and immediately after the injury and not the reasonable cost of clearing the land, though evidence of such cost would be admissible to aid in determining such difference in the value of the land.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 251-255; Dec. Dig. § 178; * Damages, Cent. Dig. §§ 276½, 282.]

3. APPEAL AND ERROR (§ 1067*)—HARMLESS ERROR—FAILURE TO INSTRUCT—MEASURE OF DAMAGES.

Error, in an action for damages caused by the flooding of land by the breaking of a reservoir, in merely requiring the jury to assess such damage as was proved by plaintiff's evidence, instead of instructing, as requested, that the measure of damages on account of the land being covered with sediment, etc., by being flooded, was the difference between the value of the land immediately before and immediately after it was injured, was prejudicial and reversible; no other instruction on the measure of damages being given.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4229; Dec. Dig. § 1067.*]

4. WATERS AND WATER COURSES (§ 179*) — FLOODING LANDS—DAMAGES—EVIDENCE—SUFFICIENCY.

In an action for damages by the flooding of plaintiff's land by the breaking of defendant's reservoir, evidence that about eight or ten months after the flooding plaintiff expended a certain sum in repairing his reservoir embankment was not of itself sufficient to authorize the allowance of damages on that ground; there being no evidence to show that the repairs were made necessary by the flooding, or that the amount expended was reasonable, or as to the actual damage to the reservoir embankment.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 250; Dec. Dig. § 179.*]

Appeal from District Court, Pueblo County; C. S. Essex, Judge.

Action by Henry Hissman against the Mustang Reservoir, Canal & Land Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Thomas R. Hoffmire, for appellant. John A. Martin, for appellee.

BAILEY, J. The plaintiff, Henry Hissman, brought suit to recover damages from the Mustang Reservoir, Canal & Land Company, a corporation, defendant, claimed to

have been occasioned through the breaking of the latter's reservoir, thus flooding the land of plaintiff, destroying a portion of his reservoir embankments and injuring prospective crops. At the trial consideration of damage to crops was taken from the jury entirely, and that matter is not before us in any phase.

In the first cause of action, beside the loss of and damage to crops, it is charged that, "The breaking and washing away of plaintiff's reservoir damaged the same in the sum of \$175." In the second cause of action it is charged in substance, that as a result of the breaking of defendant's reservoir water therefrom flooded an area of about 90 acres of plaintiff's land to a depth of several feet, all of which was then in cultivation, with growing crops thereon, and damaged the land, by trash, dirt, weeds and driftwood being carried upon it, to the amount of \$375. The plaintiff had an aggregate judgment, on the two causes of action, of \$450, which defendant brings here for review on appeal.

The only assignments necessary to be considered are those relating to proofs as to the damage to plaintiff's reservoir, and the failure of the court to instruct as to the measure of damage to his land. The record discloses that the only instruction given to the jury on the question of damage, and the method of determining its amount, is this:

"If you believe that the reservoir mentioned in the complaint and evidence, either broke its banks or overflowed, and that the overflow resulted in damage to the plaintiff, it would be your duty to assess such damage as may have been proven in evidence by the plaintiff."

It is settled doctrine everywhere that,

"The rules by which damages are to be estimated should be laid down by the court, and it is its duty to explain to the jury the basis on which the assessment should be made, the proper elements of the damages involved, and within what limits they may be estimated in the case involved.

"The jury should not be left to determine the amount from conjecture and belief without reference to the legal rules determining the bounds and limits of compensation."

13 Cyc. p. 236.

This is a rule of general practice. The court, on its own motion, should have instructed on this point, which it omitted to do. The significance of this omission is accentuated by the fact that the defendant specifically requested the court to instruct the jury in that connection, as follows:

"The court instructs the jury that the measure of damages for the alleged injury to plaintiff's land on account of it being covered with trash, sediment and debris, is the difference between the value of said land immediately before said alleged injury and immediately after said alleged injury."

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

No testimony whatever as to the value of the land, either before or after the injury, was introduced. The plaintiff, to establish his damage, undertook to show what it would reasonably cost to clear the land. This is not the true measure of damage. The true one, under the facts here shown, is embodied in the instruction asked by the defendant, and refused by the court. Such refusal was fatal error.

It may be, and doubtless is, true that it would have been competent for plaintiff to have shown what the cost of clearing the land would reasonably be, as an element in assisting to determine the difference in the value of the land just before and immediately after the flooding. It is, however, clear that the amount of damage cannot be fixed and settled by such method, without reference to the value of the land at the time of and after the happening. If the rule were as contended by plaintiff, it is manifest that in some cases the cost of removing rubbish and débris might be more than the value of the land before the injury, and more than its worth after cleared. There is nothing in the facts of this case to take it out of the general rule above set forth. Suppose the real worth of plaintiff's land was less per acre than it would reasonably cost to clear it, and there is nothing in the record to show that such is not the precise situation, will it be contended that defendant should be mulcted in damages for more than the actual loss, or that plaintiff should recover on that basis? It is only necessary to thus point out the inequity of this method of computation, to clearly indicate that the measure of damage counted on by plaintiff, and permitted by the court, is improper. Otherwise stated, the reasonable cost of clearing the land is not the measure of damage, under the facts presented, but rather evidence to be considered, in connection with other circumstances, in estimating the extent thereof. *Sedgwick on Damages* (8th Ed.) § 932; *Sutherland on Damages* (2d Ed.) § 1017; *Sullens v. Chicago, R. I. & P. Ry. Co.*, 74 Iowa, 659, 38 N. W. 545, 7 Am. St. Rep. 501; *Reichert v. Backenstross*, 71 Hun (N. Y.) 516, 24 N. Y. Supp. 1009; *Higgins v. N. Y., L. E. & W. R. Co.*, 78 Hun (N. Y.) 567, 29 N. Y. Supp. 563; *Gentry v. Richmond & D. R. Co.*, 38 S. C. 284, 16 S. E. 893; *Trinity & S. Ry. Co. v. Schofield*, 72 Tex. 496, 10 S. W. 575; *International & G. N. Ry. Co. v. Davis*, (Tex. Civ. App.) 29 S. W. 483; *Koch v. Sackman-Phillip Inv. Co.*, 9 Wash. 405, 37 Pac. 703; *De Costa v. Mass. Mining Co.*, 17 Cal. 613; *McGuire v. Grant*, 25 N. J. Law, 356, 67 Am. Dec. 49; *Easterbrook v. Erie Ry. Co.*, 51 Barb. (N. Y.) 94; *Jones v. Gooday*, 8 M. & W. 146; *Honsee v. Hammond*, 39 Barb. (N. Y.) 89; *Holt v. Sargent*, 15 Gray (Mass.) 97; *C. & W. Rld. Co. v. Willits*, 45 Kan. 110, 25 Pac. 576; *Fremont, Elkhorn & Missouri*

Valley R. R. Co. v. Harlin, 50 Neb. 698, 70 N. W. 263, 36 L. R. A. 417, 61 Am. St. Rep. 578; *Hanover Water Co. v. Ashland Iron Co.*, 84 Pa. 279.

With reference to the damage to the reservoir, the only testimony introduced to that point was a statement by plaintiff, over the objection of defendant, in effect, that some eight or ten months after the washout he had expended about \$200 in making repairs. There was not a syllable of testimony to show that such repairs were made necessary by the flooding, or that their cost was reasonable and proper, or as to the actual amount of damage to the reservoir. Manifestly such testimony alone was wholly insufficient by which to ascertain and fix the amount of that injury.

On this record it is plain that the judgment cannot stand, and for the reasons given it is reversed and the cause remanded for further proceedings according to law.

We decline to discuss or consider other alleged assignments, since such as are said to have occurred may not intervene at another trial.

Judgment reversed and cause remanded.

CAMPBELL, C. J., and WHITE, J., concur.

(38 Utah, 286)

PETERSON v. BENSON, City Recorder.

(Supreme Court of Utah. Dec. 1, 1910.)

1. MUNICIPAL CORPORATIONS (§ 183*)—OFFICER DE FACTO.

Comp. Laws 1907, § 213, provided for the election of a city marshal in cities of less than a certain population, but was amended by Laws 1909, c. 107, so as to require the appointment of a marshal by the mayor. *Held*, that where a marshal, elected under section 213, continued to hold office after the expiration of his term, no appointment having been made by the mayor, he was a de facto officer.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 472-481; Dec. Dig. § 183.*]

2. MUNICIPAL CORPORATIONS (§ 183*)—OFFICERS—COMPENSATIONS.

Comp. Laws 1907, § 213, provided for the election of a city marshal in cities of less than certain population, but was amended by Laws 1909, c. 107, so as to require the appointment of a marshal by the mayor. Comp. Laws 1907, § 225, provide that the compensation of an officer shall not be increased or diminished to take effect during the time for which such officer was elected or appointed. One elected a marshal for the term of two years took office January 6, 1908, and continued to serve after the expiration of his term; no appointment having been made by the mayor. In October 1909, an ordinance of the city increased the compensation of marshal for the term beginning 1910. *Held*, that for service after the expiration of the term for which he was elected the marshal was entitled to the increased compensation; he being a de facto officer, and not a "holdover" as the term is used, as applied to one holding a public office.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 472-481; Dec. Dig. § 183.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

3. OFFICERS (§ 95*)—COMPENSATION—DE FACTO OFFICER.

An actual incumbent of a public office who is an officer de facto is entitled to the compensation attached to the office, there being no adverse contestant or de jure officer.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 134, 139; Dec. Dig. § 95.*]

Appeal from District Court, Cache County; W. W. Maughan, Judge.

Application by Niels Peterson for a writ of mandate requiring Mae Benson, as Recorder of Logan City, to draw a warrant in favor of applicant, and from a judgment dismissing the petition, the applicant appeals. Reversed.

Niels C. Peterson, appellant, applied to the district court of Cache county for a writ of mandate requiring the recorder of Logan City to draw a warrant in his favor upon the treasurer of said city for the sum of \$83.33½ alleged to be due him for salary earned as marshal of Logan City during the month of February, 1910. An alternative writ of mandate was issued by the court. The recorder filed an answer to Peterson's petition and the cause was submitted to the court for decision upon an agreed statement of facts, from which it appears that Peterson was duly elected to the office of marshal of Logan City on November 3, 1907, and that he duly qualified as marshal and entered upon the duties of the office January 6, 1908, and ever since has continued to and did during the month of February, 1910, perform the duties of the office.

Section 213, Comp. Laws 1907, provides, as far as material here, that: "In addition to the mayor and city councilmen, there shall be elected * * * in cities of less than 12,000 inhabitants, a city marshal; provided, that in cities of less than 12,000 inhabitants the city recorder shall be ex officio city auditor and shall perform the duties of such office. * * * All elective officers shall hold their respective offices for two years, and until their successors are elected and qualified."

Section 225 provides that: "All officers of any city shall receive such compensation as may be fixed by ordinance, but the compensation of any such officer shall not be increased or diminished to take effect during the time for which any such officer was elected or appointed."

In the year 1909 the Legislature amended section 213 (Laws 1909, c. 107). The section as amended, so far as material to the questions here involved, provides that: "In cities of less than 12,000 inhabitants a city marshal shall be appointed by the mayor subject to the confirmation of the city council on the first Monday in January following a municipal election."

It appears from the statement of facts that Logan City is a city of the second class having a population of less than 12,000 inhabit-

ants; that the mayor of said city has failed and neglected to appoint a marshal for the city by and with the concurrence of the city council or otherwise; that Peterson has not been duly or otherwise appointed to the office of marshal of the city in the year 1910; that he is exercising and performing the duties of the office of city marshal, and claiming the benefits, emoluments, and salary of the office by virtue of his election thereto in the year 1907, and that he has no right or claim to the office, except such as arises out of his election to the same in the year 1907. It further appears that at the time Peterson was elected, and at the time he entered upon the duties of the office mentioned, there was in force and effect an ordinance of Logan City fixing the salary of the office of city marshal at \$900 per annum, payable at the end of each month in equal installments of \$75; that subsequently, on October 1, 1909, there was duly passed by the city council, and approved by the mayor of Logan City "an ordinance purporting to fix the annual salary attached to the office of marshal of Logan City for the term of two years beginning the first Monday in January, 1910, and ending the first Monday in January, 1912, at \$1,000 per annum," payable in monthly installments of \$83.33½ at the end of each month.

It is further stipulated that "the above-named defendant, Mae Benson, ever since January 3, 1910, has been, and now is, the duly elected, qualified, and acting city recorder of Logan City, and as such officer it was, and now is, the duty of such recorder to draw all warrants or orders for the payment of all funds due from said city to its officers on account of salary or otherwise payable out of the treasury of Logan City; that petitioner duly demanded that the defendant draw a warrant in his favor upon the treasurer of Logan City for the sum of \$83.33½ in payment of his salary as marshal earned in the month of February, 1910; * * * that the recorder refused and still refuses to draw a warrant for said sum or any sum except said amount of \$75; * * * that the recorder tendered to the petitioner a warrant drawn on the treasurer of Logan City for the sum of \$75," which Peterson, the petitioner, refused to accept; that defendant deposited with the clerk of the district court of Cache county at the time she filed her answer said warrant for \$75 for the use and benefit of Peterson; and that defendant has at all times been ready, willing, and able to issue and deliver to Peterson a warrant for \$75. It was also stipulated that "the petitioner has no plain, speedy, or adequate remedy at law."

The court found on the issues in favor of the recorder, and rendered judgment dismissing the petition for a writ of mandate. To reverse the judgment, Peterson has brought the case to this court on appeal.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

A. A. Law, for appellant. H. G. Nebeker, for respondent.

MCCARTY, J. (after stating the facts as above). Respondent contends, first, that the period of time elapsing from January 3, 1910, the date upon which the officers of Logan City elected in 1909 were installed in office, until March 1, 1910, 'was a part and a continuation of the term of office to which appellant was elected in November, 1907, and that the tenure of his office and the emoluments thereof were as fixed by law at the time he qualified and entered upon the duties of the office, January 6, 1908; and, second, "that so much of the ordinance passed October 1, 1909 (mentioned in the foregoing statement of the case), as purported to increase the salary of said marshal to take effect January 3, 1910, is void as to appellant, for the reason that it would increase the salary of said marshal 'to take effect during the time for which such officer was elected' and would be in conflict with section 225 of the Compiled Laws of the state of Utah, 1907."

The authorities seem to hold that when a person is elected or appointed to an office and he qualifies and enters upon the duties thereof under a statute which provides that the person so elected or appointed shall hold the office for a definite period of time and until his successor is elected and qualified, and such person holds over and continues to discharge the duties of the office after the expiration of his regular term because of the failure to elect or appoint a successor, the hold-over period is a part of the time for which such officer was elected or appointed. In this case, however, the law under which appellant was elected, and under which he held the office from January 6, 1908, until the first Monday in January, 1910, was, in the year 1909, amended and the office changed from an elective to an appointive office. The amendment, so far as it affects the officer in question, went into effect immediately on the expiration of the term (two years) for which appellant was elected. Chapter 107, p. 230, Sess. Laws Utah, 1909. As appellant was not appointed to the office after his term expired, and the law under which he had been elected having been, in effect, repealed, it follows that during the month of February, 1910, he was not a de jure officer, and was in no sense a holdover, as the term "holdover" is understood when applied to a person holding a public office. *State v. Simon*, 20 Or. 365, 28 Pac. 170. It does appear, however, that he was a de facto officer, and as such discharged all the duties of the office during the month of February, 1910. The important question therefore is, Can an actual incumbent of a public office, who is only an officer de facto and in no sense a de jure officer, maintain an ac-

tion for the salary, fees, or other compensation attached to the office, there being no adverse contestant or de jure officer?

There are many American decisions in which the view derived from England is still adhered to, namely, that the right to the emoluments of a public office is an incident to and rests upon the title to the office; and hence under no circumstances is a de facto officer legally entitled to the emoluments of the office, although he may have performed all the services and discharged all the duties of the office. Upon the other hand, there are courts of high standing which hold that in this country a public office is in no sense property, and that public officers have no proprietary interest in their offices. Pursuant to these latter views such courts have deduced the doctrine that the right to the emoluments of an office arises out of the actual rendition of the services required to be performed by the officer; that is, the emoluments are designed to be merely compensatory. *Stuher v. Curran*, 44 N. J. Law, 184, 43 Am. Rep. 353; *Erwin v. Jersey City*, 60 N. J. Law, 141, 37 Atl. 732, 64 Am. St. Rep. 584. In view of the foregoing, some of the courts have adopted and followed the intermediate course, namely, that as between an officer de facto and a de jure officer the latter is entitled to whatever salary and other compensation may be attached to the office, even though the de facto officer may have performed all the duties of the office. This doctrine is based upon the theory that unless the de jure officer is protected, dishonest intruders will lay claim to the office, and, obtaining possession thereof, will claim the emoluments to the detriment of the public and the injury of the de jure officer. In cases, however, where there is no de jure officer, the line of decisions last mentioned hold that a de facto officer who, in good faith, has had possession of the office and has discharged the duties pertaining thereto, is legally entitled to the emoluments of the office and may, in an appropriate action, recover the salary, fees, and other compensation attached to the office. This doctrine is discussed and illustrated in the following cases: *Erwin v. Jersey City*, supra; *Dickerson v. City of Butler*, 27 Mo. App. 9; *Behan v. Board*, etc., 3 Ariz. 399, 31 Pac. 521; *Adams v. Directors*, etc., 4 Ariz. 327, 40 Pac. 185.

Constantinian, in his treatise on the De Facto Doctrine, § 238, says: "Certain courts, while denying to the de facto officer the right to recover salary when there is a de jure officer entitled to the office, have thought that the rule should be different when there is no such officer in existence. This doctrine may undoubtedly be supported on equitable grounds, since it seems unjust that the public should benefit by the services of an officer de facto, and then be freed from all liability to pay any one for such services." The au-

thor cites with approval the Arizona cases above mentioned.

We think the rule as declared by these authorities is more in consonance with the principles of equity than the opposite rule which holds that an officer de facto cannot, under any circumstances, maintain an action for the salary, fees, or other compensation attached to the office which he holds.

The judgment is reversed, with directions to the trial court to issue a writ of mandate as prayed for in appellant's complaint. Appellant to recover costs.

STRAUP, C. J., and FRICK, J., concur.

(38 Utah, 264)

- HALVERSON v. WALKER.

(Supreme Court of Utah. Nov. 26, 1910.)

1. EVIDENCE (§ 411*)—PAROL EVIDENCE—INCOMPLETE AGREEMENT.

Where a preliminary written agreement recites that a formal agreement is to be prepared, there is no complete contract, and the real intention of the parties will govern and must be ascertained from what was said and done immediately preceding the preparation of the preliminary memorandum.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1882; Dec. Dig. § 411.*]

2. EVIDENCE (§ 448*)—PAROL EVIDENCE—AMBIGUITY IN INSTRUMENT.

Where the language of a written agreement is ambiguous the circumstances surrounding and affecting the parties and the subject-matter of the agreement may be inquired into.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2071; Dec. Dig. § 448.*]

3. SALES (§ 75*)—CONSTRUCTION OF CONTRACT—PRICE—"BALANCE."

A contract for the sale of a half interest in a barber shop by W. to H. provided that "it is understood and agreed that H. is to pay \$1,912.50 for a one-half interest in barber shop, including all fixtures and everything pertaining to the same now contained in shop, and including lease. Said H. is to advance on debts such sum as may be necessary, and balance to be paid in regular course of business as the same may be necessary." Held, that the total amount that H. was to pay was \$1,912.50; the word "balance" referring to the purchase price as named in the agreement and not to the subsisting debts of the seller over and above the \$1,912.50.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 204; Dec. Dig. § 75.*]

For other definitions, see Words and Phrases, vol. 1, pp. 677-679.]

4. GOOD WILL (§ 1*)—DEFINITION OF.

The good will of a business is the probability that old customers will resort to the old place (citing 4 Words and Phrases, p. 3128).

[Ed. Note.—For other cases, see Good Will, Cent. Dig. § 1; Dec. Dig. § 1.*]

5. GOOD WILL (§ 7*)—SALE OF—CONSTRUCTION OF CONTRACT—EVIDENCE.

A contract for the sale of a half interest in a barber shop, including fixtures and the lease

of the building, held, under the evidence, to include the good will of the business.

[Ed. Note.—For other cases, see Good Will, Cent. Dig. § 7; Dec. Dig. § 7.*]

6. SALES (§ 87*)—CONSTRUCTION OF CONTRACT—PURCHASE PRICE—EVIDENCE.

The purchase price, as stated in a memorandum of agreement for the sale of a half interest in a barber shop, held, under the evidence, to be the full price that the seller was to receive for the furniture and fixtures, the lease of the building, and the good will of the business.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 87.*]

7. APPEAL AND ERROR (§ 1010*)—REVIEW—FINDINGS OF FACT.

Findings of fact by the trial court, which are sustained by the greater weight of the evidence, will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3979; Dec. Dig. § 1010.*]

Appeal from District Court, Salt Lake County; C. W. Morse, Judge.

Action by Fred Halverson against David F. Walker. From a judgment for plaintiff, defendant appeals. Affirmed.

E. C. Ashton and Moyle & Van Cott, for appellant. A. T. Sanford, for respondent.

FRICK, J. In June, 1908, respondent commenced this action in equity for a dissolution of the partnership then existing between him and appellant, and for an accounting and distribution of the assets of the partnership business after payment of the partnership debt.

Both parties agreed that a dissolution of the partnership should be had, that the debts be paid, and a distribution of the assets be made, but they did not, and could not, agree upon the extent of their respective liabilities for the debts that appellant owed on the business at the time the partnership was formed. All other matters arising out of the partnership business were either agreed upon between the parties or were determined to the satisfaction of each by the district court, and a settlement of all those matters was had in that court. The only question that is presented to us is the question with respect to the amount that respondent should pay of the debts of appellant that were outstanding at the time the partnership was formed.

On the 29th day of November, 1907, after considerable bargaining, respondent purchased from appellant a one-half interest in the barber shop which he conducted in Salt Lake City. To evidence the transaction the parties had prepared and signed the following memorandum: "It is understood and agreed that Fred Halverson is to pay \$1,912.50 for a one-half interest in barber shop, including all fixtures and everything pertaining to same, now contained in shop and including lease. Said Fred Halverson is to advance on debts such sum as may be

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

necessary, and balance to be paid in regular course of business as the same may be necessary. Formal agreement to be hereafter drawn and dated December 1, 1907. November 29, 1907."

We remark that from the fact that a formal agreement was to be drawn (which was not done), as well as from the face of the memorandum itself, it is apparent that the memorandum was not intended as a completed contract; that is, one in which all the terms of the bargain and sale were expressed. In view of this, the real intention of the parties had to be ascertained from what was said and done at and immediately preceding the time that the memorandum was proposed and signed. This was the view that the parties entertained at the trial, as is made apparent from the evidence which they submitted to the court. After the court had heard all of the evidence adduced by both parties, it made its findings of fact, none of which is assailed, except the following: "That prior to the time of the partnership agreement between the plaintiff and the defendant, the defendant carried on the business of a barber at the place where it is now conducted, and on the 29th day of November, 1907, the defendant sold to the plaintiff for the sum of \$1,912.50, one-half of the interest in the barber shop, including all fixtures, good will, and everything pertaining to the same then in said shop, together with the lease on said premises at No. 215 South Main street, Salt Lake City, Utah. In accordance with said agreement and understanding of the parties, the plaintiff purchased an undivided one-half interest of all the property and fixtures in or pertaining to said barber shop. At the time of the sale of said half interest in said personal property and fixtures, there was existing a chattel mortgage on the whole of it for \$2,000 and a title note against a part of it for \$227. The plaintiff did not assume or agree to pay any part of said indebtedness and it was agreed that the defendant should pay the same, and that the plaintiff should have said half interest free and clear of incumbrances." The conclusion of law based on the foregoing two findings is also complained of.

The court also found, in connection with the foregoing findings, that before this action was commenced appellant had reduced the amount owing by him on the chattel mortgage and title note referred to in said findings to the sum of \$1,336.40; that shortly after the action was commenced the mortgagee began proceedings to foreclose the chattel mortgage by advertising the mortgaged property for sale; that by reason thereof, and to preserve said property from forced sale, respondent was compelled to and did pay the amount unpaid and then due on said chattel mortgage, which, with interest and attorney's fees, amounted to the sum of \$1,409.65. Pursuant to the two findings which

we have set forth, and which are assailed by appellant, and the other findings last above referred to, the court entered judgment in favor of respondent for the amount last above stated.

We have carefully examined the evidence and are well satisfied that the findings of the court are amply supported by the evidence, and, further, that the conclusions of law as found by the court are likewise sound. We might therefore affirm the judgment of the court without further discussion, but, as appellant strenuously insists that the judgment is wrong, we have deemed it best to consider the case somewhat in detail and along the lines of appellant's contentions.

Appellant insists that this judgment is erroneous, for the reason that respondent, in purchasing the one-half interest from appellant, agreed to pay one-half of the debts that appellant owed on the business and which amounted to \$3,200. In other words, appellant contends that respondent was to advance \$1,912.50 as a part liquidation of said sum of \$3,200, and that, after applying the \$1,912.50, there still remained unpaid the sum of \$1,287.50, of which respondent had agreed to pay one-half, but which was to be paid by him out of the earnings of the business. This, appellant contends, was the actual agreement between him and respondent, and he now insists that the court erred in its findings to the contrary, and that the findings as they now stand are not supported by the evidence and are contrary thereto.

Appellant's counsel insist that the foregoing contention is supported by the terms of the memorandum itself, which was signed by the parties at the time respondent purchased the one-half interest in the barber shop. In their brief they say: "We maintain that the word 'balance,' as used in the memorandum, is equivalent to the word 'debts,' which precedes the word 'balance' in the same sentence." We cannot agree with this contention. The word "balance," as it is used in the memorandum, is used in the sense of remainder and clearly refers to the remaining portion of the \$1,912.50, only a part of which respondent was to pay forthwith. That is, he was to pay so much of that sum as would meet the demands of the creditors whose claims had to be paid then. The balance—remainder—of the \$1,912.50 was to be paid by respondent as stated in the memorandum. Moreover, it is not at all likely that the writer who prepared the memorandum, who was a lawyer, would state only a portion of the consideration. At least, this is a circumstance worthy of consideration. Having undertaken to state what the consideration was, he would, in all probability, have stated the whole of it. But it is also clear that the sentence following the one in which the \$1,912.50 is mentioned does not refer to what the consideration was to be, but clearly refers only to the manner in which the respondent should pay the express-

ed consideration, namely, the \$1,912.50, into the business, and the meaning of the memorandum is to the effect that this should be done by respondent by immediately advancing—paying “on the debts such sum as may be necessary”—and whatever remained unpaid of the \$1,912.50 was to be paid “in regular course of business when necessary.”

Appellant's counsel contend that, in view of all the evidence, it is clear that appellant did not agree to sell the one-half interest in his barber shop to respondent for the sum of \$1,912.50. In this connection, it is insisted that the evidence is to the effect that the furniture and fixtures belonging to the barber shop when respondent purchased were alone of the value of \$5,100; that the unexpired term of the lease was worth an additional amount of \$3,800, and that the good will of the business was worth, in addition to the two amounts aforesaid, the sum of \$1,500 to \$2,000. The evidence is to the effect that respondent was an employé of appellant for some time before the sale of the one-half interest was consummated and thus was familiar with the business; that appellant had fixed the cost price of the furniture and fixtures at \$5,100; that respondent objected to this valuation as entirely too high, and that it was agreed between them that 75 per cent. of this sum, namely, \$3,825, should be taken as the actual value of the furniture and fixtures. With regard to this, appellant testified: “He (respondent) told me that the stuff wasn't worth only 75 cents on the dollar, if it were taken out. I said, ‘Probably it isn't; but,’ I said, ‘the stuff is here, the good will is there, and the lease is there, and we will not say anything about that at all, but simply let that go.’ ‘Well,’ he says, ‘all right, then. * * *’ Then we discounted the stuff 75 cents on the dollar and cut it in two, and whatever it was he was to apply. I told him right there and then, I said, ‘I don't want any of this money; simply apply it on the debts, and the balance of it will be paid in the regular course of business.’ The 75 per cent. of \$5,100 amounted to \$3,825. This sum “cut in two,” as appellant says, would make one part \$1,912.50. This is the amount that respondent claims he agreed to pay for a one-half interest, while appellant contends that in addition to that sum respondent also agreed to pay one-half of the debts remaining after the \$1,912.50 had been applied, as before stated.

We have already shown that appellant's construction of the memorandum is not tenable. Nor do we think that his contention should prevail that he did not sell the one-half interest in the barber shop to respondent for the sum of \$1,912.50, because that was the value only of the furniture and fixtures, exclusive of the value of the unexpired term of the lease and the good will of the business. The lease was expressly included with the furniture and the fixtures in the

memorandum. Appellant did not allege that there was either fraud or mutual mistake with respect to the terms of the memorandum; nor did he ask that the agreement as therein expressed be reformed. The only element, therefore, that is left to consider is the value of the good will of his business. The question is not, were the price and terms of sale respecting the barber shop such as the appellant and respondent, or either of them, were likely to have made, but the question is, what were the price and terms agreed upon? True, where the language of an agreement is ambiguous, all the circumstances surrounding and affecting the parties and the subject-matter of the agreement ought to be considered. This the district court did, and, after doing so, found the issues in favor of respondent, as we have before shown. We have already disposed of the unexpired term of the lease by showing that it was expressly included within the terms of the written memorandum. In this connection we remark, however, that by the very terms of the lease itself the time it had to run was uncertain. The tenancy under certain conditions could have been terminated by the landlord at any time. This, it appears, was considered by the parties, and all that appellant urges is, that the landlord in all probability would not have enforced his rights in that respect. It is not claimed that the landlord bound himself not to do so, but only that it was probable that he would not. In our judgment, the parties considered the whole situation with respect to the unexpired term of the lease, and then expressly included it within the consideration expressed in the written memorandum. This eliminates the question of the value of the lease.

Upon the question respecting the value of the good will of the business, the testimony shows without conflict that appellant had been engaged in the barber business for about eight years within a distance of about 50 feet of where he was so engaged when he sold the one-half interest to respondent; that he had moved to the new location only a few months before the sale; that all of his old customers followed him to the new location, and that the new place was larger than the old one and contained considerably more furniture and fixtures; that the furniture and fixtures then in the shop were fairly worth \$3,825; that there was a chattel mortgage for \$2,200 and a title note which were liens on said furniture and fixtures; and that appellant's indebtedness, including said liens, amounted to at least \$3,200, or perhaps a few hundred dollars more. It further appeared from the evidence that appellant was somewhat in arrears for rent; that a portion of the foregoing indebtedness was pressing and had to be paid or the creditor would enforce his lien, and that in the fall of 1907, at the time of the transfer, there was a great stringency in the money market in

Salt Lake City, as well as throughout the country generally. Moreover, it is made apparent that if appellant was not necessarily bound to sell, he was at least desirous of doing so and to obtain money to pay off the pressing debts. Under such circumstances, it is easy to perceive why appellant might have sold on less favorable terms to himself than he otherwise would, and why respondent would offer to pay less for the same property than he might have done under different circumstances. "Good will," as defined by Lord Eldon, "means nothing more than the probability that the old customers will resort to the old place." See 4 Words and Phrases, 3128, where the cases upon this subject are collated. If, therefore, we keep in mind the fact that appellant had continued in business at practically the same place for a period of eight years; that in moving into the new place he had retained all of his old customers, as he said he had; that notwithstanding his eight years of continuous business he was indebted at least \$3,200, a large portion of which was secured by a chattel mortgage on the only property he had, and his creditors were then pressing for payment for a considerable portion of the amount owing by him, then logically one of two things must follow, namely, his business either was not profitable or he needed a business manager. If the business was such that when properly managed it would not yield sufficient to pay the debts incurred in establishing it, then it was not a very desirable business and the good will thereof might not be considered as of any value by a prospective purchaser. If the owner of a business cannot pay off liens resting on the property used in the business, and if such liens were foreclosed and the owner's equity of redemption was all that was left him, and which was no greater than what appeared to be in this case, we cannot well see how the good will of such a business would be considered of great, if of any, value by any one. Whatever its value might have been, however, it is clear that under the circumstances above referred to and which were shown to exist in this case, the owner of the business would not be in a position to make such value, if any, available; and thus it is easy to see why he might sell an interest in his business without special reference to the value of the good will, which we think was the case in making the sale to respondent. No doubt, if the case be considered entirely from appellant's point of view, he should have had a considerably larger amount for one-half interest of the business sold by him to respondent.

It is appellant's misfortune, however, that not only is the evidence of respondent and his brother, who was present at the time the bargain between the parties was made, and who prepared the written memorandum,

contrary to appellant's claims, but there are other weighty circumstances that are likewise contrary thereto. One unfavorable circumstance is, that appellant insists that respondent agreed to pay a consideration which was not, in express terms at least, mentioned in the written memorandum. If the \$1,912.50 which respondent agreed to pay had also been omitted from the memorandum and the whole consideration had been left to the verbal understanding, the situation would have been somewhat different. Where, however, a consideration is expressed in a written agreement, the purchaser ought not, at least without good cause therefor, be required to pay a consideration in addition to that expressed in the written agreement. Moreover, when it is contended that one has assumed to pay the debts of another, the fact that the assumption was in fact made should be reasonably well established. Upon these questions the facts were all before the district court and it found them against appellant's contention, and we think that in view of all the circumstances the findings that are assailed were sustained by the greater weight of the evidence. This being so, it follows that the conclusion of law and the judgment, both of which are based upon said findings, must likewise be sustained.

The judgment therefore is affirmed, with costs to respondent.

STRAUP, C. J., and McCARTY, J., concur.

(33 Utah, 374)

McMILLAN v. DURAND, Justice of the Peace.

(Supreme Court of Utah. Nov. 28, 1910.)

JUSTICES OF THE PEACE (§ 205*)—CONCLUSIVE-NESS OF RECORD.

Comp. Laws 1907, § 3757, requires every justice to keep a docket of the time when the parties or either of them appeared, or their nonappearance, if default be made. In certiorari proceedings to review the action of a justice, the record of the proceedings made by the justice showed that defendant was duly served with summons, that he failed to appear, and that his default was entered, and there was nothing in the record showing anything to the contrary. *Held*, that the record could not be contradicted by a statement in the return or by other evidence dehors the record.†

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 793-799; Dec. Dig. § 205.*]

Appeal from District Court, Salt Lake County; T. D. Lewis, Judge.

Neal McMillan obtained a writ of certiorari to review the proceedings of Charles F. Durand, a Justice of the Peace, and to annul a judgment rendered against petitioner. The judgment of the justice's court was affirmed by the district court, and the petitioner appeals. Affirmed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

† Griffith v. Justice's Court, 35 Utah, 443, 100 Pac. 1064.

Moyle & Van Cott and Geo. M. Sullivan, for appellant. E. A. Walton and Dey & Hoppaugh, for respondent.

STRAUP, C. J. A writ of certiorari was obtained in the district court to review the proceedings of a justice's court and to annul the judgment rendered by it in favor of the plaintiff in a case wherein William R. Forsythe was plaintiff and Neal McMillan was defendant. On a hearing the district court affirmed the judgment of the justice's court. From the judgment of the district court an appeal is prosecuted to this court.

A transcript of the justice's docket and record as returned and certified to the district court, in pursuance to the writ, shows, among other things, the docketing of the case "William Forsythe, Plaintiff, v. Neal McMillan, Defendant," on the 9th day of February, 1907; that on the same day a complaint was filed and a summons issued; that on the 9th day of March, 1907, "summons returned claiming (showing) personal service of the defendant of county of Salt Lake, state of Utah, this 25th day of February, 1907," by a constable; that on the 11th day of March, 1907, "defendant being duly served with summons and having failed to appear and answer, and the time to answer having expired, upon motion of plaintiff the default of defendant is hereby entered by the court;" and on the same day "from the evidence I find the defendant is indebted to plaintiff in the sum of \$200.30, including interest. It is therefore ordered and adjudged by the court that plaintiff have and recover from the defendant the sum of \$200.30 and costs taxed at \$3.40." In addition to the return of the transcript of the justice's record, it was also made to appear by the return, that on the 28th day of February, 1907, which was before default day, the justice received a general and special demurrer to the complaint which was not filed by him but which was placed in an envelope on which was indorsed "held for fees." The demurrer was not placed with the other papers on file in the cause, but was kept about the office with other papers. Counsel for the petitioner, at the hearing before the district court, also offered to testify that before default day, he, residing at Salt Lake city, mailed to the justice, residing at Murray, the demurrer; that afterwards he saw the demurrer in the justice's office, and that the justice made no demand for fees for the filing of the demurrer. The court declined to receive the testimony. Complaint is made of this ruling, and also of the ruling affirming the judgment on the return as made.

We think the rulings were right. In the case of Griffiths v. Justice's Court, 35 Utah, 443, 100 Pac. 1064, we said: "The record itself, as returned by the inferior tribunal or board imports verity, and is deemed con-

clusive as to all matters or things which are required to be recorded and made of record and may not be aided, contradicted, or controlled by anything dehors the record, nor by statements in the return." As to all such matters, the reviewing court on the hearing must confine itself to an inspection of the record as returned. The reviewing court in such a proceeding is called upon to review, not make, a record. The statute (section 3757, Comp. Laws 1907) requires that "every justice must keep a book denominated a 'docket' in which must be entered; * * *

(4) The time when the parties, or either of them, appear, or their nonappearance, if default be made; a minute of the pleadings and motions, if in writing, referring to them; if not in writing, a concise statement of the material parts of the pleadings." The appearance or nonappearance of the defendant in a case in the justice's court is by statute required to be made of record. The justice made such a record. A record was made by him that the defendant was duly served with summons, that he failed to appear, and that his default was entered. There is nothing of record showing anything to the contrary. The record in such particular may not be contradicted by a statement in the return or by other evidence dehors the record. Were it otherwise, then in such a proceeding as this, could also a record be contradicted showing that a complaint was filed, or when it was filed, or that a summons was issued, or when it was served, and could be contradicted in any other particular which is required to be and which was recorded.

We think the ruling announced in the Griffith Case is wholesome, and is supported by the great weight of authority. A different rule would invite strife and cause endless mischief.

We think the judgment of the court below ought to be affirmed, with costs. It is so ordered.

FRICK and McCARTY, JJ., concur.

(38 Utah, 309)

SALT LAKE INV. CO. v. FOX.

(Supreme Court of Utah. Jan. 6, 1911.)

1. MANDAMUS (§ 169*)—DETERMINATION OF ISSUES AND QUESTIONS—DISMISSAL.

Where an alternative writ of mandate was issued to the district court requiring it to make findings and render judgment in a cause, and after service of the writ that court made findings and rendered judgment, and where the party on whose application the writ was issued appealed from that judgment and on appeal it is vacated with directions, the mandamus proceeding will be dismissed.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 375; Dec. Dig. § 169.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

2. MANDAMUS (§ 190*)—MANDAMUS TO DISTRICT COURT—COSTS AGAINST DEFENDING PARTY.

Where the action of a district court against which an alternative writ of mandamus has issued requiring it to make findings and to render judgment in a cause has been induced and defended by a party to the cause, the costs on dismissal, because no longer necessary, will be taxed to such party.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 438-443; Dec. Dig. § 190.*]

Action by the Salt Lake Investment Company against Jesse M. Fox. On application by the defendant an alternative writ of mandamus was issued requiring the district court to make findings and to render judgment in the cause. Proceeding dismissed.

C. S. Patterson, for plaintiff. Gatrell & Johnson, for defendant.

STRAUP, J. Upon application of Fox an alternative writ of mandate was issued to the district court requiring it to make findings and to render judgment in the above cause. After the writ was served the district court made findings and rendered a judgment. From that judgment Fox appealed to this court. The judgment, on appeal, was vacated, and in lieu thereof, the district court was ordered to enter a judgment as directed by us. *Salt Lake Inv. Co. v. Fox*, 108 Pac. 1132. This proceeding is therefore dismissed. As the action of the district court was induced, and defended in this proceeding, by the Salt Lake Investment Company, it is ordered that the taxable costs, amounting to \$10, be paid by it.

FRICK, C. J., and McCARTY, J., concur.

(38 Utah, 151)

SMYTH v. BUTTERS et al., County Com'rs.
(Supreme Court of Utah. Sept. 17, 1910.)

1. INTOXICATING LIQUORS (§ 74*)—LICENSES —MANDAMUS TO COMPEL ISSUANCE.

Under Comp. Laws 1907, § 3641, providing that mandamus may issue to any inferior tribunal, board, etc., to compel the performance of an act which the law specifically enjoins as a duty resulting from an office, trust, or station, or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled, and from which he is unlawfully precluded, in order to entitle one to mandamus compelling the granting of a license to sell intoxicating liquors at retail at a particular place, he must show that the granting of a license to sell at that place was, under the facts alleged, specifically enjoined by law on defendants as a duty resulting from their office as county commissioners, or that their refusal unlawfully precluded him from the enjoyment of a right to which he was entitled.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 74, 75; Dec. Dig. § 74.*]

2. INTOXICATING LIQUORS (§ 69*)—LICENSES —DUTIES OF OFFICERS—STATUTORY PROVISION.

Comp. Laws 1907, § 1242, provides that no person shall sell intoxicating liquors without first obtaining from the board of county com-

missioners a license therefor. Section 1243 provides that the boards of county commissioners in their respective counties are authorized to grant licenses as contemplated in section 1242, to any person over 21 years old, on an application therefor by petition signed by the applicant and filed with the county clerk. By section 1244 the county commissioners are given the power to determine the amount of the license within certain limits, and the time for which it is granted. Section 1245 provides that an application for a license may be refused for good cause in the discretion of the board of county commissioners of the county. *Held*, that the commissioners are not bound to issue a license to every one applying for it, though the application be made in conformity with statute, and the applicant be found to possess all the qualifications requisite for the issuance of a license, it being within their discretion to refuse a license under such circumstances.†

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 70, 73; Dec. Dig. § 69.*]

3. INTOXICATING LIQUORS (§ 74*)—LICENSES —MANDAMUS TO COMPEL ISSUANCE.

An applicant for license to sell intoxicating liquors at retail is not entitled to mandamus to compel the issuance of a license where the county commissioners have acted upon the application and refused it because they are opposed to the issuance of any licenses in the county, mandamus being available only as a remedy to compel the commissioners to hear and determine the application or to issue the license where they have arbitrarily or capriciously refused to issue it.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 74, 75; Dec. Dig. § 74.*]

4. INTOXICATING LIQUORS (§ 74*)—LICENSES —MANDAMUS TO COMPEL ISSUANCE.

On an application for mandamus to compel the issuance of a license by county commissioners to sell intoxicating liquors at retail, an answer alleging that the plaintiff in the previous conduct of his business knowingly and repeatedly permitted intoxicating liquors to be sold on Sunday and permitted gambling to be carried on on the premises in violation of law, and if another license were issued he would continue to carry on the business with such violations of law, stated a complete defense to the complaint.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 74, 75; Dec. Dig. § 74.*]

5. INTOXICATING LIQUORS (§ 74*)—LICENSES —MANDAMUS TO COMPEL ISSUANCE.

In proceedings for mandamus to compel the issuance of a license to plaintiff to sell intoxicating liquors, an order granting plaintiff's motion for judgment on the pleadings which in effect commanded the defendants to issue a license to the plaintiff as prayed for, was inconsistent with a judgment requiring the defendants to determine whether the plaintiff has complied with the provisions of law relating to the granting of licenses, whether or not he is a suitable person to whom a liquor license should be issued and whether for any other reason the license should or should not be granted and directing them not to refuse to grant the license on the ground that they were opposed to the issuance of licenses to sell liquor in the county, and such judgment was not responsive to nor in accordance with the pleadings.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 74, 75; Dec. Dig. § 74.*]

Appeal from District Court, Morgan County; J. A. Howell, Judge.

Action by D. A. Smyth for a writ of mandate to T. U. Butters and others, as County

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

† *Perry v. City Council*, 7 Utah, 143, 25 Pac. 739, 398, 11 L. R. A. 446.

Commissioners of Morgan County. From a judgment in favor of plaintiff, defendants appeal. Reversed and remanded, with directions to dismiss the action.

N. J. Harris, Dist. Atty., for appellants.
A. G. Horn, for respondent.

STRAUP, C. J. The plaintiff applied to the district court for a writ of mandate to compel the defendants, the county commissioners of Morgan county, to grant him a license to sell intoxicating liquors at retail at Devil's Slide, in Morgan county. It is alleged in the complaint that on and prior to the 1st day of March, 1909, the plaintiff was engaged in such business at such place pursuant to a license theretofore issued to him by the defendants, and that on the day last named he applied to them for a license to there continue the business, but that they refused to grant it. It is further alleged that the plaintiff signed and filed a petition for a license with the county clerk of Morgan county as provided by law, and that he also presented a bond signed by himself and by two good and sufficient sureties in the sum of \$1,000, and conditioned as by the statute provided, that he would keep an orderly and well-regulated house, and would not allow gambling with cards, dice, or other device or implements, and that he would pay all damages, fines, and forfeitures which might be adjudged against him under the provisions relating to intoxicating liquors. It is further alleged that the application "was acted upon by said defendants on March 1, 1909, in due and regular meeting of said board of county commissioners, and by them then and there refused and not granted," and that "such refusal was not based upon any defect in the application nor upon any other reason, except that said board was opposed to the granting of any liquor license in said county, and refused said application upon said ground and no other ground." Upon such verified complaint the plaintiff prayed that the defendants be required to issue him a license to sell intoxicating liquors at Devil's Slide, or show cause why they should not do so, and the district court issued an alternative writ of mandate commanding the defendants, as the county commissioners of Morgan county, to grant the license to plaintiff as prayed for, or show cause why they did not do so.

The defendants filed a motion to quash the writ and a demurrer to the complaint for want of facts. The motion and the demurrer were overruled. The defendants then filed an answer in which they averred that a large majority of the residents and taxpayers of Morgan county was opposed to the granting of licenses for the sale of intoxicating liquors at any place within the boundaries of the county, outside of the limits of incorporated cities, and that a large percentage of the residents and taxpayers of that county had theretofore filed with the county commissioners written protests

against the granting of any such licenses; that it was against the interests of Morgan county, and of the residents and taxpayers thereof, to permit the sale of intoxicating liquors at any place within the boundaries of the county, outside the limits of incorporated cities; that a majority of the residents and taxpayers of the precinct in which the plaintiff desired permission to sell intoxicating liquors was opposed to the granting of a license to sell intoxicating liquors at retail therein; and that, in the opinion of the defendants, the permitting of such sales in such precinct was against the best interests of the precinct, and of the residents and taxpayers thereof. It is further alleged by them that during the time the plaintiff was engaged in the business of selling intoxicating liquors at Devil's Slide, prior to the 1st day of March, 1909, under a license theretofore issued to him by the board of county commissioners, the plaintiff, in the conduct of such business, knowingly and repeatedly violated the laws of the state, "and, more particularly, that the plaintiff permitted intoxicating liquors to be sold and disposed of on the premises on the first day of the week, commonly called Sunday, and that at divers times during said period he permitted upon said premises gambling, by means of cards, slot machines, and other devices," contrary to law; that the defendants believed if a license were issued to the plaintiff, as applied for by him, he would continue, in the conduct of such business upon his premises, to violate such laws, and that, in the opinion of the defendants, no license should be granted him to sell intoxicating liquors at such place. Upon the filing of such answer the plaintiff moved for a judgment upon the pleadings. After argument and submission, the court took the motion under advisement, and subsequently ordered and adjudged "that said motion be, and the same is hereby, granted." Thereupon the court, without evidence or any further proceedings, made findings of facts, finding all the allegations of the complaint to be true, and upon such findings ordered and adjudged that "a peremptory writ of mandamus issue to the defendants," commanding them "immediately after the receipt of this writ to proceed to consider whether or not the plaintiff has complied with the provisions of law relating to the granting of liquor licenses, whether or not he is a suitable person to whom a liquor license for the sale of intoxicating liquors at retail at the place petitioned for should be granted, and whether or not for any other reason applicable to the granting of this particular license, the said license, in the exercise of their discretion, should or should not be granted, other than the general objection to granting any license at all for the sale of intoxicating liquors at retail in said county, and said defendants are further directed not to refuse to issue the said license to the said plaintiff upon the ground that they are op-

posed to the granting of any liquor license in said county."

From such judgments the defendants have prosecuted this appeal. The principal errors assigned relate to the rulings overruling the demurrer and the motion to quash, and granting judgments on the pleadings and so-called findings. They involve the question whether the determination of the commissioners in refusing to grant the plaintiff a license on his application can be controlled by mandamus, and, if so, whether the judgments entered by the lower court on the pleadings and findings were justified. The nature and object of a writ of mandamus have often been stated. "It is a command," said the court in the case of *Johnson's License*, 165 Pa. 315, 31 Atl. 203, "to some official or other officer to proceed to the discharge of some official duty. When that duty is deliberative or depends upon the exercise of an official discretion the purpose of the writ is to quicken the action of the officer and require him to proceed to hear, to deliberate, to exercise his discretion. It does not lie to revise the decision of any person clothed with judicial, deliberative or discretionary powers. If a judge declines to hear, or delays a hearing unreasonably, a mandamus is the appropriate remedy. It commands him to proceed to a hearing and decision, but it is not a substitute for an appeal, and it does not bring up for review the soundness of the discretion used or the correctness of the decision reached. This rule is applicable to petitions for licenses to sell (intoxicating liquors) at wholesale as well as at retail."

In a recent case the Maryland court (*Gross v. Mayor of Baltimore*, 111 Md. 543, 75 Atl. 346) concisely stated the rule that "the essential question to be determined in all such cases is whether the nature of the duty is imperative or discretionary. If it be the former the writ will be granted or not according to the merits of the case, but if it be the latter the writ will not be granted at all." And to that effect is our statute (section 3641, Comp. Laws 1907), which provides that the writ may issue to any inferior tribunal, board, etc., "to compel the performance of an act which the law specifically enjoins as a duty resulting from an office, trust, or station; or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled and from which he is unlawfully precluded by such inferior tribunal, board," etc. To entitle the respondent to the writ, it therefore is incumbent upon him to show that the granting of a license to him to sell intoxicating liquors at retail at Devil's Slide, the particular place named in his petition, was, under the facts alleged, specifically enjoined by law upon the defendants as a duty resulting from their office as county commissioners, or that their refusal unlawfully precluded him from the

enjoyment of a right to which he was entitled.

Section 1242, Comp. Laws 1907, relating to intoxicating liquors, is as follows: "No person shall manufacture, sell, barter, deal out, or otherwise dispose of any spirituous, vinous, malt, or other intoxicating liquors, without first obtaining from the board of county commissioners of the county, or city council of the city, or board of trustees of the town in which he intends to do business, a license therefor, as hereinafter provided."

By section 1243 it is provided that: "The boards of county commissioners in their respective counties, and the city councils in their respective cities, and the boards of trustees in their respective towns, are hereby authorized to grant licenses, as contemplated in section 1242, to any person over the age of twenty-one years, upon an application being made for such license, by petition signed by the applicant and filed with the county clerk, city recorder, or town clerk, as the case may be. Said petition must state definitely the particular place at which any of the liquors named in section 1242 are intended to be manufactured, sold, bartered, dealt out, or otherwise disposed of, and whether the applicant intends to carry on a retail or wholesale business."

It is further provided by that section that, before a license is granted, the applicant shall execute a bond with two or more sureties in a sum not less than \$500 and not more than \$1,000, to be fixed and approved by the board of county commissioners, etc., and conditioned, as in that section provided, that during the continuance of his license he will not allow gambling with cards, dice, or other device or implements, that he will keep an orderly and well-regulated house, and that he will pay all damages, fines, and forfeitures which may be adjudged against him under the provisions of the title relating to intoxicating liquors.

By section 1244 the county commissioners, etc., are given the power to determine the amount of the license, which shall not be less than \$400 for a period of one year, and the time for which it is granted which shall not be for a longer period than one year, nor less than three months. And by section 1245 it is further provided that "any application for such license may be refused for good cause, in the discretion of the board of trustees of the town, the city council of the city, or the board of county commissioners of the county," etc.

It is in effect contended by respondent that when an application for a license in conformity with the statute is made and the applicant shows himself to possess the qualifications requisite for the issuing of a license under the statute, it then becomes the imperative duty of the commissioners to grant the license, and that they cannot lawfully, in the exercise of any other discretion, re-

fuse it. And he is required to take such a position, else the complaint does not show a plain legal duty resting upon the commissioners to grant the license.

We do not think that under the statute the commissioners are bound to issue a license to every one applying for it, though the application be made in conformity with the statute, and the applicant found to possess all the qualifications requisite for the issuance of a license. And such is the effect of the holding in the case of *Perry v. City Council*, 7 Utah, 143, 25 Pac. 739, 908, 11 L. R. A. 446. In that case the granting of a license upon an application made in conformity with the requirements of the statute and the ordinances of the city was refused by the council without assigning any reason therefor. Upon an application for a writ of mandamus to compel the council to issue a license to the applicant the writ was denied on the ground that the granting or refusing of a license was within the discretion of the council. The then powers conferred upon the council, and the ordinances of the city relating to the issuing of such licenses, were, as appears in the statement of the case, similar to those conferred upon the county commissioners, and the present statutes, heretofore referred to, with the exception that the latter in express terms confer upon the commissioners a discretion to refuse the granting of a license. In that case, Mr. Justice Zane, in delivering the prevailing opinion, and in holding that the council had conferred upon it "a wide discretion" in the matter, said: "It is apparent from the act under consideration that the intention of the Legislature in conferring on the city council the power to regulate the sale of liquor was to enable that body to protect society from the evils attending it. The benefit of the dealer was not the chief end, therefore the duty of the council with respect to him must depend largely on the good of the neighborhood."

He further approvingly referred to the cases of *Muller v. Com'rs*, 89 N. C. 172, and *State v. Holt* County Court, 39 Mo. 521, where it was held that even though the application for a liquor license was made in conformity with the requirements of the statute, and the party applying possessed all the required qualifications for the issuance of a license under the statute, still the commissioners, and the county court, upon whom was conferred the power to grant liquor licenses, could, in the exercise of their discretion, refuse to grant it. In those cases the statute conferred no wider discretion upon those authorized to grant licenses than is conferred by our statute upon the board of county commissioners. If upon an application for a license made in conformity with the statute, and the applicant shown to possess all the qualifications requisite for the issuing of a license, the county commissioners have no discretion to refuse the granting

of the license, then, upon application, might the commissioners be obliged to grant a license to sell intoxicating liquors at every settlement, or neighborhood, or cross-roads, in the county; and not only one or a half a dozen at each place, but as many more as there were persons showing themselves so qualified and applying for a license. The Legislature undoubtedly vested the county commissioners with the power of passing upon applications for permission to sell intoxicating liquors. In passing upon such question they may not only consider whether the applicant is 21 years or more of age, whether his application is in due form, and whether his proposed bond is good and sufficient, but also whether the person applying for the license is a proper person to be intrusted with the conduct of such business, whether the place proposed to engage in the business is suitable, whether the demands of the public require such accommodations at such place, and they may also take into consideration many other questions involving the safety, peace, good order, morals, and public good of the neighborhood or community in which it is proposed to engage in the business.

That there are certain dangers and evils attending the business of selling intoxicating liquors is generally conceded and recognized. Mr. Justice Field, in the case of *Crowley v. Christensen*, 137 U. S. 86, 11 Sup. Ct. 13, 34 L. Ed. 620, said: "There is no inherent right in a citizen to sell intoxicating liquor by retail; it is not a privilege of a citizen of the state or of a citizen of the United States. As it is a business attended with danger to the community, it may, as already said, be entirely prohibited, or be permitted under such conditions as will limit to the utmost its evils. The manner and extent of regulation rest in the discretion of the governing authority. That authority may vest in such officers as it may deem proper the power of passing upon applications for permission to carry it on, and to issue license for that purpose." And, as we have seen, by our statute a wide discretionary power is conferred upon the board of county commissioners in passing upon applications for licenses to sell intoxicating liquors within their territorial jurisdiction. When an application for a license is made to them, it unquestionably is their duty to consider it, to make proper inquiry concerning it, and, upon the responsibility of their official oath, to reach a determination. But the duty of the commissioners in the premises to grant licenses is not imperative and mandatory. It is discretionary.

In *State v. Board of Com'rs*, 60 Minn. 510, 62 N. W. 1135, the court said: "Whether a license to sell intoxicating liquors shall be granted or refused rests in the discretion of the board of county commissioners in the exercise of which they act judicially and not ministerially, and therefore their action

cannot be controlled or reviewed by mandamus." And in *State ex rel. Howle v. Common Council of Northfield*, 94 Minn. 84, 101 N. W. 1064, that court again said: "The provisions of the charter vest in the common council authority to regulate and control the sale of intoxicating liquors within the city, and in exercising that authority the council is clothed with discretionary powers, the exercise of which cannot be controlled by the courts. The power to regulate and control includes the power to do all that is deemed, in the judgment of the council, for the best interests of the municipality and its inhabitants. It necessarily confers the power to refuse a license, or to limit the number of licenses to be granted, when, in the judgment of the council, the welfare of the city suggests such action."

In *Stanley v. Monnet*, 34 Kan. 708, 9 Pac. 755, the court said: "We think the motion to quash must be sustained. The probate judge is vested by the statute with discretionary power in granting permits (to sell intoxicating liquors by druggists), and the duty to do so is not peremptory and absolute. It is not claimed that the probate judge refused to receive or consider the application presented. He has heard the application, and determined not to grant the same. He refuses to give his reasons therefor, but that is immaterial; he has acted."

In *Ramagnano v. Crook*, 85 Ala. 226, 3 South. 845, the court said: "In *Dunbar v. Frazer*, 78 Ala. 538, it was held that the judge of probate, in granting or refusing a license to retail spirituous liquors under the act of February 17, 1885, acts in a quasi judicial capacity, whether the application is or is not contested, and that his action cannot be reviewed or controlled by mandamus. A mandamus will be issued to compel a judicial officer to act, when it is his duty, and he refuses, but not to direct him how to act. In the present case, the judge of probate acted; and the sufficiency of the reasons for his action cannot be reviewed by mandamus, though they may be erroneous." These views are also supported by the following cases: *Ex parte Whittington*, 34 Ark. 394; *State v. Stiff*, 104 Mo. App. 685, 78 S. W. 675; *Devin v. Belt*, 70 Md. 352, 17 Atl. 375; *Eve v. Simon*, 78 Ga. 120; *Malmö's Appeal*, 72 Conn. 1, 43 Atl. 485; *Batters v. Dunning*, 49 Conn. 479; *State v. Bonnell*, 119 Ind. 494, 21 N. E. 1101; *Swift v. People*, 63 Ill. App. 453; *Barnes v. County Com'rs*, 135 N. C. 27, 47 S. E. 737; *People v. Murphy*, 65 App. Div. 123, 72 N. Y. Supp. 473; *Burke v. County Com'rs*, 18 S. D. 190, 99 N. W. 1112.

It is not averred here that the commissioners refused to examine or consider, or act upon, the application. To the contrary it is averred in the complaint that the application "was acted upon by said defendants in due and regular meeting of said board of county commissioners, and by them refused and not

granted." These cases, to a large extent, proceed upon the theory that the retail traffic of intoxicating liquors is one which confessedly requires to be kept in prudent hands, and that where the Legislature conferred the power upon authorities to regulate, restrict, and control the traffic, and the power, in passing upon applications, to grant or refuse licenses in their discretion undefined and unprescribed by the Legislature, the responsibility for the proper conduct of such business rests with such authorities; and, in the language of the court in *Ex parte Whittington*, supra, if they do not act with a view to the public interests, the Legislature may take away their power and discretion, or the people may elect more satisfactory officers upon whom such power and discretion has been conferred; and in the language of the federal court in the case of *In re Hoover* (D. C.) 30 Fed. 51, that the state may authorize the sale of spirituous liquors on such terms, by such persons, and at such places, as it thinks proper, "and if it may do this directly, may it not delegate to others the exercise of the power? It has simply delegated a portion of its sovereignty to the county commissioners of Chatham county. The commissioners, in the exercise of that sovereignty, refuse a license to the petitioner. The discretion must rest somewhere. The state might have exercised it. It intrusts its discretion to the board of county commissioners, and, as I have said, by the terms of the grant, this discretion is final and not reviewable. This power is inseparable from the sovereignty of the state."

We are not unmindful of rulings made that even though a licensing board may be vested with a discretion in the matter of granting licenses, it cannot act arbitrarily or capriciously in refusing to issue a license, and that where it is made to appear that an applicant is entitled to a license upon a compliance with the statutory requirements, and the action of the board is of such a character, issuance of the license may be compelled by mandamus (*Joyce on Intoxicating Liquors*, § 271), and the allegations contained in the complaint that the refusal of the defendants to grant plaintiff a license was not based "upon any defect in said application, nor upon any other reason, except that the board was opposed to the granting of any liquor license in said county." Even though it be conceded that the discretion conferred upon the commissioners cannot be exercised arbitrarily or capriciously, and that the allegation referred to is sufficient to show the discretion to have been exercised in such manner, still, before the respondent is in a position to complain, it is essential for him to show by proper averments that a plain legal duty rested upon the commissioners to grant a license to him. In this connection we must not lose sight of the action of the court invoked by plaintiff. It was not that the commissioners had refused to examine or con-

sider, or act upon, his petition, or that their determination was the outcome or result of no or an improper examination or consideration, but that they, in a due and regular meeting of the board, had acted on it, and refused to grant the plaintiff a license upon insufficient reasons, and hence the action of the court was invoked to compel the commissioners to issue a license to him, or show cause why they should not do so. If upon the filing of a petition for a license in conformity with the statute, and a showing that the applicant possessed all the qualifications requisite for the issuing of a license, a plain legal duty was imposed upon the commissioners to issue a license, and they arbitrarily or capriciously refused to do so, then mandamus might well lie to compel the issuance of it. But the statute does not impose a duty upon the commissioners to issue a license upon such conditions or findings, or upon conditions set forth in the allegations of the complaint, that the plaintiff had filed a petition or application with the county clerk for a license in which the place proposed to sell intoxicating liquors at retail was designated, and had presented a proper bond with good and sufficient sureties. And we may again say, as was said by the court in *Barnes v. Commissioners*, supra, "the judgment of the court is based entirely upon the theory that after finding that the applicant is a fit person and that the building is suitable, and the other recited facts, the commissioners have no discretion left in the matter. This is an error, for the statute expressly provides that even though when those facts are found the commissioners *may* grant license, and not that they *must* do so." Our statute merely "authorized" the county commissioners to grant licenses to sell intoxicating liquors. It does not in express terms require or command them to do so. The use of the word "authorized" in such a statute is permissive, not mandatory.

In construing a statute "authorizing and empowering" the mayor to grant theatrical licenses, the New York court, in the case of *People v. Grant*, 58 Hun, 455, 12 N. Y. Supp. 879, observed: "The rule undoubtedly is that where public bodies or officers are empowered to do that which the public interests require to be done, and adequate means are placed at their disposal, the proper execution of the power may be insisted upon, though the statute conferring it is only permissive in its terms. * * * But why, it may be asked, should this construction be given to the act under consideration? What public interest demands that the mayor should be required under all circumstances to accept the fee and grant the license? It seems to me that it is quite the other way. The public good clearly requires that the permissive words in question should be read in the natural and ordinary sense." Such ruling was later approved by the same court in the case of *People v. Murphy*, supra.

Even though it may be said that under the statute a duty is implied to license some one, yet there is nothing in the statute which can properly be construed as imposing a legal duty to license any particular person. And certainly no duty is imposed upon the commissioners to grant a license within the range of their power to all who may apply and show qualifications requisite for the issuing of a license. It may again be observed, as was said by the court in the case of *Barnes v. Commissioners*, supra, that "while their discretion is not an arbitrary one, this is far from proving that the courts can by writ of mandamus coerce the commissioners in exercising that discretion in favor of any particular person, or in any particular way. If the case of *Attorney General v. Justices* [27 N. C. 315] decides anything, it certainly decides that a mandamus will not be issued for the purpose of compelling the body invested with the discretion of granting or refusing a license to issue a license to a person whose application has been rejected by them. In that case the justices refused the application upon the single ground that their power to do so was absolute. No stronger case for a mandamus, if one can issue in any case, could have been presented, and yet the court adjudged that 'because this is not a case for a mandamus, the judgment of the court must be reversed, and the motion for a peremptory mandamus is refused.'"

The Legislature saw fit not to prescribe the conditions upon which the commissioners were required to grant liquor licenses. Should the courts, by mandamus, compel or coerce them to do so upon certain assumed or existing conditions, they would but do what the Legislature itself saw fit not to do. No one has an unqualified or inherent right to carry on the business of selling intoxicating liquors at retail, nor a vested right to do so which he may ask to be enforced; nor can it be said that it concerns or promotes the public interests for any one to exercise it. *Ex parte Whittington*, supra; *Malmo's Appeal*, supra. And, as said by the court in the case of *State ex rel. v. Stiff*, supra, "the business of selling liquor is not a right and cannot be likened to the ordinary callings of life; that it is a mere privilege to be granted or withheld at the exclusive discretion of the body empowered to license." The refusal of a license to plaintiff, therefore, did not unlawfully preclude him from the enjoyment of a right to which he was entitled.

As already observed, when an application is made to the county commissioners for a license, they may not refuse to examine or consider it, or, without examination or consideration, arbitrarily or capriciously reject it. When the application is properly made in conformity with the statute, it is their legal duty to examine and consider it, to make proper inquiry concerning it, and to reach a decision or determination as the result or

outcome of such examination, consideration, and inquiry. When they have done that they have discharged their official duty, so far as the courts have any power to control them in the premises. If, as the result of such a determination, they reach a conclusion to grant or refuse a license to an applicant, they are not answerable to the courts for their conduct and discharge of duty, but to the people who conferred the power upon them to regulate and control the liquor traffic and clothed them with the discretion to grant or refuse liquor licenses. It is only upon averments and proof that they arbitrarily and capriciously disapproved and rejected an application without examination, consideration, and inquiry that the courts may interfere, and then not to direct them how to act or to decide the matter, or to compel or coerce them to issue or refuse a license to any particular person upon certain assumed or existing conditions.

We are of the opinion that under the statute, and upon the facts alleged in the complaint, it is not made to appear that a plain legal duty was imposed upon the commissioners to issue a license to the plaintiff upon his application, or that their refusal to do so unlawfully precluded him from enjoying a right to which he was entitled, and therefore the court erred in overruling the demurrer.

For additional reasons we are also of the opinion that the court erred in rendering judgment on the pleadings and findings. The plaintiff contends that he was entitled to a judgment on the pleadings on the ground that the defendants had failed to specifically deny the allegation in the complaint that the license was refused plaintiff for the reason that they were opposed to the granting of any license to sell intoxicating liquors in the county. Here again, the relief sought by plaintiff by his complaint must be kept in mind. It was to compel the defendants to issue a license to him to sell intoxicating liquors at retail at a particular place. Devil's Slide, or show cause why they should not do so. In response to the alternative writ to grant a license to the plaintiff for such purpose or show cause, the defendants, among other things in their verified answer, alleged that the plaintiff in the conduct of such business at such place, and in pursuance of a license theretofore issued to him, knowingly and repeatedly permitted intoxicating liquors to be sold and disposed of on Sunday, and there upon his premises where such business was conducted knowingly and repeatedly permitted gambling to be carried on by means of cards, slot machines, and other devices, in violation of law, and that if another license were issued to him he would continue to carry on the business with such violations of the law. The undoubted effect of such averments was that the plaintiff was not a suitable person to be intrusted with the conduct of the business, and unquestionably was a showing of good cause why the court should

not by mandamus direct a license to be issued to him. The plaintiff, by his motion for judgment on the pleadings, at least for the purposes of the motion, admitted the truth of the facts thus averred by the defendants. The only judgment which the court could have rendered for the plaintiff, on the motion, was to direct the defendants to issue a license to him in accordance with the allegations and prayer of the complaint. But confessedly such a judgment could not properly have been rendered by the court in the face of the averments contained in the verified answer. Such averments did not controvert only a part of the cause of action alleged in the complaint, but constituted a complete defense.

The court in effect made two inconsistent orders, or rendered two inconsistent judgments. First, the court, after being "sufficiently advised," made an order granting plaintiff's motion for judgment on the pleadings, which indirectly, and, were it not for the subsequent order or judgment of the court, directly required and commanded the defendants to issue a license to the plaintiff as prayed for in his complaint, and which was a ruling that the cause or causes averred in their answer why they had not done so, was no cause. Then the court, without evidence or further proceedings, made findings of facts, that the allegations of the complaint were true, and upon such findings made an order, or rendered a judgment, remanding the case back to the defendants, in effect, to proceed and determine whether the verified answer filed by them was true or not, and "whether the plaintiff has complied with the provisions of law relating to the granting of liquor licenses, whether or not he is a suitable person to whom a liquor license for the sale of intoxicating liquors at retail at the place petitioned for should be granted, and whether or not for any other reason applicable to the granting of this particular liquor license, the said license, in the exercise of their discretion, should or should not be granted," and admonished and directed them that they must not refuse to grant the license on the ground that they were opposed to the granting of licenses to sell intoxicating liquors in the county. Such a judgment was not responsive to, nor in accordance with, the pleadings. As before observed, the complaint does not proceed upon the theory that the defendants had refused to consider or examine the application, or to act, or to proceed to a decision or determination, but upon the theory that the plaintiff, upon the filing of his petition with the county clerk for a license in conformity with the statute, and the presentation of a proper bond as required by the statute, was entitled to a license, and that a plain legal duty was imposed upon the defendants to grant it, and that their refusal to do so was based upon insufficient reasons or invalid grounds, and hence the action of the court was invoked, by mandamus, to com-

mand and compel the defendants, not to hear and determine whether the plaintiff was entitled to a license, but to issue one to him.

We are of the opinion that the judgment of the court below ought to be reversed and the case remanded to the district court, with directions to dismiss the action. It is so ordered. Cost to appellants.

FRICK and McCARTY, JJ., concur.

(38 Utah, 440)

PAGE v. COMMERCIAL NAT. BANK OF SALT LAKE CITY et al.

(Supreme Court of Utah. Jan. 5, 1911. Rehearing Denied Jan. 23, 1911.)

1. APPEARANCE (§ 19*)—GENERAL APPEARANCE—FILING OF GENERAL DEMURRER TO COMPLAINT.

Under the express provisions of Comp. Laws 1907, § 3334, the filing of a general demurrer to a complaint constitutes a general appearance, sufficient to confer jurisdiction over the person.¹

[Ed. Note.—For other cases, see Appearance, Cent. Dig. §§ 79-90; Dec. Dig. § 19.*]

2. CERTIORARI (§ 1*)—GROUNDS.

Under Comp. Laws 1907, § 2630, providing that when an inferior tribunal, or an officer, exercising judicial functions, has exceeded its jurisdiction, and there is no appeal, nor in the judgment of the court or judge a plain, speedy, and adequate remedy, certiorari may be granted to review the proceedings, the writ will be granted by the Supreme Court only to correct the usurpation or abuse of authority, and when there is neither an appeal nor other speedy and adequate remedy, by which such usurpation can be corrected.²

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. § 1; Dec. Dig. § 1.*]

3. CERTIORARI (§ 5*)—GROUNDS.

When service of summons is assailed as insufficient to confer on the district court jurisdiction over the person, the question as to the sufficiency of service must be submitted to the court in which the action is commenced for decision, it having jurisdiction for such purpose, and as mere errors or irregularities of such court, where jurisdiction exists, cannot be reviewed except on appeal, if the court erred in holding that the service conferred jurisdiction, or in holding that certain conduct or statements of the person served or his counsel in open court constituted a general appearance whereby the court acquired jurisdiction over such person, such errors cannot be reviewed by certiorari.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. §§ 5, 6; Dec. Dig. § 5.*]

4. CERTIORARI (§ 5*)—GROUNDS—REVIEW OF JURISDICTION—GENERAL APPEARANCE.

While a special appearance may be sufficient to preserve the right to a review on appeal, though a general appearance has also been made, the special appearance cannot operate to prevent the court from acquiring jurisdiction over the person and thus to preclude a review of the question of jurisdiction by certiorari.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. §§ 5, 6; Dec. Dig. § 5.*]

¹ Farnsworth v. U. P. Coal Co., 32 Utah, 112, 89 Pac. 74; Stone v. U. P. Ry. Co., 32 Utah, 185, 89 Pac. 715.

² O. S. L. R. Co. v. District Court, 30 Utah, 374, 85 Pac. 362; Hoffman v. Lewis, 31 Utah, 179, 87 Pac. 167.

5. CERTIORARI (§ 1*)—GROUNDS—REVIEW OF INTERLOCUTORY RULING.

Certiorari cannot be employed to review merely interlocutory orders or rulings, nor to prevent threatened wrongs, but under statutes similar to Comp. Laws 1907, § 3630, allowing the writ when an inferior tribunal or officer exercising judicial functions has exceeded its or his jurisdiction, and there is no appeal, nor any plain, speedy, and adequate remedy in the judgment of the court or judge, the office of the writ is merely to annul acts which are clearly without or in excess of jurisdiction.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. § 1; Dec. Dig. § 1.*]

Certiorari by H. D. Page against the Commercial National Bank of Salt Lake City, and others. Writ quashed.

M. E. Wilson and E. A. Walton, for plaintiff. Henderson, Pierce, Critchlow & Barrette, for defendants.

FRICK, J. The plaintiff made an original application to this court for a writ of certiorari directed to the above-named defendants. The writ was issued as prayed for, and the defendants have duly complied with the commands thereof by certifying to this court a transcript of all the proceedings had in a certain action pending in the district court of Salt Lake county.

The controlling facts, in substance, are: That on the 21st day of July, 1909, the defendants Commercial National Bank and H. P. Clark, as trustee, commenced an action in the district court of Salt Lake county against a certain copartnership and a corporation. In the language of the complaint in that action the defendants therein are sued as "Page & Brinton, a copartnership, and Utah Savings & Trust Company, a corporation." On the same day the action was commenced the district court, upon application duly made, also issued an order directed to said firm of Page & Brinton requiring it to show cause by a day fixed why a receiver should not be appointed "pending the trial of the cause for all the assets and property of the said Page & Brinton, a partnership with power to take, receive and collect all the moneys due or to become due to said defendant partnership from any and every source whatever." On the same day the complaint was filed and the order to show cause as aforesaid was issued, the sheriff of Salt Lake county made return that he served the summons issued in the action and said order to show cause "upon Page & Brinton, a copartnership, defendant, by delivering to and leaving with David B. Brinton, one of the copartners," a copy of the summons and also a certified copy of the order to show cause. On the 2d day of August, 1909, the record shows that both the plaintiffs and the defendant Page & Brinton appeared in court by their respective attorneys, and the hearing on the order to show cause was continued to the following day. The record

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

shows, further, that on that day the parties aforesaid again appeared in court by their counsel and that after hearing evidence on behalf of plaintiffs the court appointed a receiver as prayed for. Following this, on the 9th day of August, and before the time to answer in the action had expired, the defendant Page & Brinton appeared specially by filing a motion in which it assailed the jurisdiction of the court over the person of said Page & Brinton upon the grounds that "there has been no service upon said partnership or any member thereof;" that neither when the action was commenced nor when the pretended service of summons was made was there any "partnership known as Page & Brinton composed of H. D. Page and D. B. Brinton as alleged in plaintiff's complaint;" that the only service of summons that was made in the action was upon D. B. Brinton, who, at the commencement of the action or at the time the pretended service was made was not and is not now a member of the firm of Page & Brinton, and that "at the time of all the matters referred to in said complaint the said D. B. Brinton was not, and is not now, a member of said firm." The foregoing motion was supported by an affidavit, and said Page & Brinton were given until September 9, 1909, within which to file additional affidavits "in support of said motion without prejudice to any right they now have as to their appearance." On the 18th day of August, 1909, Mr. Brinton, one of the alleged partners of the firm of Page & Brinton, filed an affidavit in which he stated that prior to the 22d day of May, 1908, there was a firm by the name of Page & Brinton; that affiant was one member thereof and that H. D. Page was the other member; that on the day aforesaid affiant sold all his interest in said firm to said H. D. Page and that since said time affiant at no time was a member of said firm. On the 1st day of September following H. D. Page of Page & Brinton filed a motion whereby he specially appeared in the action, and asked the court to quash and set aside the pretended service of summons on Page & Brinton as aforesaid upon substantially the same grounds heretofore mentioned, and upon the further ground that the return as made by the sheriff was false and untrue in that at the time the pretended service was made "there did not exist any firm or partnership by the name of Page & Brinton, nor was at said time David B. Brinton a copartner of Page & Brinton or other agent of this mover." This motion was supported by Mr. Page's affidavit wherein he reiterated the facts stated by Mr. Brinton with respect to the existence and dissolution of the copartnership of Page & Brinton, and stated, further, that since the dissolution of said copartnership "affiant has been doing business under the style of Page & Brinton." Affiant further stated that he alone was concerned

in and conducted said business and that the return of the sheriff showing service on the firm of Page & Brinton by serving David B. Brinton as one of the members of said firm was false in that there was no such firm or partnership existing at said time, and said Brinton was not a member thereof, nor was he the agent of affiant. The motion of Mr. Page remained pending until October 23, 1909, at which time plaintiff's counsel moved the court for a default as against the firm or copartnership of Page & Brinton. Counsel for Mr. Page insisted that the motion to quash the service of summons had precedence, and upon being asked by the court whether they objected to the entering of a default against the firm of Page & Brinton they said that in the sense that they had a pending motion that they did so object. After considerable argument by counsel for both sides upon the subject of whether the service of summons was sufficient and whether or not Mr. Page had appeared in the action the court overruled the motion to quash the service of summons, and the attorneys appearing for Mr. Page, upon their own request, were given "ten days in which to plead herein." Thereafter, on the 3d day of November, 1909, H. D. Page filed a general and special demurrer in the action, the introductory part of which reads as follows: "Comes now Hubert D. Page, impleaded herein as Page & Brinton, and specially appearing for the purpose of this demurrer only, * * * and without waiving his objections to the jurisdiction of the court over him," demurs on substantially the following grounds, namely: (1) That the court "has not jurisdiction over the defendant"; (2) that "the court has no jurisdiction over the subject-matter of this action"; and (3) that the "complaint does not state facts sufficient to constitute a cause of action." This demurrer it seems was still pending when this proceeding was commenced. On the 9th day of January, 1910, counsel for plaintiffs in the pending action served a notice, service of which, using defendants' counsel's own language, was accepted as the "attorneys for Hubert D. Page as Page & Brinton." The notice served as aforesaid notified said last-named attorneys that said plaintiff's counsel would apply to the district court for an order which, among other things, would require "that the defendants Hubert D. Page and David B. Brinton do within _____ days from date of this order assign in writing to the receiver appointed in this case in due and proper form for the benefit of creditors and those entitled thereto all the right, title, and interest of the said copartnership, and of each of said copartners personally in and to all claims for moneys admitted by the United States * * * and all claims made or to be made by the copartnership or either of said copartners for further sums of money on account of a contract" entered into by said co-

partnership with the United States known as contract No. 103, dated May 19, 1906, and all rights arising under the same. After a hearing in which counsel for both sides participated the court granted the application and made an order requiring the assignment as indicated in the foregoing quotation. Immediately after the foregoing order was made by the district court, and for the purpose of preventing its enforcement, the application for a writ of certiorari to review the proceedings had in the district court as before stated was made to this court, and the writ was granted as stated in the opening of this opinion.

We have given a full synopsis of the proceedings had before the district court, not because we deemed it essential for the purpose of this decision, but for the purpose of showing that the proceedings had before the court were regular and in due course. The matter upon the application was submitted to us upon the affidavit of the plaintiff herein and the certified transcript of the proceedings had before the district court in the case referred to. As we understand counsel for plaintiff herein they insist that the district court exceeded its authority or jurisdiction in making the order requiring the assignment before referred to upon the grounds: (1) That the district court in the action pending therein has obtained jurisdiction of neither the copartnership of Page & Brinton nor of Mr. Page, who, it is contended, alone represented or constituted said firm; and (2) because the court in said action at no time obtained possession of any property belonging to said copartnership or in which it has any interest, or which was within the state of Utah, or within the jurisdiction of the court. Upon the other hand, counsel for the defendants herein contend that the service of summons on Mr. Brinton as made was sufficient to give the court jurisdiction over the copartnership as such, and over its property or assets for the purpose of appointing a receiver therefor. Further, that both Mr. Brinton and Mr. Page had conferred jurisdiction upon the court of both their persons and of the firm or copartnership, by what they said and did through their counsel during the course of the proceedings, and especially by appearing and objecting to the entry of the default against the firm of Page & Brinton as stated, and that Page certainly conferred jurisdiction over himself by filing his general demurrer by which the sufficiency of the complaint was assailed. The filing of a general demurrer to a complaint no doubt constitutes a general appearance which is sufficient to confer jurisdiction over the person. *Farnsworth v. U. P. Coal Co.*, 32 Utah, 112, 89 Pac. 74; *Stone v. U. P. Ry. Co.*, 32 Utah, 185, 89 Pac. 715; section 3334, Comp. Laws 1907. Plaintiff's counsel, however, insist that in filing the general demurrer they acted under protest, and in doing so saved all the rights they had under their special appearance. The

courts are not unanimous as to whether a defendant who appears specially to assail the court's jurisdiction over his person may preserve his rights under his special appearance by appearing generally under protest and subject to the special appearance. For the purposes of this decision we shall assume that a party who has preserved his rights by a special appearance may, subject to such appearance, appear generally, and may on appeal be permitted to review the orders and rulings of the court relating to the question of the jurisdiction over his person as well as those orders, rulings, and judgment made in the action after his general appearance. The controlling question in this proceeding, however, is, can a party review the orders and rulings of the court with respect to its jurisdiction over the person of such party by the special proceeding of certiorari in a case where he has the right to do so in the regular way by appeal? Counsel for plaintiff herein say this may be done, and in support of their contention they cite some cases from the Supreme Court of Michigan. Counsel evidently have failed to examine the statutes of Michigan relative to the right of review by the writ of certiorari. Had they done so, we think they would not have insisted that what may be done by way of review under the Michigan statute by writ of certiorari may also be done under a similar writ in this state under our statute. Our statute is entirely different from that in force in the state of Michigan. Under the Michigan statute the writ of certiorari, in many cases, takes the place of our appeal, while under our statute certiorari does not lie in a matter like the one before us in case an appeal can be had. Section 3630, Comp. Laws 1907, so far as pertains to the powers of this court in granting writs of certiorari provides that "when an inferior tribunal, board, or officer exercising judicial functions has exceeded the jurisdiction of said tribunal, board, or officer, *and there is no appeal*, nor in the judgment of the court or judge a plain, speedy, and adequate remedy," the writ of certiorari may be granted to review the proceedings of the tribunal or officer aforesaid. (Italics ours.) From the foregoing provisions two purposes are clearly apparent: (1) That the writ shall be granted by this court only to correct the usurpation or abuse amounting to usurpation of power or authority, and (2) when there is neither an appeal nor other speedy and adequate remedy by which such usurpation can be corrected. This, we think, is substantially what this court has already held. In the case of *O. S. L. R. Co. v. District Court*, 30 Utah, the present Chief Justice, in speaking for the court, at page 374, 85 Pac., at page 362, said: "This court will not permit a writ of certiorari to be issued to exercise the functions of an ordinary appeal to review errors or mistakes where the court acted within its jurisdiction. * * * When, therefore, it is made to appear, as is

required by subsequent provisions of the statute, that the district court has exceeded its jurisdiction, and that *there is no appeal nor plain, speedy, and adequate remedy*, we have the right and power to issue a writ of certiorari to inquire into and review determinations made by it without or in excess of its jurisdiction." (Italics ours.) The foregoing case is followed in *Hoffman v. Lewis*, 31 Utah, 179, 87 Pac. 167.

The contention that the court acted without or in excess of jurisdiction in making the order requiring the partnership of Page & Brinton and each of the partners to assign to the receiver the claims mentioned in the order is, for the purposes of this proceeding, in our judgment, untenable. As we have shown, the order was not made until after both Mr. Brinton and Mr. Page each had generally appeared in the action. The court thus, subject to their special appearance at least, had acquired jurisdiction over them. True, the question whether such jurisdiction was acquired by the court or not was subject to review on appeal, but in our judgment is not subject to review by the writ of certiorari. Ordinarily we are deprived of the power to review the proceedings of the district court by issuing writs of certiorari when it is made to appear that the court whose orders or rulings are complained of had jurisdiction to make such orders or rulings at the time they were made. Mere errors or irregularities of such courts where jurisdiction exists cannot be reviewed by this court except on appeal. If the district court, therefore, should err in holding that service of summons in a particular manner or upon a particular person conferred jurisdiction over some other person by reason of the legal relationship existing or alleged to exist between the two persons, or if the court should err, however grossly, in holding that certain conduct or statements of the person or his counsel in open court constituted a general appearance whereby the court acquired jurisdiction over such person, such errors would not deprive the court of jurisdiction to proceed in the action and could be reviewed only on appeal. This seems to us too obvious to admit of serious controversy. When service of summons is made and such service is assailed as insufficient to confer jurisdiction over the person, the question respecting the sufficiency of service must be submitted to the court for decision in which the action is commenced. Such court, it must be conceded, has jurisdiction to hear and determine the question of whether the service is sufficient or not to confer jurisdiction. Suppose it be conceded that the service, as a matter of law, is insufficient to confer jurisdiction over the person, and this court on appeal would so hold, does it follow that the inferior court was therefore ousted of jurisdiction to proceed farther in the action or that its orders or rulings could be reviewed by the writ of certiorari? We think not. This must be

so for various reasons. If in the case now pending in the district court that court proceeds to judgment, as it possibly will, and its judgment should be adverse to the plaintiff herein, could it be seriously contended that such a judgment was without or in excess of jurisdiction so as to permit a review of the proceedings upon which it rests by a writ of certiorari? We think not. In such a case the record itself would disclose that any other review except on appeal would be improper because it would affirmatively appear that all questions, including the question of jurisdiction over the person, had been submitted to and passed on by the court. The record would further show that the plaintiff had entered a general appearance in the action. True, such appearance would appear to have been subject to the special appearance, but it is also true that unless plaintiff should pursue the court's rulings in holding that it had acquired jurisdiction over him by taking an appeal he would waive the error, and the judgment could not be assailed in any other way except on appeal. This simply illustrates that while a special appearance may be sufficient to preserve the right to a review on appeal, although a general appearance has been made, yet it also is apparent that the special appearance cannot prevent the court from acquiring jurisdiction over the person so as to authorize a review of the question of jurisdiction by the writ of certiorari. The jurisdiction is given by the general appearance, and it exists, and the only way it can be questioned under such circumstances is by way of an appeal by which the proceedings may be reversed and set aside because the court erred in assuming jurisdiction, but not because it had no jurisdiction to proceed at all and thus had no jurisdiction even to err. If the foregoing conclusions are not sound, then it must follow that, in every case where the sufficiency of service to confer jurisdiction over the person is in question, the court's rulings thereon may be reviewed by the writ of certiorari. Moreover, in a case like the one at bar where the order complained of was made a party may assail such an order in three ways: (1) By the writ of certiorari; (2) by refusing to comply with the order, and if imprisoned for contempt of court by suing out a writ of habeas corpus upon the ground that the order is void because the court was without jurisdiction; and (3) if he should fail in both of the foregoing proceedings, then ask a review of the proceedings on appeal. This alone shows the fallacy of the contention that a person in conferring jurisdiction over his person by a general appearance may nevertheless insist that the court lacked such jurisdiction because before he appeared generally he had also appeared specially, and hence his general appearance could be of no legal effect because the general appearance was in effect made under duress or compulsion. There is no duress or compulsion involved in such a proceeding.

Where one objects to the sufficiency of service to confer jurisdiction over his person and his objection is overruled he may either appear and defend the action or he may refrain from further participation therein. If he appears and defends he may perhaps nevertheless review the court's rulings relating to the jurisdiction over him on appeal, but he may not appear and defend on the merits, and then deny that the court acquired jurisdiction over him.

As to whether the court erred or not in holding the service of summons sufficient to confer jurisdiction, or in holding that the plaintiff had entered a general appearance by what his counsel did or said, or what the legal effect of such errors would be in this case, we express no opinion. Such rulings at most may constitute errors which must be reviewed on appeal, and not by writ of certiorari. Moreover, the writ of certiorari cannot be employed to review merely interlocutory orders or rulings as is attempted here. *Schwarz v. County Court*, 14 Colo. 44, 23 Pac. 84. Nor can such a writ be used as a means to prevent threatened wrongs. The office of the writ of certiorari under statutes like ours is merely to annul acts which are clearly without or in excess of jurisdiction, and hence constitute usurpation of judicial power, and not to prevent in advance threatened wrongs. *People v. County Judge*, 40 Cal. 479; *Beeler v. Hall*, 30 Tenn. (11 Humph.) 445; *McCorkle v. Brooks*, 53 Tenn. (6 Helsk.) 601; *Sayers v. Superior Court*, 84 Cal. 642, 24 Pac. 296. Under the foregoing authorities the claim made by counsel for plaintiff that this court should interfere because by the order of the court requiring the assignment the plaintiff may be prejudiced can be given no effect. The same must stand or fall upon the one question of jurisdiction.

From what has been said it follows that although a person may appear specially and by motion assail the jurisdiction of the court over his person, and in case the court errs in overruling his motion he may review the court's rulings on appeal, yet that he may not appear generally and then challenge the court's jurisdiction over his person by a writ of certiorari.

The writ heretofore issued, therefore, should be, and the same is hereby, quashed and set aside; defendants to recover their costs in this court.

MCCARTY, J., and LEWIS, District Judge, concur.

(38 Utah, 293)

MIDGLEY et al. v. CAMPBELL BLDG. CO.
(Supreme Court of Utah. Jan. 4, 1911.)

1. EVIDENCE (§ 205*)—ADMISSIONS—EFFECT.

A contractor's voluntary admission that the materials used by a subcontractor were in accordance with the contract is sufficient to justify

fy a finding to that effect as against the contractor.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1029-1050; Dec. Dig. § 205.*]

2. CONTRACTS (§ 176*)—INSTRUCTIONS—WRITTEN CONTRACTS.

It is proper for the court to charge the jury upon the uncontested effect of a written contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 767-770; Dec. Dig. § 176.*]

3. EVIDENCE (§ 417*) — PAROL EVIDENCE — VARYING WRITTEN INSTRUMENT.

Where a written contract between a contractor and a subcontractor contained no requirements as to the use of any certain manufacturer's material, parol evidence of previous understandings on that point could not vary it.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1874-1899; Dec. Dig. § 417.*]

4. CONTRACTS (§ 282*)—CONSTRUCTION—CONDITIONS—RIGHTS OF PURCHASER.

Where a promisor agrees to pay for work or goods provided he is satisfied with them, he cannot, if dissatisfied, be made to accept and pay for them, but he cannot compel the other party to continue to do work or make goods until he is satisfied.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1284-1289; Dec. Dig. § 282.*]

5. CONTRACTS (§ 284*) — CONSTRUCTION—CONDITIONS PRECEDENT TO PAYMENT OF PRICE.

Where a subcontractor agreed in writing to put in the plumbing in a building according to certain specifications, and to the satisfaction of the architect, but no particular manufacturer's goods were specified, though the contractor had already informed the architect that a certain manufacturer's materials were to be used, the architect could not arbitrarily condemn the use of other material of equally good quality.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1292-1302, 1308-1317, 1326-1333, 1340-1346; Dec. Dig. § 284.*]

Appeal from District Court, Salt Lake County; Geo. G. Armstrong, Judge.

Action by E. A. Midgley and another against the Campbell Building Company. From a judgment for plaintiffs, defendants appeals. Affirmed.

Henderson, Pierce, Critchlow & Barrett, for appellant. Moyle & Van Cott and Powers & Marloneaux, for respondents.

STRAUP, J. In May, 1902, the government of the United States entered into a written contract with the appellant, the Campbell Building Company, to construct a government building at Salt Lake City, in accordance with plans and specifications prepared by the supervising architect. About 12 pages of typewriting of such plans and specifications relate to the plumbing of the building, in which are enumerated and described in detail the kind, character, quality, grade, etc., of each fixture and article to be furnished and used for such purpose. Such portion of the plans and specifications also contained a stipulation that "the required material and fixtures must in each case be in strict accordance with the specifications, and of the best quality and grade

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

found in the market," and that "the contractor immediately after the award of the contract is to furnish for approval of the supervising architect the name and address of the manufacturer and catalogue number of the following named fixtures he proposes to use: Water-closets, urinals, slop sink, wall hydrants, fire hose rack, gate valves, pressure reducing valve, basin faucets, shower bath, and water heater." Neither in the contract between the government and the Campbell Building Company, nor in the plans and specifications, was it stipulated or provided that the material or fixtures to be furnished and used should be made by any particular manufacturer. It, however, was made to appear by the evidence that on the 8th of March, 1903, nearly one year after the making of the contract between the government and the Campbell Building Company, and about one year before the Campbell Building Company entered into the contract with the Midgley Bros., the Campbell Building Company, by letter, submitted to the supervising architect a list and catalogue number of the articles referred to, and gave Clow & Sons as the name of the manufacturer, which were then approved by the supervising architect. On the 9th of March, 1904, after receiving and accepting one of several different bids submitted by Midgley Bros., the Campbell Building Company entered into a contract with them to furnish the material for, and to do the plumbing work of, the building, by the terms of which Midgley Bros. agreed "to furnish all and singular the materials and labor necessary to complete the plumbing, gas fitting, sewerage, etc., under the specification headings from page 33½ to 45, inclusive," relating to the plumbing, "all to be in strict and full accordance with the plans, details and specifications prepared by" the supervising architect. It was further stipulated in their contract that the "second party (Campbell Building Company) for and in consideration of the first parties (Midgley Bros.) completing and faithfully executing the aforesaid contract and by and at the time mentioned and to the full and complete satisfaction of the supervising architect and the superintendent of construction, does hereby agree to pay" Midgley Bros. the sum of \$9,500 at the times and in the manner specified in the contract. There is nothing contained in the contract between the Campbell Building Company and Midgley Bros. requiring the latter to furnish or use fixtures or material manufactured by Clow & Sons, or by any particular manufacturer. So much of the plans and specifications prepared by the supervising architect as related to the plumbing was, however, made a part of their contract; but, as we have observed, the plans and specifications themselves did not require the fixtures or material furnished or used to be manufactured by Clow & Sons, but did require the Campbell Building Company to

submit to the supervising architect the name and address of the manufacturer and the catalogue number of the fixtures proposed to be used, which, as before stated, was submitted to the supervising architect by the Campbell Building Company, and approved by him about one year before the making of the contract between the Campbell Building Company and Midgley Bros. After the Midgleys had partly performed their contract by the furnishing and using of goods and material supplied by and purchased from Crane & Co., and had received partial payments for materials so furnished and used by them and for work done, and after they had purchased from Crane & Co. certain other fixtures and material—those in question—and had taken them to the building to be installed, a controversy arose between the supervising architect, who was at Washington, D. C., and who had not been at or about the building, and who had no personal knowledge of the character or quality of the goods furnished by the Midgleys and the Campbell Building Company with respect to the question of whether such fixtures and material were purchased from, or supplied by, Clow & Sons. Because they were purchased from Crane & Co. and not from Clow & Sons, the supervising architect condemned and rejected them. The Campbell Building Company thereupon notified the Midgleys of such action taken by the architect, requested them to remove the fixtures, demanded that they furnish fixtures satisfactory to the architect, and proceed with their contract in accordance with the plans and specifications, and notified them that, upon their refusal or failure so to do, the Campbell Building Company would itself obtain such fixtures and complete the plumbing work, and hold the Midgleys responsible for any damages sustained by it. The Midgleys took the fixtures away, but refused to further proceed with the work. Thereupon the Campbell Building Company purchased fixtures from Clow & Sons, and completed the work at a cost in excess of that contracted for, occasioned by a higher price paid to Clow & Sons for the goods than was required to be paid to Crane & Co. for the same goods. The Midgleys brought an action against the Campbell Building Company, seeking a reformation of the contract entered into between them and the Campbell Building Company. It was alleged by them that the written bid submitted by them to and accepted by the Campbell Building Company was based on fixtures to be furnished by Crane & Co., that such provision was a part of their agreement, and was intended to have been incorporated in and made a part of their written agreement, but by mutual mistake was omitted. Upon such a reformed contract, they alleged a breach on the part of the Campbell Building Company and claimed damages on account of it. The Campbell Building Company denied

the allegations of the complaint, and alleged "that there was no agreement ever made at any time between plaintiffs and the defendant that the plaintiffs should furnish any certain manufacturer's goods, but it was expressly agreed that any goods furnished by the plaintiffs were to be in strict and full accordance with the plans, details, and specifications prepared by the supervising architect and to the full and complete satisfaction of the supervising architect and the superintendent of construction" of the building, and that the contract, as heretofore set forth, expressed the true intention of the parties. It was further alleged by it that the goods furnished by the plaintiffs were not approved, but were rejected by the supervising architect. By way of counterclaim, the Campbell Building Company further alleged that on the 9th of March, 1904, it and the plaintiffs entered into a written contract in terms as heretofore set forth, whereby the plaintiffs agreed to do the plumbing work of the building in accordance with the plans and specifications and to the full and complete satisfaction of the supervising architect and the superintendent of construction; that the plaintiffs failed to perform the conditions of their contract, and neglected and refused "to perform the work and furnish the materials as therein agreed," by reason of which the Campbell Building Company was itself compelled to furnish material and complete the work agreed to be furnished and done by the plaintiffs, to its damage in the sum of \$823. The issues presented by the complaint were first tried to the court who found them in favor of the defendant and against the plaintiffs, that the written contract as alleged by the defendants, and, as heretofore set forth, "expressed the intention of the parties and there was no mistake or fraud or omission connected with the execution thereof, nor was there any promise, agreement, or other parol stipulation connected therewith in any manner affecting said contract." The issues raised by the counterclaim were then tried to a jury. No other issues were tried and submitted to them. Upon such issues a verdict was rendered in favor of the plaintiffs and against the defendant, no cause of action. From the judgment entered upon the verdict, the Campbell Building Company has prosecuted this appeal.

It was made to appear without substantial conflict in the evidence, and was testified to by the superintendent of construction of the building, whose duty it was on behalf of the government to inspect the material and fixtures that went into the building and to see that they were in accordance with the plans and specifications prepared by the supervising architect, that the fixtures and articles furnished by the Midgleys and taken to the building by them and which were condemned and rejected by the order of the supervising architect "were in accordance with

the plans, details, and specifications prepared by the supervising architect," and "were in quality and character in every way equal to the requirements of the plans, details, and specifications," and that they fell short in the "circumstance" only that they were supplied by and purchased from Crane & Co. instead of Clow & Sons, and that such facts were reported by him to the supervising architect. It was also shown by the admissions of the appellant in a letter written by its president and on its behalf to the superintendent of construction in June, 1903, and, after the controversy arose, that Clow & Sons did not manufacture plumbing fixtures of the kind in question, and that those furnished by the Midgleys "are strictly in accordance with those mentioned in our letter to the supervising architect dated May (March) 6, 1903. You will also find that these fixtures are exactly the same as shown in Clow's catalogue of 1902. We have reason to believe that these fixtures are manufactured by the same parties who manufacture for Clow." Other evidence was also adduced tending to show that many, if not all, of the kind of fixtures in question, were not manufactured by Clow & Sons, and that they, like Crane & Co., were but dealers in or jobbers of such goods, and that such kind of goods handled by both was manufactured by the same person or firm. But, aside from this, the admission of the appellant was itself sufficient to show, and to justify a finding to the effect, that the goods furnished by the Midgleys and proposed to be installed by them were strictly in accordance with those theretofore submitted by the Campbell Building Company to the supervising architect and approved by him, and were "exactly the same as shown in Clow's catalogue," and "were manufactured (as it believed) by the same parties who manufacture for Clow & Sons." While a litigant in a cause may not necessarily be concluded by his extra judicial admission of facts, yet whatever is so voluntarily admitted by him against himself may reasonably be taken to be true; and he ordinarily may not complain if it is treated as true.

It was testified to by the Midgleys that at the time of the making of their contract with the Campbell Building Company they had no knowledge or notice that the latter had submitted to the supervising architect the name of Clow & Sons as the manufacturer. The president of the Campbell Building Company testified that such fact was made known to them prior to the making of the contract. But it is beyond dispute that in the written contract finally entered into between them there is no covenant or agreement requiring the Midgleys to furnish goods manufactured by Clow & Sons. This is shown by the contract itself, by the allegations of the defendant's answer wherein it was alleged that "there was no agreement

made at any time between the plaintiffs and defendant that the plaintiffs should furnish any certain manufacturer's goods," and was so testified to by the president of the Campbell Building Company. No question arose with respect to the manner in which the labor was performed. The only particular wherein it is claimed that the Midgleys had not performed the conditions of their contract is that the particular goods in question and furnished by them were supplied by and purchased from Crane & Co., and not from Clow & Sons, and for that reason did not satisfy the supervising architect, and on that ground were condemned and rejected by him, notwithstanding that they were as testified to by the superintendent of construction, and not disputed by the supervising architect, "in accordance with the plans, details, and specifications prepared by the supervising architect," and "were in quality and character in every way equal to the requirements of the plans, details, and specifications," and therefore were "of the best grade and quality found in the market," and were, as admitted by the Campbell Building Company itself, "strictly in accordance with those submitted by it to the supervising architect and approved by him," and were "exactly the same as shown in Clow's catalogue," and were manufactured by the same persons or firm who manufactured for Clow & Sons.

The appellant requested the court to charge that under the terms of the contract the Midgleys were not only required to furnish material and to do the work in accordance with the plans and specifications, but that the work and material were also required to be to the satisfaction of the supervising architect, and that it was "their duty so to do the work, and so to furnish the materials," regardless of the question of whether the architect in condemning and rejecting the goods furnished by the Midgleys acted unreasonably; and, if they so failed and refused to furnish and install the goods to the approval and satisfaction of the supervising architect, then they were liable to the Campbell Building Company to whatever damages were suffered by it by reason of such refusal and failure on their part. The court refused the request, and charged that the contract between the Midgley Bros. and the Campbell Building Company did not require the Midgleys to furnish goods manufactured or supplied by Clow & Sons; and, if the jury believed from the evidence that the goods which Midgley Bros. had furnished and taken to the building to be installed therein "were examined by the superintendent of construction and were found to be in accordance with the plans, details and specifications, but were thereupon condemned and rejected by the government representative solely because they were not manufactured or supplied by Clow & Sons," then Midgley Bros. had the right to decline to further proceed under the contract, and the Campbell

Building Company in such case had no claim for damages against them for their failure to further proceed for such reason. The court further charged the jury that the clause in the contract whereby the Campbell Building Company agreed to pay Midgley Bros. in consideration of their faithful execution of the work "to the full and complete satisfaction of the supervising architect and superintendent of construction" in effect left to the judgment of the supervising architect and the superintendent of construction "whether the goods and work complied with the plans and specifications, and, if the goods and work did comply with the plans and specifications, they or either of them could not legally arbitrarily refuse to accept the same so as to make Midgley Bros. liable to the Campbell Building Company for damages for failure to supply work or goods other than that called for in the contract, or for the failure of Midgley Bros. to supply goods of a make not mentioned in the contract, and if you find from the evidence that the work performed and the goods supplied by Midgley Bros. were in accordance with the plans and specifications, and that the supervising architect and superintendent of construction did so arbitrarily refuse to accept them because they were not of a certain make not authorized in the contract and plans and specifications, you will find the issues for the plaintiff Midgley Bros." Appellant's exceptions to the court's refusal to charge as requested, and to the charge as given, present the principal questions for review.

In view of the issues submitted to the jury and of the evidence adduced, we think no error was committed. The court correctly charged that the contract between the Midgleys and the Campbell Building Company did not require the former to furnish material or fixtures manufactured or supplied by or purchased from Clow & Sons. We have already adverted to that, and to the fact that no stipulation or agreement was contained in the written contract requiring the Midgleys to furnish material or fixtures manufactured or supplied by Clow & Sons, or by any particular manufacturer. If the Campbell Building Company desired to have such a requirement imposed on the Midgleys, not appearing on the face of the plans and specifications submitted to them and made a part of their contract, but which was brought into existence only because of something done by the Campbell Building Company in pursuance of the specifications, furnishing to the supervising architect the name of Clow & Sons as the name of the manufacturer, etc., such fact ought to have been embodied in the written contract entered into between the Campbell Building Company and the Midgleys. If the fact of furnishing to the architect the name of Clow & Sons as the manufacturer was regarded as a part of the plans and specifications, something not appearing on the face of them but done in pursuance,

and existing outside of them, then it was incumbent upon it to have incorporated into the contract the whole, and not only a part, of the plans and specifications. Written contracts are to be regarded with some gravity; and the presumption is indulged that all prior and contemporaneous conversations and understandings are merged and embodied within them. Hence the fact as testified to by the Midgleys that they had no knowledge that the Campbell Building Company had furnished to the supervising architect the name of Clow & Sons as the manufacturer until after the making of their contract, and after they had purchased the goods from Crane & Co. and had taken them to the building, or, as testified to by the president of the Campbell Building Company, that such fact was made known to them before the making of the contract, is immaterial; for, in ascertaining the terms of the written contract—the binding contract between them—we must look to the covenants and agreements of that contract, and not to the prior or contemporaneous oral statements or conversations of the parties. And the jury were instructed that the court had already found and determined that the written contract, heretofore referred to, expressed the intention of the parties, that there were no other agreements or promises or oral stipulations affecting it, that the written contract must be accepted by them as containing all the agreements and stipulations between the parties, and that in considering it they could not consider any oral or other prior stipulation or agreement.

It, however, is urged by the appellant that because of the clause in the contract whereby the Campbell Building Company agreed to pay the Midgleys the sum of money therein specified in consideration of their "completely and faithfully executing the aforesaid work, and by and at the time mentioned, and to the full and complete satisfaction of the supervising architect and superintendent of construction," the supervising architect could properly reject or condemn the fixtures furnished and offered to be installed by the Midgleys, regardless of whether his action in so doing was wise or unwise, just or unjust, reasonable or unreasonable, capricious or otherwise. In other words, because of such clause in the contract obligating the Campbell Building Company to pay in consideration of the Midgleys executing the work to the "satisfaction of the supervising architect and superintendent of construction," it is urged that the supervising architect had the choice to accept the fixtures, or to reject them, if he was not satisfied, regardless of whether they were or were not in strict accordance with the plans, details, and specifications, and that the ground or reason for his decision, or the propriety of it, cannot be inquired into except for fraud or bad faith; and if the Midgleys so failed or refused to furnish material to the satis-

faction of the supervising architect, whether his decision was based on reasonable or unreasonable grounds, or whether his action in that regard was just or unjust, capricious or arbitrary, or otherwise, then such failure or refusal constituted a breach of their contract which rendered them liable in damages to the Campbell Building Company. And that in effect was what the appellant requested the court to charge. The appellant has referred us to numerous cases to the effect, and with which holdings we concur, that where a promisor agrees to pay for work or goods provided he is satisfied with them he cannot, if he is not satisfied, be made to accept and pay for them, or be compelled to pay for them if he rejects them; and that the right, except for fraud or bad faith, to inquire into the ground for his action, is ordinarily excluded. In such case, when he has not accepted the goods or the benefit of the work, it generally is sufficient that he said he was "not satisfied." This principle, however, is more generally applied to cases involving taste, fancy, sensibility, or judgment of the promisor. That is, if the subject-matter of the contract is a coat or a painting, for which the promisor agrees to pay, if the coat or the painting is to his satisfaction, he is not obligated to accept or pay for it, if he is not satisfied, though the coat may be of the best material and workmanship and style, or the painting executed in the most artistic and skillful manner and an exact likeness of the original. But this does not give the promisor a cause of action against the tailor or painter for damages for breach of contract because the coat or painting did not satisfy the fanciful taste or capricious mental state of the promisor. It is quite enough that he in such case is not required to accept and pay for the coat or the painting, if he is not satisfied, without assigning any reason therefor, except that he is not satisfied. He may not, however, also insist that the tailor keep on making coats for him, or the painter painting pictures, until the indefinable and fanciful taste of his mind is satisfied, and upon his refusal so to do subject him to a claim for damages for breach of contract. The principle has also been applied by some of the courts to questions involving not only fancy, taste, etc., but also to what is termed by them operative fitness or mechanical utility. References to the cases may be found in 9 Cyc. 617-624. But in most of them the principle was applied to cases where the satisfaction of the promisor was the chief or a prominent factor of the contract. Where the sale of a machine or steam engine is made chiefly upon the condition that it shall be to the satisfaction of the buyer, he ordinarily, according to some of the cases, is not compelled to accept it and pay for it, no matter how good or perfect or complete the machine or engine may be—it may be of the best—if the buyer is not satisfied with it and refuses to

accept it or offers to return it, though his action in the matter may be capricious or whimsical. Now, assuming that to be so, still that would not give the buyer the right where the vendor furnished and delivered to him the most perfect and complete machine or engine in the market, or the best that could be manufactured, to a cause of action against the vendor for damages for breach of contract because the machine or engine did not satisfy the capricious or fanciful mind of the buyer. We do not think the cases go to that extent. We think they are to the contrary.

As already observed, the case here tried and submitted to the jury was upon the appellant's counterclaim wherein it sought to recover damages from the Midgleys on the ground of their alleged breach of the contract. The case submitted to the jury is not one where the Midgleys are seeking to recover payment for goods furnished or work done by them which were not to the satisfaction of the appellant or of the supervising architect or the superintendent of construction. Conceding that under the clause referred to in the contract the Campbell Building Company was not obligated to pay for the execution of the work if it was not to the satisfaction of the supervising architect and the superintendent of construction though the fixtures and material furnished and the work done were in strict accordance with the plans, details, and specifications, and that the supervising architect had the right to arbitrarily reject or condemn the fixtures furnished, still, if they were rejected or condemned in such case and in such manner and upon such ground, that by no means gave the Campbell Building Company the right to claim damages against Midgley Bros. for breach of the contract on their part. And that in effect was what the court charged the jury.

Furthermore, it does not appear to us that there is anything particularly sentimental or fanciful, or tasteful, about water-closets, urinals, slop sinks, or basin faucets, especially in a public building. It is chiefly requisite that they be sanitary, useful, suitable, and neat. The chief or controlling factor in the contract is not that the goods should satisfy the fancy, taste, or æsthetic sense of the supervising architect, or his mere whim or caprice in respect of their fitness or utility. The important thing in that regard is that the work was required to be done and the goods and fixtures furnished to be "in each case in strict accordance with the plans and specifications and of the best quality and grade found in the market," and the fixtures and goods to be of the kind, character, grade, quality, and description enumerated and described in the plans and specifications. The supervising architect was not dissatisfied because the goods and fixtures furnished by the Midgleys were not

in strict accordance with such plans and specifications, or were not of the best quality and grade found in the market, or were not of the same kind, grade, character, and quality as theretofore submitted to him by the Campbell Building Company and approved by him. He was dissatisfied on the sole ground that the fixtures were purchased from Crane & Co., and not from Clow & Sons, and for that reason arbitrarily condemned and rejected them. At least there is much evidence to support a finding to that effect. If in such case the Midgleys, who had not agreed to furnish goods manufactured or supplied by Clow & Sons, are liable to the Campbell Building Company for breach of contract on the sole ground that the supervising architect was "not satisfied," and for that reason arbitrarily rejected the goods, then would they also be so liable had they furnished goods manufactured or supplied by Clow & Sons, and had they been arbitrarily rejected by the architect solely because of his dissatisfaction in that they were not purchased from or supplied by Crane & Co.

We are of the opinion that the judgment rendered on the verdict finding the issues on the counterclaim in favor of the plaintiff and against the defendant, no cause of action, ought to be affirmed, with costs to the respondent. It is so ordered.

McCARTY, J., concurs.

FRICK, C. J. I concur in the result. My first impressions were very strong that, in view of the whole record, the case at bar falls within that class where a contractor had agreed to furnish materials in accordance with the choice or direction of a person named in the contract, and where the choice of that person, although duly made, had been ignored. My associates, after a very careful consideration of the case, however, have arrived at a different conclusion. A just deference to their judgment induces me to yield my views to theirs. If the opinion of my Brethren is, however, to be construed to the effect, as I fear it may be, that a person in no case can recover as damages for breach of contract the difference between the cost of an article agreed to be furnished in accordance with the choice of a person agreed upon and some other article of the same kind just as good or better simply because the latter article is arbitrarily rejected by the person aforesaid upon the sole ground that the former was arbitrarily or for any reason chosen in preference to the latter, I must withhold my assent. I think that where A. agrees to furnish B. an article of a certain make, or one that is or may be sold only by a particular person or firm, B. has the right to insist upon that very article as stipulated for by him, although there could be obtained in the market many like articles just as good or better. It is B's

choice and not that of another that must control, since that is his right under the contract.

(83 Kan. 682)

JONES v. WILLIAMSBURG CITY FIRE INS. CO. et al.

(Supreme Court of Kansas. Jan. 7, 1911.)

(*Syllabus by the Court.*)

1. VENUE (§ 84*) — CHANGE OF PLACE OF TRIAL—PROCEEDINGS TO PROCURE—WAIVER OF ERROR—FAILURE TO OBJECT.

When an application for a change of venue on the ground of the disqualification of the district judge has been formally presented and fully considered and has been erroneously overruled, the applicant does not waive the error by neglecting to interpose an objection to going to trial when the case is reached at the next succeeding term of court.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 146, 148; Dec. Dig. § 84.*]

2. VENUE (§ 84*)—CHANGE OF PLACE OF TRIAL—PROCEEDINGS TO PROCURE—WAIVER OF ERROR—STIPULATION.

A stipulation that a cause shall be submitted to the court and the same jury that tried a companion case, upon the same evidence and instructions, verdict to be returned and judgment rendered the same as if all the steps of a trial had been taken, does not waive the error of the court previously committed in denying an application to change the venue, because of the disqualification of the district judge.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 146, 148; Dec. Dig. § 84.*]

3. APPEAL AND ERROR (§ 1043*)—HARMLESS ERROR—DENIAL OF CHANGE OF VENUE.

If upon appeal to this court the record of the proceedings shows with reasonable clearness that the judgment rendered expresses the only result which could be rightfully reached, the defeated party has not been prejudiced in his substantial rights because his motion to change the venue was denied, and he was obliged to go to trial before a disqualified judge.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4115; Dec. Dig. § 1043.*]

4. APPEAL AND ERROR (§ 1031*)—REVIEW—PRESUMPTION—DENIAL OF CHANGE OF VENUE.

Generally, prejudice will be presumed from the erroneous denial of an application to change the venue because of the disqualification of the district judge; but the presumption is subject to the limitation that it must appear from the record that there is a substantial controversy to be determined, the result of which may be detrimentally affected by the officiating of the objectionable judge.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4038-4046; Dec. Dig. § 1031.*]

5. APPEAL AND ERROR (§ 1043*)—HARMLESS ERROR—REFUSAL OF CHANGE OF VENUE.

Under the facts stated in the opinion, it is held that the error of the trial court in refusing to change the venue of this case is not sufficient to warrant a judgment of reversal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4115; Dec. Dig. § 1043.*]

Smith and Porter, JJ., dissenting.

Appeal from District Court, Franklin County.

Actions by W. H. Jones against the Wil-

liamsburg City Fire Insurance Company, against the Concordia Fire Insurance Company, against the Fireman's Fund Insurance Company, and against the Mercantile Fire & Marine Insurance Company, Consolidated. Judgment for plaintiff, and defendant appeals. Affirmed.

Fyke & Snider and E. S. Quinton, for appellants. W. S. Jenks, F. M. Harris, and H. H. Cook, for appellee.

BURCH, J. In November, 1908, a stock of merchandise at Ottawa, Franklin county, Kan., belonging to the appellee, W. H. Jones, was destroyed by fire. The appellee was insured against loss by a number of insurance companies and in due time he brought suits to recover upon the policies. The case of Jones v. American Central Ins. Co. was tried in April, 1909, with the result that a judgment was rendered in favor of the plaintiff. On appeal to this court the judgment was reversed, because an application for a change of venue, based upon the disqualification of the judge of the district court of Franklin county, was denied. Jones v. Insurance Co., 83 Kan. 44, 109 Pac. 1077. On September 22 and 23, 1909, the cases of Jones v. Westchester Fire Ins. Co. and Jones v. Prussian National Ins. Co. were tried, and verdicts were returned in favor of the plaintiff. The cases of the same plaintiff against the Williamsburg City Fire Ins. Co., the Concordia Fire Ins. Co., the Fireman's Fund Ins. Co., and the Mercantile Fire & Marine Ins. Co. were then submitted to the jury, which heard the Westchester Company's Case, under stipulations which read in part as follows: "It is hereby stipulated and agreed that the above-entitled cause shall be submitted to the court and the same jury that tried the case of W. H. Jones v. Westchester Fire Insurance Company on September 22d, 1909, upon the same evidence offered in that case, and that the court shall instruct the jury upon the same evidence submitted in that cause, except as hereinafter provided, as though it had actually been verbally given in this cause, and that the same jury before which the said cause of W. H. Jones v. Westchester Fire Insurance Company was tried shall consider the evidence and instructions of the court as though such evidence and instructions were actually given verbally and read in this cause, and shall deliberate upon the same and render a verdict upon such evidence and instructions as though actually given verbally and read in this cause to said jury, and if the finding be in favor of the plaintiff, the jury shall determine from the policy sued on in this case and the evidence given in said cause above referred to, and the instructions of the court, the amount due to the plaintiff under the policy sued on in this case, and that judgment shall be rendered accordingly." In these cases verdicts were re-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

turned in favor of Jones. Judgments were rendered in his favor in all the cases, and the various insurance companies appeal. In this court the four cases which went to the jury under the stipulation referred to have been consolidated. The six cases may be disposed of, however, by one opinion.

On July 27th, preceding the trials, applications to change the venue were denied. The grounds stated were those which were considered in the case of *Jones v. Insurance Co.*, 83 Kan. 44, 109 Pac. 1077. In several of the cases Jones filed an affidavit stating that he was able to pay his indebtedness to the First National Bank of Ottawa, amounting to \$6,000, independently of the result of the litigation with the insurance companies, and consequently that the bank would not be affected should he lose. The affidavit did not remove the disqualification of the district judge. Optimistic general statements of this kind, relating to one's resources, do not go very far in the business world. The adage is that "the eye of the master fatteneth the ox." Its truth is illustrated by the fact that Jones was adjudged to be a bankrupt within a few months after his affidavit was filed. It does not appear from the affidavit, or otherwise, that the bank had been relieved of anxiety concerning the means and ability of Jones to discharge his indebtedness, and the proof was that this very matter had been the subject of discussion between the officers of the bank and its legal adviser, the trial judge, who was also a stockholder and officer of the institution, drawing an annual salary from it. It is not necessary to add anything to what was said in the opinion in *Jones v. Insurance Company*, 83 Kan. 44, 109 Pac. 1077. A change of venue ought to have been granted in each of the cases.

The insurance companies rely for reversal upon the refusal of the court to change the venue, and upon nothing else. The appellee argues that the error was impliedly waived, because no objection to proceeding further was interposed when the cases were reached for trial. Some authorities are cited to support the claim. Those from this state are easily distinguishable. For various reasons those from other states are not controlling. The subject of a change of venue had been formally presented and fully considered. The district judge, acting conscientiously upon his best judgment, believed it to be his duty to preside at these trials. He so decided, exceptions were duly noted, and the proceeding was spread upon the record. No new fact or circumstance intervened to change the situation and there was no occasion to reopen the subject and require the court to rule upon it again. An objection of the kind suggested had no function whatever to perform, consequently was not essential to preserve the rights of the parties, and if made would have had something of the appearance of nagging the court.

The appellee further insists that the stip-

ulations referred to constituted express waivers of the disqualification of the judge in the cases in which they were filed. These stipulations related solely to the manner in which the cases should be submitted, and it would be a gross misinterpretation of them to impress them now with a different purpose.

Finally, the appellee asserts that the error committed in refusing to change the venue was harmless. The defense of the insurance companies was that the appellee had not complied with the conditions of his policies, that he was not the owner of the property burned, that he had not sustained loss to the amount claimed, that he had procured the policies through gross misrepresentation of the amount and value of the property insured, and that he had concealed and falsely misrepresented other material facts. At the trials the appellee produced evidence amply warranting recovery. The record is remarkably free from objections relating to evidence. The few which were made were inconsequential. The appellee was the chief witness in his own behalf and was cross-examined at length. No evidence was offered by the appellants, and the cases went to the jury upon simple and clear instructions against which nothing can be urged. The verdict in each case was the necessary result of the trial, and would not have been allowed to stand had it been otherwise. No trial errors of any kind are assigned, or could be sustained in this court.

In the case of *Robinson v. Melvin*, 14 Kan. 484, 488, the court was called upon to review an order discharging an attachment. A portion of the opinion reads as follows: "One other question is raised by counsel. After the dissolution of the attachment, plaintiff moved to have the order dissolving the attachment set aside and the matter referred to a judge pro tem. on the ground of the interest of the judge, and in support of such motion filed an affidavit alleging that subsequent to the dissolution he had ascertained that the judge was security for defendant on a past-due note of \$125, and that, while the motion to dissolve was pending before him he had received from defendant a chattel mortgage on a span of horses worth not over \$120 to indemnify him. We have taken this case as if originally presented to us, and considered it independent of any prior adjudication, because, even though the judge was disqualified by reason of interest, it would be wrong to the parties to remand it for examination before a judge pro tem., if it was reasonably clear to us that the attachment ought upon the evidence to have been discharged. That would be simply making additional costs with the same ultimate result. We do not mean to decide that the judge was actually disqualified by interest, the showing having been entirely ex parte; but we cannot forbear remarking that it is the duty, as it is generally the wish, of a judge to avoid sitting in judgment upon ques-

tions in which he has a direct even though slight pecuniary interest."

The conclusion to be drawn from this decision is that, when upon an appeal to this court the record of the proceedings shows with reasonable clearness that the judgment rendered expresses the only result which could rightfully be reached, the defeated party has not been prejudiced in his substantial rights because his motion to change the venue was denied, and he was obliged to go to trial before a judge who was disqualified.

The statute gives no right to an appeal immediately upon the denial of a change of venue. The trial must go on, and not until after final judgment has been rendered does an appeal lie. Shocking as the notion of a trial before an interested, prejudiced, or otherwise disqualified judge may be, the law is practical and will not compel another trial merely to gratify a sentiment or to uphold a principle. If the party applying for the change of venue should win the case, he is not permitted to say that his substantial rights were prejudicially affected by the erroneous ruling. If the facts should be agreed to and the judgment which the law requires should be pronounced upon them, no possible injury could follow from the refusal to change the venue. Many other situations can be imagined in which a ruling of the kind complained of would be harmless, and if the record should show that the party applying for the change had no defense to a well-proved, meritorious cause of action, it would be to indulge litigiousness at the expense of justice to remand the cause, in order that the same adverse result might be stated in another court. Ordinarily, therefore, it is unavailing for a party, on appeal, to stand upon a well-grounded motion for a change of venue. If he brings up nothing but the ruling on his motion and the final judgment against him, the court cannot say that prejudicial error is made manifest. It is true that the baneful influence of a biased or otherwise disqualified judge upon the proceedings cannot be made to stand out upon a printed record. The embarrassment and constraint under which party and counsel rest in developing their case before one not authorized to hear it is often sufficient to place them at an unfair disadvantage. Therefore the statement that prejudice will be presumed when a change of venue is improperly denied is generally true. But it is true only with this limitation: It must appear from the record that there is a substantial controversy to be determined, the result of which may be detrimentally affected by the officiating of the objectionable judge.

In the cases under review the only serious dispute is that made by the pleadings. There is none of moment in the evidence. The plaintiff has been severely cross-examined, his demeanor on the witness stand has been observed by several juries, his proof of a right to recover is always abundant, and the

result is always the same. The good faith of the insurance companies in contesting the losses is not questioned, but after several opportunities nothing whatever has been produced by way of defense. If they have a defense, enough of it should have been disclosed to show with reasonable clearness that it ought to be considered in another forum.

The precedent of *Robinson v. Melvin*, 14 Kan. 484, has everything to commend it, and the court is far within the principle it enunciates in holding that the error of the trial court in refusing to change the venue of these cases is not sufficient to warrant a judgment of reversal. The doctrine of harmless error here given controlling effect was not urged in opposition to a reversal in the case of *Jones v. Insurance Co.*, 83 Kan. 44, 109 Pac. 1077.

The judgment of the district court is affirmed, and an order of affirmance will be entered in each of the five companion cases.

JOHNSTON, C. J., and GRAVES and MASON, JJ., concurring. BENSON, J., not sitting.

SMITH, J. (dissenting). The argument for and against affirming the judgment is fairly and well stated by Mr. Justice BURCH in the opinion, but I cannot regard the case of *Robinson v. Melvin*, 14 Kan. 484, as very pertinent to the question. In that case the application was made to set aside a judgment and to refer to a judge pro tem. on the ground of the interest of the judge. The showing, pro and con, was by affidavits. This court examined the question, independently, upon the affidavits, and it appeared that the judge had a very slight interest, if any, to be served by his ruling, and, in fact, that he had no interest as there was abundant property to protect his rights aside from that involved in the suit. Our statutory provision is but the re-enactment of the common law on this subject,—in fact, but a recording, in form of law, the common sentiment of the civilized world.

Issues were raised by the pleadings, and I think the defendant might well have rested upon his right to an impartial hearing without attempting to make a defense by evidence. At any rate I am inclined to the view that the public question should be of controlling importance in the case and that a trial judge should not be permitted to try his own case, even if he does so without committing any error, and if he arrives at the proper decision. To maintain the confidence of the public in the absolute impartiality of the courts, I regard as of the first consequence, greater even than the rights of the party in a particular case.

"The purpose of the law is that no judge shall hear and determine a case in which he is not wholly free, disinterested, impartial and independent." *Syllabus, Tootle v. Berkeley*, 60 Kan. 446, 56 Pac. 755.

PORTER, J. (dissenting). A party is presumed to have been prejudiced who has been denied the right guaranteed by the statute, by the common law and by every principle of justice to a trial before a judge in no way personally interested in the result of the litigation. Many courts have held that the presumption of prejudice is conclusive. *Hewitt and Others v. Follett, Imp.*, 51 Wis. 264, 8 N. W. 177; *Evans v. Evans*, 105 Ind. 204, 211, 5 N. E. 24, 768; *Ferguson v. Davis County*, 51 Iowa, 220, 224, 1 N. W. 505; *Estate of White*, 37 Cal. 190; *Oakley v. Aspinwall*, 3 N. Y. 547. See also *Powers v. Reynolds*, 89 Ky. 259, 262, 12 S. W. 298, 553. In the opinion in the *Estate of White*, supra, it is said: "It is no answer to the disqualification arising from interest in the proceedings to say that the decision in the cause was correct. The statute does not say that the judge is disqualified to decide erroneously, but that he shall not decide at all, except to arrange the calendar and the order of business, or to change the venue."

Our statute is not worded the same as that of California but beyond question means precisely the same thing. The result of the doctrine declared in the opinion is that a judge who is interested in a case may overrule an application for a change of venue on that ground and proceed with the trial as if he were in every respect competent, and, if he succeeds in trying the case without error, the judgment must be affirmed. This in my opinion exalts the doctrine that reversible error must appear to have been prejudicial above a principle of far greater importance to the profession and to society, and which was said by the court in *Oakley v. Aspinwall*, supra, "is necessary in order to preserve the moral dignity of courts and the due administration of justice." There doubtless are rare instances, as in *Robinson v. Melvin*, 14 Kan. 484, where it conclusively appears that no prejudice could have resulted to the party complaining, and where, under the peculiar circumstances, the court might be justified in affirming the judgment notwithstanding the error of the court in denying the application for a change of venue. Thus, if, in an affidavit for attachment, the only grounds relied upon were that the defendant was a foreign corporation and there was record evidence upon which we are as competent to pass as the trial judge, demonstrating conclusively that the defendant was a resident corporation, it would perhaps become the duty of the court to disregard the error and affirm a judgment dissolving the attachment; but the doctrine of *Robinson v. Melvin*, supra, which is relied upon in the opinion ought not to be extended beyond the narrow facts to which it applies. Besides, in this case we cannot say that it conclusively appears that the defendants were not prejudiced. They offered no evidence in

support of the facts alleged in their answer as a defense to the action. They merely cross-examined the plaintiff who was the only witness testifying. They were not bound by anything to which he testified on cross-examination and are in the same situation in my opinion as though they had stood upon their right to a trial before a disinterested judge and had refused to offer any testimony. In the case of *Jones v. Insurance Co.*, 83 Kan. 44, 109 Pac. 1077, arising on exactly the same state of facts as this case, we held that the court committed error in refusing the change of venue and that he should not have tried the case. These cases, arising out of the same transactions, were tried before the decision reversing that case was announced. The same question was before the court then, and it was stated in the opinion:

"After the motion for a change of venue was denied, a trial was had to a jury, and no question is raised as to the fairness of the court in its rulings on the introduction of evidence or in the giving or refusing of instructions to the jury. Still, the judgment must be and is reversed, and the case is remanded with instructions to grant a change of venue."

I am satisfied with the correctness of the conclusions arrived at there and am not ready to overrule that case. It is true that our attention was not directed at that time to the case of *Robinson v. Melvin*, supra, but Mr. Justice SMITH in his dissenting opinion in this case has noted the distinction between the cases. To say that in a case of this kind the judgment must affirmatively show that the complaining party has been prejudiced is not, in my opinion, a safe rule to establish.

(84 Kan. 169)

STATE ex rel. JACKSON, Atty. Gen., et al.
v. PRATHER.

(Supreme Court of Kansas. Jan. 31, 1911.)

(Syllabus by the Court.)

1. MANDAMUS (§ 63*)—GROUNDS—PERFORMANCE OF OFFICIAL ACT.

One whose term as a public officer has expired may be required by mandamus to perform an act which he should have done while in office, wherever it is in its nature capable of such subsequent performance, and a public purpose is to be served thereby.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. § 59; Dec. Dig. § 63.*]

2. STATUTES (§ 232*)—REPEAL—SPECIAL LAW REPEALING GENERAL LAW ON SUBJECT—CONSTRUCTION.

Where an act establishing a special law for a particular county contains a clause in terms repealing the general law on the subject, such clause will ordinarily be regarded as limited in its operation to that county.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 313; Dec. Dig. § 232.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

3. STATUTES (§ 169*)—"REPEAL"—REVIVAL OF ACT REPEALED.

Where an act establishing a special law for a particular county repeals the general law on the subject as to that county, the repeal of the special act brings the county again within the operation of the general law; the statutory rule that the repeal of a statute does not revive a statute previously repealed having no application to such a situation.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 246, 247, 256; Dec. Dig. § 169.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6102, 6103.]

4. STATUTES (§ 107*)—SUBJECTS AND TITLES.

Chapter 142 of the Laws of 1909 does not violate the constitutional provision that "no bill shall contain more than one subject, which shall be clearly expressed in its title."

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 121-134; Dec. Dig. § 107.*]

5. STATUTES (§ 76*) — REPEAL — REPEAL BY SPECIAL ACT OF A PREVIOUS SPECIAL LAW.

The adoption of a constitutional provision against special legislation does not prevent the repeal by special act of a special law previously enacted, or its partial repeal, where the effect is merely to withdraw a county from the operation of the special law and make it subject to the general law.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 77½-78½; Dec. Dig. § 76.*]

6. STATUTES (§ 250*) — REPEAL OF SPECIAL ACT—EFFECT.

Where at the same session the Legislature repeals a special act fixing the compensation of the officers of a particular county, and by a separate act provides a new schedule applicable to such county, the presumption that would otherwise exist of an intention that the old basis should govern until the new one took effect fails where the operation of the new schedule is postponed for a considerable period. In such a situation the old general law governs between the repeal of the special law and the time when the new schedule becomes operative.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 331; Dec. Dig. § 250.*]

West, J., dissenting.

Mandamus by the State, at the relation of F. S. Jackson, Attorney General, and others, against Van B. Prather. Alternative writ allowed.

John S. Dawson, Atty. Gen., and Keplinger & Trickett, for plaintiff. E. C. Little and T. A. Pollock, for defendant.

MASON, J. The state, on the relation of the Attorney General, asks a mandamus against Van B. Prather, requiring him to make a report of the fees collected by him while probate judge of Wyandotte county, and to deliver a book containing a record of them. The county commissioners and county auditor join as plaintiffs.

The defendant suggests that mandamus cannot be maintained against him because he has resigned and his term has expired. The proceeding was begun while he was in office, and if it was then his duty to do the act demanded of him, and no one else can perform it, its performance by him may still be enforced as an official duty, notwithstanding he

is no longer an officer. In this respect the situation is analogous to that arising when an outgoing officer refuses to turn over to his successor the property belonging to the office—a situation in which mandamus is held to be a proper remedy. *Huffman v. Mills*, 39 Kan. 577, 18 Pac. 516; *Metsker v. Neally*, 41 Kan. 122, 21 Pac. 206, 13 Am. St. Rep. 269; *State v. Lawrence*, 76 Kan. 940, 92 Pac. 1131, 31 L. R. A. 342, note.

A number of other reasons are suggested why a writ should not issue. Most of them relate to questions of fact, or to matters appropriate to be investigated upon a return to an alternative writ. A preliminary question is whether the statute imposes upon the probate judge of Wyandotte county the duty referred to, and we deem it proper to determine this prior to the issuance of any writ. In 1899 the Legislature passed an act (Laws 1899, c. 141) relating to the compensation of county officers. So much of it as is here important is still in force (Gen. St. 1909, §§ 3669, 3671), except so far as it is affected by subsequent legislation hereinafter mentioned. Section 12 (Gen. St. 1909, § 3669) relates to probate judges, and allows them to retain fees in amounts proportioned to the population, dividing the excess with the county. In all counties having more than 55,000 inhabitants the fixed amount is \$3,000 a year. Section 14 (Gen. St. 1909, § 3671) requires certain county officers, including probate judges, to keep a record of all fees collected in a book which shall be open to public inspection, and to file quarterly reports under oath showing their amount. In 1901 an act was passed (Laws 1901, c. 214) relating to the compensation of the county treasurers and probate judges of Shawnee and Wyandotte counties. It fixed the fees of the probate judge in these counties in accordance with the general schedule, except as to two items, which were increased, and allowed him to retain the entire amount collected. It included a section reading as follows: "Original section 14 of chapter 141 of the Session Laws of 1899, and all acts and parts of acts, so far as the same are inconsistent with the provisions of this act, are hereby repealed." In 1909 an act was passed (Laws 1909, c. 142) purporting to repeal such act of 1901 so far as it applied to Wyandotte county.

The plaintiff maintains that with the repeal of the special act of 1901, relating to Wyandotte county, the probate judge of that county became subject to the general law of 1899, and was required to divide with the county fees collected in excess of \$3,000, and to record and report the amount collected. The defendant insists that to give the law this effect would be to ignore the rule that "the repeal of a statute does not revive a statute previously repealed." Gen. St. 1909, § 9037, subd. 1. We think, however, that the act of 1901 was not a "repeal" of the act of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep't Indexes

1899, within the meaning of that rule. Clearly the Legislature did not intend by it literally and absolutely to repeal section 14 of chapter 141, Laws 1899. The defendant recognizes this in his brief by speaking of section 14 as having been "repealed as to Wyandotte county" by the act of 1901. What was obviously meant was that the special law, and not the general, should govern in Wyandotte county; in other words, that Wyandotte county should be withdrawn from the operation of the general statute, and be governed, as to the matters covered, by the provisions of the special act. When the special act was repealed, in the absence of specific provision on the subject, the general law became operative in Wyandotte county as well as in the rest of the state. This conclusion accords with the spirit and purpose of the statutory rule, and with the interpretation elsewhere placed upon it. "The statutory rule is inapplicable to cases where the original act has been modified only and not repealed by the later one, as where an act merely excepts a particular class of cases from the operation of a previously existing general law, which continues to be in force. By the repeal of the act creating the exception, the general statute which was in force all the time then becomes applicable to all cases, according to its terms." 26 A. & E. Encycl. of L. 761. This principle was recently applied in *Dykstra v. Holden*, 151 Mich. 289, 115 N. W. 74, the effect of the decision being in accordance with a headnote reading: "The rule that a statute once repealed is not revived by the repeal of the repealing act is not applicable to a case in which the original act is not in fact repealed, but merely discontinued in its operation with reference to a particular territory, in which case, the discontinuing act being repealed, there is nothing to prevent the original act from again becoming operative in the exempted territory." See, also, 36 Cyc. 1101, note 72; *Grocery Company v. Burnet*, 61 S. C. 205, 39 S. E. 381, 58 L. R. A. 687; *Durr v. Commonwealth*, 3 Pa. Co. Ct. R. 525; *Barren County Court v. Kinslow*, 9 Ky. Law Rep. 108; *State v. Sawell*, 107 Wis. 300, 83 N. W. 206.

The defendant assails the validity of the act of 1909 upon the ground that it violates the constitutional provision (article 2, § 16) that no bill shall contain more than one subject, which shall be clearly expressed in the title. The act not only undertakes the repeal, so far as Wyandotte county is concerned, of chapter 214 of the Laws of 1901, relating to the compensation of the treasurer and probate judge of Wyandotte and Shawnee counties, but also the entire repeal of chapter 217, relating to the fees of the sheriff, register of deeds, and court clerks of Wyandotte county. We think within the meaning of the Constitution the act relates only to one subject—the compensation of offi-

cials of Wyandotte county—and that this subject is clearly expressed in the title.

A more serious question is whether the act of 1909 violates the constitutional provision forbidding the enactment of a special law where a general one can be made applicable. Article 2, § 17. It is obviously in a sense special legislation relating to a subject (the compensation of county officers) capable of regulation by a general law. But it was enacted under peculiar circumstances. There was in force at the time a general statute regulating the compensation of county officers according to population, and a few special statutes taking particular counties out of the rule so established. These special statutes were valid because they were passed while the Legislature had the power to determine finally whether a general law could be made applicable to the subject—a power that was transferred to the courts in 1906 by constitutional amendment. The new act was not within the reason or the spirit of the rule against special legislation. The mischief against which the prohibition is directed had already been done. The special acts had already been passed. Several counties had already been taken out of the general rule. The later enactment tended to remedy the existing evil, to reduce the number of counties governed by special acts, to take Wyandotte county out of the list of exceptional cases, and subject it to the operation of the general law. Courts disagree as to whether the adoption of a rule against special legislation prevents the amendment of a special act previously passed. *Binney's Special Legislation*, p. 122 et seq. But the reasons for holding that an existing special act may not be amended by adding thereto have no application where it is repealed in whole or in part, although by a special act. There was also enacted in 1909 (chapter 145) a law fixing the compensation of county officers in counties having a population of over 90,000 (a description which at that time applied only to Wyandotte county), the probate judge being allowed a salary of \$3,500. Chapter 142, which repealed the special law on the subject, took effect upon its publication in the official state paper March 30, 1909. Chapter 145 did not take effect before the statute book was issued, which was May 29, 1909. The defendant maintains that as the two acts related to the same matter, and were practically contemporaneous, they should be construed together and treated as though parts of the same enactment, so that the special law of 1901 should not be deemed to be repealed until the law of 1909, general in form, should become effective; in other words, as applied to the office here involved, that the probate judge should continue to retain all the fees collected until his salary of \$3,500 began. There would be much force to this contention if the new schedule of salaries dated from the publication of the statute

book. It might well be argued that the Legislature did not intend that the old general law should govern for the brief interval between March 30 and May 29, 1909. But the salaries fixed by chapter 145 were made to begin as to a part of the county officers on July 1, 1909, and as to the others, including the probate judge, on January 1, 1911. The Legislature, having provided for the immediate repeal of the special schedule, and having postponed the operation of the new schedule for so considerable a period, must be deemed to have intended that in the interval the general law should control, and that from March 30, 1909, to January 1, 1911, the probate judge should divide with the county all fees collected in excess of \$3,000 a year.

The court is of the opinion that the defendant is under a duty to account for the fees received between the dates indicated, and that the performance of the duty may be enforced by mandamus at the instance of the Attorney General upon the principle that the state has always a substantial interest in seeing that a public officer complies with the law. *State v. Lawrence*, 80 Kan. 707, 103 Pac. 839.

As the court is of the opinion that the statute imposes the duty sought to be enforced, an alternative writ will be allowed. The question whether special facts exist justifying the withholding of a peremptory writ as a matter of discretion or rendering it unavailing can be presented by answer.

JOHNSTON, C. J., and BURCH, SMITH, PORTER, and BENSON, JJ., concurring.

WEST, J. (dissenting). I agree fully with the foregoing construction of the statutes involved, but do not believe the alternative writ should be allowed. From the affidavit attached to the motion and from the reply brief, it is apparent that the main purpose sought to be accomplished by the motion is the securing of an opinion concerning the validity of certain statutes in time for possible new legislation before the adjournment of the present Legislature. As said by Lord Denman, C. J., in *The Queen v. Directors of the Blackwall Railway*, 9 D. P. C. 558: "When there is a doubt as to the mode of proceeding under an act of Parliament, the parties must act on their own responsibility, and not come and ask advice from the court, which is not bound to give them directions, before a matter is properly ripe for a judicial determination." It appears, also, that before this motion was filed an action had been begun in the district court of Wyandotte county against the defendant for a bill of discovery, for an accounting, and for statutory penalty. If section 365 of the new Code of Civil Procedure (Gen. St. 1909, § 5960) does not provide adequate means for the production of the book in question, if such exist, it would seem that

the records of the probate court would furnish fairly adequate information for use in a suit for an accounting. The writ is largely discretionary, and should not be granted unless the right thereto be clear and the purpose sought legitimate. *State v. Marston*, 6 Kan. 524; *Board of Education v. Spencer*, 52 Kan. 574, 35 Pac. 221; *Hughes v. Parker*, 63 Kan. 297, 306, 307, 65 Pac. 265; *Nation v. Gove County*, 77 Kan. 381, 383, 384, 94 Pac. 257; *State v. Graves*, 19 Md. 351, 81 Am. Dec. 639; *Merrill on Mandamus*, § 68.

(83 Kan. 719)

CRAMER v. McCANN et al. †

(Supreme Court of Kansas. Jan. 7, 1911.)

(Syllabus by the Court.)

1. DESCENT AND DISTRIBUTION (§ 38*)—INHERITANCE FROM COUSIN.

Cousins do not inherit immediately from each other, but only mediately through the parents of each, and children cannot inherit immediately from a cousin of their parent.

[Ed. Note.—For other cases, see *Descent and Distribution*, Dec. Dig. § 38.*]

2. ALIENS (§ 12*)—REAL ESTATE—RIGHT TO TAKE BY DESCENT.

Under the provisions of the alien land act (chapter 3 of the Laws of 1891), resident citizens of the United States could not inherit lands in this state through the operation of the statute of descents and distributions, when they must trace their descent through a cousin of their parent who was an alien at the time of his death.

[Ed. Note.—For other cases, see *Aliens*, Cent. Dig. §§ 33-40; Dec. Dig. § 12.*]

3. QUIETING TITLE (§ 53*)—RIGHTS OF DEFENDANT.

In an appeal from a judgment quieting title to lands, where there was sufficient evidence to sustain a judgment in favor of the plaintiff finding that when the action was brought he was in the peaceable, quiet possession of the real estate claiming title, the first inquiry must necessarily be as to what title the defendant has; for, if he have no title, he cannot question that of the plaintiff.

[Ed. Note.—For other cases, see *Quieting Title*, Dec. Dig. § 53.*]

4. QUIETING TITLE (§ 44*)—EVIDENCE.

The evidence in this case examined, and held to be sufficient to warrant a finding that when the action was brought the plaintiff was in the peaceable, quiet possession of the real estate claiming title, and, it appearing that the defendants never acquired any title themselves, the judgment is affirmed.

[Ed. Note.—For other cases, see *Quieting Title*, Cent. Dig. §§ 89-92; Dec. Dig. § 44.*]

Appeal from District Court, Barber County.

Action by J. B. Cramer against James R. McCann and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Harris F. Williams, Samuel Griffin, and Eldon M. Votaw, for appellants. Noble & Tincher, for appellee.

PORTER, J. The appellee brought this action to quiet his title to certain real es-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

† Rehearing denied.

tate in the city of Kiowa, of which he was in possession and to which he claimed title by a conveyance from the heirs at law and next of kin of Kate Craven who died intestate April 30, 1900, while seised of the title. At the time of her death, Mrs. Craven was a widow and left no parent or children or descendants of children living. Her next of kin were brothers and sisters and descendants of brothers and sisters all of whom were nonresident aliens living in Ireland. The common ancestor of Mrs. Craven and the appellants was her grandfather and their great-grandfather who lived and died a nonresident alien, as did also his two sons, the father of Mrs. Craven and the grandfather of the appellants, respectively. Richard St. Lawrence, father of three of the appellants, was a cousin of Mrs. Craven. He was born in Ireland and came to the United States in 1862, and at the time of his death, which preceded that of Mrs. Craven, he was a resident and citizen of this country. He had four children, Patrick R. St. Lawrence, Mary A. Doherty, James J. St. Lawrence, and Richard T. St. Lawrence. These children are all living and reside in Chicago, Ill. They were all citizens of the United States at the time of the death of Mrs. Craven. One of them, Richard T. St. Lawrence, has conveyed any interest he had in the real estate in controversy to James R. McCann, who is the other appellant. In June, 1900, after Mrs. Craven's death, James J. St. Lawrence, one of the appellants, who is a lawyer of Chicago, procured from the next of kin in Ireland, who are the same persons through whom the appellee claims, a power of attorney as "next of kin and heir at law of Kate Craven, deceased," which gave him full power and authority to represent them as their attorney in fact as to the real and personal property of the deceased. On October 16, 1900, Mr. St. Lawrence went to Kiowa and took possession of the real estate in controversy, which consists of a hotel and a number of lots appurtenant thereto. He had the property insured in his name as "attorney for the heirs of Kate Craven, deceased." His power of attorney was filed for record in Barber county, August 4, 1902. On his first visit to Kiowa he was there several weeks. Before leaving for his home, he found a tenant for the hotel and arranged with an agent in Kiowa to collect the rents. This agent collected the rents and remitted the same to him until some time in June, 1906, when he declined to have anything more to do with procuring tenants or looking after the property, but agreed to continue to remit to Mr. St. Lawrence the rents which were afterwards collected by J. B. Cramer & Co., real estate agents. This firm, of which appellee was a member, acted as the agent of Mr. St. Lawrence in procuring tenants. They collected rents, charged a commission, and paid the balance to the

former agent at Kiowa who remitted to Mr. St. Lawrence. This arrangement continued until July 1, 1907. In April, 1907, the alien next of kin living in Ireland executed a new power of attorney to John W. Ellis of Chicago, Ill., in which they revoked the former power of attorney executed to James J. St. Lawrence, and authorized John W. Ellis to represent them in all matters connected with the estate of Kate Craven, deceased, and to sell and convey by warranty deed all their right, title, and interest in the real estate. On April 22, 1907, John W. Ellis, acting under his power of attorney, notified the local agent at Kiowa who had been remitting rents to James J. St. Lawrence that he represented the next of kin and heirs of Kate Craven, and procured from the agent a statement in writing recognizing him as the lawful agent of the heirs. On May 7, 1907, John W. Ellis, as attorney in fact for the Irish heirs, sold and conveyed the real estate in question to Harry A. Lewis of Cook county, Ill., and on July 1, 1907, Lewis conveyed the same by warranty deed to J. B. Cramer. From that date Cramer retained the rents. The same tenant continued to occupy the hotel. Afterwards, on September 5, 1907, Cramer brought this action to quiet his title. The appellants filed their answer and cross-petition; each claiming to own an undivided one-fourth interest in the property in controversy. It was alleged that the appellants were all resident citizens of Chicago, Ill., at the time of the death of Kate Craven, and that the persons through whom the appellee claims were not her true and lawful heirs. The answer and cross-petition further expressly denied that J. B. Cramer was in the possession of the real estate when the action was commenced and alleged that whatever possession he held was obtained by fraud and collusion and without their knowledge, and that in truth and fact his possession was theirs, inasmuch as he had secured the same while acting as their agent for the purpose of collecting the rents. They asked for affirmative relief, quieting their title as against him. Issues were joined and the cause tried to the court. The court found for the plaintiff and rendered judgment quieting and confirming his title to the real estate as against the appellants. This is the judgment which is sought to be reversed.

The controversy is between the appellee, who is the grantee of the Irish heirs of Kate Craven, who were her brothers and sisters and children of deceased brothers and sisters, all of whom were aliens at the time of Kate Craven's death, and the Chicago heirs, whose father was Kate Craven's cousin, and who were citizens and residents of the United States at the time of her death. The family tree showing the next of kin of Kate Craven, both citizens and aliens, appears in the following diagram, the names of citizens being in bold-face type:

As the Constitution was originally adopted in 1859, section 99 thereof, which is section 17 of the Bill of Rights, read as follows: "No distinction shall ever be made between citizens and aliens in reference to the purchase, enjoyment or descent of property." In 1888 the Constitution was amended and this section made to read: "No distinction shall ever be made between citizens of the state of Kansas and the citizens of other states and territories of the United States in reference to the purchase, enjoyment or descent of property. The rights of aliens in reference to the purchase, enjoyment or descent of property may be regulated by law." Pursuant to this amendment, the Legislature of 1891 adopted what is known as the alien land act, which is chapter 3 of the Laws of 1891. Kate Craven died on April 30, 1900. At that time the alien land law was in full force and effect, although it was afterwards repealed. Chapter 1, Laws 1901. The act itself is entitled "An act in regard to aliens, and to restrict their rights to acquire and hold real estate, and to provide for the disposition of the lands now owned by non-resident aliens." It has frequently been before the court and was construed in the following cases: *Wuester v. Folin*, 60 Kan. 334, 56 Pac. 490; *Smith v. Lynch*, 61 Kan. 600, 60 Pac. 329; *Investment Co. v. Trust Co.*, 65 Kan. 50, 68 Pac. 1089; *Madden v. State*, 68 Kan. 658, 75 Pac. 1023; *State v. Ellis*, 72 Kan. 285, 83 Pac. 1045.

It is one of the contentions of the appellants that under the alien land act as construed by these decisions the appellee acquired no title whatever to the land in controversy by virtue of the conveyance from the Irish heirs who were all nonresident aliens at the time of her death. This was an action to quiet title, and the judgment in favor of the appellee is in effect a finding that when the action was brought he was in possession of the property, claiming title. As there was evidence sufficient to sustain this judgment, the first inquiry must necessarily be with respect to the title of the appellants themselves; for, if they have no title, they cannot question that of the appellee. Being in the peaceable possession of real estate, claiming title thereof, he has such an interest therein, although his title be ever so defective, that he may maintain this action to quiet his title and possession as against the appellants, who have no title at all. *Giltinan v. Lemert*, 13 Kan. 476; *Brenner v. Bigelow*, 8 Kan. 496; *Waller v. Julius*, 68 Kan. 314, 74 Pac. 157. The appellants are children of a cousin of Kate Craven, and, in order to inherit as next of kin, they must trace their descent through their father up to their grandfather, who was always a nonresident alien. That they cannot do this is settled by the doctrine in *Smith v. Lynch*, supra. They do not take as brothers and sisters of Kate Craven immediately, and therefore they acquired no title to the real

estate because they must claim through their grandfather, who by reason of his alienship could not inherit by descent. The precise question here, whether a cousin can inherit immediately from a cousin, or whether children can inherit immediately from the cousin of their parent, was not decided in *Smith v. Lynch*, supra, but the principle involved in both cases is the same. That was a case where nephews and nieces sought to inherit immediately from an uncle without tracing the descent through their deceased alien father. It was said in the opinion: "The effect of the alien land law is not only to exclude living aliens from acquiring title to lands in this state by descent, but is also to prevent the transmission of title through them under the operation of the act concerning descents and distributions before quoted. The disqualification is not alone of the living, but it is, as it were, of the dead as well." It was held that the effect of the alien land law was to exclude the nephews and nieces from inheriting. One of the cases relied upon in *Smith v. Lynch*, supra, is *Meier v. Lee et al.*, 106 Iowa, 303, 76 N. W. 712, holding that a cousin does not inherit immediately from a cousin, but only mediately through the parents of each. Other authorities in point are: *Jackson v. Green*, 7 Wend. (N. Y.) 333; *Lessee of Levy et al. v. McCartee*, 6 Pet. 102, 8 L. Ed. 334; *McGregor v. Comstock*, 3 N. Y. 408; *Wilcke v. Wilcke*, 102 Iowa, 173, 71 N. W. 201. See, also, *State v. Ellis*, 72 Kan. 285, 83 Pac. 1045.

There is considerable discussion in the briefs as to whether the evidence shows that Kate Craven was an alien or a citizen at the time of her death. In our view of the case, this question is not material. The grantors of the appellee had a claim of title based on the contention that their intestate died an alien. Since none of the appellants acquired any interest in the property, they are not in a position to contest this claim, and, as said in *Investment Co. v. Trust Co.*, 65 Kan. 50, 68 Pac. 1089, "the state is competent to care for itself and protect its own interests." The state not being a party to this action, the ultimate rights of the appellee as against the state are not involved, and it becomes unnecessary to consider or determine whether or not the grantors of the appellee acquired any interest in the property. Nor is it necessary to consider a question which is raised by the appellee as to the constitutionality of the alien land law.

But one question remains, and it is in respect to the character of the appellee's possession. The judgment is a finding that he had peaceable, quiet possession. It is not disputed that the real estate firm of which the appellee was a member was the agent of James J. St. Lawrence and represented him in renting the hotel property and collecting the rents. At the time St. Lawrence took possession of the real estate, he held a power of attorney from the Irish heirs, authoriz-

ing him to represent their interests in the property. He took possession of the real estate under it, had the property insured in his name as agent for the heirs at law of Kate Craven, deceased, and placed his power of attorney on record. He testified at the trial that about the time the power of attorney was being executed he learned through some correspondence with Mr. Noble, who is now one of the attorneys for the appellee, that there was some question as to whether the Irish heirs could inherit the land on account of being aliens. He testified that from that time on it was a problem in his mind as to whether he represented the Irish heirs by virtue of his power of attorney, or whether he represented himself and his brothers and sisters; but that at the time he first learned of this action having been brought he believed he represented the interests of his brothers and sisters, not, however, as their attorney or agent, but simply as the advisor of the family. He testified further as follows: "I was always advisor of the family and looked after the matter in a general way, and in a manner I had possession of the real estate for them. * * * I held in common for them as well as for myself. I never accounted for one cent to my brothers and sister and never settled with them for any rents that I received, because my expenses had to come out of the estate." Again, he testified: "I really do not know whether I was attorney for the heirs in Great Britain, or attorney for the heirs in Chicago. That was the predicament I was in, and consequently I cannot answer the question intelligently. The point is that I did not know who the heirs were." There can be no question under the evidence that he was acting as the attorney for the foreign heirs and no one else. He had a duly executed power of attorney from all of them authorizing him to represent them. He had no authority to represent his brothers and sisters. Besides, neither he nor his brothers and sisters ever had or could acquire by the laws of descent any interest in the property. The next of kin competent to take by the laws of descent were the Irish heirs unless they were prohibited from taking by virtue of the alien land law. We think the evidence warranted a finding that he took possession of the property as the attorney in fact of the Irish heirs. When they revoked his power of attorney and authorized another person to act for them, his authority ceased. So far as J. B. Cramer & Co. or the appellee acted for him, they acted as the agents of his principals. The revocation of the power of attorney under which he had acted restored to the Irish heirs whatever rights in the property they possessed, including the right to the possession as against him and any agents he had appointed.

The appellants can only prevail upon their

cross-petition upon the strength of their own title and not upon the weakness of their adversary's.

Never having acquired any title to the real estate themselves, they were not entitled to affirmative relief, and, the appellee having been in the peaceable possession of the property under a claim of title when the action was brought, the judgment, so far as any rights of the appellants are concerned, must be affirmed. All the Justices concurring.

(84 Kan. 837)

WORTH v. BUTLER et al.

(Supreme Court of Kansas. Dec. 30, 1910.)

On petition for rehearing. Denied.

For former opinion, see 112 Pac. 111.

PER CURIAM. In a petition for rehearing it is insisted that the statement in the opinion (Worth v. Butler, 83 Kan. 513, 516, 517, 112 Pac. 111, 112) "that George E. Butler testified that he found the deeds in a box in his mother's room after her death" is based upon a misapprehension of testimony of that witness, quoted in the opinion. It is said that the question, "After your mother's death, did you find these papers among her effects?" related to other papers, and not the deeds in question, and a certificate of the trial judge has been presented to that effect. Conceding the misapprehension as claimed, the facts upon which delivery is asserted rest on the testimony of Mrs. Geo. E. Butler, which, as stated in the opinion, is insufficient to show a delivery.

The petition for rehearing is denied.

(83 Kan. 653)

EDWARDS v. FLEMING et al.†

(Supreme Court of Kansas. Jan. 9, 1911.)

(Syllabus by the Court.)

1. ADVERSE POSSESSION (§ 66*) — POSSESSION OF LAND BEYOND TRUE BOUNDARY LINE—MISTAKE.

The real test as to whether or not possession of real estate beyond the true boundary line will be held adverse is the intention with which the party takes and holds the possession. It is not merely the existence of a mistake, but the presence or absence of the requisite intention to claim title that fixes the character of the entry and determines whether the possession is adverse.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 371-383; Dec. Dig. § 66.*]

2. ADVERSE POSSESSION (§ 85*) — PRESUMPTIONS—POSSESSION OF LAND—NATURE.

Among the presumptions which usually obtain with respect to the possession of real estate are these: (1) It is presumed that the possession is in subordination to the true title; (2) where one enters into possession under a deed, he is presumed to claim only the title given him by his deed, and that his possession is restricted to the premises granted.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 498; Dec. Dig. § 85.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.
† Rehearing denied January 19, 1911.

3. ADVERSE POSSESSION (§ 66*) — POSSESSION OF LAND BEYOND TRUE BOUNDARY.

Where a fence is believed to be the true boundary and the claim of ownership is up to the fence as located, if the intent to claim title exists only on the condition that the fence is on the true line, the intention is not absolute but conditional, and the possession is not adverse. *Scott v. Williams*, 74 Kan. 448, 87 Pac. 550. If, however, in such a case there is a clear intention to claim the land up to the fence, whether it be the correct boundary or not, the possession will be held adverse.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 371-383; Dec. Dig. § 66.*]

4. ADVERSE POSSESSION (§ 66*) — POSSESSION OF LAND BEYOND TRUE BOUNDARY.

In an action to quiet title, the plaintiff claimed under deeds to himself and his immediate grantor, executed by the defendants, which described the land conveyed as bounded on the south by a hedge fence. The plaintiff and his grantor had been in the actual possession of the land claiming title up to the fence for more than 15 years, during which time the defendants continued to own the land adjoining on the south, but made no claim to land north of the hedge fence. *Held*, that the evidence warranted a finding of adverse possession by the plaintiff, intention on the part of the defendants to fix the fence as the boundary, and acquiescence on their part sufficient to bar them from claiming that the fence was not the true boundary.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 371-383; Dec. Dig. § 66.*]

5. ADVERSE POSSESSION (§ 109*)—ESTABLISHMENT—EFFECT OF STATUTORY SURVEY.

Where it appears that the plaintiff has acquired title by deed, adverse possession, and acquiescence in the boundary by the defendants, a survey afterwards made at the request of the defendants, under the provisions of section 2275, Gen. St. 1909, fixing a different boundary to the tract claimed by the plaintiff, furnishes no defense to an action to quiet plaintiff's title.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 629-635; Dec. Dig. § 109.*]

6. BOUNDARIES (§ 54*)—ESTABLISHMENT—EFFECT OF STATUTORY SURVEY.

A statutory survey may establish the permanent boundaries between two tracts of land, but cannot change the title to the land.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 272-274; Dec. Dig. § 54.*]

(Additional Syllabus by Editorial Staff.)

7. ADVERSE POSSESSION (§ 66*)—BOUNDARIES—MUTUAL AGREEMENT OF PARTIES.

Adjoining landowners may, either by writing or by parol, agree upon the boundary between their lands, and their possession on either side up to the boundary so agreed upon will be mutually adverse.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 371-383; Dec. Dig. § 66.*]

Appeal from District Court, Lyon County.

Action by John E. Edwards against William H. Fleming and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Kellogg & Kellogg and John Madden, for appellants. Buck & Spencer, for appellee.

PORTER, J. Edwards sued the Flemings to quiet his title to a tract of land of about

10 acres. The defendants formerly owned the land, and, in 1891, conveyed the same to Floyd E. Fleming by warranty deed which described the tract as follows: "Commencing twenty (20) rods west of the northeast corner of northeast quarter (¼) of section thirty-three (33), township twenty (20), range thirteen (13), thence west sixty (60) rods, thence south twenty-six rods to hedge fence, thence east sixty (60) rods, thence north to place of beginning, containing ten (10) acres more or less."

The petition alleged that Floyd E. Fleming was in possession of the land under this conveyance until 1908, when he conveyed by the same description to the plaintiff, and that the plaintiff has been in possession of the land ever since the conveyance to him. There was the further allegation that both deeds made the "hedge fence" an artificial boundary and a part of the description of the land conveyed. Plaintiff also alleged that he and his immediate grantor have been in the open, notorious, exclusive, and adverse possession of the tract of land and the whole thereof up to the said hedge fence on the south for more than 15 years preceding the beginning of the action; further, that a short time before the action was brought defendants had entered upon the tract of land claimed by the plaintiff and moved a wire fence, and are now claiming that the hedge fence is not the true boundary on the south, and claim to own the land that lies immediately north thereof. The defendants in their answer set up a survey made by the county surveyor on the 18th day of January, 1908, at their request, and upon due notice to the plaintiff as required by the statute alleged that on the day appointed the plaintiff personally appeared at the time and place of survey; that the county surveyor duly surveyed and established the corners and boundaries between the lands of the defendants and the lands of the plaintiff; and that the report and plat of the survey so made were thereafter duly filed in the office of the county surveyor, and that the survey was acquiesced in both by the plaintiff and the defendants, and that no appeal therefrom was ever taken. To the answer there was attached a copy of the surveyor's report, and affirmative relief was asked, declaring the boundaries to be those established by the survey. In his reply the plaintiff alleged that there were no disputed corners or boundaries between the lands of the parties and no occasion for any survey. The reply also alleged that the notice served upon him by the county surveyor was insufficient because, in describing the land to be surveyed, it did not follow the description in the deeds under which he held, and that there were a number of other irregularities in the survey. At the conclusion of the evidence, the court made a number of special

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

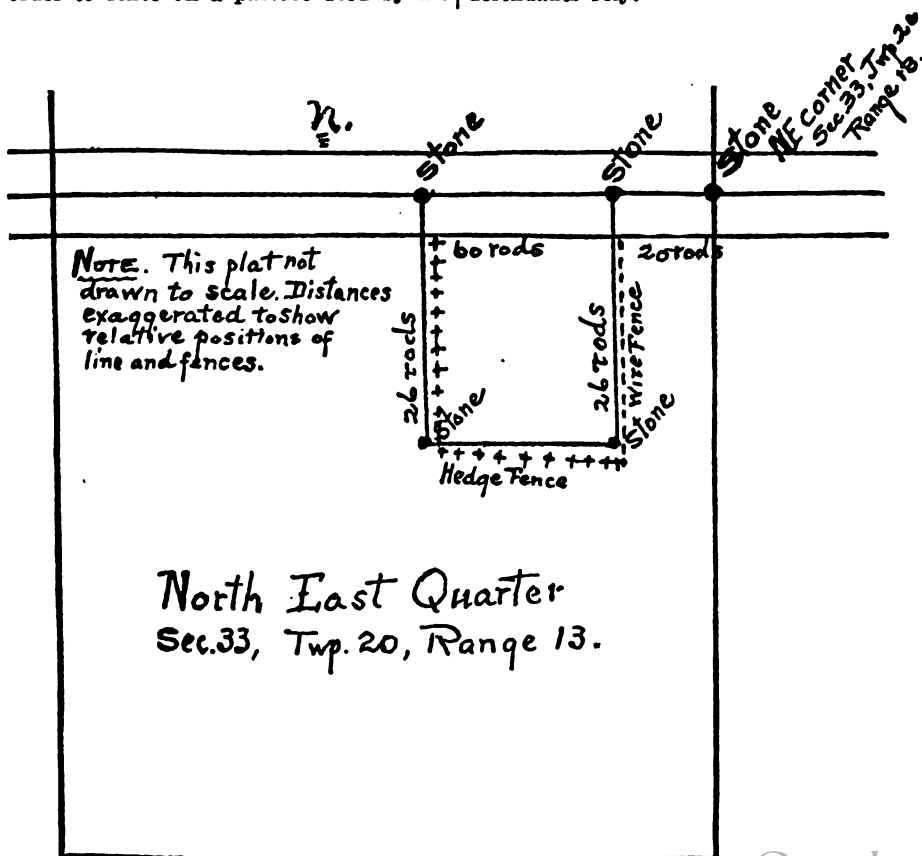
findings, and found generally for the plaintiff and against the defendants. A decree was entered quieting title in the plaintiff to the disputed tract of land. The defendants appeal.

Among the special findings are: That the plaintiff and his immediate grantors had been in the open, notorious, exclusive, and adverse possession of the tract of land claimed by him and the whole thereof for more than 15 years, and that when the defendants conveyed the land in question to Floyd E. Fleming they intended to and did convey to him a certain tract of land enclosed by four certain fences, to wit, a hedge fence on the north, a hedge fence on the west, a hedge fence on the south, and a post and wire fence extending from the hedge fence on the south and along the entire east side to the hedge fence on the north, and that the fences had remained substantially located in the same places from the time of their being built until some time during the month of March, 1909, and after the conveyance to the plaintiff.

The defendants offered testimony to show that the possession had not been adverse. But there was little conflict in the testimony. The defendant William H. Fleming testified that the hedge fence on the south was planted more than 30 years ago, not for the purpose of fixing any boundary line, but in order to fence off a pasture used by his

father, who at that time owned the whole 80 acres. The plaintiff, Edwards, lived within a few rods of the land for 42 years. He testified that he furnished the plants for the west and south hedge fences and helped the old gentleman, Fleming, then the owner, to set them out; that 25 years ago a post and wire fence was built along the whole east side, enclosing the entire field; that the fences were on the same line when he bought the land in 1908.

Floyd E. Fleming testified that he owned this tract of land, that he bought it from his brother, William H. Fleming, the defendant, and sold all he owned to the plaintiff; that he knew the boundaries of the tract; that it was fenced on the east with a wire fence, on the north, west, and south by hedge fences; that during the 17 years in which he occupied the land the defendants never, to his knowledge, claimed to own any of the land inside these fences. There was testimony of a witness who had rented the land as the Floyd E. Fleming tract and who occupied it up to the south hedge, and who testified that the defendants never claimed to own any of the land within the fences until after the conveyance to the plaintiff. The findings of the court are fully sustained by a preponderance of the evidence. The following is a plat of the survey upon which the defendants rely:



The plaintiff claims the land bounded on the north by the public road and on the west, south, and east by the dotted lines. The defendants own the land south and east of plaintiff's land, and the boundaries fixed by the surveyor gave to the plaintiff only the land included within the straight lines, amounting to 9.75 acres, which is 3.75 acres less than plaintiff claims. The controversy, so far as the defendants are concerned, is over the location of the south and east boundaries of the tract. The defendants rest mainly upon the conclusiveness of the survey under section 2275 of the General Statutes of 1909, which provides that "the corners and boundaries established in any survey, * * * where no appeal is taken from the surveyor's report, * * * shall be held and considered as permanently established, and shall not thereafter be changed."

Aside from the plaintiff's claim that the survey was irregular and void, his main contention is that he pleaded and proved his title by a deed and adverse possession for over 15 years, and that the only defense offered to the trespass of the defendants was the record of the survey. In answer to this contention, the defendants insist that the possession of the plaintiff and his immediate grantor was through a misapprehension of the true boundary lines and that the possession was therefore not adverse. The defendants rely upon the following decisions: *Winn v. Abeles*, 35 Kan. 85, 10 Pac. 443, 57 Am. Rep. 138; *Swarz v. Ramala*, 63 Kan. 633, 66 Pac. 649; *Shanline v. Wiltzie*, 70 Kan. 177, 78 Pac. 436; *Scott v. Williams*, 74 Kan. 448, 87 Pac. 550; *Crawford v. Hebrew*, 78 Kan. 401, 96 Pac. 348. These cases, however, recognize the doctrine that the character of the possession depends upon the intent with which it is taken and held. The reason why possession held under a mistake as to the true location of the boundary line is not adverse is stated to be, in *Shanline v. Wiltzie*, supra, cited with approval in *Scott v. Williams*, supra, "that there is no intention on the part of the occupant to exercise, or on the part of the owner to suffer, any dominion beyond the true line, wherever it may be." In *Scott v. Williams*, supra, there was testimony to the effect that the plaintiff claimed no more land than was in the northeast quarter of the section, and, of course, the possession was held not to be hostile or adverse.

It would be impossible to reconcile the conflict in the authorities, generally, respecting the effect of possession of real property taken and held under a mistake as to the true location of the boundary line. There are many cases which state the rule in general terms and apparently hold that under no circumstances can the possession be adverse where there was a mistake as to the true boundary. The better considered cases, however, recognize the existence of two rules, or, at least, they make an exception and hold that the general rule has no application

where the party holds possession with intent to claim to the boundary line in any event. 1 A. & E. Enc. Law, pp. 791 and 792. In 1 Cyc. 1037, it is said that "the real test as to whether or not a title will be acquired by a holding for the period prescribed by the statute of limitations is the intention of the party holding beyond the true line. It is not merely the existence of a mistake, but the presence or absence of the requisite intention to claim title, that fixes the character of the entry and determines the question of disseizin." In *Preble v. Railroad Co.*, 85 Me. 260, 27 Atl. 149, 21 L. R. A. 829, 35 Am. St. Rep. 366, the court recognizes the existence of the two rules, and in the opinion it is said: "The distinction between them is neither subtle, recondite, or refined, but simple, practical, and substantial. It involves sources of evidence and means of proof no more difficult or complex than any other inquiries of a similar character constantly arising in our courts."

Numerous cases illustrating both rules are referred to and collated in a note to this case in 21 L. R. A. 829. In the notes the editor cites a large number of cases holding that one may acquire title by adverse possession by claiming and occupying up to a fence, notwithstanding by mistake he supposes the fence to be on the true line. Thus, in *Hitchings v. Morrison*, 72 Me. 331, it is held that if the title was claimed clear to the fence, which was not on the true line, the title may be acquired by adverse possession, although by mistake it was supposed to be on the true line. In *Tamm v. Kellogg*, 49 Mo. 118, it was decided that if possession was held to a fence under the claim that it was the true line, and the other party acquiesced or failed to take steps to disturb possession, it was adverse. And, again, in *Handlan v. McManus*, 100 Mo. 124, 13 S. W. 207, 18 Am. St. Rep. 533, it was decided that if a fence is held as the true division line by one of the parties who claims to hold all land to the fence, his possession is adverse. To the same effect are *Wilson v. Hunter*, 59 Ark. 626, 23 S. W. 419, 43 Am. St. Rep. 63; *Ayres v. Reidel*, 84 Wis. 276, 54 N. W. 588; *Bunce v. Bidwell*, 43 Mich. 542, 5 N. W. 1023; *Hockmoth v. Des Grand Champs*, 71 Mich. 520, 39 N. W. 737; *James M. Watrous v. William A. Morrison*, 33 Fla. 261, 14 South. 805, 39 Am. St. Rep. 139; *Alexander v. Wheeler*, 69 Ala. 332; *Fuller v. Worth*, 91 Wis. 406, 64 N. W. 995; *Graeven v. Dieves*, 68 Wis. 317, 31 N. W. 914; *Taylor v. Fomby*, 116 Ala. 621, 22 South. 910, 67 Am. St. Rep. 149; *Tex v. Pfug*, 24 Neb. 666, 39 N. W. 839, 8 Am. St. Rep. 231. See, also, note to *Finch v. Ullman*, 24 Am. St. Rep. 383.

In *Alexander v. Wheeler*, supra, it is said: "The quo animo, or intention with which possession is taken and held by a defendant, must always constitute an essential consideration. * * * But the rule is different where the fence is believed to be the true

line, and the claim of ownership is up to the fence as located, even though the established division line is erroneous, and the claim of title was the result of the mistake. In such case there is a clear intention to claim to the fence as the true line, and the possession does not originate in an admitted possibility of mistake." To the same effect is *Hoffman v. White*, 90 Ala. 354, 7 South. 816.

There must be an intention to claim the land within a certain boundary, whether it eventually be the correct one or not. Where, however, the intent to claim title exists only upon the condition that the fence is on the true line, the intention is not absolute but conditional, and the possession is not adverse. *Shanline v. Wiltale*, 70 Kan. 177, 78 Pac. 436; *Scott v. Williams*, 74 Kan. 448, 87 Pac. 550; *Dow v. McKenney*, 64 Me. 138.

There is no evidence in this case, as there was in *Scott v. Williams*, supra, that the claim was a provisional one. Two presumptions always obtain with respect to the possession of real estate: (1) It is presumed that the possession is in subordination to the true title; (2) where there is a deed, it is presumed that the grantee entered into possession under his deed, claiming only the title given him by his deed, and that his possession was restricted to the premises granted. *Fuller v. Worth*, 91 Wis. 406, 410, 64 N. W. 995. Neither of these presumptions hinder and both help the claim of the plaintiff. If we look to the deeds under which the plaintiff and his immediate grantor took and held possession, we find that they describe the land as bounded on the south by a hedge fence, so that his entry, his possession, and his claim of title are identical. As said in *Tex v. Pflug*, 24 Neb. 666, 39 N. W. 839, 8 Am. St. Rep. 231, "He took possession to the line fixed by the surveyor, and designated as his boundary by his grantor, and held with reference to it, and to nothing else."

It may be observed that the findings, as well as the evidence, seem to preclude the possibility of the possession having been taken and held through a mistake as to the true location of the boundary line. There is no finding that the claim of the plaintiff and his immediate grantor was provisional; that is, that they claimed to own up to the fence only upon the supposition that this was the true boundary. Nor is there any finding that the fence is not the true boundary. If we turn to the evidence, we find nothing to suggest that possession was taken and held up to the fence through a mistake or that the fence was not the true boundary, except the evidence of the recent survey made a short time before the commencement of the suit. This survey was made at the request of the defendants who owned the land on the south and east. The evidence is that they told the county surveyor to get the description of the land of the plaintiff from his recorded deed, and to serve him with proper notice.

It appears, however, that in his notice to the plaintiff he did not describe all the land which the plaintiff claims. Neither in the notice nor the survey was any attention paid to the artificial boundaries mentioned in the deeds under which the plaintiff holds. The notice and the survey proceed upon the theory that the land he was to survey and establish the boundaries of was a tract of 10 acres more or less, commencing at a stone 20 rods west of the northeast corner of the quarter, "thence west sixty (60) rods, thence south twenty-six (26) rods, thence east sixty (60) rods, thence north to place of beginning." The west line of the tract which the plaintiff claims to own is described in his deeds as running "south twenty-six (26) rods to hedge fence, thence east sixty (60) rods," etc.

The only evidence, therefore, of any mistake as to the south boundary is that a survey not of the entire tract as described in the plaintiff's deeds, or as claimed to be owned by him, but of a different tract of land shows a south boundary different from the hedge fence. It is altogether probable that the objections raised by the plaintiff to the validity of the survey, based upon the variance in the description of his land in the notice and the description in his deeds, would, in a proper case, be held to be a mere irregularity of which advantage could only be taken by an appeal from the survey. *Shanline v. Wiltale*, 70 Kan. 177, 78 Pac. 436. But this is not an action to set aside a survey, but to quiet title to a tract of land to which plaintiff claims to have held adverse possession for more than 15 years, so that, in our view, the validity of the survey is not involved, and we only refer to the alleged defects therein to show that there is no evidence that the hedge fence on the south is not the true boundary of the land actually claimed by the plaintiff to be his.

The theory of the defendants, of course, is that a valid survey from which no appeal was taken has permanently fixed the boundaries between the two tracts and determined that the hedge fence never was the true boundary, and that it necessarily follows that the possession of the plaintiff was acquired under a misapprehension as to its true location. If, however, we concede that such is the effect of the survey, still, under the authorities we have cited, supra, the plaintiff's possession would be adverse, notwithstanding the mistake, if the intention was to take and hold to the fence in any event. Upon this theory we have deemed it necessary to review the cases holding that the test is, not whether there was a mistake, but what was the intention of the person holding possession up to the mistaken boundary.

Viewed from still another aspect of the case, the judgment must be affirmed. The petition alleges and the evidence abundantly shows that the defendants, having by their deed fixed the hedge fence as an artificial

boundary of the land conveyed, acquiesced in that being the true boundary for a period long enough to estop them from claiming the contrary. It is well settled that adjoining landowners may either by writing or parol, agree upon the boundary between their lands, and that their possession on either side up to the boundary so agreed upon will be mutually adverse. *Steinhilber v. Holmes*, 68 Kan. 607, 75 Pac. 1019; *Sheldon v. Atkinson*, 38 Kan. 14, 16 Pac. 68; *Alexander v. Wheeler*, supra; *Yates v. Shaw*, 24 Ill. 367; *Cleveland v. Obenchain*, 107 Ind. 591, 8 N. E. 624; *McNamara v. Seaton*, 82 Ill. 498; *James M. Watrous v. William A. Morrison*, supra; *Clark v. Hulsey*, 54 Ga. 608. See note to case in 21 L. R. A. 833, and note to case in 39 Am. St. Rep. 154; 1 Cyc. 1036.

The purpose of the original proprietor in planting the hedge throws no light upon the matter. He owned the land on the other side and did not intend the fence as a boundary line; but the defendants afterwards in their deed expressly fixed upon this hedge as the south boundary line of the tract which they conveyed. Their situation is the same as though they had agreed with the adjoining landowner that this should be the boundary line. Their acquiescence in it as the true boundary line for a period even less than the statutory period for acquiring title by prescription would estop them. *Sheldon v. Atkinson*, supra. Their acquiescence continued beyond the statutory period, and, under the circumstances of this case, should, upon every principle of justice and equity, estop them from now claiming that the fence is not the true boundary.

It is unnecessary to consider whether the court erred in holding the survey void, for the reason that the judgment rests as well upon the findings of adverse possession by the plaintiff and acquiescence in the boundary line by the defendants. The latter is included in the general finding and is fully sustained by the evidence. This being an action to quiet title, the survey however valid cannot defeat the action. As held in *Swarz v. Ramala*, supra, the title to real estate is not put in issue in a determination by the county surveyor of the true boundary line between two tracts of land. It was said in the opinion in that case: "Adverse possession may change the title to real property, but it cannot change the location of a quarter section line." Conversely, it may be said that a valid statutory survey may change the location of the boundary lines between two tracts of land, but it cannot change the title to the land itself. Suppose that at the time the survey was made the plaintiff held an unrecorded deed conveying to him a perfect title to the strip of land in controversy. It would hardly be contended that his failure to appeal from the survey vested the title to this intervening strip of land in the defend-

ants, or prevented the plaintiff from asserting title by his deed. Conceding its validity, the only effect of the survey is to determine the quantity of land which the defendants deprived themselves of by agreeing in their deed upon a different boundary, and their long acquiescence in that and the other boundaries, and by the adverse possession of the plaintiff.

The judgment will be affirmed. All the Justices concurring.

(18 Wyo. 362)

BURTON v. UNION PACIFIC COAL CO.

(Supreme Court of Wyoming. Jan. 6, 1911.)

STATUTES (§ 181*)—CONSTRUCTION.

The Legislature cannot be held to have intended something beyond its authority in order to qualify the meaning of the language it has employed in a statute.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 181.*]

Beard, C. J., dissenting.

On rehearing. Petition denied.

For prior opinion, see 107 Pac. 391.

POTTER, J. Counsel for defendant has filed a petition for rehearing, in support whereof it is contended that the court erred in the reasoning and conclusion set forth in the former opinion. 107 Pac. 391. No new point is presented, nor any question that was not considered by the court and fully and ably covered by the arguments of counsel at the former hearing. The question involved in the cause as it comes to this court is important and not free from difficulty; but, after carefully considering and giving due weight to the arguments advanced by the brief in support of a rehearing, no doubt is entertained by a majority of the court as to the correctness of the decision heretofore announced, and it is not believed at all probable that a rehearing would result in a different conclusion. We do not deem it necessary to again discuss the question at length, and shall not attempt to do so.

To avoid any possible misunderstanding of the ground upon which the decision was based, we think it proper to say at this time that it did not depend upon the legal correctness of certain statements contained in the opinion, which are criticised by counsel, to the effect that the section of the Constitution declaring the liability of the party in fault to an action for damages for death by wrongful act, neglect, or default would be ineffectual without a statute providing the manner of enforcing the right of action or liability (article 9, § 4); and that the provisions of section 2582, Rev. St. 1899, were enacted pursuant to the section of the Constitution referred to, and amounted to a partial compliance with its requirement that "the Legislature shall provide by law at its first

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

session for the manner in which the right of action in respect thereto shall be enforced." Any inaccuracy, technical or otherwise, of either of those statements, would not disturb the conclusion upon the ultimate question that was presented, for the constitutional provision that vitally affected the question involved and the decision is that found in section 4 of article 10, rather than section 4 of article 9; the former declaring that "no law shall be enacted limiting the amount of damages to be recovered for causing the injury or death of any person."

We are not, however, willing to concede the unsoundness of the statements alluded to as argued by counsel. The reference to the necessity of a statute providing the manner of enforcing the right of action may have been expressed too broadly, and in such language as to convey the impression that the court supposed it necessary, in order to render effectual the constitutional provision declaring the liability to an action for damages, that there should be a statute specially providing a form of procedure in such cases. That, however, was not the thought in the mind of the court at the time; nor do we conceive such a statute to be essential to the existence of a remedy in favor of the party entitled to enforce the liability. It was only intended by the statement referred to that the Legislature was required to designate the party to whom the liability should accrue or who might bring the action, and we remain inclined to that opinion. However, the point was not deemed very material and was not therefore closely considered, for the reason that a statute was in force when the Constitution took effect, and was continued in force by an express provision of that instrument, providing that every such action should be brought by and in the name of the personal representative of the deceased person; and the statute of 1890-91 (section 2582, Rev. St. 1899), enacted after the adoption of the Constitution, which provided for the recovery of damages for the death of a person caused by a violation of, or a willful failure to comply with, the provisions relating to the operation of coal mines, declares that the right of action shall accrue to the administrator of the estate of the person whose life shall be lost. But, should the view in that particular of section 4 of article 9 of the Constitution, as expressed in the opinion be deemed erroneous, it is not properly to be regarded as a fundamental error inducing in any degree the conclusion upon the ultimate question that was submitted for decision.

The same comment is applicable to the reference in the opinion to the statute known at the time as section 2582, Rev. St. 1899, as in part a compliance with the constitutional provision that the Legislature shall provide by law for the manner in which the right of action shall be enforced. Conceding that the statute extended the right of action to

acts or defaults not covered by the words employed in the Constitution, referring to an action for the death of a person injured, it provides to whom the right of action shall accrue where death occurs through a violation of, or a willful failure to comply with, the statutory provisions, and we are not convinced that in that respect and to that extent it may not properly be said that the statute was enacted pursuant to or in compliance with the Constitution. It may be that, without the statute so declaring, a right of action for death occurring through acts or defaults therein mentioned would not exist; but, when it is so declared, such acts or defaults then become wrongful as the basis of an action if the death of the person injured ensues, so that the command upon the Legislature to provide by law for the manner of enforcing the right of action becomes pertinent and applicable, though it is of course true that without such a constitutional direction, and in the absence of anything in the Constitution restricting legislative action in that respect, the Legislature would have authority to enact a statute making such provision. See *Louisville Ry. Co. v. Raymond's Adm'r*, 135 Ky. 738, 123 S. W. 281, 27 L. R. A. (N. S.) 176. The Constitution itself provides that the Legislature shall provide by law for the proper development, ventilation, drainage, and operation of all mines. Article 9, § 2. And that, "for any injury to person or property caused by willful failure to comply with the provisions of this article or laws passed in pursuance hereof, a right of action shall accrue to the party injured, for the damage sustained thereby." Article 9, § 4. Immediately following this last-mentioned provision is that for a right of action in all cases whenever the death of a person shall be caused by "wrongful act, neglect or default, such as would, if death had not ensued, have entitled the party injured to maintain an action to recover damages in respect thereof."

Notwithstanding that antedating the Constitution a similar statute had been enacted relating to the ventilation and operation of coal mines, the propriety cannot reasonably be questioned, we think, of referring to the statute of 1890-91, containing the provisions of section 2582, as enacted pursuant to constitutional requirement, so far at least as it regulates the development, ventilation, drainage, and operation of coal mines. And the fact that a part of section 2582, viz., that part providing for a right of action in favor of the party injured for damages sustained through any violation of, or a willful failure to comply with, the provisions of the act, is substantially the same as the constitutional provision covering the same matter, does not disprove the assertion that the section of the statute mentioned was, connectedly with the remainder of the statute, passed pursuant to the Constitution or to carry out its provi-

sions. Nor is the propriety of the statement that the statute, in the respect that it provides for an action for the death of the person injured, was in part a compliance with the direction contained in section 4 of article 9 of the Constitution that a law be enacted for enforcing the action for death, disturbed by the consideration that the statute may cover acts or defaults causing death, not covered by said section of the Constitution.

The general statute in force prior to the Constitution relative to the kind of action under consideration, which was known as sections 3448 and 3449, Rev. St. 1899, provided that the action might be maintained by the personal representative of the deceased person when the death shall be caused "by wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action to recover damages in respect thereof." We are inclined to the opinion that the provision in question in section 2582, Rev. St. 1899, created a new right of action, and this we understand to be conceded in counsel's brief in support of a rehearing. This view assumes that the particular act or default causing death specified in section 2582 as the basis of the action therein provided for would not be covered in the absence of negligence by the general words employed in section 3448. But, whether a new right of action was created or not, the later statute enacted after the Constitution had become operative provided that a right of action for the recovery of damages for the injuries sustained should accrue to the administrator of the estate of a person whose life shall be lost as the result of a specified act or default. Had the Constitution not intervened, it may be conceded that it would have been imperative under the ordinary rules of statutory construction to consider all the provisions of the earlier and later statute together as *in pari materia*, and to give effect to the provisions of the earlier statute as applicable to the action under the later statute so far as the same could be done without violating the provisions of such later statute, and thus the meaning of such provisions might be explained or qualified. By such a construction it might then perhaps have been proper to hold that the action for damages under section 2582 would be limited as to the amount to be recovered by section 3449 which had established a limitation of \$5,000 upon the damages to be recovered in every action provided for by section 3448.

We are, however, required to consider in this connection not only sections 3448 and 3449 of the statutes, but as well section 4 of article 10 of the Constitution, which expressly declares that no law shall be enacted limiting the amount of such damages. At the time section 2582 was enacted, that constitutional provision was in force, and must be regarded as affecting the construction of

every statute upon that subject subsequently enacted. The Legislature cannot be held to have intended something beyond its authority in order to qualify the meaning of the language it has employed. It must be considered unquestionable that the Legislature could not, in enacting section 2582, have constitutionally declared that the right of action thereby provided for should be for the recovery of damages not exceeding \$5,000 or any other amount; and therefore it is not permissible to hold that such a provision was intended. It is true that it is not stated in the section in so many words that the damages shall be unlimited; but they would be unlimited, except as limited by the lawful proof, by the very force of the language employed, construing the section alone, because the provision is sufficient to allow the recovery of all damages of the character permitted by it which might be established by competent evidence.

It is argued, and it might be conceded, that as section 3449, containing the limitation clause, was continued in force together with other statutes not in conflict with the Constitution, the limitation clause would apply not only to acts wrongful at the time it was enacted, but as well to acts subsequently made wrongful while continuing in force. But the difficulty in the way of applying it to the action under section 2582 is that the section does more than merely describe what shall constitute a wrongful act. It prescribes expressly that, in case of death resulting from the specified wrongs, a right of action shall accrue for recovery of damages for the injuries sustained; or, to use the words of the statute, "for like recovery of damages for the injuries sustained," having reference to some preceding provision of the section. The word "damages," as thus employed, is not qualified other than by the word "like" and the words "for the injuries sustained" with which it is connected, and necessarily means and embraces all damages that might be lawfully proven, except as explained or qualified by the words above referred to. This, in our opinion, renders the limitation of section 3449 inapplicable, or, if it otherwise would apply, it is to be regarded as impliedly repealed so far as the action provided for by the provision now being considered of section 2582 is concerned, because inconsistent with it. To say, as counsel does in the brief, that the Legislature, when enacting section 2582, knew of the existing statute limiting damages, and also must be held to have known the rule that the new statute would not change existing statutes except where the intention to do so is clearly manifest, and then to apply the propositions to the statute in question so as to leave it subject to the limitation of the former statute, is to impute to the Legislature an intention not only to refrain from repealing such limitation clause, but to provide that damages might be recovered in the

action provided for not exceeding the amount limited by the former statute. And it is clear that, had they expressed such an intention in words, it would have been ineffectual because unconstitutional. It would then clearly have been a statute limiting the amount of damages, such as the Constitution prohibits. But to construe the statute as having that meaning and effect would be equally as obnoxious to the Constitution, and to so construe it would require that the language employed be given a restricted meaning on the ground that the Legislature so intended it. It is only on the theory that the statute was intended to be made subject to the limitation of the old statute that the latter could be regarded as applicable, and we have endeavored here and in the previous opinion to show the constitutional objection to the adoption of such a theory in disposing of the question presented in this case. We believe that this amply explains the reasons leading to the conclusion heretofore announced. As remarked at the outset, a majority of the court do not think a rehearing would be justified.

Mr. Chief Justice BEARD desires it to be stated that he has some doubt about the correctness of the decision, and for that reason is in favor of granting a rehearing.

Rehearing denied.

SCOTT, J., concurs.

(13 Ariz. 279)

PHOENIX RY. CO. v. LANDIS.

(Supreme Court of Arizona. Jan. 16, 1911.)

TRIAL (§ 256*) — INSTRUCTIONS — OMISSIONS — NECESSITY FOR REQUEST.

An instruction that, in determining damages for negligent death, the jury could consider decedent's habits, is not prejudicial error for failing to specify the habits subject to consideration, in the absence of a request for an instruction covering the omission.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 628-641; Dec. Dig. § 256.*]

On rehearing. Former judgment affirmed. For former opinion, see 108 Pac. 247.

PER CURIAM. In our former opinion in this case (108 Pac. 247) we affirmed the judgment of the lower court, but subsequently granted a rehearing, in order that we might further consider whether the lower court committed error in giving an instruction upon the measure of damages which charged the jury that in determining the measure of damages they should take into consideration the habits of deceased, but failed to specify particularly what habits they were authorized to so consider.

If appellant desired that the court instruct with greater particularity as to what habits should be considered, it should have presented to the court and requested the giving of instructions fully covering the subject in ac-

cordance with its view of the law. Having failed so to do, it is not now entitled to complain of the omission. This, we think, is the generally accepted view. *Backus v. Fort Street Union Depot*, 169 U. S. 557, 18 Sup. Ct. 445, 42 L. Ed. 853; *Kansas City So. Ry. Co. v. Henrie*, 87 Ark. 443, 112 S. W. 967; *Galveston Oil Co. v. Malin*, 60 Tex. 645; *Sharon v. Winnebago Furniture Mfg. Co.*, 141 Wis. 185, 124 N. W. 299; *Warren, etc., R. Co. v. Waldrop* (Ark.) 123 S. W. 792; *Greenway v. Taylor Co.* (Iowa) 122 N. W. 943.

No prejudicial error appearing, the judgment of the lower court is affirmed.

The CHIEF JUSTICE, being disqualified, took no part in the determination of this cause.

(13 Ariz. 280)

HERLICK v. HOGHE et al.

(Supreme Court of Arizona. Jan. 17, 1911.)

INTOXICATING LIQUORS (§ 74*) — LICENSES — MANDAMUS TO COMPEL ISSUANCE OF LICENSE.

In view of Laws 1903, No. 80, § 1, prohibiting the issuance of a license to sell liquors in less quantities than five gallons within six miles of any camp of men engaged in the construction or repair of any public work, where 25 or more men are employed, a peremptory writ of mandamus will not be granted to compel the issuance of a license to sell liquor in an incorporated city in which there was under construction a bridge, conceded by the petitioner to be a public work within the terms of the statute, where the only contention of petitioner is that the statute is not applicable to the case of a license for a sale in an incorporated city.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 74, 75; Dec. Dig. § 74.*]

Petition by Hans Herlick against Leo M. Hoghe and others for a peremptory writ of mandamus to compel the board of supervisors and the sheriff of Maricopa county to issue a license to petitioner to sell spirituous liquor within the limits of the city of Phoenix. Petition denied.

Eugene S. Ives and W. M. Seabury, for petitioner. G. P. Bullard, for respondents.

PER CURIAM. This is an original proceeding for a peremptory writ of mandamus to compel the board of supervisors and the sheriff of Maricopa county to issue a license to the petitioner to sell spirituous liquor within the limits of the city of Phoenix.

The first section of Act No. 80 of the Laws of 1903 provides: "Section 1. It shall be unlawful for the sheriff or the treasurer of any county in this territory to grant a license to any person to sell, barter, exchange or otherwise dispose of malt, spirituous or vinous liquors in less quantities than five gallons within six miles of any camp or assembly of men engaged in the construction or repair of any railroad, canal, reservoir, public work or other kindred enterprise

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

where twenty-five or more men are employed."

It is to be noted that in the case of a public work the law in question only applies to a public work of the character specified in the statute, and is then only applicable where in such work a construction camp of 25 or more men is maintained. In the case before us it is conceded by the petitioner that the construction of the so-called Center Street Bridge makes a case within the terms of the section of the statute; but it is contended that under the proper construction of the whole of Act No. 80 and by subsequent legislation the provisions of the section, in question are not applicable to the case of a license for the sale in an incorporated city or town. The respondents aver that the sole reason for refusing to issue the license is that the section in question is operative and prohibitory.

While all the members of the bench have participated in our determination in the matter, the members are not all in accord in their views, or in the reasons for the result reached. The members of the bench are, however, unanimously of the opinion that the applicant has not shown such a clear right to the relief demanded as to warrant the granting of the application and the issuance of the writ.

The application for a peremptory writ of mandamus is therefore denied.

(13 Ariz. 270)

GILA VALLEY G. & N. RY. CO. v. HALL.
(Supreme Court of Arizona. Jan. 14, 1911.)

1. MASTER AND SERVANT (§ 288*)—INJURIES—ACTIONS—JURY QUESTIONS—ASSUMPTION OF RISK.

In an action against a railroad company for injuries to a chainman by the velocipede on which he was riding jumping the track, claimed to have been caused by a defective wheel, whether the defects in the wheel were plainly observable so that plaintiff assumed the risk, *held* a question for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1083; Dec. Dig. § 288.*]

2. MASTER AND SERVANT (§ 219*)—ASSUMPTION OF RISK—OBVIOUS OR LATENT DEFECTS.

An employé does not assume the risk of injury from defects in appliances which he could have discovered by the exercise of ordinary care, but only assumes the risk from defects which were known to him or plainly observable.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 610-624; Dec. Dig. § 219.*]

3. MASTER AND SERVANT (§ 273*)—INJURIES TO SERVANT—KNOWLEDGE OF DANGER—EVIDENCE.

In a railroad employé's action for injuries claimed to have been caused by a defect in a velocipede wheel, causing it to jump the track, evidence of a statement as to the condition of the wheel, made a short time before the accident by the operator of the velocipede, was properly excluded where it was not shown with reason-

able certainty that plaintiff heard such remark, though plaintiff and the speaker were near each other when the remark was made.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 937; Dec. Dig. § 273.*]

4. NEW TRIAL (§ 162*)—GROUNDS—EXCESSIVE DAMAGES—REMISSION—POWER OF COURT.

Where there have been no reversible errors of law, and it appears that an excessive verdict for plaintiff in a personal injury action resulted from too liberal views held by the jury as to the damages sustained, rather than from prejudice or passion, the court may remit such part of the verdict as it deems excessive instead of granting a new trial, but where it appears that the verdict resulted from prejudice or passion, a new trial should be granted.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 324-329; Dec. Dig. § 162.*]

5. APPEAL AND ERROR (§ 977*)—DISCRETION OF TRIAL COURT—COURTS REDUCING VERDICT.

Unless it clearly appears from the court record that an excessive verdict in a personal injury action resulted from prejudice or passion rather than an undue liberality, exercised by the jury in awarding damages, the trial court's action in remitting a part of the verdict instead of granting a new trial will not be disturbed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3864; Dec. Dig. § 977.*]

Appeal from District Court, Gila County; before Justice Frederick S. Nave.

Action by John Hall against the Gila Valley Globe & Northern Railway Company. From a judgment for plaintiff and an order denying a motion for a new trial, defendant appeals. *Affirmed.*

Eugene S. Ives and S. L. Pattee, for appellant. A. C. Baker, and Stoneman & Jacobs, for appellee.

CAMPBELL, J. Appellee was in the employ of appellant as chainman. On April 23, 1907, he was engaged with another employé, named Ryan, in measuring distances, locating mile posts on appellant's line of railway. For that purpose they used a three-wheeled velocipede furnished by appellant. This velocipede was of the kind ordinarily used in work of this character, with a gasoline engine for motive power. It had two wheels on the right-hand side, over which was the engine, and a seat for the use of the operator, and a seat in front for another person. The third wheel was a small wheel on the left-hand side, nearly opposite the front wheel on the right-hand side, and fastened to the machine by a bar extending across the track. On the day mentioned, Hall and Ryan were upon this velocipede on plaintiff's line of railway, Ryan operating the machine and Hall sitting in front. While the velocipede was going at a speed of from 8 to 12 miles an hour, it suddenly left the track, going to the left, the side on which was situated the one small wheel. Hall was thrown in front of it and run over, sustaining severe injuries. This action was brought against the railroad

company to recover damages for the injuries so received, it being alleged that the flange on the third or small wheel was worn and cracked, and that by reason of such condition the machine left the track, and that the company was negligent in furnishing such velocipede. Appellant answered, denying the negligence alleged, pleading contributory negligence, and that Hall knew or might have known the condition of the velocipede and assumed the risk of the injuries resulting from the alleged defect. The jury returned a verdict for \$10,000. A motion for a new trial was made, and prior to its determination Hall voluntarily remitted \$5,000 from the amount of the verdict. Thereafter, the court denied the motion for a new trial and entered judgment in favor of the plaintiff for \$5,000 and costs. From this judgment and from the order denying the motion for new trial, the railway company appeals.

We shall consider the assignments of error in the order in which they are argued by counsel. It is first insisted that the court should have directed a verdict at the close of the plaintiff's case, for the reason, as contended, that the testimony showed that at the time the velocipede left the track it was going north around a right-hand curve, and therefore, as stated by counsel, "would be impelled by centrifugal force toward the outer rail, and the two wheels on the right-hand side would be held against the rail on that side, and the flange on the left-hand or third wheel impelled away from the rail. The application of this natural law would result in the constant tendency on the part of the machine to keep straight ahead, and thus the flange on the left-hand side would be kept away from the rail, and its condition would have no effect while going around such a curve, and thus the condition of the flange could have no effect." The testimony shows that the wheel in question was badly worn and gouged, and there is expert testimony to the effect that the tendency of a wheel in such condition is to mount the rail. It is true that the plaintiff testified that the accident occurred on the curve. However, in another portion of his testimony, he states that at the time of the accident the car was just going off the curve on a tangent. The testimony of Ryan, the operator of the car, who later visited and observed the scene of the accident, is: "At the point where the gasoline car left the track, the situation of the road with reference to being curved or tangent, was just coming off a curve, a right-hand curve, and going on a tangent. The car was just going off a right-hand curve when the accident occurred." It is argued by counsel for appellee, with much show of reason and supported by testimony of expert witnesses, that in leaving the curve the car was thrown against the left-hand rail, and that the flange of the small wheel, because of its defects, failed to perform its

functions. A careful consideration of the whole record convinces us that the jury was warranted in finding that the accident resulted from the defective wheel.

It is further insisted that the court erred in not directing a verdict for the defendant, for the reason that the evidence showed that the defects of the wheel were plainly observable, and the danger easily appreciated, and that therefore the plaintiff assumed the risk. It is true that the defects should have been discerned by any one whose duty it was to inspect wheels, but Hall was not an inspector, nor did he have anything to do with the operation of the car. His only connection with it was to ride upon it from place to place, in locating mile posts. Nor does it seem possible to say, as a matter of law, that he should have appreciated the danger had he known the condition of the wheel. He had but little experience with machines of that character. It does not appear that he had ever used any other track velocipede, and it does appear that he had been employed on the one in question but about 14 hours at the time of the accident. One without experience in such matters might observe that the wheel was worn and yet not appreciate that it was in such condition as to be dangerous. In fact, the record in this case discloses a wide difference of opinion among those who qualified as experts, as to whether or not an accident was likely to result from a wheel in the condition in which this one was shown to have been. The court did not err in permitting the case to go to the jury.

Appellant contends that the court in its instructions erred in stating the rule of assumption of risk by an employé, in that it limited the defects, the risk of injury from which the plaintiff assumed, to those which he actually knew or those which were plainly observable to him, and insists that an employé also assumes the risk of those he might or ought to have known through ordinary care. There are authorities which support this contention, but the question is determined to the contrary by our appellate court. "Upon this question the true test is not in the exercise of care to discover dangers, but whether the defect is known or plainly observable by the employé." *Choctaw, Oklahoma & Gulf Railroad Company v. McDade*, 191 U. S. 64, 24 Sup. Ct. 24, 48 L. Ed. 96.

The refusal of the court to permit Ryan, the operator of the car, to testify to a remark made concerning the condition of the wheel, a short time before the accident, is assigned as error. Hall, Ryan, and one Regna were in the neighborhood of the velocipede when Regna commented upon this alleged defect. Ryan was unable to state that Hall took any part in the conversation, could not state how far he was from Regna at the time, and there is nothing in the record to indicate with any reasonable certainty that

he heard the remark. Therefore the testimony was properly excluded.

The remaining important question in the case is whether the court erred in rendering judgment for the amount of the verdict less the sum remitted by the appellee. It is insisted by appellant that the court should have granted a new trial for the reason that it is beyond the power of a court to permit a remittitur where the damages are unliquidated and the verdict excessive. The question has heretofore been before this court in two cases. *Southern Pacific Co. v. Tomlinson*, 4 Ariz. 126, 33 Pac. 710, was an action to recover damages for death by wrongful act, under a statute permitting the jury "to give such damages as they may think proportioned to the injuries resulting from said death." A verdict for \$50,000 was returned, from which the plaintiff remitted \$31,998, and judgment was entered for the remainder. The power of the trial court to permit the remittitur was questioned, but it was held: "A trial court has the power, where excessive damages have been allowed by the jury, and where the motion to set aside the verdict is based upon this ground, to make a remission a condition precedent to overruling the motion. The exercise of this power rests in the sound discretion of the court. This doctrine is affirmed in the case of *Cattle Co. v. Mann*, 130 U. S. 74, 9 Sup. Ct. 458 [32 L. Ed. 554]; also in *Railroad Co. v. Herbert*, 116 U. S. 642, 6 Sup. Ct. 590 [29 L. Ed. 755]. Of course, if it is apparent to the trial court that the verdict was the result of passion or prejudice, a remittitur should not be allowed, but the verdict should be set aside. In passing upon this question, the court should not look alone to the amount of damages awarded, but to the whole case, to determine the existence of passion or prejudice, and to determine how far such passion or prejudice may have operated in influencing the finding of any verdict against the defendant. When the circumstances, as they may appear to the trial court, indicate that the jury deliberately disregarded the instructions of the court, or the facts of the case, a remittitur should not be allowed, but a new trial should be granted. If they do not so indicate, and the plaintiff voluntarily remits so much of the damages as may appear to be excessive, the court, in its discretion, may allow the remission and enter judgment accordingly." In *Southern Pacific Company v. Fitchett*, 9 Ariz. 128, 80 Pac. 359, the verdict was for \$1,000 for "injuries to feelings," from which the plaintiff, upon the suggestion of the trial court, remitted \$600. This court held that it was apparent that the jury was influenced by passion or prejudice, and that therefore a new trial should have been granted. We further sought to distinguish the facts in that case from the *Tomlinson* Case, suggesting that in the latter the damages were susceptible of accurate computation

from the evidence. We are not now prepared to adhere to the views so expressed. Both are cases of unliquidated damages. In the one case no less than the other, the jury's verdict represents the damages "proportioned to the injuries resulting" in the opinion of the jury, based upon evidence that affords no basis for exact computation. If there is a difference, it is one of degree rather than one of kind. There is authority for the position that in no case of unliquidated damages should the court permit a remission where the verdict is excessive, without the consent of the defendant, but as we now view it, the great weight of authority supports the practice. *Northern Pacific Rld. Co. v. Herbert*, 116 U. S. 642, 6 Sup. Ct. 590, 29 L. Ed. 755; *Arkansas Cattle Co. v. Mann*, 130 U. S. 69, 9 Sup. Ct. 458, 32 L. Ed. 854; *Kenyon v. Gilmer*, 131 U. S. 22, 9 Sup. Ct. 696, 33 L. Ed. 110; 29 Cyc. 1022, 1023, and cases cited.

It is argued that to permit a remittitur, or to require it as a condition of refusing a new trial, is to substitute the court's judgment for that of a jury, to the latter of which the defendant is entitled. But it is to the jury's judgment that defendants object when they appeal to the court for new trials on the ground of excessive verdicts. The trial court has undoubted power to determine whether the verdict is or is not excessive, and in considering the question usually determines in its own mind the maximum amount for which a verdict could with propriety be permitted to stand. Where there has been no error of law committed which would require a retrial, and it appears that the excessive verdict has resulted from too liberal views as to the damages sustained, rather than from prejudice or passion, to permit a remission of the excess, instead of putting the parties to the expense of a new trial, promotes justice and puts an end to the litigation. Of course, if it appears that the verdict is tainted by prejudice or passion, and does not represent the dispassionate judgment of the jury upon the question of the right of the plaintiff to recover, a new trial should be granted. But we think that the trial court is in a better position to determine whether the verdict is so tainted than is this court, and that unless it clearly appears from the record that the excessive verdict resulted from prejudice or passion, rather than from that liberality which jurors sometimes exercise in cases which appeal to men's sympathies, we should accept the trial court's determination. The trial court in this case has determined that the jury was not influenced by passion or prejudice, and we see no reason for not accepting its conclusion.

Other rulings of the court are assigned as error and have received our consideration, but they are not of sufficient importance to warrant discussion here. We find no reversi-

ble error in the record, and affirm the judgment of the district court.

KENT, O. J., and LEWIS and DOE, JJ., concur.

DOAN, J. (specially concurring). I concur in the result arrived at in this case, but not in the analysis given of the opinion of this court in the Fitchett Case. This court held in the Tomlinson Case that a trial court has the power to make a remission of excessive damages a condition precedent to denying a new trial, but said: "If it is apparent to the trial court that the verdict was the result of passion or prejudice, a remittitur should not be allowed, but the verdict should be set aside. * * * When the circumstances, as they may appear to the trial court, indicate that the jury deliberately disregarded the instructions of the court, or the facts of the case, a remittitur should not be allowed, but a new trial should be granted. If they do not so indicate, and the plaintiff voluntarily remits so much of the damages as may appear to be excessive, the court, in its discretion, may allow the remission and enter judgment accordingly." In the Fitchett Case, this court held that it was apparent that the jury was influenced by passion or prejudice, and that, therefore, a new trial should have been granted.

The trial court in the case now under consideration has determined that the jury was not influenced by passion or prejudice; the record discloses no reason for refusing to accept its conclusion; the affirmance of the judgment of the lower court is, therefore, in perfect harmony with the former rulings of this court in both the Tomlinson and Fitchett Cases.

(83 Nev. 581)

In re SCHNITZER. (No. 1,901.)

(Supreme Court of Nevada. Jan. 26, 1911.)

1. ATTORNEY AND CLIENT (§ 38*)—SUSPENSION AND DISBARMENT—UNPROFESSIONAL CONDUCT—"MISCONDUCT."

For an attorney to publish and advertise a pamphlet, the purpose of which is to attract nonresidents to the state to apply to its courts for divorce, through his agency as an attorney, that he may profit financially thereby, is "misconduct," within Comp. Laws, § 2625, providing for removal or suspension of attorneys for misconduct.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 51, 61; Dec. Dig. § 38.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4531, 4532; vol. 8, p. 7722.]

2. ATTORNEY AND CLIENT (§ 58*)—UNPROFESSIONAL CONDUCT—PUNISHMENT.

An attorney who published and advertised a pamphlet to attract nonresidents to the state to apply for divorce through him will be shown leniency, and suspended for only eight months, and till the further order of the court; he having discontinued the advertising when his attention was called to his methods being con-

demned by the bar association of the city, and his being the first case of the character brought to the attention of the court.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 70-78; Dec. Dig. § 58.*]

In the matter of the application for the disbarment of William H. Schnitzer as an attorney at law. Respondent suspended.

The respondent, William H. Schnitzer, was admitted to practice in all the courts of this state upon the 18th day of January, 1907, upon motion based upon a license to practice in the courts of the state of New York and upon a showing of good moral character. Respondent filed a demurrer to the petition filed by the Reno Bar Association, praying for his disbarment, which was overruled, whereupon he interposed an answer. The main facts upon which the petition is based are not denied, but certain allegations in the petition, based upon such facts, are denied.

The following are the principal facts upon which the proceeding is based:

Prior to the institution of these proceedings, the respondent caused to be published in the programs of the Orpheum Theater of San Francisco advertisements reading as follows:

DIVORCE LAWS OF NEVADA.

Have you Domestic troubles,
Are you seeking DIVORCE?
Do you want quick and reliable action?

Send for my booklet

Contains Complete Information FREE
Shortest Residence
Address

Counsellor, P. O. Box 263, Reno, Nevada.
Correspondence Strictly Confidential.

DIVORCE LAWS OF NEVADA.

Send for my booklet
Contains information FREE
Address:

Counsellor, P. O. Box 263, Reno, Nevada.
(W. Shafer)
Correspondence Strictly Confidential.

DIVORCE LAWS OF NEVADA

Have you Domestic Troubles
Are you seeking DIVORCE?
Do you want quick and reliable action?

SEND FOR MY BOOKLET

Contains Complete Information FREE
Shortest Residence
Address

W. H. SCHNITZER

Counsellor, P. O. Box 263, Reno, Nevada,
Correspondence Strictly Confidential.

Upon certain days during the month of April, 1909, the respondent caused to be inserted in the Brooklyn Daily Eagle of Brooklyn, N. Y., and in the Washington Post of Washington, D. C., newspapers of large circulation, the following advertisement: "Divorce Laws of Nevada. Complete Information Mailed Free by Attorney William K. Shafer, Reno, Nevada." The "W. Shafer" and the "William K. Shafer" mentioned in the foregoing advertisements was intended for a certain William B. Shafer, who for a time was in the office of the respondent.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ent, but who was not an attorney of this court.

In January, 1909, the respondent published a 24-page pamphlet for general distribution, the title page of which reads:

DIVORCE PRACTICE AND PROCEDURE.

Under the Laws of the State
of Nevada, with Notes
and Decisions.

Compiled and Digested by
WILLIAM H. SCHNITZER
of the Nevada Bar.

Published at Reno, Nevada,
January, 1909.

The preface to the pamphlet reads:

"Preface.

"The purpose of this treatise is to briefly, tersely, concisely, and clearly present to the reader the divorce practice and procedure under the laws of the State of Nevada.

"While the laws of the eastern and middle west States generally, contain some provision for the dissolution of the marriage tie, it is obvious to the reader that in cases where extreme cruelty, desertion and neglect to provide form the basis of the grievance, the law in such States offers no substantial relief to the aggrieved party, because the requirements of proof, duration of offense, corroboration of plaintiff, and procedure under court rules are so exacting and irksome, that the desired relief sought by applicant is rendered impossible of attainment.

"Summing up the situation, as it exists in the eastern States, respecting the domestic relation law, the client when consulting local counsel, is almost invariably advised that upon the facts submitted he or she is without remedy.

"Here in Nevada, the applicant, without deception or fraud, upon almost any charge, from which lack of harmonious relations may be reasonably inferred, may apply to our courts and secure prompt results, by decree of absolute divorce, valid and binding in law. The next few pages will contain the statutes of Nevada applicable together with a brief interpretation, supported by Supreme Court decisions, clearly indicating the superior advantages afforded applicant under the law and procedure of Nevada.

"William H. Schnitzer."

The pamphlet is divided into subjects under the following headlines: "Divorce Statutes." "Causes." "Cruelty as Interpreted by Judicial Decisions." "Residence." "Summons and Service; How Made Upon Defendant." "Service of Non-Resident by Publication." "Appearance of Defendant." "Testimony and Hearings Before the Court." "Alimony and Custody and Support of Children." "Decree of Divorce Shall Provide." "The City of Reno, Nevada." "Summary." "Your Selection of Lawyer." "My References."

Without setting forth a copy of the pamphlet in full, the following extracts will serve to show its general import:

112 P.—54

"Residence.

"Under the provisions of section 22 of the Marriage and Divorce Act, the plaintiff must reside in the State for a period of at least six months. This is not construed to mean that in order to fully comply with the statute, party must remain here continuously for said period. So, if a party comes to Nevada, and in good faith takes up a residence, party may leave the State at any time after establishing residence, may go and travel when and wherever party chooses and may return to the State whenever inclination prompts, and yet, such temporary absence would not in anywise affect the legality of the residence established, but party would be entitled, under the law, to bring suit any time after the lapse of six months from the date residence was originally established, notwithstanding party's absence from the State during said period.

"Upon a careful reading of section 22 (page 5) the reader will note several exceptions to the rule requiring a residence in the State of six months, viz.: *In any case where the defendant may be found, or may reside within the State.* The residence of the plaintiff is immaterial, and it is not necessary to prove any period of residence on the part of plaintiff; so, in cases where defendant is willing to facilitate the plaintiff, and will come to Nevada and remain here long enough to enable plaintiff to procure the service of the summons on defendant personally, within the State, then in that case, suit may be filed at once regardless of the duration of plaintiff's residence here, and under such circumstances the court will acquire complete jurisdiction."

"Appearance of Defendant.

"A defendant shall be deemed to appear in an action when he answers, demurs or gives the plaintiff or her attorneys written notice of his appearance, or when an attorney gives notice of appearance for him.

"Compiled Laws of Nevada, section 3594.

"A voluntary appearance of defendant shall be equivalent to personal service of summons upon him.

"Compiled Laws of Nevada, section 3130.

"In many cases the voluntary appearance of defendant may be procured, thereby saving the time and avoiding the tedious delays incident to service of process and proofs of service. To that end I am in position to recommend to my clients, the names of reputable attorneys in the State, who, upon written instructions from defendant will enter an appearance in his or her behalf, which practice is frequently resorted to for the purpose of bringing the main issue speedily before the court."

"Testimony and Hearings Before the Court.

"After the completion of the service of the Summons upon the defendant as herein set forth, and his time to appear for answer has

expired, the plaintiff may at once proceed with hearing before the court. Our courts are always in session to hear testimony in uncontested divorce proceedings, and the hearing can be set for any day, on motion of counsel. In all such cases where there is no real contest, the oral testimony of plaintiff, without corroborative testimony, (usually required in other States) before the Judge, in *private chambers*, in support of the allegations of the Complaint is deemed sufficient.

"This rule of practice is in line with the provisions of section 26 of the Domestic Relation Act, Laws of Nevada."

"The City of Reno, Nevada.

"Important questions that will appeal to many, before deciding to leave their present domicile, and coming to this Western country are: What sort of a place is Nevada with respect to climate, comfort and convenience of life and opportunity of engaging in business, or securing lucrative employment?

"To fully cover this ground and to do justice to the grandeur and industrial enterprises of this great-greatest-mineral State, would alone require a volume. I will only reply briefly and tersely to these interrogatories, and for further and more complete information on the subject will be pleased to reply by letter to special inquiry.

"Reno, the commercial metropolis of Nevada, is beautifully situated on the Truckee River, at an elevation of 4495 feet above sea level, and is on the main line of the Southern Pacific Railroad, overlooking the majestic Sierra Nevada Mountains, and is just 26 miles easterly from the borders of California; just two hours ride from Lake Tahoe, the most beautiful and picturesque lake in America, and the mecca of society and fashion; the climate is dry, healthy and invigorating; is especially favorable to the treatment of bronchial and pulmonary troubles; there are no sudden extremes of heat and cold.

"Reno is the seat of the State University, has public library, seven churches of all religious dominations, five banks with combined deposits of over six million dollars, three theatres, four modern up-to-date fire-proof hotels, six and half miles of street railway, operated through the leading streets, beautiful public and office buildings, and magnificent homes.

"The cost of living in Nevada, all things being considered, is as low as any part of the country, and employment in all branches of labor is readily obtained at good wages. Steady and industrious mechanics should experience no difficulty in securing employment at a high rate of wages."

"Summary.

"Summarizing all that has been herein submitted to the reader, and as sound reasons why the greatest advantages and facilities

are afforded under the law and practice of Nevada, to those seeking speedy release from the marital relations we submit as follows:

"1. The shortest period of residence, viz. six months.

"2. In special instances, when defendant may be found in the State, suit may be filed at once without a delay of six months.

"3. The great number of grounds, viz. seven distinct and separate grounds.

"4. The simplest and least difficult grounds to prove: (Reading carefully citations under subdivision of 'Cruelty').

"5. No delays after time for defendant to answer has expired, our courts being always in session to hear testimony in uncontested cases.

"6. Under the charge of Extreme Cruelty plaintiff may allege and prove any facts or acts producing mental anguish and *threatening* health.

"7. Under the practice of our courts, where no real contests exists, parties are not subjected to embarrassing cross examinations.

"8. In all uncontested cases parties may, on application of counsel, have hearings conducted in private chambers of the Judge and thereby avoid embarrassing publicity and exposure to the public.

"9. Unlike the practice and rule in most States, the sole testimony of plaintiff, without corroborative proofs, is sufficient to establish the allegations of the complaint in all undefended actions.

"10. A decree absolute is granted immediately, after proofs are submitted, so that party receiving same may marry again at once, and is not obliged to wait for any period thereafter as is the law in many States.

"11. Here in Nevada, we have up-to-date Cities where one may enjoy all the comforts, conveniences and luxuries of an Eastern metropolis, and may indulge in little journeys into the adjoining State, California, which is justly styled the land of 'Sunshine and Flowers.'"

"Your Selection of a Lawyer.

"Lastly, but most importantly, is the question for you to determine: Who shall I select as my attorney to conduct my proceedings? Naturally you want the best, the most skillful and reliable talent obtainable, one in whose judgment and advice you will place implicit confidence before you incur the expense and time in travelling to this State to establish your new residence.

"It may sound somewhat boastful to shout my own praise, but under the circumstances it is necessary that I tell you frankly who I am, and how I stand in this community.

"The writer has had twenty years experience in the actual practice of the law at the New York and Nevada Bar. I pride myself in being able to state, with perfect frankness and candor, that during the three years of active practice at the Nevada bar I have earned and won the friendship, respect and

esteem of my colleagues at the bar and the Judges on the Bench.

"I have made it a rule of my conduct to always make my word good and deal on the square with everybody. I am a member of the executive committee of the State democratic organization.

"A sense of modesty impels the writer to refrain from further self-aggrandizement; but with the consciousness of my own record in this Commonwealth, and with a full realization that those who know me will be willing to say a kind word for me and will testify to my good reputation and high standing, I unhesitatingly submit to the inquirer a few of my references."

Under the heading of "My References," the respondent appends the names of judges, a United States Senator, the Acting Governor of the state, attorneys, editors, and prominent business men of the state, at least one of whom is shown to have repudiated the use of his name in such manner.

The concluding page of the pamphlet reads as follows:

WILLIAM H. SCHNITZER,
Attorney and Counsellor-at-Law,
Rooms 10, 11, 12 and 13,
Gazette Building,
Reno, Nevada.
Branch Offices:
Goldfield, Nevada,
Carson City, Nevada,
Tonopah, Nevada,
Rawhide, Nevada.

Commercial and Mining Practice and Litigation in all State and Federal Courts.

Depositions carefully taken. Correspondence in Reference to Financial Standing of Parties will receive prompt attention. For references see page 18.

Twenty years active experience in commercial litigation and practice.

Sylvester S. Downer, Chas. R. Lewers, James T. Boyd, W. A. Massey, and Cole L. Harwood, for petitioner. Platt & Gibbons, for respondent.

PER CURIAM. That the purpose of the pamphlet, published by respondent, was to attract persons, residing outside the state of Nevada, and citizens of other states and counties, to come to this state for the ultimate purpose of applying to its courts for divorce, through the agency of the respondent as an attorney, in order that he might profit financially thereby, is too manifest to require other than the bare statement. That the object of the advertisements quoted was to extend the circulation of the pamphlet is equally obvious. This method of advertising is highly reprehensible and contrary to the ethics of the legal profession, as universally recognized. Even if statements contained in the pamphlet were not open to question, either as to fact or law, nevertheless, the purpose for which the pamphlet was issued and the advertisements published merits a severe rebuke. The pamphlet, however, contains statements that, to say the least, are mislead-

ing. It is not true that the laws of this state permit a divorce "upon almost any charge from which lack of harmonious relations may be reasonably inferred." It is not true that the testimony of the plaintiff in a divorce case whether or not there be a "real contest" can be heard "before the judge in private chambers." The testimony in divorce proceedings must be before the court. An action for the dissolution of the bonds of matrimony, whether contested or not, is not a proceeding that a judge can hear in chambers. Even if we were to accept the explanation of respondent that he only intended to convey the information that in uncontested cases the court could hold sessions in the private chambers of the judge, nevertheless, that would not be the meaning which the layman would naturally place upon the language used.

Petitioners have attacked the correctness of a number of statements contained in respondent's pamphlet as to the law of this state upon the subject of divorce; but we do not deem it essential in this proceeding to determine these questions. It would be sufficient to rest our condemnation of the conduct of the respondent upon the pamphlet and advertisements upon a bare recital of the same without comment. They speak for themselves and are unworthy the high calling that respondent has followed, as he says, for 20 years. The courts of Nevada were established and are maintained for the protection of her citizens and citizens of other states and countries having dealings with the citizens of this state. An attorney who, for purposes of personal gain, seeks to make the courts of this state a clearing house for the domestic woes, real or imaginary, of the country at large, is certainly guilty of misconduct. Comp. Laws, § 2625; *People v. MacCabe*, 18 Colo. 186, 32 Pac. 280, 19 L. R. A. 231, 36 Am. St. Rep. 270; *People v. Taylor*, 32 Colo. 250, 75 Pac. 914; *Ingersoll v. Coal Creek Coal Co.*, 117 Tenn. 263, 98 S. W. 178, 9 L. R. A. (N. S.) 282, 295, 119 Am. St. Rep. 1003; *People v. Goodrich*, 79 Ill. 148; 4 Cyc. 911.

In *People v. MacCabe*, supra, the Supreme Court of Colorado, by Mr. Justice Elliott, said:

"The ethics of the legal profession forbid that an attorney should advertise his talents or his skill as a shopkeeper advertises his wares. An attorney may properly accept a retainer for the prosecution or defense of an action for divorce when convinced that his client has a good cause. But for any one to invite or encourage such litigation is most reprehensible. The marriage relation is too sacred; it affects too deeply the happiness of the family; it concerns too intimately the welfare of society; it lies too near the foundation of all good government—to be broken up or disturbed for slight or transient causes.

"In the present case we are not called up-

on to deal with a matter of ordinary advertising, but with a peculiar kind of advertising. Respondent did not advertise for business openly, giving his name and office address. His advertisement was anonymous and well calculated to encourage people to make application for divorces who might otherwise have refrained from so doing. When a lawyer advertises that divorces can be legally obtained very quietly, and that such divorces will be good everywhere, such advertisement is a strong inducement—a powerful temptation—to many persons to apply for divorces who would otherwise be deterred from taking such a step from a wholesome fear of public opinion. * * *

The advertisement published by respondent, to the effect that divorces could be legally obtained very quietly which should be good everywhere, was the more mischievous because anonymous. Such an advertisement is against good morals, public and private; it is a false representation and a libel upon the courts of justice. Divorces cannot be legally obtained very quietly which shall be good anywhere. To say that divorces can be obtained very quietly is equivalent to saying that they can be obtained without publicity. Every lawyer knows that to obtain a legal divorce a public record must be made of the proceeding; the complaint must be filed; the summons must issue; process must be served upon the defendant either personally or by publication in a public newspaper; proof must also be taken; and a decree must be publicly rendered by the court having jurisdiction of the proceeding. All these public proceedings the statute imperatively requires, and for a lawyer by an advertisement to indicate that such public proceedings can or will be dispensed with by the courts having jurisdiction of such cases is a libel upon the integrity of the judiciary that cannot be overlooked when brought to our notice.

"In the case of *People ex rel. v. Brown*, 17 Colo. 431 [30 Pac. 338] this court said: 'When this court grants a license to a person to practice law, the public, and every individual coming in contact with the licensee in his professional capacity, have a right to expect that he will demean himself with scrupulous propriety, as one commissioned to a high and honorable office. A person enjoying the rights and privileges of an attorney and counselor at law must also respect the duties and obligations of the position.'

"The case of *People ex rel. v. Goodrich*, 79 Ill. 148, was a disbarment proceeding under statutes from which ours were undoubtedly borrowed. Among other things, the complaint against Goodrich set forth that he had published advertisements without signature, representing that he could procure divorces without publicity, and by such advertisements solicited business of that character by communication through a particular post office box. The Goodrich Case, though similar to the one before us, was more aggravat-

ed in some respects. Mr. Justice Breese, in delivering the opinion of the court, said: 'This court, having power, by express law, to grant a license to practice law, has an inherent right to see that the license is not abused, or perverted to a use not contemplated in the grant. In granting the license, it was on the implied understanding that the party receiving it should, at all times, demean himself in a proper manner, and if not reflecting honor upon the court appointing him, by his professional conduct, he would at least abstain from such practices as could not fail to bring discredit upon himself and the court. * * * The morals of defendant's professional conduct deserves special notice. He makes divorce cases a specialty. How many persons in our broad land weary of the chain that binds them? How many are eager to seize upon the slightest twig that may appear to aid them in escaping from a supposed sea of troubles, in which wedded life has immersed them? How many are fretting under imaginary ills, and what better devices than those practiced by this defendant could be contrived to increase these disquietudes, and stimulate to effort, by perjury, if need be, to free themselves from their supposed unhappy condition? Is it desirable that divorce cases should accumulate in our courts? If so, the defendant is justified in the means he has used, and is using, to that end. An honorable, high-toned lawyer will always aid a deserving party seeking a divorce, as coming strictly within his professional duties. He will render the aid, not solicit the case; and he will, in all things regarding it, act the man, and respect, not only his own professional reputation, but the character of the courts, and discharge the unpleasant duty in all respects as an honorable attorney and counselor should do.'"

While this proceeding presents to the court a situation demanding punitive action, and while the higher interests of the public must not be underestimated, the effect upon the respondent of any action by this court must not be lost sight of and should be given impartial consideration. An attorney is required to spend years in preparation for the practice of his profession, and this, together with his years of experience, is, very often, his greatest asset.

Chief Justice Marshall, in *Ex parte Burr*, 9 Wheat. 529, 6 L. Ed. 152, covered the situation fully in the following apt words: "On the one hand, the profession of an attorney is of great importance to an individual, and the prosperity of his whole life may depend on its exercise. The right to exercise it ought not to be lightly, or capriciously taken from him. On the other, it is extremely desirable that the respectability of the bar should be maintained, and that its harmony with the bench should be preserved. For these objects, some controlling power, some discretion, ought to reside in the court. This

discretion ought to be exercised with great moderation and judgment; but it must be exercised; and no other tribunal can decide, in a case of removal from the bar, with the same means of information as the court itself."

As some extenuation of the respondent's unprofessional conduct, it appears that, when the bar association of Reno called his attention to the fact that his methods of advertising were condemned by the association, he discontinued the objectionable advertising in newspapers and theater programs and has since refrained from the same. As this is the first case of this character that has been brought to the attention of this court, we are disposed to be lenient with the respondent.

It is ordered that the respondent be, and he hereby is, suspended from the practice of the law for a period of eight months and until further order of this court, and that he pay the costs of this proceeding.

(159 Cal. 34)

PEOPLE v. MULCAHY et al. (Sac. 1,780.)
(Supreme Court of California. Dec. 27, 1910.)

1. JUDGMENT (§ 279*)—JUDGMENT ROLL—CONTENTS.

Under the express provisions of Code Civ. Proc. § 670, subd. 1. the judgment roll, where the complaint is not answered by any defendant, and where service is made by publication, embraces the affidavit for publication of summons and the order directing the publication.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 551; Dec. Dig. § 279.*]

2. JUDGMENT (§ 153*)—VACATION—TIME FOR PROCEEDINGS.

Code Civ. Proc. § 412, provides that where defendant resides out of the state, has departed therefrom, cannot after due diligence be found there, or conceals himself to avoid service of summons, and the fact appears by affidavit, and it also appears by affidavit or by the verified complaint that a cause of action exists against defendant, or that he is a necessary or proper party to the action, or that the action relates to property in the state in which such defendant has or claims an interest, the court or judge may make an order that service be made by publication. *Held* that, in the absence of a sufficient affidavit, and where the complaint is not verified, and the affidavit is insufficient, stating merely that affiant was acquainted with the facts of the case and verily believed that plaintiff was entitled to the relief sought, and that defendant sought to be served was a necessary and proper party defendant without affirming directly or on information and belief that the facts alleged in the complaint were true, it appears in the judgment roll itself, and hence upon the face of the judgment, that it was void for want of jurisdiction on service of summons by publication, no order for such service being authorized, so that though relief against the judgment was not demanded within the time limited by Code Civ. Proc. § 473, providing that, where a summons has not been personally served, the court may allow defendant at any time within a year after judgment to answer to the merits, the court could set aside the judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 309-304; Dec. Dig. § 153.*]

3. PROCESS (§ 85*)—SERVICE BY PUBLICATION.—NECESSARY COMPLIANCE WITH STATUTE.

Actions wherein service of summons is had by publication are in invitum, and strict compliance with the statute is necessary.

[Ed. Note.—For other cases, see Process, Cent. Dig. § 99; Dec. Dig. § 85.*]

Department 2. Appeal from Superior Court, Placer County; Henry C. Gesford, Judge.

Action by the People against Patrick Mulcahy and others. There was a judgment for plaintiff, and, from an order setting it aside, plaintiff appeals. Affirmed.

Charles A. Tuttle and M. W. McIntosh, for appellant. Chauncey H. Dunn, J. D. Meredith, and J. B. Landis, for respondents.

MELVIN, J. Appeal from an order setting aside a default judgment.

In August, 1899, the district attorney of Placer county filed a complaint to foreclose the interest of Patrick Mulcahy in certain school lands and to cancel his certificate of purchase. The summons was served by publication, and upon default of the defendant a decree of foreclosure was made and entered on December 4, 1899. On June 14, 1900, James T. and Theodore F. Hill as grantees by mesne conveyances from said Patrick Mulcahy gave notice of motion to vacate the judgment, and after due hearing the motion was granted July 14, 1909. The material part of the court's finding was as follows: "That said judgment in said action is null and void on its face, and that the court never acquired jurisdiction over the person of defendant. That no service of summons, either actual or constructive, was ever made upon the defendant."

Appellant contends that the judgment is not void upon its face, and that therefore the court had no power to consider the affidavit of James T. Hill (one of the petitioners); the relief not having been demanded within the time limited by section 473 of the Code of Civil Procedure, citing *People v. Davis*, 143 Cal. 675, 77 Pac. 651. There can be no doubt of the correctness of the rule announced in the above-cited case, and it therefore becomes our duty to scan the judgment roll and to see whether or not invalidity of the judgment is apparent from an inspection thereof. This case differs from *People v. Davis*, supra, in the fact that section 670, subd. 1, of the Code of Civil Procedure, is applicable here as it has stood since the amendment of 1895, and we are permitted to consider the affidavit for the publication of summons and the order directing publication.

The only important problem in this case arises over the interpretation of section 412, Code Civ. Proc. The respondent contends that, under the requirements of this section, it must appear by affidavit or by the verified complaint on file that a cause of action ex-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ists against defendant, or that he is a necessary or proper party to the action. The complaint is not verified. The affidavit of the district attorney upon which the order for publication of summons was based stated substantially that he was acquainted with the facts of the case and verily believed that plaintiff was entitled to the relief sought and that Mulcahy was a necessary and proper party defendant. He did not affirm directly or on information and belief that the facts alleged in the complaint were true. Respondent contends that the affidavit in order to be effective must state probative facts from which the court could ultimately conclude that a cause of action against defendant exists and that he is a necessary and proper party, citing *County of Yolo v. Knight*, 70 Cal. 431, 11 Pac. 662, and *Columbia Screw Co. v. Warner Lock Co.*, 138 Cal. 446, 71 Pac. 498. These cases undoubtedly sustain respondents' theory. Appellant contends that the amendment of 1895 to section 412, Code Civ. Proc. changed the pre-existing rule and dispensed with the necessity of having a verified complaint in certain classes of cases. The material portion of that section is as follows: "Where the person on whom service is to be made resides out of the state; or has departed from the state; or cannot, after due diligence, be found within the state; or conceals himself to avoid the service of summons; or is a foreign corporation having no managing or business agent, cashier or secretary within the state, and the fact appears by affidavit to the satisfaction of the court or a judge thereof; and it also appears by such affidavit, or by the verified complaint on file, that a cause of action exists against the defendant in respect to whom the service is to be made, or that he is a necessary or proper party to the action; or when it appears by such affidavit, or by the complaint on file therein, that it is an action which relates to or the subject of which is real or personal property in this state, in which such person defendant or foreign corporation defendant has or claims a lien or interest, actual or contingent, therein, or in which the relief demanded consists wholly or in part in excluding such person or foreign corporation from any interest therein, such court or judge may make an order that the service be made by the publication of summons. * * *

The position of the appellant is that the words "the complaint on file herein," contained in that part of the section which was adopted in 1895, dispenses with the necessity of verification of the complaint in cases like the one here considered because in the preceding clause the words "the verified complaint on file" are used. We cannot agree with this. The filing of a verified complaint (in the absence of a sufficient affidavit) is

contemplated in the other parts of the section, and, when the reference of the statute is to "the complaint on file herein," evidently such verified complaint was in the contemplation of the Legislature. There is no good reason why some sort of verification should be required in one class of cases and none in an equally important kind of actions. The word "herein" used in the statute, although awkwardly employed, indicates that reference was intended to the sort of complaint mentioned elsewhere in the section.

Actions of this sort are in invitum, and strict compliance with the statute is necessary. *Columbia Screw Co. v. Warner Lock Co.*, supra. As we have seen, the statute was not closely followed in the requirement that the facts necessary to establish a cause of action should be alleged by a verified instrument—the complaint or the affidavit. This appears upon the face of the judgment; that is to say, in the judgment roll itself. It follows that the order of the court setting aside the judgment was properly made. This conclusion makes it unnecessary to discuss the other points mentioned in the briefs.

The order is affirmed.

We concur: LORIGAN, J.; HENSHAW, J.

(159 Cal. 1)

GRANGER et al. v. SUPERIOR COURT OF NEVADA COUNTY et al. (S. F. 5345.)

(Supreme Court of California. Dec. 21, 1910.)

1. PROHIBITION (§ 10*)—JURISDICTION OF COURT.

The grantee of a purchaser from executors sued to quiet title and obtained judgment, which was reversed on appeal on the ground that the sale by the executors did not pass title because not confirmed by the court. A defendant in his dual capacity of coexecutor and residuary legatee filed a cross-complaint for an accounting by the purchaser and his grantee of the rents, subject to a deduction for improvements. The original complaint of the grantee was stricken out and the case proceeded on the cross-complaint. Judgment was rendered against the purchaser and the grantee, but the grantee obtained a new trial, and a decision was again rendered against him, but no judgment was entered thereon. Subsequently another executor filed an amended complaint to quiet title and for an accounting. Held that, while the judgment conclusively settled the account between the purchaser and the estate of testator, and while the striking out of the complaint of the grantee left only the matter of accounting at issue, the court had jurisdiction to proceed to the entry of judgment as to the grantee, and prohibition could only issue so far as to prevent further proceedings against the purchaser on behalf of the estate or the executors thereof.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. §§ 37-56; Dec. Dig. § 10.*]

2. PROHIBITION (§ 10*)—JURISDICTION OF COURT.

A purchaser of real estate from executors obtained no title because the sale was not confirmed by the court, and he conveyed the property to a third person. A devisee conveyed his interest to the third person's husband, and the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

third person and her husband conveyed to the purchaser, who brought suit to quiet title. Pending the suit a judgment adjudging that he held possession of the property as trustee of the estate of testator, and that there was due from the estate on account of the purchase money paid to the executors, after deducting the rents received, a specified sum, was rendered. A judgment denying relief was reversed on appeal, and on remand a cross-complaint was filed by an executor. *Held*, that the court had jurisdiction of the case, so that prohibition to restrain it from proceeding in the case could not lie, though the judgment rendered pending the suit could be pleaded as an adjudication of the matters determined by it.

[Ed. No.e.—For other cases, see Prohibition, Cent. Dig. §§ 37-56; Dec. Dig. § 10.*]

In Bank. Application for writ of prohibition by Samuel Granger and another against the Superior Court of Nevada County, and George L. Jones, judge thereof. Granted in part; denied in part.

Thos. S. Ford and Ed. V. Henley, for plaintiffs. C. W. Kitts and J. M. Walling, for defendants.

PER CURIAM. This is an application to this court for a writ of prohibition against further proceedings in the superior court of Nevada county in two certain actions in said court: (1) The action of Mary A. Benallack against William G. Richards, James Benallack, and Francis L. Richards, as executors of the estate of Phillip Richards, deceased, and William S. Richards and William G. Richards, as individuals, begun February 11, 1895, and numbered 2,343 in said court; (2) the action of Samuel Granger against the same parties, begun May 18, 1897, and numbered 2,635 in said court. The general ground upon which prohibition is asked is that a judgment has been rendered in the first-named action which disposes of all the matters at issue between the parties in both actions and that said judgment has become final. Although the cases involve the same facts, they will require separate consideration.

1. The complaint in the action of Mary A. Benallack in substance stated a cause of action to quiet title to lot 28 in block 30 in Nevada City. The complaint alleged that Phillip Richards died seised of this lot on March 27, 1887, that his will was duly probated and the above-named parties appointed the executors thereof, that they were empowered by the will to sell and convey real or personal property of the estate without any order of court, that on May 11, 1891, as such executors, they sold and conveyed said lot to Samuel Granger for \$3,305, which sum was paid to the executors and by them distributed among the legatees under the will, that thereafter Granger conveyed the property to the plaintiff Mary A. Benallack, and that the defendants claimed an interest in the lot adverse to her. The answer of William G. Richards and William S. Rich-

ards alleged that the deed from the executors to Granger was never reported to the superior court or confirmed, that the purchase money therefor was in fact paid by James Benallack, and that Granger bought the same on behalf of said James Benallack. Judgment was rendered in favor of the plaintiff from which an appeal was taken to the Supreme Court, and said judgment was reversed on April 6, 1897; the opinion being reported in 116 Cal. 405, 48 Pac. 622. The ground of reversal was that a sale made by executors under a power given to them by the will of the deceased did not pass title to the grantee unless the sale was confirmed by the court.

On December 2, 1897, after the coming down of the remittitur, Francis S. Richards, one of the defendants, in the dual capacity of coexecutor and residuary legatee, filed a cross-complaint in the action. Therein he set forth the facts hereinbefore stated, including the failure to confirm the sale by the executors to Granger, and further that Granger took and held possession of the lot from May 11, 1891, until February 9, 1893; that Mary A. Benallack held possession thereafter from the latter date until May 8, 1897; that Francis S. Richards, as devisee, had conveyed his interest in the lot to James Benallack in 1894; that Mary A. Benallack and James Benallack conveyed to Granger on May 8, 1897; that Granger has ever since that time held possession thereof; that James Benallack died on November 13, 1897; that neither Mary Benallack nor Granger had ever accounted for rents received by them from said lot; that each had made valuable improvements thereon; that they were trustees of said rents for the benefit of the estate; and that as such executor he offered to make such restitution to them as the court should direct. The prayer was that Granger be made a party to the action, that an accounting be had of the purchase money paid, the taxes and insurance paid, the repairs made and the rents received, and for general relief. This cross-complaint was served on all the other parties to the action. William G. Richards, the other surviving executor, and William S. Richards, the other residuary devisee, filed a demurrer to said cross-complaint, which was overruled with their consent. They filed no answer within the time allowed, and their default thereon was duly entered. Mary A. Benallack and Granger answered denying, in part, the receipt of the rents as alleged therein, averring payments for improvements, repairs, and taxes, and denying the trust. On these issues a trial was had and on January 24, 1899, findings were filed and judgment given declaring that Granger held possession of the lot as trustee of the estate of Phillip Richards, deceased, that there was due from said estate to him on account of the purchase money

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

paid to the executors, after deducting the rents he had received, the sum of \$2,811.19, and that before the estate would be entitled to the possession of the lot it must pay him said sum. It was also declared that Mary A. Benallack was indebted to the estate on account of rents collected by her while in possession of the lot, in the sum of \$2,198.19. After the filing of the cross-complaint of Richards, the original complaint of Mary A. Benallack was stricken out, and the cause thereafter seems to have proceeded on the theory that she had dismissed her action, and that the case was pending solely upon the cross-complaint of the executor aforesaid. Granger did not appeal from this judgment, nor did the cross-complaining executor, and so far as it adjudged matters at issue between them it has become final. Mary A. Benallack moved for a new trial thereof so far as the issues relating to her were concerned, and the motion was granted. Thereafter a new trial was had and a decision given again declaring her indebted to the estate. No judgment has ever been entered upon this decision. After the judgment of January 24, 1899, to wit, on March 3, 1899, William G. Richards, as executor as aforesaid, by leave of court, filed a pleading styled an amended cross-complaint in said action of Bennalack v. Richards, asking to have the title of the estate to said lot quieted, and for an accounting. To this Granger and Mary A. Benallack filed an answer setting up the judgment of January 24, 1899, as a bar to the cross-complaint and denying the jurisdiction of the court to proceed further in the action.

It is evident from this recital of the facts that the court has not been divested entirely of jurisdiction. While it is true that the judgment of January 24, 1899, conclusively settles the account between Granger and the estate of Richards and establishes Granger's right to hold possession of the lot until the amount due him has been paid, and while the striking out of the original complaint seems to have left no other matter at issue in the case so far as Granger and the estate is concerned, the court still has jurisdiction to proceed to the entry of judgment with respect to Mary A. Benallack. Upon the new trial which she secured, findings were filed; but it appears no judgment has yet been entered. So far as Granger and the estate of Richards is concerned, the litigation in Bennalack v. Richards appears to be at an end, and the court is without jurisdiction to proceed further. Treating this application as separable, a writ of prohibition can issue to prevent further proceedings against Granger on behalf of the estate or the executors thereof in that action. With regard to Mary A. Benallack no case of prohibition has been made.

2. After Granger received the conveyance

of the lot from Mary A. Benallack and her husband on May 8, 1897, he began the action of Granger v. Richards, numbered 2,635 aforesaid. His complaint set out the same facts heretofore recited, stating them somewhat more at length than in the complaint of Mary A. Benallack in Bennalack v. Richards, and prayed for a decree quieting his title to the lot and for general relief. Answers were filed by the defendants and a trial resulted in a judgment in favor of W. G. Richards as surviving executor and residuary legatee. From this judgment Granger appealed to the Supreme Court, and the judgment was reversed. The case is reported in 154 Cal., at page 478, 98 Pac. 528. The opinion declared that Granger was entitled to be reimbursed for the amount of his purchase money and that an accounting should be had of the rents received during his possession. A cross-complaint was filed in that case by William G. Richards, as executor, and the case is still pending; no trial having been had since the reversal of the first judgment. It is obvious that the court still has jurisdiction of that case and that a writ of prohibition cannot be issued. It may be conceded that with respect to everything except the taking of a supplemental account and making of a decree requiring Granger to reconvey the property to the estate upon the payment of the money found due him upon the accounting, the whole controversy has been settled by the judgment in the action of Bennalack v. Richards. But this does not affect the jurisdiction of the court to proceed in the action. That judgment can be pleaded as an adjudication of the matters determined by it, but it cannot be given the effect of depriving the court of jurisdiction.

Let a writ issue prohibiting the superior court of Nevada county from proceeding further in the case of Bennalack v. Richards, except so far as may be necessary to determine and adjudge the issues between the estate of Richards and the estate of Mary A. Benallack, deceased, with respect to the amount due her or for rents received from said lot while she was in possession thereof. In other respects the petition is denied.

BEATTY, C. J., not participating.

(159 Cal. 85)

DE LA GUERRA et al. v. STRIEDEL et al.
(L. A. 2,466.)

(Supreme Court of California. Dec. 29, 1910.
Rehearing Denied Jan. 28, 1911.)

1. APPEAL AND ERROR (§ 1010*)—REVIEW—FINDINGS OF TRIAL COURT.

In an action to restrain defendant from breaking a gate, and to quiet title to a strip of land, evidence considered, and *held* to present some proof tending to support the findings of the trial court that an easement claimed by defend-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ant was permissive only, so that such finding would not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3982; Dec. Dig. § 1010.*]

2. HIGHWAYS (§ 17*)—PRESCRIPTIVE RIGHTS—EVIDENCE.

That certain land is inclosed by a fence is strong evidence, that the use of it by the public is permissive, and based on a mere license of passage.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 24; Dec. Dig. § 17.*]

Department 2. Appeal from Superior Court, Santa Barbara County; James W. Taggart and Samuel E. Crow, Judges.

Action by Delfina de la Guerra and another, against Michael Striedel and another. From a judgment for plaintiffs, defendant named appeals. Affirmed.

Canfield & Starbuck, for appellant. B. F. Thomas, for respondents.

MELVIN, J. Plaintiffs sued to restrain defendants from breaking down a gate which had been built across a strip of land ten feet in width, and to quiet their title against defendants in the said strip of land, which was claimed by the defendants as a right of way extending from the property of defendant Striedl (named in the pleadings as Striedel) to Haley street in the city of Santa Barbara. Defendant John Doe, whose true name was found by the court to be K. Okuhara, having been regularly served and having failed to appear, judgment by default was taken against him. Defendant Striedl by his answer denied plaintiffs' right to close the strip of land in question and counterclaimed a right of way in himself in common with others and the public over the aforesaid property. Treating the counterclaim as a cross-complaint, plaintiffs entered a denial of its allegations, and the case was tried on the issues thus raised. Judgment was entered in favor of plaintiffs, and this appeal is from the judgment and from an order denying defendant Striedl's motion for a new trial.

We mention the default judgment against Okuhara because the respondents raise the point that he is an interested party within the meaning of section 940, Code of Civil Procedure, and that since he has not been served with the notice of appeal nor the bill of exceptions, this court has no jurisdiction to consider these appeals. While there is, perhaps, some force in this contention (see *Niles v. Gonzales*, 152 Cal. 90, 92 Pac. 74, s. c. 155 Cal. 359, 100 Pac. 1080) we have examined the case, and are prepared to sustain the judgment and order on their merits. The court, after finding that plaintiffs were the owners of a certain parcel of land, including the strip over which defendant claimed a right of way, found that neither Striedl nor the public had any easement of way across the whole or any part of said land; that "for many years, viz., since

1880, the said parcel of land has been inclosed and separated from the said Haley street by a good and substantial inclosure with a gateway to enter said parcel of land from said side of Haley street, which gate was made and maintained by the plaintiffs, their tenants and their predecessors in interest, and that said gate was across that portion of said parcel of land, described as an alley in said defendant's answer"; and that "for thirty years the said Michael Striedl, without the knowledge of the plaintiffs, occasionally walked along the said parcel of said land described in said defendant's answer as an alley, but the said defendant at no time asserted to the plaintiffs or their predecessors in interest that he claimed any right of way over said alley, but the said defendant's said occasional use of the same was permissive by the plaintiffs and their predecessors in interest." It was also found that the alley was intended by the plaintiffs and their predecessors to be used by themselves and their tenants, and that it had been so used for 30 years. It appears that in 1875 Mrs. Josefa de la Guerra owned substantially all of the west quarter of a block in the city of Santa Barbara bounded on the southwest by State street and on the northwest by Haley street. Her holding extended 200 feet on Haley street and 232 feet on State street. In that year she conveyed to Col. Hollister the west corner, 60 feet on State street by 100 feet on Haley street. Later she sold to Mr. Stearns a piece of land adjoining Col. Hollister's with a frontage of 75 feet on State street and a depth from that street of 125 feet and a strip 25 feet in width running to Haley street. It will be seen at once that this parcel surrounded the Hollister property on two sides. Later and in the year 1875 Mrs. de la Guerra sold to Striedl the property adjoining that of Stearns. This parcel had a frontage of 25 feet on State street and a depth of 125 feet. Buildings were erected on the three lots above described, and when Mr. Stearns built his back fence, he put it 115 feet from State street, leaving a strip 10 feet wide at the rear of his lot outside the fence. When Striedl built his fence he followed the example of his neighbor, Mr. Stearns, and left a similar space at the rear of his property. He also put a large gate and two doors in his back fence for convenience, he said, in going and coming between his property and Haley street. It is this strip of land over which defendant Striedl claims an easement against the plaintiffs who are the successors in interest of Stearns, the latter's title having been acquired by Mrs. de la Guerra by foreclosure about six years after the sale, and having descended with that of the rest of the property here considered to the plaintiffs. Appellant contends that the user by Striedl for 30 years of this alleyway was presumptively adverse, and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

that the court ignored this presumption by a finding to the contrary, unsupported by competent evidence. The only evidence offered in that behalf, according to appellant's contention, was that the tenants of Mr. Stearns and Mrs. de la Guerra used the alley as much as Mr. Streidl did. An examination of the testimony (which was conflicting) discloses the fact, however, that there was evidence offered on behalf of plaintiffs tending to show that a gate was maintained at the Haley street end of the alley as found by the court. Carlos de la Guerra testified: "We—I say 'we' because I had charge of the property at one time—we have always tried to maintain a gate there since 1874, and when I came to manage the property in 1886 or 1887 up until 1892 or 1893 we always had a gate there, especially so when they paved the street, State street, and paved Haley street, including up beyond the gate there, I had that paved with asphaltum and also paved the passageway with asphaltum through that gate—that was in 1888 or 1889 when I had the asphaltum sidewalk laid there and I had that fence put to the gate, re-established it as I had already done before. I never knew of any one else or any one other than the tenants of this property here having a passageway or using any part of this de la Guerra property that is represented here as vacant or northeast of these lines as a right of way." Mr. Maris, who occupied the property for eight or nine years following 1891 testified, in reference to the Haley street terminus: "There was a gate there all the time when I had the property—there was always a gate up there. It was kept closed most of the time. I had my horses running loose in there, and the gate was generally closed to keep them in; I always looked out for that. It was board fence from the gate down to my tract of land of three or four boards. When I first put up the fence I put up bars there, but I only kept them up a short time, and I put up a gate with hinges. That fence about which I speak as existing on the de la Guerra property along on Haley street, up to this gate, was built along in '91." The same witness said: "While I was the tenant of this property I knew of people making use of this gate going back into this property. The tenants of all the property along there used it. I had no objections to their using it as long as they didn't trespass on the land, I wanted to use there, my crop of hay there, and kept the gate closed. As long as they did that I had no objection. I refer to all the tenants along there, the tenants in the de la Guerra estate there and back of the Odd Fellows (meaning the property formerly sold to Col. Hollister)." Dr. Franceschi, who occupied property on that block for some time, commencing in 1899, testified: "There was a gate there. I think that gate has been there all the time since I

went there. I don't know whether it has been there recently or whether it had been there for some time, but it was there a good many years." It will thus be seen that there is some evidence to sustain the finding that the property had been fenced and that the use of the alleyway was merely permissive. Counsel for appellant are of the opinion that Carlos de la Guerra's testimony was so discredited as to be worthless, but we cannot interfere with the peculiar function of the trial court in passing upon the weight of evidence. The showing that the land had been inclosed by a fence would strongly indicate that the use of it by the public was merely permissive and "is strong evidence in support of a mere license to the public to pass over the designated way." *Quinn v. Anderson*, 70 Cal. 456, 11 Pac. 746; *Huffman v. Hall*, 102 Cal. 30, 36 Pac. 417. We think that there is sufficient evidence to justify all of the findings of the court and to sustain the judgment.

The judgment and order therefore are affirmed.

I concur: LORIGAN, J.

(159 Cal. 49)

CALIFORNIA WINE ASS'N v. COMMERCIAL UNION FIRE INS. CO. OF NEW YORK. (S. F. 5,261.)

(Supreme Court of California. Dec. 28, 1910.)

1. APPEAL AND ERROR (§ 1070*)—HARMLESS ERROR—ERRONEOUS SPECIAL VERDICT.

An incorrect special verdict is harmless error when another consistent special verdict correctly found sustains the judgment.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4231-4233; Dec. Dig. § 1070.*]

2. JUDGMENT (§ 279*)—JUDGMENT ROLL—SPECIAL VERDICTS.

Under Code Civ. Proc. § 670, subd. 2, making a copy of the verdict a part of the judgment roll, special verdicts controlling a general verdict are properly included.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 546-551; Dec. Dig. § 279.*]

3. APPEAL AND ERROR (§ 654*)—RECORD—AMENDMENT—ESTOPPEL BY STIPULATION.

Where appellant seeks to overthrow the general verdict by showing error as to one of the issues, the judgment roll may be amended by incorporating the special verdicts to show that the judgment is sustainable regardless of the alleged error, though respondent has stipulated that the transcript is correct and that the appeal be heard thereon.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 654.*]

4. APPEAL AND ERROR (§ 656*)—RECORD—AMENDMENT—STIPULATION—EVIDENCE.

Evidence on respondent's application to incorporate special verdicts in the judgment roll held to show that respondent did not waive his right thereto in consideration of appellant omitting from the bill of exceptions special interrogatories refused.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 656.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

5. WITNESSES (§ 240*)—EXAMINATION—LEADING QUESTIONS—JUDICIAL DISCRETION.

Allowance of leading questions in examining witnesses is discretionary with the trial court.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 795; Dec. Dig. § 240.*]

6. WITNESSES (§ 243*)—EXAMINING WITNESSES—LEADING QUESTIONS.

Allowance of leading questions manifestly designed not to suggest answers but rather to direct witnesses of slow comprehension to the general subject of the testimony was not reversible error.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 795, 847; Dec. Dig. § 243.*]

7. TRIAL (§ 132*)—MISCONDUCT OF COUNSEL—WITHDRAWAL OF REMARKS.

Applying the term "welching" to defendant was not reversible error where counsel withdrew it.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 315; Dec. Dig. § 132.*]

8. WITNESSES (§ 270*)—CROSS-EXAMINATION—SCOPE—IRRELEVANT MATTERS.

Where in an action on a fire policy, defended on the ground that the loss was caused by earthquake, plaintiff's witness testified respecting a fire, a question on cross-examination as to whether he had conversed with certain people on the morning of the earthquake was properly excluded if intended as a foundation to show the conversation.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 926, 955-957; Dec. Dig. § 270.*]

9. WITNESSES (§ 329*)—CROSS-EXAMINATION—QUESTION TESTING RECOLLECTION.

Where in an action on a fire policy a witness for plaintiff testified concerning the fire, it was not error to exclude a question on cross-examination to test witness' recollection as to whether he had had any conversation with certain people on the morning of the earthquake; allowance of the question being within the trial judge's discretion.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1104, 1105; Dec. Dig. § 329.*]

10. TRIAL (§ 63*)—ORDER OF PROOF—JUDICIAL DISCRETION.

It was not an abuse of discretion to permit defendant to show on surrebuttal matter which was part of its case in chief.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 151-153; Dec. Dig. § 63.*]

11. APPEAL AND ERROR (§ 1033*)—ERROR FAVORABLE TO PARTY COMPLAINING—REVIEW—INSTRUCTIONS.

A fire insurance company sued on a policy cannot complain of an instruction that if fire caused by earthquake spread from building to building until it reached plaintiff's, plaintiff could not recover because the instruction omitted to require a finding that the fire burned "uninterruptedly" from one building to another, the omission being beneficial to the company.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 1033.*]

Department 2. Appeal from Superior Court, City and County of San Francisco; Frank F. Murasky, Judge.

Action by the California Wine Association against the Commercial Union Fire Insurance Company of New York. From a judgment for plaintiff and from an order refusing a new trial, defendant appeals. Affirmed.

T. C. Van Ness and Otto Irving Wise, for appellant. Pillsbury, Madlson & Sutro (Alfred Sutro, of counsel), for respondent.

HENSHAW, J. This action was to recover upon a contract of insurance. The policy was pleaded in *hæc verba*. It contained the following provision: "This company shall not be liable for loss caused directly or indirectly by * * * earthquake." At the trial defendant conceded plaintiff's right to recover, unless it could successfully maintain its defense under the quoted provision. It undertook to do so by showing that the fire which destroyed plaintiff's property was caused either directly or indirectly by the earthquake of April 18, 1906. The verdict of the jury was for plaintiff. Judgment was entered accordingly; and defendant appeals, insisting that several errors of law committed by the trial court were of sufficient gravity to entitle it to a reversal. The appeal is from the judgment and from the order denying defendant's motion for a new trial.

At the trial plaintiff urged, and introduced evidence to show, that defendant was estopped from making its defense under the clause above quoted. Upon this appeal it is contended that the court erred in admitting this evidence, and in its instructions to the jury upon the subject of estoppel. It is further insisted that the evidence was entirely inadequate to establish an estoppel. Again, appellant urges that the court erred in refusing to give certain instructions which it proposed, to the effect that if the jury found that a fire or fires were started by the earthquake, that such fire or fires, spreading and burning continuously and uninterruptedly, finally reached and destroyed plaintiff's property, plaintiff could not recover. Respondent, while maintaining that the court fell into error in no one of these matters, further argues that if one and all were conceded to be errors, still its judgment is good by reason of the special verdicts which the jury returned in answer to interrogatories. To interrogatory 26 the jury answered that on the morning of the 18th of April, 1906, in the territory described by the witnesses there was a fire or there were fires not caused directly or indirectly by the earthquake; and to interrogatory 29, the jury made answer that it was one or more of these fires, not caused directly or indirectly by the earthquake, which, burning uninterruptedly from building to building and block to block, reached and destroyed the property of the plaintiff. The jury, also, in terms, found and declared that no fire caused directly or indirectly by the earthquake destroyed the property of plaintiff. The general verdict for plaintiff which followed is manifestly and admittedly supported by these special verdicts. When more than one special issue, which would sustain a judgment is

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

submitted to a jury, and the jury's general verdict is supported by one of these special verdicts and is not supported by the others, if there be no self-destroying inconsistency between these special verdicts, that one, which is correctly found will sustain the judgment, and the incorrect special verdicts become harmless error. Upon this precise subject this court has said: "If then either (special verdict) was sustained by the evidence and was not affected by any error, the want of evidence to sustain the finding on the other defense, or any errors committed in regard to it, could not have been prejudicial." *Big Three Mining & Milling Co. v. Hamilton*, 107 Pac. 301; *Crosett v. Whelan*, 44 Cal. 200; *Verdelli v. Gray's Harbor Commercial Co.*, 115 Cal. 517, 47 Pac. 364, 778.

In the original transcript filed in this case all the special verdicts were omitted and the general verdict alone appears in the judgment roll. Respondent, under suggestion of diminution of the record, moved to complete the judgment roll by adding thereto the special verdicts. To this appellant objects, upon the ground, first, that the special verdicts form no part of the general verdict, and so no part of the judgment roll; second, that respondent is estopped by reason of the fact that it stipulated that the transcript upon appeal was correct and that the appeal could be heard on the transcript; and, third, because the insertion of the special verdicts would work an injury to appellant in that respondent waived the insertion of the special verdicts by stipulation, in consideration of appellants omitting from the bill of exceptions the special interrogatories which it had asked the court to submit to the jury, and which the court refused to submit. Upon this refusal, appellant had intended to predicate error. Under the terms of section 625 of the Code of Civil Procedure, as it existed at the time this action was tried, the jury was required, if so instructed by the court at the request of either party, to return special verdicts upon any issue made by the pleadings. The special verdicts or findings in this case were such, therefore, as the law not only contemplated, but compelled the jury to make upon request. Section 670, subdivision 2, of the Code of Civil Procedure, declares "a copy of the verdict of the jury" to be a part of the judgment roll. We entertain no doubt that this language embraces the special verdicts, which, themselves, absolutely control the general verdict. It is so expressly decided in *Frank v. Grimes*, 105 Ind. 340, 4 N. E. 414, and in *Suydam v. Williamson*, 61 U. S. 427, 15 L. Ed. 978, and such is declared to be the general rule in 2 Cyc., page 1068.

Appellant, in support of its contention that respondent is estopped by stipulation from asking that the judgment roll be amended, cites *Bonds v. Hickman*, 29 Cal. 400, and *Harnish v. Bramer*, 71 Cal. 155, 11 Pac. 888. In *Bonds v. Hickman*, the stipulation was to

the effect that the transcript contained a true copy of the pleadings and judgment, and that "notice of appeal admitted as duly filed and served, also the filing of appeal bond, insertion of copies waived." After entering into this stipulation respondent moved that the appeal be dismissed upon the ground that the court had no jurisdiction of the case because no notice of appeal had been in fact filed. This court declared merely that if the stipulation was entered into by the respondent under a mistake of fact, and its operation was injurious to him, doubtless it was competent for the court below, upon proper application, to relieve him from it; that this court would do the same if a stipulation were here entered into under a mistake of fact; but under the circumstances of the case this court was powerless in the premises and could not amend the documents constituting the transcript, nor indirectly accomplish the same result by accepting as true a statement not found in the transcript, which necessarily displaced a fact stated therein. It is further declared that this court may order a document to be inserted in or stricken from the transcript in order to perfect it, although it cannot vary or amend a document found therein. In *Bonds v. Hickman* respondent, who had certified that a judgment was entered on a given date, upon the hearing of the appeal, for the first time, undertook to show by affidavit that in fact it was entered at a later date. Respondent did not undertake to show that he had been deceived or misled in making the stipulation, and his attempt to avoid it and defeat the appeal at a time when a new appeal could not have been taken, could not, under the simplest principles of fair dealing, be permitted. He had lulled his adversary into a fancied security by his stipulation, and when the time for retrieving the error had passed, he sought to defeat the appeal by proving the fact to be to the contrary of that which he had knowingly stipulated. No such question is here involved. The appellant seeks to overthrow the general verdict and judgment based thereon by showing that the court fell into error as to one of the issues. Respondent, in turn, asks the court to perfect the judgment roll, not by changing any document therein, but by adding to it omitted matters properly belonging thereto, which omitted matters would show that the judgment is sustainable regardless of the alleged error. The court of its own motion, and to perfect the record before it, could make the order, and would in any case make it, unless a right of the adverse party was injuriously affected thereby.

The third objection of the appellant to the perfection of the judgment roll rests, as has been said, upon estoppel. The matter was heard upon affidavits supported by the proposed bill of exceptions and the proposed amendments thereto. The proposed bill of exceptions negatives the contention of appel-

lant's counsel that he desired inserted in the bill of exceptions his proposed interrogatories which the court refused to submit to the jury. His proposed bill of exceptions contains nothing to this purport. One of respondent's proposed amendments to appellant's proposed bill of exceptions contained a demand for the insertion of all the questions of fact, findings upon which were requested by either plaintiff or defendant. The court refused to allow this amendment under the belief, that as there was no claim that the special verdicts were inconsistent with the general verdict in any particular, the special verdicts had no place in the record. It thus appears that the absence of the special verdicts was not due to any stipulation, but was due to a ruling of the court in opposition to plaintiff and respondent's motion that they be inserted. Appellant also states that it withdrew "a number of matters which were then a part of the said proposed bill of exceptions," but nowhere is any one of these matters specifically pointed out. Respondent is therefore not estopped, and his motion in this regard to complete the judgment roll by adding thereto the special interrogatories submitted to the jury and their findings thereon is granted.

With the complete record before us, since the sufficiency of the evidence to support the special verdict is not questioned, and since the judgment is sustainable under the special verdict above adverted to, that plaintiff's property was destroyed by a fire not caused directly or indirectly by the earthquake, there is left for consideration only the errors of law occurring at the trial, and, of these, such alone as bear upon this special verdict.

It is contended that the manner in which counsel for plaintiff insisted upon examining his witness throughout the trial necessitates a reversal of the judgment and order. The objections especially noted under this head are that plaintiff's attorneys insisted upon asking leading questions. But the asking of leading questions is within the control of the trial court, and is permitted or not in the court's discretion. Undoubtedly the questions were leading, but they were in their nature harmless, and manifestly were designed not to put answers in the witnesses' mouths, but rather to direct witnesses, who were slow of comprehension, to the general matter concerning which it was sought to elicit their testimony. Thus, for example, a witness is asked: "Did I ask you if you saw anything there? Did you tell me what you saw?" To this the court, in response to an objection said: "The witness apparently is a man who does not comprehend readily. That is the reason why I have allowed leading questions." Plaintiff's attorney asked one of his witnesses if he remembered "when the subject of the welching insurance companies that refused to pay the California Wine Association its insurance first came up." The question was objected to. The ad-

jective "welching" was withdrawn. But appellant insists that the use of this epithet calls for a reversal of the case. We do not think so. *Fogel v. San Francisco, etc., Ry. Co.*, 42 Pac. 565; *Allen v. McKay*, 139 Cal. 94, 72 Pac. 713.

The court sustained an objection to a question propounded to one of plaintiff's witnesses on cross-examination. This witness testified with reference to a fire on the morning of the earthquake. Upon the cross-examination he was asked whether he had had any conversation with the members of the Stern family on the morning of the earthquake. The court sustained the objection upon the ground that conversation had with members of the Stern family would not be competent evidence. If the purpose of counsel was to follow this preliminary question by another seeking to elicit the conversation, the court's ruling was undoubtedly correct. It is here urged that the question was admissible, if only to test the recollection of the witness. Conceding this to be so, it was upon a most minor and immaterial matter. It does not appear that the cross-examination of the witness was unduly curtailed, and the allowance or refusal to allow a specific question such as this was a matter resting in the discretion of the court, and not one for which a cause would be reversed even if, in the view of the appellate tribunal, the question might have been permitted. In rebuttal witnesses called for plaintiff had testified that certain streets were free from fire on the morning of the earthquake. In surrebuttal the defendant called a witness to ask him the condition of these streets. An objection was offered and sustained. Evidence as to the condition of the streets had been a part of defendant's case in chief. It was to rebut this evidence that plaintiff's witnesses were called. To allow further evidence on behalf of defendant, going to the same matter as to which their witnesses testified in chief, was in effect merely to open the case of the defense in chief. The question addressed itself to the discretion of the court and its refusal to allow this to be done was not error.

Complaint is made that the court refused to give an instruction to the effect that if the earthquake caused directly or indirectly a fire at one or a number of named locations in the city of San Francisco "and such fires or any one or more of them burned uninterruptedly from building to building or from block to block until they or any one or more of them reached and burned the insured property, then the defendant was not liable." The court instructed the jury as follows: "If you should find and believe from the evidence that the fires, or any one or more of the fires mentioned by the witnesses or as to which testimony has been introduced, were

¹ Reported in full in the Pacific Reporter; reported as a memorandum decision without opinion in 110 Cal. xvii.

caused directly or indirectly by the earthquake of April 18, 1906, and that such fire or fires thereafter spread by heat, spark, flame, embers, burning brands or cinders, to and burned from building to building, or block to block, and destroyed the property of plaintiff located on the southeast corner of Fifth and Bluxome streets, in the city and county of San Francisco, then in that case, I instruct you that your verdict should be in favor of the insurance company and against the plaintiff, California Wine Association." The absence of the word "uninterruptedly" from the instruction given, which word is contained in the instruction refused, forms the basis of appellant's complaint. But manifestly the effect of the use of the word "uninterruptedly" was to narrow the instruction proposed by defendant. The absence of the word in the instruction which the court gave made rather for the benefit of defendant than to its injury. The foregoing disposes of all objections meriting discussion. The more interesting consideration, to which no small part of the briefs of both parties is directed, namely, what in law constitutes a fire directly or indirectly caused by an earthquake, is, for the reasons already given, eliminated from this case. Whatever might be said about it would be purely dicta and the question may well be left for future consideration.

For the foregoing reasons the judgment and order appealed from are affirmed.

We concur: LORIGAN, J.; MELVIN, J.

(159 Cal. 113)

PEOPLE v. RIGGINS. (Cr. 1,571.)

(Supreme Court of California. Dec. 30, 1910.)

1. CRIMINAL LAW (§ 1158*)—APPEAL—REVIEW—CONFLICTING EVIDENCE.

The evidence being conflicting, denial of application for change of venue on account of a general feeling against the defendant in the county cannot be disturbed.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1158.*]

2. JURY (§ 97*)—"ACTUAL BIAS."

"Actual bias," defined by Pen. Code, § 1073, as a state of mind in reference to the case, or either of the parties, which will prevent him from acting with entire impartiality and without prejudice to the substantial rights of party, may consist of an opinion as to the guilt or innocence of defendant, based on some knowledge or information of the facts embraced in the charge, or of the evidence to be produced, or, the juror having no such knowledge or information, may consist of a preconceived opinion concerning defendant or the prosecuting witness which would prevent a fair consideration by the juror of the evidence given or facts proven in the case.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 431-437; Dec. Dig. § 97.*]

For other definitions, see Words and Phrases, vol. 1, pp. 151, 152.]

3. JURY (§ 133*)—EXAMINATION ON VOIR DIRE—ACTUAL BIAS.

Whether a juror has actual bias is a fact to be determined by the trial court on the evidence before it on his examination on his voir dire.

[Ed. Note.—For other cases, see Jury, Dec. Dig. § 133.*]

4. CRIMINAL LAW (§ 1158*)—APPEAL—REVIEW—ACTUAL BIAS OF JURORS.

The evidence on a voir dire examination of a juror being conflicting as to his actual bias, as where he gives contradictory answers, the decision of the court thereon, as in other cases of conflicting evidence, is conclusive on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3070; Dec. Dig. § 1158.*]

5. JURY (§ 97*)—COMPETENCY OF JUROR—ACTUAL BIAS.

To make a juror competent, notwithstanding an opinion amounting to actual bias, under Pen. Code, § 1076, declaring that one shall not be disqualified as a juror because of having formed or expressed an opinion on the matter or cause to be submitted, founded on public rumor, statements in public journals, or common notoriety, provided that it appear in his declaration that he can and will, notwithstanding such an opinion, act impartially and fairly on the matters to be submitted to him, the opinion must be on the merits of the case, "the matter or cause to be submitted," and must be founded exclusively on one or more of the sources of information enumerated in such section; so he is incompetent where this prejudice consists of an opinion that defendant was guilty of a murder, of which he was acquitted, having nothing to do with the case at bar.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 431-437; Dec. Dig. § 97.*]

6. CRIMINAL LAW (§ 1186*)—APPEAL—REVERSAL—DENIAL OF TRIAL BY FAIR AND IMPARTIAL JURY.

One who, because of exhaustion of his peremptory challenges, is obliged to accept a juror, incompetent for actual bias, his challenge for cause to him being erroneously overruled, is entitled to a reversal, without inquiry as to the sufficiency of evidence of guilt, for infringement of his right to a fair and impartial jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3215-3219; Dec. Dig. § 1186.*]

7. HOMICIDE (§ 156*)—MALICE—EVIDENCE.

Evidence that, a few hours after the alleged assault with intent to murder K., defendant called K. vile names, and cautioned B., as a friend, to have nothing to do with K., though not in the presence of K., was admissible as tending to show malice.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 286, 287; Dec. Dig. § 156.*]

8. HOMICIDE (§ 174*)—EVIDENCE—RELEVANCY.

That, several hours after the alleged assault with intent to murder, defendant was carrying in his overcoat a pistol, was irrelevant; the prosecution having proved that this was not the pistol with which the assault was committed, and his possession of such other pistol afterwards not being shown to have any connection with or relation to the offense.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 174.*]

9. HOMICIDE (§ 158*)—EVIDENCE—RELEVANCY.

The statement of defendant, a week before the alleged assault with intent to murder K., that before he went to jail "somebody would go to the morgue," cannot be said to be irrelevant, being admitted on the theory that the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

"somebody" referred to was K., and some circumstances being proved tending in a slight degree to indicate K. was the person to whom he intended to refer.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 293-296; Dec. Dig. § 158.*]

In Bank. Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Emmett Riggins was convicted of assault with intent to murder, and appeals. Reversed.

Henry Brickley and W. D. Foote, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

PER CURIAM. The defendant was convicted of assault with intent to murder one A. L. Kreiss. His motion for a new trial was denied. He appealed from the judgment and order to the District Court of Appeal for the First district. The justices of that court being unable to agree, the case was transferred to this court for determination.

Several errors are alleged, but the principal point presented is that the court erred in overruling the defendant's challenges for cause to the jurors Simpson, Bargroth, and McKeen.

In July, 1905, the defendant shot and killed one Robert E. Dean in Fresno county. He was charged with the murder of Dean, and upon a trial he was acquitted thereof in September, 1905. The case had caused great public discussion. The local newspapers had published detailed accounts of the facts and of the trial, commenting thereon and denouncing the verdict as a miscarriage of justice, even going so far as to condemn the jurors who rendered the verdict. Great indignation was excited against the defendant on account of this, and it manifested itself to such an extent that he left Fresno county and was absent for nearly a year. The offense with which he now stands charged occurred after his return. An application for a change of venue on account of this general feeling against the defendant in Fresno county was presented to the court. Counter affidavits were filed. It appeared from the affidavits and counter affidavits that many persons in the county had expressed feelings of prejudice and bias against the defendant, but that there were also a great many persons who stood indifferent and knew nothing of the defendant or of the present or former charge. The court denied the application. This is assigned as error, but we think the affidavits presented such a conflict that this court cannot disturb the ruling. We mention the facts disclosed merely because they emphasize the necessity for care in passing upon challenges to individual jurors to see that the prevailing prejudice did not find its way into the jury box. On the trial it appeared that many persons were prejudiced against the defendant. Thirty-

five of the jurors examined were excluded from the panel on the challenge of the defendant based on their testimony that their belief that the defendant was guilty of the murder of Dean was so strong, notwithstanding his acquittal, that they could not give him a fair and impartial trial upon the charge of which he stood accused.

No one of the jurors above named knew the defendant personally or had any personal feeling of ill will toward him. They had no knowledge of the facts of the previous shooting of Dean, except what they had heard or had read in the newspapers. On his voir dire Simpson said that he thought Riggins was guilty of the murder of Dean and that by his acquittal thereof he had unjustly escaped punishment, that this belief would influence him as a juror if selected to try the case in hand, that he would have a prejudice against the defendant on account of it, and that for that reason it would require less evidence for the prosecution to induce him to convict the defendant of the present charge, and more evidence of innocence to induce an acquittal, than if he were not thus prejudiced. In answer to questions by the district attorney he testified that he could and would lay aside this prejudice, if he were sworn as a juror in the case, and would give the defendant a fair and impartial trial. On re-examination, he said again that, because of this belief that the defendant had murdered Dean, he would require more evidence on behalf of the defendant and less for the prosecution than if the defendant were a person of whom he had never heard. McKeen testified to the same belief as Simpson in regard to the former charge of murder. He further said that, notwithstanding this belief, he could give the defendant a fair and impartial trial on the evidence in the case, that he would not hold any spite against the man for the past and would take the evidence introduced, but that, if there arose a reasonable doubt, his opinion that the defendant had murdered a man once before might cause him to determine the doubt against the defendant. To the district attorney he said that if there was a doubt he did not know that he could give the defendant as fair and impartial a trial as if he had never heard of him before, but that if the court so instructed he would give him the benefit of any reasonable doubt, the same as he would any other man who was being tried. Bargroth testified that he also believed the defendant to be guilty of the murder of Dean. He then said that he did not think this opinion would influence his action as a juror in the case on trial; that the fact that he had shot a man before would lead him to believe that defendant would possibly be more apt to draw a pistol, and would make him think it more likely, if defendant drew a pistol, that he intended

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

to use it, than in the case of a stranger; that circumstances would change this tendency considerably; that he expected he would require the defendant to show that he did not have an intention to use the pistol to kill the man he drew it upon; that if the prosecution proved that he did pull the pistol he would think this sufficient to show an intent by the defendant to kill the man, unless he showed that he did not so intend. In answer to the district attorney, he said that after it was shown that the defendant drew a pistol he would not require less evidence of his intention in doing so than in any other case, that his belief in regard to the former case might make a little difference because it would show a difference in the character of the person, but that if the court instructed that the people must prove every element of the crime charged, beyond a reasonable doubt, to wit, that he made the assault, that he made it with a deadly weapon, and with intent to commit murder, before the defendant was required to prove anything, he could and would obey those instructions.

"Actual bias" is defined in section 1073 of the Penal Code as "a state of mind on the part of the juror in reference to the case, or to either of the parties, which will prevent him from acting with entire impartiality and without prejudice to the substantial rights of either party." Such bias may consist of an opinion as to the guilt or innocence of the accused, based upon some knowledge or information of the facts embraced in the charge or of the evidence to be produced, or it may exist without such knowledge or information, and may consist of a preconceived opinion concerning the defendant or the prosecuting witness which would prevent a fair consideration by the juror of the evidence given or facts proven in the case. Upon the examination of a juror on his voir dire, the question whether or not he has actual bias is one of fact, to be determined by the trial court upon the evidence before it. If the evidence is conflicting upon that question, as where the juror gives contradictory answers, the decision of the trial court thereon, as in any other case of conflicting evidence, is conclusive upon the appellate courts. *People v. Wells*, 100 Cal. 229, 34 Pac. 718; *People v. Ryan*, 152 Cal. 371, 92 Pac. 853; *People v. Fredericks*, 106 Cal. 559, 39 Pac. 944; *People v. Scott*, 123 Cal. 435, 56 Pac. 102; *People v. Owens*, 123 Cal. 487, 56 Pac. 251; *People v. Evans*, 124 Cal. 210, 56 Pac. 1024; *People v. Flannely*, 128 Cal. 86, 60 Pac. 670.

But the inquiry as to the ability of the juror to lay aside an opinion which he has, amounting to actual bias, and to act impartially and fairly in the matter, is pertinent and material, under section 1076 of the Penal Code, only where it is an opinion upon the matter to be submitted to him and is based solely upon public rumor, common

notoriety, or statements in public journals. If the actual bias is of any other character, no further inquiry is authorized by law. To bring the juror within the exception of the section, the concurrence of the two conditions is necessary: First, the opinion must be upon the merits of the case, "the matter or cause to be submitted"; second, it must be founded exclusively upon one or more of the sources of information above stated. The effect of the absence of the second of these conditions has been repeatedly decided, as the following cases show:

In *People v. Wells*, supra, a juror had an opinion on the merits of the case, and it was founded upon what he had been told by those who seemed to know the facts they had related to him; but he stated that, notwithstanding that opinion, he could and would act fairly and impartially in the case. The court held that he was incompetent, saying: "At common law a juror who entered the box with an opinion as to the guilt or innocence of the accused was ipso facto disqualified from acting in the case, but section 1076 of the Penal Code of this state creates an innovation upon this principle and declares an exception to the common-law rule. But in order that a juror disqualified at common law, by reason of having previously formed an opinion as to the guilt or innocence of the accused, may come within the provisions of the statute, it must appear affirmatively to the court from the evidence before it that such opinion is formed from public rumors, or statements of public journals, or common notoriety; and it must further appear to the court by the juror's declarations under oath that, notwithstanding such opinion, he can and will act fairly and impartially upon the matter to be submitted to him." But the court proceeded to declare that, where the opinion is founded upon statements, from other sources than those above named, "that fact of itself is a disqualification under the law, and it is a disqualification even though the juror should declare to the court under oath that, notwithstanding such opinion, he would and could act fairly and impartially upon the matter to be submitted to him." In *People v. Miller*, 125 Cal. 46, 57 Pac. 771, the court says: "The juror went into the box with an opinion that the defendant was guilty. Such condition of the juror's mind was an absolute disqualification at common law. Under the Penal Code of this state a single exception is declared in section 1076. This juror was clearly disqualified, unless he came within the provisions of the aforesaid section." This was said in view of the further fact that the juror had declared that he could and would act fairly and impartially and obey the instructions of the court. In *People v. Helm*, 152 Cal. 536, 93 Pac. 101, the court in discussing this subject says: "If it is not made to appear that the juror's opinion is based entirely upon one or all

of the three sources of information above named, if it is shown that his belief has its origin in any other source than one of the three enumerated, he is at once as thoroughly disqualified under our Code as he would have been at common law."

The principle established by these declarations is that the juror's ability to disregard actual bias, shown to exist in his mind, is wholly immaterial, save in a case which comes within the exception specified in section 1076. The concurrence of both conditions being necessary to the exception, the failure to bring the juror within it is as clear where the opinion constituting the bias or prejudice is not an opinion on the matter or cause to be submitted, as where, although it is upon that matter or cause, it is not based solely upon one or more of the sources of information named in the excepting clause. If both conditions are not met, the juror is disqualified, and no declaration by the juror that he can lay aside the prejudice and act fairly and impartially will remove the disqualification. *Lombardi v. Railway Co.*, 124 Cal. 316, 57 Pac. 66; *Naylor v. Railway Co.*, 66 Kan. 407, 71 Pac. 835; *Coughlin v. People*, 144 Ill. 165, 176, 33 N. E. 1, 19 L. R. A. 57.

In the case of the juror Simpson, at least, if not of the others, actual bias was shown to exist, and it consisted of a prejudice against the defendant, growing out of a belief that he was guilty of a murder, of which he had been duly acquitted by a jury. His answers were not contradictory upon this point. It amounted to this: That upon the trial of the case in hand he would take into consideration the fact that the defendant was, as he believed, guilty of a previous murder and would give that fact some weight against the defendant in determining his guilt or innocence, although the fact was not in evidence and could not be inquired into at all. The fact that he proposed to consider a belief formed wholly upon newspaper accounts, without any knowledge of the facts of that case, a belief persisted in, notwithstanding an acquittal by a jury after hearing all the evidence from the lips of the witnesses, shows a considerable degree of prejudice, and the fact that he was still willing to say, in all sincerity, that he could and would lay aside this prejudice and act fairly and impartially in the case, shows the wisdom of the common-law rule that, where bias appears, the juror's opinion of his own fairness will not be considered. One of the striking instances of the frailty of human nature is the fact that a prejudiced person usually believes himself fair-minded and impartial. The guilt of the defendant of the murder of Dean in 1905 was no part of the matter to be submitted upon the charge of assault with intent to murder Kreiss in 1908.

Upon the trial of the latter charge no evidence in regard to the former charge could be allowed. The prejudice clearly arose from facts extraneous to the case, and it was not upon the matter to be submitted. The challenge should have been allowed.

The defendant exhausted all his peremptory challenges, and by reason of the refusal of these challenges he was forced to accept McKeen upon the jury. He asked the privilege of challenging McKeen peremptorily, and was denied. Error in denying any one of those challenges would therefore be substantially injurious to the defendant. Consequently, even if it be admitted that the answers of the jurors McKeen and Bargroth, as to the existence of actual bias on their part, were merely conflicting, and that the decision of the trial court with regard to the challenge to them is conclusive, the denial of the challenge to the juror Simpson would require a reversal of the judgment. The right to a fair and impartial jury is one of the most sacred and important of the guaranties of the Constitution. Where it has been infringed, no inquiry as to the sufficiency of the evidence to show guilt is indulged, and a conviction by a jury so selected must be set aside.

There are no other assignments of error that demand elaborate discussion. The testimony of Barton that, a few hours after the alleged assault, defendant had called Kreiss vile names and cautioned Barton, as a friend, to have nothing more to do with him, although not in the presence of Kreiss, was admissible as evidence tending to show malice. *People v. Shears*, 133 Cal. 158, 65 Pac. 295. The testimony that defendant was carrying a pistol in his overcoat pocket while attending a performance at a theater in the evening of the day of the alleged assault, and several hours afterward, was irrelevant and should have been excluded. The prosecution had proved that this was not the pistol with which the alleged assault was committed, and his possession of another pistol afterward was not shown to have any connection with or relation to the offense charged, and it may have prejudiced defendant in the minds of the jurors. The evidence of a statement by the defendant, about a week before the difficulty, that before he went to jail "somebody would go to the morgue," was admitted on the theory that the "somebody" referred to was Kreiss, the assaulted party. Some circumstances were proven tending in a slight degree to indicate that Kreiss was the person to whom he intended to refer. We cannot say that the evidence was irrelevant. But the court might well have directed the jury that they should disregard it unless they found from the evidence that he did refer to Kreiss.

The judgment and order are reversed.

(159 Cal. 65)

PEOPLE v. BANK OF SAN LUIS OBISPO et al. (L. A. 2,384.)

(Supreme Court of California. Dec. 28, 1910. Rehearing Denied Jan. 27, 1911.)

1. JUDGMENT (§ 578*)—RES JUDICATA—EFFECT OF MOTION FOR NEW TRIAL.

Under Code Civ. Proc. § 1049, declaring that an action is deemed pending from its commencement until final determination on appeal, or until the time for appeal has passed, where a judgment has been affirmed on appeal and has thus become final, or where the time for appeal has expired, the judgment may be pleaded or given in evidence as *res judicata* or an estoppel, though a motion for new trial is pending, which, if successful, will overthrow the judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1022; Dec. Dig. § 578.*]

2. NEW TRIAL (§ 12*)—MOTION FOR NEW TRIAL—EFFECT.

A motion for new trial does not stay or suspend the operation of a final judgment, in the absence of an order of the court to that effect.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 17; Dec. Dig. § 12.*]

3. STATUTES (§ 276*)—REPEALING ACTS—EFFECT ON PENDING ACTIONS.

The court on appeal from a judgment cannot proceed where the statute which alone supports the judgment given has been repealed, since the court can pronounce judgment only under the authority of an existing law.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 371-373; Dec. Dig. § 276.*]

4. STATUTES (§ 276*)—REPEALING ACTS—PENDING ACTIONS.

The decision on appeal from an order denying a new trial, where no stay has been granted, and where the judgment has become a finality, is not on the judgment, but on the order, appealed from, and the repeal of the statute supporting the judgment, pending the appeal from the order denying a new trial, does not destroy the right to be heard on the motion for new trial.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 276.*]

5. APPEAL AND ERROR (§ 460*)—APPEAL FROM ORDER DENYING NEW TRIAL—EFFECT.

An appeal from an order denying a new trial is a separate and independent appeal, which, if prosecuted in time, may be taken after the judgment has become final, and, except when ordered by supersedeas or permitted by stay bond, an appeal does not suspend the judgment or interfere with its finality.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 460.*]

6. NEW TRIAL (§ 12*)—MOTION—NATURE.

A motion for new trial under the Code differs from the common-law motion, which was always heard and determined before the entry of judgment, so that an appeal from the judgment embraced all questions; but it is in the nature of an equitable bill of review which, while countenanced in proper cases, even after affirmance of judgment on appeal, never operates in itself to suspend the decree.

[Ed. Note.—For other cases, see New Trial, Dec. Dig. § 12.*]

7. STATUTES (§ 276*)—REPEAL—EFFECT ON ACTIONS.

The repeal of the banking act of 1903 (St. 1903, c. 266), authorizing an equitable action by the people by the Attorney General to ob-

tain a decree adjudging a bank insolvent and ordering it into liquidation, leaving the proceedings governing the action those which generally obtain in the practice of the state, does not destroy the right of a bank to a hearing on appeal from an order denying a new trial after adverse judgment, which prior to the repeal became final by affirmance on appeal; the repeal taking place pending decision on the appeal.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 276.*]

8. BANKS AND BANKING (§ 76*)—INSOLVENCY—EVIDENCE.

Evidence held to sustain a finding that a bank was insolvent within the banking act of 1903 (St. 1903, c. 266), authorizing the people on the relation of the Attorney General to proceed in equity to have a bank declared insolvent.

[Ed. Note.—For other cases, see Banks and Banking, Dec. Dig. § 76.*]

In Bank. Appeal from Superior Court, San Luis Obispo County; E. P. Unangst, Judge.

Action by the People, by U. S. Webb, Attorney General, against the Bank of San Luis Obispo and others. From an order denying a new trial after judgment for plaintiff, defendants appeal. Affirmed, and motion to vacate the judgment and dismiss the proceedings denied.

James L. Crittenden, for appellants. U. S. Webb, Atty. Gen., and R. C. Van Fleet, Deputy Atty. Gen., for the People.

HENSHAW, J. Under the banking act of 1903 (St. 1903, c. 266), action was begun in the name of the people of the state of California by the Attorney General, as contemplated by the provisions of the act, for a decree declaring the defendant, Bank of San Luis Obispo, insolvent, ordering it into involuntary liquidation, and restraining it from the transaction of a banking business. This action proceeded to judgment in accordance with the complaint of the people, and a receiver was appointed by the court to administer its affairs in liquidation. On appeal to this court the judgment of the trial court was in all respects affirmed (People v. Bank of San Luis Obispo, 154 Cal. 194, 97 Pac. 306), and this judgment became final in September, 1908. On June 10, 1908, the trial court denied the defendant bank's motion for a new trial, and from this order an appeal was taken to this court. Pending the decision on this appeal from the trial court's order refusing to grant the motion for a new trial, the banking act of 1903 (St. 1903, c. 266), under the authority of which this action was prosecuted and these proceedings had, was repealed by the banking act of 1909 (St. 1909, c. 76), which latter act made no provision for continuing in force any pending proceedings or litigation under the repealed act.

The Bank of San Luis Obispo now moves this court to vacate and set aside the judgment given against it, and to direct the trial

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

court to dismiss this action upon the ground that the repeal of the banking act of 1903 put an end to all litigation pending under it, and that within the meaning of the law the action of the people of the state of California against the Bank of San Luis Obispo was litigation pending and undetermined. The principle which appellant invokes has thus been stated: "When a cause of action is founded on a statute, a repeal of the statute before final judgment destroys the right, and a judgment is not final in this sense so long as the right of exception thereto remains." 1 Lewis' Sutherland, *Statutory Construction* (2d Ed.) p. 285. And, says Cyc. (volume 36, § 1228): "As a general rule, the repeal of a statute without any reservation takes away all remedies given by the repealed statute and defeats all actions pending under it at the time of its repeal. The rule is especially applicable to the repeal of statutes creating a cause of action and providing a remedy not known to the common law, or conferring jurisdiction where it did not exist before, and is carried to such extent as to abate proceedings pending upon appeal after verdict in favor of plaintiff. A suit, the continuance of which is dependent upon the statute repealed, stops where the repeal finds it." But a consideration of the leading adjudications becomes necessary to determine the precise meaning of the language thus employed—how broad may be its scope and to what extent the principle is carried.

In *Surtees v. Ellison*, 9 Barn. & Cress. 752, the question was whether the evidence of trading which was sufficient to have supported the judgment of bankruptcy under the act of 5th George II would support a commission in bankruptcy issued if all previous statutes had been repealed, and the controlling statute was that of 6th George IV. The Court of King's Bench held that the acts must be those contemplated by the existing statute; in this connection Lord Tenterden saying: "It has been long established that, when an act of Parliament is repealed, it must be considered, except as to transactions past and closed, as if it had never existed." And to the same effect is *Key v. Goodwin*, 5 Moore & Payne, 341, where, the question being similar, Lord Chief Justice Tindal declared: "I take the effect of repealing a statute to be to obliterate it as completely from the records of Parliament as if it had never passed, and that it must be considered as a law that never existed, except for the purpose of those actions or suits which were commenced, prosecuted, and concluded whilst it was an existing law." *Rex v. Justices of London*, 3 Burrow, 1456, was an application for mandamus to require the justices to proceed in a matter pending before them after the act regulating the proceeding had been repealed. The matter was regularly before them for consideration and had by them been adjourned without decision until a day after the repealing act took effect, whereupon they re-

fused further to proceed. The court found the case to be one of great inconvenience and great hardship. "The Legislature had the whole affair under their consideration, and they have not thought fit to reserve any jurisdiction to the justices after the 19th of November, 1761. Therefore Lord Mansfield was very clear, and all the rest of the court concurred with him, that no jurisdiction now remains in the sessions."

In *United States v. Schooner Peggy*, 5 U. S. 103, 2 L. Ed. 49, the schooner *Peggy* was seized as a prize, and by decree of the Circuit Court condemned and forfeited. An appeal was taken to the Supreme Court of the United States. While the appeal was pending, a treaty was entered into between the United States and France, whereby property not definitely condemned was to be restored to the original owner. Chief Justice Marshall held that the pending appeal forbade the conclusion that the property had been definitely condemned since the judgment of condemnation had been appealed from and was undecided at the time when the treaty took effect; that, therefore, in contemplation of the treaty, the property was not definitely condemned and should be restored, the Chief Justice saying: "It is, in general, true that the province of an appellate court is only to inquire whether a judgment, when rendered, was erroneous or not; but if, subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed or its obligation denied. * * * In such a case the court must decide according to existing laws, and if it be necessary to set aside a judgment rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside." In *The Schooner General Pinkney v. United States*, 9 U. S. 231, 3 L. Ed. 101, the schooner and its cargo had been condemned for violation of an act prohibiting intercourse with certain designated ports on the Island of St. Domingo. Judgment of condemnation was pronounced by the District Court. This condemnation was affirmed upon appeal by the Circuit Court, and from this judgment, in turn, an appeal was taken to the Supreme Court of the United States. While this appeal was pending, the time limit of the law under which the proceedings were taken expired and the law's existence ceased. Chief Justice Marshall, delivering the opinion of the court, declared that in admiralty cases an appeal suspends the sentence altogether, and that the judgment is not res adjudicata until the final sentence of the appellate court be pronounced, and that the cause in the appellate court is to be heard de novo as if no sentence had ever been passed, and, "if no sentence had been pronounced, it has long been settled, on general principles, that after the expiration or repeal of the law no penalty can be enforced nor punishment inflict-

ed for violations of the law committed while it was in force, unless some special provision be made for that purpose by statute." The Schooner *Rachel v. United States*, 10 U. S. 329, 3 L. Ed. 239, was decided upon the principle governing *The Schooner General Pinkney v. United States*, *supra*. Under the sentence of condemnation the schooner *Rachel* had been sold and the proceeds of the sale paid over to the United States while the act was in force. The Supreme Court made a general order for restitution of the property condemned, leaving it to the District Court to say whether that order for restitution would be complied with by order for the payment over of the proceeds of the sale as prayed for by claimants. In *Maryland v. Baltimore & Ohio R. R. Co.*, 3 How. 534, 11 L. Ed. 714, Chief Justice Taney, in a brief sentence, expounds the reason for the rule as follows: "The repeal of the law imposing a penalty is itself a remission." In *Railroad Co. v. Grant*, 98 U. S. 398, 25 L. Ed. 231, Chief Justice Waite declares: "It is equally well settled that if a law conferring jurisdiction is repealed, without any reservation as to pending cases, all such cases fall with the law." But this language was employed under the following state of facts: An act conferring jurisdiction in certain cases upon the Supreme Court of the United States on appeal from the Supreme Court of the District of Columbia had been repealed. At the time the repeal became operative, the case was pending before the Supreme Court under a writ of error. The court declared that the single question was "whether there is any law now in force which gives us authority to re-examine, reverse, or affirm the judgment in this case," and held that the repeal of the law conferring jurisdiction deprived the court of jurisdiction. And to the argument that the appellants were deprived of a remedy secured to them by the earlier law, and of which they had availed themselves before the repeal of that law, it was answered: "But a party to a suit has no vested right to a writ of error from one court to another. Such a privilege once granted may be taken away, and, if taken away, pending proceedings in the appellate court stop just where the rescinding act finds them, unless special provision is made to the contrary." Of like import is *Insurance Co. v. Ritchie*, 72 U. S. 541, 18 L. Ed. 540, where Chief Justice Chase delivered the opinion of the court. The Chief Justice there says: "It is clear that, when the jurisdiction of a cause depends upon the statute, the repeal of the statute takes away the jurisdiction." But this was addressed to an action brought when the parties were citizens of the same state, under the act of 1833, countenancing such actions. It had been repealed before judgment pronounced, and it was held that the action must fall. In *Ex parte McCordle*, 74 U. S. 506, 19 L. Ed. 264, the same principle is announced by the Chief Justice.

That case also was one where, when the court came to consider an appeal properly taken, it was confronted with the fact that after the appeal had been taken, the law authorizing it had been repealed. Chief Justice Chase, again delivering the opinion of the court dismissing the appeal, says: "What, then, is the effect of the repealing act upon the case before us? We cannot doubt as to this. Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist the only function remaining to the court is that of announcing the fact and dismissing the cause. And this is no less clear upon authority than upon principle. * * * The general rule, supported by the best elementary writers, is that, 'when an act of the Legislature is repealed, it must be considered, except as to transactions past and closed, as if it never existed.' And the effect of repealing acts upon suits under acts repealed has been determined by the adjudications of this court. The subject was fully considered in *Norris v. Crocker*, and more recently in *Insurance Co. v. Ritchie*. In both of these cases it was held that no judgment could be rendered in a suit after the repeal of the act under which it was brought and prosecuted. * * * Judicial duty is not less fitly performed by declining ungranted jurisdiction than in exercising firmly that which the Constitution and the laws confer." *Norris v. Crocker*, 13 How. 429, 14 L. Ed. 210, was an action brought under the "Fugitive Slave Act," to recover from defendant a penalty prescribed by that act against one who aided a slave to escape. While the action was pending, and before it had passed to judgment, the provision of the act fixing the penalty was repealed. Addressing itself to this state of facts, the Supreme Court says: "As the plaintiff's right to recover depended entirely on the statute, its repeal deprived the court of jurisdiction over the subject-matter. And, in the next place, as the plaintiff had no vested right in the penalty, the Legislature might discharge the defendant by repealing the law." To like effect, in *Assessor v. Osbornes*, 76 U. S. 567, 19 L. Ed. 748, where, upon the authority of *Insurance Co. v. Ritchie*, *supra*, it is declared that, where jurisdiction depends wholly on a statute, suits brought during the existence of the statute fall with its repeal. *United States v. Tynen*, 78 U. S. 88, 20 L. Ed. 153, was a criminal case. Tynen was indicted under the act of 1813. The judges of the Circuit Court divided upon the question of the sufficiency of the indictment. They certified the case to the Supreme Court. While it was there pending, Congress repealed the act of 1813, and it was held that the prosecution of Tynen fell with the repeal. In *Re Hall*, 167 U. S. 38, 17 Sup. Ct. 723, 42 L. Ed. 69, a judgment given in the Court of Claims was reversed by the Supreme Court of the United States because interest

on the original claim had been improperly allowed. The case was remanded to the Court of Claims for further proceedings not inconsistent with the opinion of the Supreme Court. The mandate of the Supreme Court was filed in the Court of Claims, an application was made for judgment in accordance with the opinion of the Supreme Court, and pending the decision upon this application the act of Congress authorizing the original judgment was repealed, and the Court of Claims declined to enter the judgment as prayed for. The plaintiff thereupon made an application to the Supreme Court for mandamus to require the Court of Claims to enter the judgment. It was held that the effect of the repealing act was to take away the jurisdiction of the Court of Claims to proceed further in any case founded upon the repealed act. But the Supreme Court distinctly held that its decision was not to be construed as an intimation that the Court of Claims would not have jurisdiction to entertain and grant a motion on the part of the petitioner to reinstate the original judgment without interest. In *Flanigan v. Sierra County*, 196 U. S. 553, 25 Sup. Ct. 314, 49 L. Ed. 597, the question arose as to the effect of a repeal of an ordinance construed as a revenue ordinance upon proceedings begun before the repeal and pending after it. The action had been commenced in the superior court of the county of Sierra, state of California, by Sierra county, had been removed to the United States Circuit Court, where judgment was given against Flanigan, which judgment was affirmed by the Circuit Court of Appeals. He then obtained from the Supreme Court of the United States certiorari to the Circuit Court of Appeals. The suit was brought on the 21st of June, 1900. On March 23, 1901, the ordinance was repealed. The action was at that time pending and undetermined, and the familiar principle is declared "that no proceedings can be pursued under the repeal of the statute, though begun before the repeal, unless such proceedings be authorized under a special clause in the repealing act. 9 Bacon's Abridgment, 225."

Taking up, in turn, the views embodied in the leading decisions of sister states: In *Commonwealth v. Duane*, 1 Bin. (Pa.) 601, 2 Am. Dec. 497, the defendant was convicted under an indictment for libel against the Governor of the state. He moved in arrest of judgment. While his motion in arrest of judgment was pending, the Legislature of Pennsylvania passed an act "that from and after the passing of this act, no person shall be subject to prosecution by indictment" for libel as at common law. It was held that the judgment should be arrested, since it had not been pronounced, and that the court cannot "pronounce judgment and inflict punishment when the law declares that the defendant shall not be subject to prosecution." In *Balch v. City of Detroit*, 109 Mich. 253, 67 N. W. 122, under an existing statute, the city

of Detroit had proceeded to condemn land for street purposes, trial was had as to the value of the property sought to be condemned, a verdict and award of the jury given, and judgment entered, from which neither party took appeal. The act under which these proceedings were taken was then repealed, and substituted therefor was another act containing no saving clause as to pending litigation, but providing specifically that all proceedings to take private property on the part of the city of Detroit should be held and prosecuted under the provisions of the later act. The city of Detroit refusing to pay the award, mandamus was sought to compel it to do so. It defended upon the ground that the repeal of the previous act forbade it from levying an assessment and collecting the amount of the award. But it was held that as the proceedings in confirmation had gone to judgment, and that the judgment had become final, the petitioners had the right to insist that the judgment should stand and to enforce payment of the amount awarded them under it. In *Speckert v. City of Louisville*, 78 Ky. 288, a fine was imposed upon the appellants for violating the provisions of a penal ordinance forbidding the sale of liquor on Sunday or after half past 11 o'clock at night. The appellants "suspended the judgments in the various actions against them" by appeal. During the pendency of the appeal, the ordinance imposing the penalty was repealed. Before the appellate court this fact was made known, and it was argued that there was no law in existence under which the judgments could be enforced. It is to be noted that the appeal herein and of itself had the effect of suspending the judgments. It is said: "The right of the Legislature to repeal such laws cannot be questioned, and the mere fact that a party may be entitled to the benefits resulting from the prosecution of a penal action gives him no vested right to prosecute the action to a recovery, nor does the fact that a judgment has been rendered below vest him with such a right as cannot be divested by legislative action had before execution." Sedgwick on Statutory Law is quoted, and Cooley's Const. Limitations (4th Ed. 477), to the effect that, "if a case is appealed and pending the appeal the law is changed, the appellate court must dispose of the case under the law in force when their decision is rendered."

In *Butler v. Palmer*, 1 Hill (N. Y.) 324, the statute gave a judgment creditor a year from the date of the sale under the mortgage in which to redeem. A subsequent statute, after sale and while the time for redemption was running, shortened the time. After the passage of this act the redemption was attempted within the time limited by the earlier statute, but after the time prescribed by the later act. It was held that the later statute, though operating to shorten the time for the exercise of the previous-

ly existing right of redemption, was not unconstitutional; that rights specifically conferred by a statute are lost by its repeal unless saved by express words in the repealing statute; that, where the statute conferred jurisdiction, its repeal takes away all right of proceeding under the repealed statute, even in regard to suits pending at the time of the repeal, which pending proceedings rest for their support upon the jurisdiction conferred by the repealed statute; but that it is otherwise in respect to such civil rights as have been perfected far enough to stand independent of the statute, or, in other words, such as have ceased to become executory and have become executed. In *Denver & R. G. Ry. Co. v. Crawford*, 11 Colo. 598, 19 Pac. 673, after judgment obtained, but while the judgment was upon appeal, the statute prescribing a penalty against a railroad company for failure to file with the county clerk notice of the station at which a book should be kept for entering a description of animals killed was repealed, it was held that the repeal put an end to the proceeding, that the appellee could have "no such thing as a vested interest in an unenforced penalty." It is pointed out that the judgment for the penalty does not enforce the penalty, but the penalty must be enforced by the execution of the judgment, and that the power to enforce it had been suspended by the appeal. In *Church v. Rhodes et al.*, 6 How. Prac. (N. Y.) 281, under the law as it existed, a report of referees could be reviewed by rehearing. The provision for a rehearing was repealed, and it was held that the repeal applied to pending and inchoate proceedings; that is to say, to actions commenced before the passage of the repealing act, and in progress for rehearing at the time of the passage, and that the effect was to take away the right to a rehearing. In *Vance v. Rankin*, 194 Ill. 625, 62 N. E. 807, 88 Am. St. Rep. 173, the law required the trustees of a village to pass an ordinance disconnecting certain designated territory. Mandamus was sued out to compel the trustees so to do, and judgment as prayed for awarded. The trustees appealed from the judgment. While the appeal was pending, the Legislature amended the law so as to make it discretionary with the trustees, rather than compulsory upon them, so to do. It was held that the new statute controlled, and that by reason of the change in the law it would be improper to enforce mandate where the existing law did not countenance it. In *Western Union Tel. Co. v. Smith*, 96 Ga. 569, 23 S. E. 899, plaintiff had obtained a verdict and judgment against the defendant under an act imposing penalties upon telegraph companies. Within the time allowed by law, defendant filed its motion for a new trial. The motion was overruled, and a bill of exceptions assigning error in the overruling of the motion for a new trial was sued out by the defendant. While the cause was in this

condition, the penal statute was repealed. Says the Supreme Court of Georgia: "At the time the repealing act was passed, the plaintiff was not entitled to the enforcement of his judgment, and the case must be dealt with as one which was pending when the repeal took place." And then the court declares the established rule that when such a statute is repealed it ends all pending litigation under it.

In this state it is provided by Code that any statute may be repealed at any time except when it is otherwise provided therein, and persons acting under any statute are deemed to have acted in contemplation of this power of repeal. Section 327, Pol. Code. It is further provided that: "The repeal of any law creating a criminal offense does not constitute a bar to the indictment or information and punishment of an act already committed in violation of the law so repealed, unless the intention to bar such indictment or information and punishment is expressly declared in the repealing act." Pol. Code, § 329. In *Thorn v. San Francisco*, 4 Cal. 127, the language of Lord Tenterden to the effect that, "when an act of Parliament is repealed, it must be considered the same as if it had never existed," is quoted, with the comment that "no one will question the right of Parliament or the Legislature to repeal statutes where subsisting rights are not disturbed or the obligation of contracts impaired." In *McMinn v. Bliss*, 31 Cal. 122, appeal from a judgment in an action of forcible detention and detainer had been taken. When the case came to be heard on appeal, a motion was made to dismiss upon the ground that the statute under which the action was brought had been repealed. The principle is recognized that the repeal of a statute under which alone a right of action exist operates as an extinguishment of all actions pending when the repeal takes effect, but it was held, for reasons stated, that the statute had not been repealed. In *Lamb v. Schottler*, 54 Cal. 319, proceedings were taken under an act which contemplated the creation of a board of water commissioners for the purpose of acquiring by condemnation the Spring Valley Waterworks of San Francisco. The supervisors and the board of water commissioners had taken certain steps under the act when the act was repealed. It was declared by this court that the repeal of the statute effectually annulled all proceedings had under it, unless the obligation of a contract would thereby be impaired, or a vested right destroyed, and that by reason of the repeal it was impossible for the supervisors and the water commissioners to proceed further. In *Spears v. County of Modoc*, 101 Cal. 303, 35 Pac. 869, a fine had been imposed for violation of a municipal ordinance. Pending an appeal from the judgment, the municipal ordinance was repealed. It was held that such repeal operated as a remission of the penalty for

the offense and the fine imposed for its violation, and that, notwithstanding a mistaken affirmance of the judgment by the superior court after the repeal of the ordinance, the enforcement of such a mistaken judgment would be restrained by injunction. It is said in this case: "By the appeal to the superior court the enforcement of the judgment appealed from was stayed until after the determination of the appeal. Pen. Code, § 1470. As no undertaking on appeal was required, the appeal operated as a supersedeas. *McGarrahan v. Maxwell*, 28 Cal. 75. The effect of the appeal was therefore to preserve the rights of the parties in the same condition as they were prior to the entry of the judgment (*Dulin v. Pacific Wood & Coal Co.*, 98 Cal. 304 [33 Pac. 123]); and until the determination of the appeal the proceeding was a pending action in which the rights of neither party had been conclusively determined." In *First Nat. Bank of San Luis Obispo v. Henderson*, 101 Cal. 307, 35 Pac. 899, an action by the bank against the defendant upon an account stated, judgment was given in favor of the bank. One of the defenses was the failure of the bank to comply with the provisions of the act of April 1, 1876, requiring the bank to file with the county recorder or to publish the statements required by the act. The defense was established at the trial. Pending the appeal the Legislature repealed this statute without a saving clause. It was by this court held that, while ordinarily it is the province of an appellate court to review the judgment of an inferior court as of the time when it was rendered, since ordinarily the judgment of a trial court is a determination of the rights of the parties as they existed at the commencement of the action, the rule was subject to exception, and such an exception was presented in this case, and that the modification of the rule is that if a case is appealed, and pending the appeal the law is changed, the appellate court must dispose of the case under the law in force when its decision is rendered. *Cooley*, Const. Lim. p. 469. It was held that the statute requiring banks to file or publish their statements, under the penalty that a bank so failing could not maintain or prosecute any action, was in its nature penal; that when the Legislature had remitted the penalty by repeal of the statute the appellant was no longer able to avail himself of the privilege and defense which it conferred upon him. In *Anderson v. Byrnes*, 122 Cal. 272, 54 Pac. 821, an act authorizing a stockholder of a domestic mining corporation to recover from its directors a penalty for failure to comply with the provisions of the act was repealed while an appeal was pending in this court from a judgment given under the act. It was held that the repeal absolutely prevented any further prosecution of the litigation, and that, as no person has a vested right in an unenforced penalty, the proceedings must cease.

In *Napa State Hospital v. Flaherty*, 134 Cal. 315, 66 Pac. 322, the action was brought by the State Hospital to secure from defendant provision for the support of his son—an inmate of the asylum. The law countenancing this action had been repealed, and it was by this court held that, if the remedy for a right accorded solely by statute is repealed while the right is still inchoate and not reduced to possession or judgment, the right is thereby lost if the repealing statute contains no saving clause. In *Ball v. Tolman*, 135 Cal. 377, 67 Pac. 339, 87 Am. St. Rep. 110, the action was to recover a penalty under the provisions of an act for the better protection of stockholders. Judgment for plaintiff was entered in the trial court on January 9, 1897. Pending a motion for a new trial, the penal provisions of the act were repealed. The motion for a new trial was denied, and defendant then appealed from the judgment and from the order denying his motion for a new trial. This court affirmed the judgment and order. *Ball v. Tolman*, 119 Cal. 358, 51 Pac. 546. The remittitur issued on January 18, 1908. Neither this court nor counsel at the time of the affirmance in this court had actual knowledge of the existence of the repealing statute. Upon subsequent appeal to this court the judgment was vacated and annulled; this court holding: "By reason of the repeal, it was without jurisdiction to proceed, and that, in all cases where a court is rendered incompetent to proceed, its proceedings during such incompetency are as invalid as though it had never possessed jurisdiction." In *City of Sonora v. Curtin*, 137 Cal. 583, 70 Pac. 674, plaintiff had recovered a judgment in a civil action under one of its ordinances prescribing a license fee to be paid by every attorney at law. By general statute the power to pass such an ordinance was taken away from municipalities. It was held: "The right given the plaintiff in this case being penal in its nature and the remedy created solely by statute, its enforcement is dependent upon the statute alone. It is still inchoate and not reduced to possession nor perfected by final judgment. In such case the repeal of the statute destroys the remedy, unless the repealing statute contains a saving clause."

These cases have been cited as fairly typifying the extremes of judicial determination, and as expressing the reasons upon which their rules of decision are based. In the case of penalties and crimes, the repeal operates to defeat all actions pending. In case of a statute conferring civil rights or powers, the repeal operates to deprive the citizen of all such rights or powers which are at the time of the repeal inchoate, incomplete, and unexercised. In the case of statutes conferring jurisdiction, the repeal operates by causing all pending proceedings to cease and terminate at the time and in the condition which existed when the repeal became opera-

tive. In cases of judgment pending upon appeal, the rule of decision is that the proceedings abate and the judgment falls. But the general expressions to this effect employed in the decisions are to be read in each case in the light of the facts which are there disclosed. Here the wise admonition of Chief Justice Marshall in *Cohens v. Virginia*, 6 Wheat. 399, 5 L. Ed. 257, applies with peculiar force: "It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision. The reason of this maxim is obvious. The question before the court is investigated with care and considered in its full extent, and other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated." In every case where, after judgment, the proceeding has been declared to be "pending," there will be found a direct appeal from the judgment, which direct appeal either suspended the judgment so that it was not final and enforceable, or, as in *The Schooner General Pinkney v. The United States*, 9 U. S. 281, 3 L. Ed. 101, worked a removal of the cause to the appellate court, where it was to be tried *de novo*. The reason given why the proceeding must abate under these circumstances is that, because of the suspension of the judgment by appeal, it is without finality; that to give it finality the Court of Appeals must itself pronounce its judgment; and that in pronouncing its judgment it must be governed by the existing law. Therefore, when it finds that by the existing law the previous law, under which alone validity could be given to the judgment, has been repealed, the sole prop and foundation for support of the judgment has been removed, and of necessity it must be declared null and void. No case, however, has been found, and we venture to say none can be found, where a judgment which has been affirmed after direct appeal, and has by such affirmation become final during the existence of the statute supporting it, where the judgment itself has been in the process of execution within the law, and where rights have arisen by virtue of this legal execution of the judgment, has ever been held to be destroyed by a repeal of the statute supporting it because the collateral proceeding of an appeal from an order denying a new trial is pending without supersedeas or stay bond. And to this consideration we now come.

Western Union Telegraph Co. v. Smith, 96 Ga. 569, 23 S. E. 899, would seem, at first glance, to be in opposition to the declaration just made. There a judgment under a statute imposing a penalty had been recovered. The defendant had moved for a new

trial and had secured its bill of exceptions, assigning error in the overruling of its motion for a new trial. The Supreme Court of Georgia held that the situation disclosed was one which brought the case within the accepted rule that the effect of the repeal is to abate actions for the statutory penalty then pending. But this is based, not alone upon the proposition that the repeal of a statute exacting a penalty is a remission of the penalty unless at the time the appeal operates the penalty has actually been enforced, but still further the court points out that at the time of the repeal the judgment was in suspension and could not have been enforced. Here, not only had the judgment itself been affirmed upon direct appeal, but it was not stayed in law or in fact by virtue of the pending proceedings under the motion for a new trial. The Code of Civil Procedure declares (section 1049) that "an action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal is past, unless the judgment is sooner satisfied." In *Gilmore v. American C. I. Co.*, 65 Cal. 63, 2 Pac. 882, it is said: "While proceedings are pending for the review of a judgment, either on appeal or motion for a new trial, the litigation on the merits of the case between the parties is not ended; and, until litigation on the merits is ended, there is no finality to the judgment, in the sense of a final determination of the rights of the parties, although it may have become final for the purpose of an appeal from it." This language is quite appropriate to the consideration then before the court. This court there did not have before it the question of the effect of a repeal of a statute upon a judgment which had become final by affirmation after direct appeal, but it was merely considering and interpreting a stipulation between parties, to the effect that judgment should be entered for plaintiff provided such judgment was given for plaintiff in another action between the parties, the same "to be entered when the judgment had become final." Its language was used solely with reference to the stipulation, holding that, within its terms, the judgment had not become final, by reason of the pendency of a motion for a new trial. In *Sharon v. Hill* (C. C.) 26 Fed. 337, 392, the case of *Gilmore v. American C. I. Co.* is quoted from and commented upon; the discussion in the federal case being addressed to the proposition whether a judgment in a state court could be pleaded as *res adjudicata* while an appeal was pending both from the judgment and from the order denying the motion for a new trial. Upon the authority of *Gilmore v. American C. I. Co.*, it is intimated, though not necessary to the decision, that the pendency of a motion for a new trial would be sufficient to forbid the reception of the judgment in evidence by way of *res adjudicata* or estoppel. But, upon the other hand, it

is now well settled that where a judgment has been affirmed upon appeal and has thus become final, or where the time for appeal has expired, the judgment may be pleaded as *res adjudicata* or in estoppel, notwithstanding the fact that proceedings upon a motion for a new trial are pending, which, if successful, would result in the overthrow of the judgment. In *Harris v. Barnhart*, 97 Cal. 546, 32 Pac. 589, the matter is discussed, and the conclusions of the court may be summarized as follows: A motion for a new trial, in the absence of an order of the court to that effect, does not stay or suspend the operation of a final judgment. An action under section 1049 of the Code of Civil Procedure is to be deemed pending while an appeal from the judgment is pending, or until the time for such an appeal has expired, but when the judgment upon appeal has been determined by an affirmance of the judgment, or when the time for appeal has expired, the judgment is admissible in evidence as *res adjudicata* and to raise an estoppel in bar of the action. The same ruling as to the effect of a pending motion for a new trial upon the finality of a judgment is declared in *Young v. Brehe*, 19 Nev. 379, 12 Pac. 364, 3 Am. St. Rep. 892, and the soundness of the rule is intimated by the Supreme Court of the United States in *Hubbell v. United States*, 171 U. S. 203, 18 Sup. Ct. 828, 43 L. Ed. 136, where it is said: "Indeed, it may well be doubted whether the pendency of a motion for a new trial would interfere in any way with the operation of the judgment as an estoppel."

In *Spanagel v. Dellinger*, 38 Cal. 284, it is said: "Under our system, from the entry of the verdict or filing of the findings of the court, the motion for new trial is a kind of episode, or, in a certain sense, a collateral proceeding—a proceeding not in the direct line of the judgment—for the judgment may be at once entered and even executed, while a motion for a new trial is pending in an independent line of proceeding, which ends in an order reviewable on an independent appeal. The motion may be heard and decided and an appeal taken on its own independent record, while the proceedings on and subsequent to the judgment may be still regularly going on, and even an independent appeal taken in that line." And this language is quoted with approval by this court in the later case of *Brisson v. Brisson*, 90 Cal. 323, 27 Pac. 186; while to the same effect is *Houser & Haines Co. v. Hargrove*, 129 Cal. 90, 61 Pac. 660, and *Knowles v. Thompson*, 133 Cal. 247, 65 Pac. 468. A broad difference exists between the operation and legal effect of a direct appeal from a judgment (which, while the appeal is pending, in the generality of cases operates to stay the judgment absolutely, and in all cases operates to destroy for it any claim of finality), and the "collateral proceeding" of an appeal from an

order denying a motion for a new trial taken after the judgment itself has become an enforceable finality by reason of its affirmance upon direct appeal. In the former case the courts, when the law which alone will support the judgment given has been withdrawn, have felt and expressed themselves as unable to proceed further with the litigation, since they themselves must pronounce a judgment, and can pronounce it only under the authority of existing law. In the case of appeal from an order refusing a new trial where no stay has been granted and where, as here, the judgment has become a finality, the decision which the court renders is not upon the judgment appealed from, but upon the order appealed from, and while the effect of its reversal of the order will, of course, be necessarily the setting aside of the judgment, this, after all, is but an incident to the ruling which it makes, which ruling goes not at all to the sufficiency or finality of the judgment, but only as to whether, within familiar rules and limitations, the judgment was fairly given. Herein our motion for a new trial differs essentially from the common-law motion which was always heard and determined before entry of judgment, so that the appeal from the judgment embraced all questions. Under our system, the appeal from an order denying a new trial is a separate and independent appeal, which, if prosecuted in time, may be taken after the judgment has become final. Excepting when ordered by superseas or permitted by stay bond, it in no way suspends the judgment nor interferes with its finality. It is in this respect more in the nature of an equitable bill of review which, while countenanced in proper cases, even after a judgment of affirmance upon appeal, never operated in and of itself to suspend the decree. Indeed, it has been so expressly declared by this court in *Fowden, Adm'r, v. Pac. Coast S. S. Co.*, 149 Cal. 151, 154, 86 Pac. 178.

We conclude, therefore, that, as the judgment had become final while the statute authorizing the action was in force, its finality is not disturbed by a pending motion for a new trial which does not operate in any way to stay the execution of the judgment; that as the statute authorizes the people upon the relation of the Attorney General to proceed in equity to have the bank declared insolvent, leaving the proceedings governing the action those which generally obtain in the practice of this state, the repeal of the statute did not destroy the right of the appellant to be heard upon this motion for a new trial; that, if the appeal from the motion for a new trial should be granted, it would necessarily have the effect of vacating the judgment; that by virtue of the repeal the action could then no longer be prosecuted; that if, however, the appeal from the order denying the motion

for a new trial should be denied and the order affirmed, the repeal of the statute would not affect any proceeding taken under it and under the judgment heretofore affirmed.

2. To the consideration of the appeal from the order refusing appellant's motion for a new trial we now proceed. Many of the propositions advanced go to the alleged errors of the court in admitting evidence of the action and reports of the bank commissioners in the sequestration of the bank's property, and of their report that it was unsafe to permit the bank longer to continue business. They are based upon appellant's contention that, for specified reasons, the act itself is unconstitutional. The objections thus advanced have been completely answered in the opinion upon the appeal from the judgment and do not require further discussion. *People v. Bank of San Luis Obispo*, 154 Cal. 194, 97 Pac. 306. See, also, *State ex rel. Sparks v. State Bank & Trust Co.*, 31 Nev. 456, 103 Pac. 407. The evidence was sufficient to justify the finding of the insolvency of the bank. That evidence disclosed that the assets of the bank amounted to \$158,903.70; that the principal items of assets were inventoried as "bills receivable \$133,332.56; profit and loss account of \$5,022.69; and real estate and bank building at \$19,000." The cash on hand was \$367.35. The bills receivable consisted in large part of 15 notes signed by the San Luis Land & Improvement Company, a note of the Breeze Publishing Company for \$4,000 and \$645.75 accrued interest, a note of James L. Crittenden for \$22,268.13 principal and \$7,779.64 accrued interest, and sundry other notes. The notes of the San Luis Land & Improvement Company were secured by mortgages upon real estate, and there was conflicting evidence as to the value of that real estate. The officers of the Bank of San Luis Obispo likewise constituted the officers of the San Luis Land & Improvement Company. On the debit side of the statement there were certificates of deposit amounting to \$54,433.49. Some of these, with accumulated interest, were due and others coming due. Thus, upon July 24, 1906, there was due \$400 with accumulated interest upon a certificate of deposit of January 17, 1905, payable six months after date; also \$473 upon a like certificate of July 18, 1905; \$3,040, with accumulated interest upon like certificate of February 6, 1905; and \$20,000 upon a certificate of September 27, 1902, due and payable 12 months after date. Manifestly, these overdue demands could not be met from cash on hand of \$367.35, and it appears that the answer which the bank officials made to the inquiries of the bank commissioners was that Mr. Crittenden, the president, was in San Francisco endeavoring to borrow money to meet the demands against the bank. Without further elaboration of the evidence, it

is apparent that it sustained the finding of the court as to the insolvency of the institution.

Wherefore the motion to vacate and annul the judgment and dismiss the proceedings is denied, and the order denying defendants' motion for a new trial is affirmed.

We concur: SHAW, J.; LORIGAN, J.; MELVIN, J.; SLOSS, J.

(159 Cal. 89)

BROWN v. SHARPHOUSE CONTRACTING CO. (L. A. 2,554.)

(Supreme Court of California. Dec. 29, 1910.)

1. MASTER AND SERVANT (§ 150*)—INJURIES TO SERVANT—NEGLIGENCE—WARNING.

Where the foreman in charge of the work of excavating at the foot of a bank of earth 65 or 75 feet high knew that there was a large crack at the top of the bank, but plaintiff, a laborer working at the bottom of the bank, did not know of such crack, and received no warning thereof, the master was liable for injuries to plaintiff caused by the caving in of the bank owing to such crack.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 297, 299; Dec. Dig. § 150.*]

2. MASTER AND SERVANT (§§ 101, 102*)—INJURIES TO SERVANT—NEGLIGENCE.

It is the duty of an employer to furnish a reasonably safe place in which the employé may perform the work in which he is engaged and use ordinary care to keep the place reasonably safe so that the employé may not be exposed to danger.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 179; Dec. Dig. §§ 101, 102.*]

3. MASTER AND SERVANT (§§ 101, 102*)—INJURIES TO SERVANT—NEGLIGENCE.

An employer is not an insurer of the safety of the employé, and no liability is cast upon him to indemnify an employé for injuries which are the ordinary risks of the business in which he is employed.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 172; Dec. Dig. §§ 101, 102.*]

4. MASTER AND SERVANT (§ 217*)—INJURIES TO SERVANT—ASSUMPTION OF RISK.

Where a person undertakes to work in a place where conditions of danger are liable to occur in the ordinary prosecution of the work, and where he has knowledge of such dangers, or his faculties for seeing or discovering them are just as good as those of his employer, and he undertakes the employment with the knowledge or opportunity for ascertaining those dangers, he is in law deemed to assume the perils incident to the employment.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 574-600; Dec. Dig. § 217.*]

5. MASTER AND SERVANT (§ 219*)—INJURIES TO SERVANT—ASSUMPTION OF RISK.

The rule of assumption of risk has no application where the dangers are not obvious.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 610-624; Dec. Dig. § 219.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

6. MASTER AND SERVANT (§ 226*)—INJURIES TO SERVANT—ASSUMPTION OF RISK.

A servant does not assume the risk of injury from perils which might have been discovered and removed by the employer.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 659-667; Dec. Dig. § 226.*]

7. MASTER AND SERVANT (§ 124*)—INJURIES TO SERVANT—NEGLIGENCE—CAVE-IN.

Where a dangerous condition exists at the top of a bank of earth from blasting which would not be observed by the workmen at the base and which could only be discovered by inspection at the top, it is the duty of the employer to have proper inspection made.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 235-242; Dec. Dig. § 124.*]

8. MASTER AND SERVANT (§ 90*)—INJURIES TO SERVANT—NEGLIGENCE.

The law does not permit an employer to take any chances as to the safety of his employes.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 139; Dec. Dig. § 90.*]

9. MASTER AND SERVANT (§ 118*)—INJURIES TO SERVANT—NEGLIGENCE—CAVE-IN.

In an action against an employer for negligence in permitting a cave-in of earth, it was gross negligence for the defendant to take the chance of the earth not caving in, when it could have been prevented by prying the mass down the bank.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 209; Dec. Dig. § 118.*]

10. APPEAL AND ERROR (§ 1064*)—INSTRUCTIONS—HARMLESS ERROR.

Under Code Civ. Proc. § 2061, which provides that the section shall be given to the jury upon proper occasions, an instruction that, if weaker or less satisfactory evidence is offered, when it appears that stronger or more satisfactory was within the power of the party, the evidence offered should be viewed with distrust, was not prejudicial to defendant, in an action of negligence caused by falling earth, where it was shown by defendant, on the matter of warning plaintiff and four others, that defendant had endeavored to obtain the presence of these four men as witnesses but could not find them.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4219, 4221; Dec. Dig. § 1064.*]

11. APPEAL AND ERROR (§ 1066*)—INSTRUCTIONS—HARMLESS ERROR.

An instruction that it was the duty of the master to give warning to an inexperienced servant of unusual and hidden dangers of which the master is aware and of which the servant, to the master's knowledge, is ignorant, in an action against an employer for negligence in permitting a cave-in, in which there was no evidence that plaintiff was inexperienced, was not prejudicial where the evidence showed that it was the duty of the employer, whether the servant was experienced or inexperienced, to keep the place of employment in a safe condition.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Dec. Dig. § 1066.*]

12. MASTER AND SERVANT (§§ 90, 91*)—INJURIES TO SERVANT—NEGLIGENCE—CAVE-IN.

The fact that a servant is experienced, or that an inexperienced servant has notice of perils ordinarily incident to the employment, does not relieve the master from the duty to protect both from risks which are not natural and ordinary incidents to the conduct of the

business, and which could have been removed by the exercise of due diligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 139, 141; Dec. Dig. §§ 90, 91.*]

Department 2. Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by Boh H. Brown against the Sharp-houser Contracting Company. From a judgment for plaintiff, defendant appeals. Affirmed.

M. E. C. Munday, for appellant. Gavin W. Craig and C. H. Slease, for respondent.

LORIGAN, J. This is an action for damages for personal injuries, and from a judgment in favor of the plaintiff, entered upon the verdict of the jury, and from an order denying its motion for a new trial, defendant appeals.

Under contract with the Santa Fé Railroad Company, the defendant was engaged in cutting down a hill along the railroad line near Orange in Los Angeles county. The work of removing the hill was done by blasting down the bank and using a steam shovel to load the loosened earth upon cars which conveyed it away. The steam shovel was propelled by a traction engine operating over a bed of ties laid along the base of the hill. When the earth loosened by one blast was removed, the steam shovel was moved back and another blast put in the hill to loosen the rock and earth, which being done, the traction engine was again moved forward, the dirt at the base of the hill cleared away, and the ground leveled so that additional ties might be laid ahead upon which to operate the engine and shovel, in removing the rock and earth loosened by the last blast. The plaintiff was, with others, employed by the defendant to level the earth and lay down the ties as occasion required ahead of the traction engine and shovel, such employes being known as "pitmen," and plaintiff had been in the employ of the defendant in such capacity some 10 days prior to the accident. He had never worked as a pitman, although he had done shovel work theretofore on the Santa Fé and other railroads.

On December 21, 1908, the bank of the hill had been blasted down, leaving a steep bank, nearly perpendicular, and from 65 to 75 feet high. In the morning, two days afterwards, plaintiff, with others, was engaged in their regular occupation of leveling the ground and laying the ties at the base of the hill for the operation of the steam shovel. While so engaged the assistant foreman of defendant took the general foreman to the top of the steep bank below which the plaintiff and the others were working in order that he might examine it. Before doing so, the assistant had himself gone up and inspected the top of the cut and had found cracks, from a foot

to 18 inches wide in the bank, about 10 feet back from the face of the cut, and running parallel with the face of the bank and pretty deep down, but not noticeable from the bottom of the hill where the plaintiff and the others were working. The assistant foreman considered the conditions on top pretty bad, and did not deem the bank safe as against a cave, and so called the general foreman, Sullivan, to inspect it. The latter did so and said, "She looks pretty bad," but, "We will take a chance at her." He instructed the assistant to remain on top to watch the bank and warn the men below should a slide commence, while he went below to move the shovel through. The condition of the bank at the top of the cut was not noticeable from the bottom of the hill where plaintiff and the others were working; from that point the face of the cut seemed to be safe. The condition at the top was not known or observable to plaintiff, or, as far as the evidence discloses, to any one save the general foreman and the assistant foreman of defendant who inspected it. When the general foreman came down from the top, and reached the place where plaintiff and the other pitmen were working, he testified that he told them to be careful and look out for the bank. No warning of any particular danger was given them; they were not informed of the condition of the bank as he had discovered it. Plaintiff testified that the foreman gave them no warning whatever, but that as the latter came down from the top, and approached near where the men were working, plaintiff asked him if the bank was dangerous, to which he made no reply, but walked over to where a work train was stationed. Just about this time a vast body of rock and earth from near the top of the bank where the ground was crevassed was suddenly precipitated, a sheer fall of about 50 feet, upon the pitmen below, grievously and permanently injuring the plaintiff. It was in evidence further that in blasting banks crevassed conditions such as were found on the top of the hill would sometimes occur; that after a blast the usual and proper course before moving up the steam shovel was to examine the bank and see if it was safe to work under; that when there is any apparent danger of caving these conditions of danger are removed; men with bars are directed to loosen any dangerous mass of earth, either on the face or top of the hill, and cave them down the bank; sometimes small blasts are put in to effect the purpose.

Various grounds are urged for a reversal. It is first insisted that the evidence is not sufficient to sustain the verdict; the claim being that the injury sustained by the plaintiff from the fall of the mass of earth was one of the risks ordinarily incident to the business in which he was engaged, and which he assumed when he took the employment.

This is the only point made in regard to the evidence.

The rule as to the assumption of risk by an employé has, however, no application under the evidence in this case. It is the duty of an employer to furnish a reasonably safe place in which the employé may perform the work in which he is engaged, and to use ordinary care to keep the place reasonably safe so that the employé may not be exposed to danger. It is true that the employer is not an insurer of the safety of the employé. The measure of his obligation is to use ordinary care in seeing that the place where the work is being done is safe in the first instance, and to employ the same degree of care in continuing to keep it safe. No liability is cast upon the employer to indemnify an employé for injuries which are the ordinary risks of the business in which he is employed. Where a person undertakes to work in a place where conditions of danger are liable to occur in the ordinary prosecution of the work, where he has knowledge of such dangers, or his facilities for seeing or discovering them are just as good as those of his employer, and he undertakes the employment, or continues in the work with the knowledge or opportunity for ascertaining those dangers, he is in law deemed to assume the perils incident to the employment, and cannot look to the employer for indemnification for injuries resulting therefrom. But this rule of assumption of risk has no application where the dangers are not obvious, where they are known to the employer and not to the employé, or where, in the exercise of ordinary care, the conditions of peril might have been discovered and removed by the employer.

In the case under consideration, while in the ordinary transaction of the work a dangerous condition at the top of the slope might sometimes occur, after the face of the hill was blasted, this was not obvious to the men working at the base. No inspection or observance from that point could have disclosed it. It was not the duty of the plaintiff to go to the top of the hill and discover this condition. A dangerous condition being liable to arise there from the blasting, which would not be observable by the workmen at the base, and which could only be disclosed by inspection at the top of the hill, it was the duty of the defendant, in the exercise of ordinary care towards the safety of its employées, to have made such inspection. This duty was recognized by it, and, for the purpose of discharging it and determine whether the top of the hill was safe or not, its general and assistant foreman both made an inspection of it, and both discovered that its condition was such as to be an impending danger to the men below. The plain legal duty of the general foreman, as representing the defendant in the discharge of his duty to its employées, was to have removed

the danger. This could have been readily accomplished by prying the mass down the bank with bars. Instead of doing this, the foreman concluded "to take a chance." The law does not permit an employer to take any chances as to the safety of his employes. As disclosed here, the defendant neglected to take the ordinary care which the law requires shall be exercised in providing a safe place for employes to work. It was gross negligence for defendant to take the chances, and, they having gone against it, the defendant was clearly liable to plaintiff for the result of the injuries suffered by him thereby.

There is nothing in *Thompson v. California Const. Co.*, 148 Cal. 35, 82 Pac. 367, cited by appellant, sustaining its claim that the evidence in this case showed an assumption by plaintiff of the danger of injury by a fall of the bank. In the case cited the danger of a fall of rock from the face of the quarry was as obvious to the employe as to the employer, and it was not claimed there that the defendant had not taken proper precaution to prevent the rock from falling. In the case here, danger from the fall of the bank was not only not known or obvious to the plaintiff, but its dangerous condition was known to the defendant, and no precautions were taken by it to prevent its fall after discovery of the conditions. In the case cited, under the evidence, the rule of assumption of risk was properly applied. It is inapplicable here as the facts show that the dangerous condition was solely known to the defendant, and, this being true, it was its absolute duty to have protected the plaintiff against the danger by removing it.

Complaint is made of various instructions to the jury. The court read to the jury some of the subdivisions of section 2061 of the Code of Civil Procedure, which that section provides are to be given to a jury "on all proper occasions." Appellant complains particularly of the giving of that subdivision which declares "that, if weaker or less satisfactory evidence is offered when it appears that stronger or more satisfactory was within the power of the party, the evidence offered should be viewed with distrust." This instruction, like some others contained in the Code section referred to, has been criticised by this court as being an intrusion on the province of the jury to exclusively determine the weight and effect to be given to the evidence in any case presented to them, and the giving of it is particularly deprecated in criminal cases. *People v. Cuff*, 122 Cal. 589, 55 Pac. 407. In that case the advisability of not giving it at all in criminal cases is suggested. A similar suggestion is applicable to civil cases. As formulated in the Code subdivision, the instruction is but a mere commonplace rule which an intelligent jury will recognize, and apply when the evidence in the case calls for its application, without any suggestion by the court on the subject. This, however, furnishes no reason why the

giving of it should be held harmless whenever the existence of a proper occasion for giving it is questioned, any more than it should be held error always to give it because it may be an invasion of the province of the jury. Like other instructions in a case, error in giving it cannot be insisted on unless it appears to have been prejudicial to the party complaining of it. Nothing of the kind appears here. The jury were told that they were to view with distrust the offer of weaker or less satisfactory evidence when it appeared that stronger or more satisfactory evidence was "within the power of the party" to produce. It was shown in evidence by the defendant, in connection with the testimony of the foreman on the matter of warning the plaintiff and the four others, that defendant had endeavored to obtain the presence of these four men as witnesses but could not find them. Hence the evidence showed that the conditions under which the jury, on the theory of the appellant, might have applied the instruction so as to distrust the testimony of the foreman about the warning, did not arise in the case. It did not appear that it was within the power of the defendant to produce these other witnesses; but, on the contrary, it actually appeared that it was not in defendant's power to do so.

The court instructed the jury that: "It is the duty of the master to give warning to an inexperienced servant of unusual and hidden dangers of which the master is aware, and of which the servant to the master's knowledge is ignorant. Therefore, if you find from the evidence that the plaintiff herein was inexperienced as a pitman, and the defendant was aware of the dangerous condition of the bank, and knew of plaintiff's inexperience, it was defendant's duty to warn plaintiff of such dangerous bank." There is no question but that the general principle of law was correctly given in this instruction; but it is claimed that it was inapplicable because there was no evidence that plaintiff was inexperienced about the dangers to be apprehended in the work to which he was assigned, or, if he was, that the defendant had any knowledge of it. Whether this is true or not we do not consider of any importance. Under the unquestioned evidence in the case, the instruction was more favorable to the defendant than it was to the plaintiff, as the right of the plaintiff to recover should not have been limited, under the evidence in the case, upon the fact whether he was experienced or inexperienced in the work. While it is the duty of the master to inform an inexperienced servant of any danger to be apprehended in conducting a particular employment in which he is engaged, and of which the master has knowledge, but which may not be known or understood by the servant, his paramount duty to his servant, whether inexperienced or experienced, is to use due care and diligence to keep the place of employment in safe con-

dition so that such servants may not be exposed to unusual and unreasonable risks. A servant who has had experience in an employment, and has notice and knowledge of the dangers incident to the ordinary course of the work, and who undertakes the employment or continues to perform it with the knowledge, assumes the risk of injury. But the fact that a servant is experienced, or that an inexperienced servant has notice of perils ordinarily incident to the employment, does not relieve the master of the duty to protect both from risks which are not natural and ordinary incidents to the conduct of the business, and which could have been removed by the exercise of due diligence. The evidence in the case at bar shows that danger of the fall of the bluff was not an ordinary peril of the employment, nor as obvious to the employé as to his employer. On the contrary, it was one unknown to the plaintiff and known as a fact to the defendant. It was an imminent danger when discovered and could readily have been removed, and it was the affirmative duty of the defendant to have done so and not leave it to imperil the men below, and it owed this absolute duty to the plaintiff whether he was an experienced or inexperienced employé. So that the plaintiff having a right to recover under the evidence, whether an experienced or an inexperienced employé, the limitation on his right to do so under this particular instruction, only if the jury found that he was inexperienced, and had not been warned of the danger, cannot be complained of by defendant, as the instruction was not prejudicial to it, but, on the contrary, to the plaintiff.

The appellant attacks several other instructions given by the court; but we do not feel called upon to review them particularly. While parts of some of them may be subject to criticism, when taken separately, still, taking the instructions as a whole, as the jury necessarily did, they correctly stated the law applicable to the evidence in the case.

The judgment and order are affirmed.

We concur: MELVIN, J.; HENSHAW, J.

(159 Cal. 37)

LOS ANGELES COUNTY v. HANNON et al.
(L. A. 2,497.)

(Supreme Court of California. Dec. 27, 1910.
Rehearing Denied Jan. 26, 1911.)

1. DEEDS (§ 38*)—VALIDITY—SUFFICIENCY OF DESCRIPTION.

A deed is not to be held void for uncertainty, if by any reasonable construction it can be made available, and unless it is apparent from its face that the intent of the grantor as to the property conveyed is so uncertain that it is incapable of being made certain by resort to extraneous facts.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 65; Dec. Dig. § 38.*]

2. DEEDS (§ 100*)—VALIDITY—SUFFICIENCY OF DESCRIPTION.

Where there is no patent ambiguity appearing on the face of a deed, but the description of the land as lying between two lines of railroad and from their junction at a certain depot to a specified avenue tends to create an uncertainty because of the existence of two junctions of the railroad and because there is no junction at the immediate point stated, the grantor's intent may be sought for by consideration of the facts surrounding the parties when the instrument was made.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 239; Dec. Dig. § 100.*]

3. DEEDS (§ 192*)—PRESUMPTIONS—INTENT OF GRANTOR IN DEED.

It is to be presumed from the making of a deed that the grantor intended to convey some property by it.

[Ed. Note.—For other cases, see Deeds, Dec. Dig. § 192.*]

4. DEEDS (§ 114*)—CONSTRUCTION—PREMISES CONVEYED—"AT."

A deed conveyed a strip of land on either side of the center line of a railroad commencing at a specified point and running in an easterly direction to a point where the G. cut-off line diverges from the old railroad, running thence easterly along the center line of both lines of railroad to their intersection with the easterly line of the Rancho San Pascuals, and also all the land lying between the two lines of railway from their junction at Garvanza depot to Pasadena avenue, where such avenue lies between such railway lines. There were two junctions of the cut-off and the main line; the easterly one being at the intersection of the easterly line of the Rancho San Pascuals, and the other being a considerable distance west of the depot mentioned, but much nearer to it than the easterly junction, and situated in the territory known as Garvanza, while the easterly junction was situated in another territory. *Held*, that in view of the fact that the westerly junction was in the same territory as the Garvanza depot and nearer to it, and that the easterly junction was referred to, in the deed immediately previous to the reference to the junction as "Garvanza depot," as the "intersection near the easterly line of the Rancho San Pascuals," and the fact that the word "at," when applied to a place, is not definitely locative, but primarily expresses the relation of presence, nearness in place, or time or direction toward, the description of the land lying between the two lines of railway from their junction at "Garvanza depot," etc., will be deemed to refer to the westerly junction of the railway line and to convey the land bounded by the triangle formed by the two lines of railway west of Pasadena avenue.

[Ed. Note.—For other cases, see Deeds, Dec. Dig. § 114.*]

For other definitions, see Words and Phrases, vol. 1, pp. 593-599; vol. 8, p. 7585.]

5. QUIETING TITLE (§ 10*)—PERSONS ENTITLED TO RELIEF—OWNER OF EQUITABLE TITLE.

An action to quiet title cannot be maintained by the holder of an equitable title against one holding the legal title.

[Ed. Note.—For other cases, see Quieting Title, Dec. Dig. § 10.*]

6. DEEDS (§ 111*)—CONSTRUCTION—ESTATES CONVEYED—EQUITABLE ESTATES.

G. contracted with R. and another to sell them certain property and to convey it to them or to such persons as they might request, and that on receipt of the price specified that he would convey to R. and the other whatever balance might remain after deducting lots conveyed by G. under the contract. R. deeded to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

C. numerous lots, including four lots in question in trust for persons to whom R. had sold or agreed to convey such property. Subsequently G. and R. deeded land including the four lots to M. Afterwards G. made a deed to R. of all the land which was agreed to be conveyed by the original agreement except the lands expressly exempted by the terms thereof. Subsequently C. deeded the lots in question to H. *Held*, that the deed from R. to C. only transferred the equitable right which R. had under his contract with G., the legal title then being in G., and G. joined by R. having conveyed the legal title to M., C.'s deed to H. transferred merely the equitable title in the lots conveyed which he had received from R., such deed not being affected by the last deed of G. to R., G. having already conveyed the legal title to M., and such last deed to R. expressly exempting portions of the property which had been previously conveyed at the request of R. under the contract.

[Ed. Note.—For other cases, see Deeds, Dec. Dig. § 111.*]

In Bank. Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by the County of Los Angeles against Joseph E. Hannon and others. From a judgment for plaintiff and an order denying a new trial, defendants appeal. *Affirmed*.

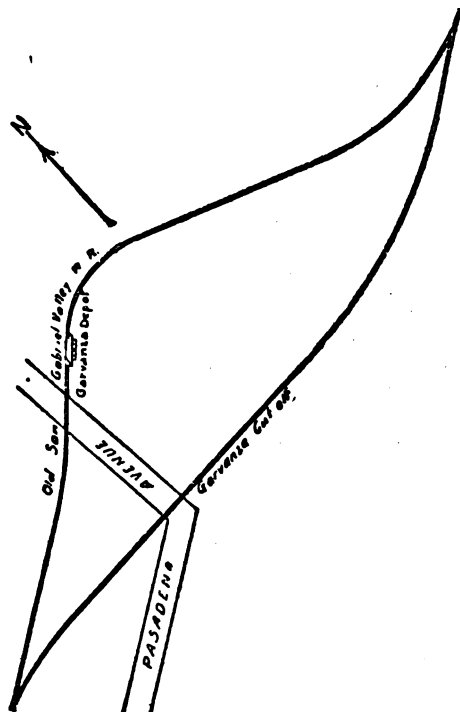
Hass, Garrett & Dunnigan and McNutt, McNutt & Hannon, for appellants. J. D. Fredericks, Dist. Atty., and Hartley Shaw, Chief Deputy Dist. Atty., for respondent.

LORIGAN, J. This action was brought to quiet title to a tract of land in Los Angeles county. Plaintiff had judgment, and defendants appeal therefrom and from an order denying their motion for a new trial.

All parties asserted title to the property from a common grantor, Andrew Glassell; the plaintiff claiming under a deed made by said Glassell and one Ralph Rogers to D. McCool. This deed to McCool described some property not involved in this action; but, as the whole description must to some extent be examined in determining the meaning of the description of the particular property involved here, the entire description is set forth and is as follows: "Being a strip of land thirty (30) feet in width on either side of a center line of what is now known as the California Central Railway, commencing at a point in the center of San Rafael avenue, where said railway crosses said street, according to a map of the town of Garvanza, now on file in the office of the county recorder of Los Angeles county, state of California. In book 9, of miscellaneous records, pages 45 and 46, and running thence in an easterly direction along the center line of said railway to the point on said center line where the Garvanza cut-off line diverges from the original center line of the old San Gabriel Valley Railroad, running thence easterly along the center lines of both the above lines of railroad to their intersection with the easterly line of the Rancho San Pascuals,

and to said easterly line of said rancho. Also all of the land lying between the two lines of said railway from their junction at Garvanza depot to Pasadena avenue, where said avenue lies between said railway lines." It is with reference to this particular description in the deed, which we have italicized, that the principal controversy in this case arises: the claim of appellants being that the deed is void for uncertainty in the description.

As far as the description on the face of the deed is concerned, it is quite apparent there is no uncertainty in it. It describes a triangular tract of land having for its boundaries two lines of railway and Pasadena avenue. In order to apply the description in the deed to the land in controversy, and as described in the complaint, the plaintiff introduced a map showing the location of the lines of railroad and Pasadena avenue, the essential features of which map are produced here on a smaller scale:



It will be observed that on this map there are two junctions of the lines of railways mentioned in the deed, one lying to the east, the other to the west of Pasadena avenue, and that there are two different triangular tracts of land bounded by the railways and said avenue. It was stipulated that the Garvanza depot was not located at either point of junction of said railways, but was located at the point indicated on the diagram above, and that the map as to railways, avenue, and location of depot presents the sit-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

uation as it existed when the deed to McCool under which plaintiff claims was made. It is admitted by appellants that the tract west of Pasadena avenue embraces the land relative to which this action is brought, but it is insisted that as the map introduced in aid of locating the land as described in the deed shows that one of the calls therein—the junction of the railways—cannot be determined by reference to the Garvanza depot, and hence the description in the deed applies equally well to the two triangular tracts of land on either side of Pasadena avenue and similarly bounded, a patent ambiguity is created to which parol evidence could not be addressed, and therefore the deed was void for uncertainty in its description. It is further insisted, if this contention is not correct, that the description in the deed applies to the eastern and not to the western triangular piece involved in this suit.

There can be no doubt that where a deed shows on its face an indefinite description of property, or where the description contained in it is so imperfect that with the aid even of surrounding circumstances a court is unable to say what particular land is intended to be conveyed, the deed must be declared void for uncertainty. In the case at bar, however, there is no uncertainty of description on the face of the deed. The uncertainty arose from the production of the map in an effort to identify the land described in the deed. There was no patent ambiguity appearing on the face of the deed, but a latent ambiguity arising from parol evidence—the production of the map—containing two junctions of the railway, and there can be no question that under such circumstances extrinsic evidence is properly admitted to explain such latent ambiguity and show which junction was meant.

A deed is only void for uncertainty where it is apparent from its face that the intention of the grantor as to the property conveyed is so uncertain that it is incapable of being made certain by resort to extraneous facts. When, however, the description only tends to create an uncertainty as to what property the grantor meant to convey by it, his intention may be sought for by a consideration of all the facts surrounding the parties when the instrument was made. The court will take these facts into consideration so as to place itself in the situation of the parties and determine, if possible, therefrom the identity of the land which was meant to be conveyed by the description used.

The general rules in that respect are well settled. "A deed is not to be held void for uncertainty if by any reasonable construction it can be made available. Parol evidence cannot be admitted to contradict or control the language of a deed, but latent ambiguities may be explained by such evidence, and the technical terms of art. Facts existing

at the time of the conveyance, and prior thereto, may be proven by parol evidence, with a view of establishing a particular line as being the one contemplated by the parties, when by the terms of the deed such line is left uncertain." 3 Washburn on Real Property (6th Ed.) § 2320. In 1 Jones on Real Property (1st Ed.) § 323, the author says: "A deed will not be declared void for uncertainty if it is possible by any reasonable rule of construction to ascertain from the description, aided by extrinsic evidence, what property it was intended to convey. The office of a description is not to identify the land, but to furnish the means of identification. The description will be liberally construed to afford the basis of a valid grant." Our own court has declared in *Stanley v. Green*, 12 Cal. 148, that: "The law will not declare the instrument void for uncertainty until it has been examined with all the light which contemporaneous facts may furnish. If these render the intention clear and the words of the instrument are, by fair rendering, susceptible of a construction to uphold such intention, then they will be so construed and the instrument enforced." So for the purpose of explaining and removing any latent uncertainty in a description "the court will place itself as nearly as possible in the position of the parties when the instrument was executed, and will consider the origin and sources of its derivation, all the attendant surrounding circumstances or the existing state of facts, the situation of the parties and of the property, or the condition or state of things granted at the time, the state of the country, and generally all sources of inquiry, naturally suggested by the description, or which may have acted upon the minds of the parties." 13 Cyc. 607, 608.

Under the rule announced parol evidence was introduced, and, though in some particulars conflicting, certain facts, among others, must in support of the conclusion of the court that the description in the deed embraced the tract of land west of Pasadena avenue and between the railways be taken as established. It was shown (which does not appear on the map introduced in evidence or on the foregoing diagram) that there was a deep and wide arroyo or gully known as the "Arroyo Seco" lying between the two points of the junction of the railways. This arroyo was between Garvanza depot and the eastern junction of the railways; the depot being west of the arroyo and distant about 1,000 feet from the western junction of the roads and some 2,000 feet from their eastern junction. When the deed was made the territory to the west of the "Arroyo Seco" was known by the name of "Garvanza," and the western junction of the railways was located in the territory so generally designated. This name "Garvanza" was not applied to any territory lying east of the Arroyo Seco in which the eastern junc-

tion was located. The territory or neighborhood near which this eastern junction was located was known generally as "Lincoln Park." It will be observed, too, from the description of the other property conveyed in the deed immediately before the description here involved, that when occasion is had to designate the eastern junction of the railways it is referred to as "their intersection near the easterly line of the Rancho San Pascuals."

It is to be presumed from the making of a deed that a grantor intended to convey some property by it, and that presumption is to be indulged in here and all proper evidence considered and all inferences and deductions therefrom to be indulged in to make the instrument effective for that purpose. The only trouble with the description in the deed under consideration arises from the call for a junction of the railways "at Garvanza depot" as part of the description of the property conveyed. It appears that there was no such junction at Garvanza depot itself. If that call must be construed as absolutely locative of the junction referred to, it is beyond doubt a false call and would have to be rejected, as it is conceded that there is no junction "at Garvanza depot." Rejecting this call as false, the effect would be that there would be nothing in the deed which would indicate which junction of the railways was meant, whether the western or the eastern junction, and hence the deed would be void for uncertainty, a conclusion which must not be reached if a different one can be adopted.

But the word "at," when applied to the place or location of an object, is not treated as definitely locative. Webster, defining the word "at," declares: "Primarily this word expresses the relation of presence, nearness in place or time, or direction toward. * * * It is less definite than in or on. At the house may be in or near the house." In 3 Ency. of Law (2d Ed.) 167, it is said: "At, used in reference to time or place has frequently the sense of near." A railroad was authorized by its charter to intersect another railroad "at Charlotte," and it was held that an intersection a thousand yards outside Charlotte satisfied the requirement; the court saying: "The word 'at,' when used in reference to place, frequently means in or within, but not always. It sometimes denotes nearness or proximity. That is its primary significance, and it is less definite than in or on. At the house may be in or near the house. Its significance would generally be controlled by the context and attending circumstances, if any, denoting the precise sense in which it is used." *Purifoy v. Richmond, etc., R. Co.*, 108 N. C. 100, 12 S. E. 741. A tract of land near the terminus of a railroad was held exempt under a statute exempting certain lands "at" the terminus; the court considering the matter saying: "The

word 'at' is somewhat indefinite; it may mean in, or within, * * * or it may mean near. Its primary idea, the lexicographer says, is nearness, and it is less definite than in or on." *State v. Receiver, etc.*, 38 N. J. Law, 290, 302. See, also, *Rogers v. Galloway, etc.*, *College*, 64 Ark. 627, 44 S. W. 454, 39 L. R. A. 636; *Minter v. State*, 104 Ga. 743, 30 S. E. 989; *Bartlett v. Jenkins*, 22 N. H. 53; *West Chicago, etc., Co. v. Manning*, 70 Ill. App. 239. Other authorities to the same effect might be cited, but it is unnecessary, as the rule announced is hardly open to question.

Now applying this rule as announced, and taking the word "at" as having the primary meaning of nearness, and also that it is a relative term, the signification of which is to be determined by taking into consideration the circumstances surrounding and attending its use, and the meaning of the expression "at Garvanza depot" in referring to a junction, can be reasonably construed as applying to the western junction of the railways.

It must be assumed that the parties to the deed knew the conditions of the locality when the conveyance was made. They had a junction of the railroads in view or it would not have been referred to. If there were no other junction save the one west of Pasadena avenue, there could be no question but that the reference to a junction "at Garvanza depot" would be held to mean that junction. This would follow under the rule that the word "at" is merely indicative of nearness, and we think this signification was properly given to it by the trial court, as the Garvanza depot was much nearer to the western junction than the eastern, and was in the same territory as the western junction was situated on, and it would be only natural, when referring to a junction in the same territory—Garvanza—in which the depot was situated, to associate the junction with the depot. This construction is all the more reasonable and warranted when we consider that the eastern junction was not in the territory known as "Garvanza," but in territory known as "Lincoln Park." Added to this is the circumstance that, when there is occasion to refer to the intersection of the two lines of railroad at their eastern junction, such junction is not designated as "at Garvanza depot," but is designated as the "intersection near the easterly line of the Rancho San Pascuals." It will be observed, too, by examining the full description in the deed, that this description of the eastern junction is found immediately preceding, and by but a few lines, the description here in question, and yet, when we come to this later description where the junction of these railroads is again referred to, it is mentioned as a junction "at Garvanza depot." It is hardly possible that, if this last reference to a junction was intended to be to the same

junction as previously described, the person drafting the deed would have in such a brief space of time indulged in such a variety of expression to describe it. This difference in expression as to the location of the separate junctions of these railroads was a potent circumstance warranting the conclusion that as the first description undoubtedly referred to the eastern junction, the subsequent immediate reference to a junction by different description must mean another junction, and, necessarily, the only other junction known to exist, namely, the western junction.

Under the evidence and the reasonable deductions to be drawn therefrom, we think the trial court was justified in concluding that there was no uncertainty in the description in question, but that the reference in the deed to the junction "at Garvanza depot" was intended to mean the western junction of the railroads, and that the land intended to be conveyed by the deed was the triangular piece of land lying to the west of Pasadena avenue and between the two railroads.

In this view it is hardly necessary to discuss the claim of appellants that the deed was intended to describe the easterly triangular tract of land.

Now, as to the other points on this appeal: The appellants W. B. Judson and Julia N. Rogers assert title to all the block described in the complaint except four lots therein. Their claim, however, was based solely on the proposition that the deed to McCool was void, and, as we have seen that it was not, no further discussion of the claim of these particular appellants is necessary.

The appellant Joseph E. Hannon asserts title to the four lots above referred to under a claim that, conceding the deed to McCool to be valid, appellant is nevertheless, the owner of the four lots by title superior to plaintiff. As to this claim: It appears that on December 26, 1885, Andrew Glassell, the then owner of the property in question, made an agreement with Ralph Rogers and W. E. Rogers (which was immediately recorded) to sell and convey the property in dispute to them. The contract provided that Glassell would convey the property to the Rogers "or to such person as they may request"; that the Rogers might negotiate sales of portions of the property and Glassell would convey to the purchasers; and that on receipt of the full consideration specified in the contract—\$113,000—he would convey to the Rogers "whatever balance may remain (of said property) after deducting such lots * * * as may have been * * * conveyed by virtue of the privilege above stated." On October 27, 1887, Ralph Rogers made a deed of trust to A. D. Childress, purporting to convey to him some 180 lots, including the four lots in question, in trust for the benefit of persons to whom Rogers had sold or agreed to convey said property. On April 25, 1888, the deed from Glassell and Ralph Rogers to Mc-

Cool was made, which embraced these four lots, and was the commencement of the title of plaintiff. On July 12, 1888, Glassell made a deed to Ralph Rogers, which was joined in by W. E. Rogers. No particular description of the land intended to be conveyed by this deed is given, but it is described as all the land which was agreed to be conveyed by the agreement of December 26, 1885, except "all the lands and property expressly excepted by the terms of the contract of December 26, 1885." In 1894 A. D. Childress made a deed to appellant Hannon, purporting to convey to him the four lots in dispute, and he asserts title to them under this conveyance, supported by the deed from Glassell to Ralph Rogers of July 12, 1888.

It is contended by appellant that, as the contract between Glassell and Rogers antedated the deed from Glassell to McCool, appellant, under the Childress deed to himself, supported by the conveyance from Glassell to Rogers, acquired a title superior to plaintiff to these four lots. This claim is met by the assertion on the part of plaintiff that the trust deed from Rogers to Childress is void for various reasons assigned. We perceive no necessity, however, for discussing that claim, because we are satisfied that, if the appellant acquired any title whatever to the lots in question, it was an equitable one, arising solely under the contract of sale between Glassell and the Rogers, which title he is in no position to assert in this action to quiet title.

Conceding that the deed of trust from Rogers to Childress was valid, it only transferred such right in the property as Rogers had under his contract of sale with Glassell, which was purely an equitable right. When Rogers made the deed to Childress, the legal title was in Glassell. It is true that Glassell had agreed to convey the land to Rogers, but in fact he conveyed the legal title to the property (Rogers joining in the deed) to McCool by the deed of April 25, 1888. The deed from Glassell to Rogers made July 12, 1888, which appellant contends operated in aid of the conveyance from Rogers to Childress, did not affect the situation whatever. Glassell could not thereby convey any legal title to the property, as he had already conveyed it to McCool. In fact, the Glassell deed did not purport to convey these lots to Rogers, but excepted them. Rogers had joined in the deed from Glassell to McCool. The only interest Rogers then had was that acquired under a contract of sale with Glassell, which provided that the latter might convey any of the property described in the contract to such persons as Rogers might request, and the only purpose of Rogers in joining in the conveyance to McCool was to show that it was made at his request. Now the deed from Glassell to Rogers, made after the conveyance by them to McCool, was in satisfaction of the contract of December 26, 1885.

But as that contract provided that Glassell should convey to Rogers only that portion of the property, which had not been conveyed at the request of Rogers to other persons, and the deed made by Glassell to Rogers in satisfaction of the contract excepted from its operation all portions so conveyed at the request of the latter, it is clear that, as Glassell had previously conveyed to McCool the lots in dispute at the request of Rogers, the latter took no title whatever to them under the deed of July 12, 1888.

It is apparent, therefore, that, if the appellant Hannon acquired any interest in the lots in question, it was purely an equitable one under the contract of sale between Glassell and Rogers. He has no legal title because that passed to McCool, and is now vested in the plaintiff. The appellant is not asserting any rights under the contract of sale. His answer denies title in plaintiff and alleges that he is the owner in fee of these four lots. In effect his answer is in the nature of a cross-complaint to quiet his alleged ownership of this property in fee. But it is clear that he is not such owner; he has no legal title to it; that is in the plaintiff. While appellant averred in his answer a legal title, he proved what is at best an equitable one, and this he seeks to have quieted against the legal title held by plaintiff. It is the settled law, however, that an action to quiet title cannot be maintained by the holder of an equitable title against one holding the legal title. *Von Drachenfels v. Doolittle*, 77 Cal. 295, 19 Pac. 518; *Tuffree v. Polhemus*, 108 Cal. 670, 41 Pac. 806; *Fudickar v. East Riverside I. Dis.*, 109 Cal. 29, 41 Pac. 1024; *McDonald v. McCoy*, 121 Cal. 55, 53 Pac. 421; *S. San Bernardino L. & I. Co. v. San Bernardino Nat. Bank*, 127 Cal. 245, 59 Pac. 699. Under these authorities, as whatever right the appellant may have acquired under the contract of sale to the four lots in question is purely an equitable one, he cannot in this action and under his pleadings assert it against the legal title held by the plaintiff.

The judgment and order appealed from are affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.; MELVIN, J.; HENSHAW, J.

SHAW, J., being disqualified, does not participate in the foregoing.

(159 Cal. 104)

MEIGS v. PINKHAM et al. (L. A. 2,463.)
(Supreme Court of California. Dec. 30, 1910.
Rehearing Denied Jan. 28, 1911.)

1. LIMITATION OF ACTIONS (§ 55*)—COMPUTATION—ACCRUAL—INJURY TO LAND BY DISCHARGE OF WATER.

Where defendants constructed ditches on their own land to carry away surface water, no

right of action accrued to plaintiff, an adjoining owner, until actual injury, and mere anticipation of danger from the fact that a deposit of silt and sand on defendants' land would eventually raise it and cause the overflow to be on plaintiff's land did not give a cause of action against which limitations ran.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 305; Dec. Dig. § 55.*]

2. APPEAL AND ERROR (§ 843*)—EXTENT OF REVIEW—QUESTIONS NOT NECESSARY—LIMITATIONS.

Where defendants enjoined from maintaining a ditch flooding plaintiff's land claimed that overflows occurred in certain years, and that a certain statute was applicable, and the evidence as to the time of the overflows was conflicting, and the court decided that the action was not barred by the statute pleaded by defendants, the court on appeal would not decide the applicability of the statute.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 843.*]

3. EQUITY (§ 87*)—LACHES—APPLICABILITY OF STATUTE OF LIMITATIONS.

As the statute of limitations is applicable to both legal and equitable actions, there can be no laches in delaying the bringing of an action if it is brought within the period of limitation, unless there are some circumstances attending the delay which have operated to the injury of the defendants.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 242; Dec. Dig. § 87.*]

Department 2. Appeal from Superior Court, Santa Barbara County; Samuel E. Crow, Judge.

Action by Peverill Meigs against Rufus F. Pinkham and others. From a judgment for plaintiff and from an order denying a new trial, defendants appeal. Affirmed.

Wm. G. Griffith and H. C. Booth, for appellants. Canfield & Starbuck, for respondent.

LORIGAN, J. Plaintiff brought this action to abate, as a private nuisance, a dam and ditch maintained on the land of defendants adjoining lands of plaintiff, to enjoin defendants from further maintaining them and thereby diverting storm waters onto the lands of plaintiff, and for damages. Judgment was entered in favor of the plaintiff granting the injunction as asked, and awarding plaintiff damages, and defendants appeal from said judgment and from an order denying their motion for a new trial.

Reliance for reversal is based on three grounds: First, it is claimed that the evidence shows that plaintiff's cause of action is barred by the statute of limitations; second, that plaintiff has been guilty of laches in prosecuting his action; and, third, that the injunction granted by the court, if warranted at all, is broader than the law authorizes.

The general situation surrounding this litigation appears to be as follows: The plaintiff and defendants own adjoining tracts of land near the city of Santa Barbara; plaintiff owning the easterly and defendants the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

westerly one. Both tracts face southerly toward the Pacific Ocean, the northerly parts lying in the foothills from whence through several ravines the storm waters in the winter time flow through the lands of the parties to the Pacific Ocean. Immediately back of the dividing line between the lands of the plaintiff and defendants is situated one of these ravines, the storm waters of which in their ancient, natural, and accustomed course flow in a southwesterly direction diagonally across the land of defendants.

In 1889 one I. K. Fisher owned the lands now owned by defendants, and plaintiff then owned his lands. Fisher, in order to prevent the waters from flowing across his land in the accustomed diagonal course just mentioned, constructed a dam at the mouth of the ravine particularly referred to above, and dug a ditch therefrom due south along the west side of the division fence between his land and that of plaintiff, but on his side to the county road, and thence along the county road parallel to the southern boundary of his land westerly to an outlet into the ocean. As a result he carried the waters at right angles around his land and by preventing it from flowing diagonally across it redeemed his land. In its original natural and straight flow through the land of Fisher (which he subsequently conveyed to the defendants who have ever since maintained the dam and ditch), the storm waters carried with them in suspension sand and silt which in considerable quantities were deposited upon the land of defendants. When first constructed by Fisher, the ditch here involved had firm sides in the adobe land along the division fence, but, on account of its rectangular course, its longer length, and lesser average grade than the original shorter and more direct diagonal course, the flow of the water was impeded, and as a natural result the sand and silt were deposited quicker and in larger quantities along its course. To such an extent was this done that during the first flow of storm water after its construction the ditch filled up with sand at its right angle turn more rapidly than two men could clear it out, and, by reason of this impediment, overflowed the extreme southwest corner of plaintiff's land with water and sand. Fisher, however, exerted himself thereafter, as did defendants after they acquired the property, to keep the water off the lands of plaintiff, and were so successful that for many years no further flow upon plaintiff's land occurred. The ditch, however, during this interval of years repeatedly filled up and overflowed the land of defendants so that eventually there was deposited along the division fence on the land of defendants a blanket of sand which raised the surface of the defendants' lands from a foot to a foot and a half. The adobe ditch with its firm sides became filled up, and thereafter the water flowed in a ditch through the sand above the summit of a

slight ridge dividing the land of plaintiff and defendants. The ditch, though kept in repair as far as possible by defendants, having no sufficient resistant power, would during the years when there were heavy storms melt away and flatten out, the storm waters overflowing the land of defendants, but not flowing upon that of plaintiff. These conditions continued for many years without affecting the plaintiff's land. While there is some dispute between respective counsel as to when the first injury to plaintiff's land occurred subsequent to the original construction of the ditch, it is at least undisputed that in February and March, 1906, and January and February, 1907, although defendants had repaired the said ditch, it was again flattened out and the waters rushed over plaintiff's lands. Without mentioning the damage to plaintiff's land by reason of any particular overflow, it appears that as a result of all of them during the two years last mentioned a large portion of plaintiff's land has been covered to a depth of from six inches to two feet with clear sand which is incapable of cultivation, and is to large in quantity to be plowed into the adobe land it covers. Gulleys were also cut through the land of plaintiff, successive crops of garden truck destroyed, and several hundred young gum trees died on account of the sand deposit about them. Plaintiff called on one of the defendants in an endeavor to have some measures taken for the joint protection of their lands, plaintiff offering to defray a portion of the expense himself. This defendant refusing to assist, or to take any measures to keep the water off plaintiff's land, and declaring an intention to continue the maintenance of the ditch as it then existed, this action was brought by plaintiff in July, 1907, to obtain the relief which the court by its decree awarded him. We make only this general statement of the facts because it is not questioned but that on the evidence the plaintiff was entitled to an injunction unless his right to maintain the action therefor was barred by limitation or by laches.

As to the question of limitation. This point is directed only against the action in as far as it is brought for preventive relief. No point is made on it as far as the action is one for damages.

It is insisted generally by appellant that at the time this dam and ditch were constructed by Fisher it was apparent to plaintiff, according to his own testimony, that, if they were maintained, the result would be that sand and silt would be gradually deposited in such large quantities on the land of defendants as would ultimately turn the waters upon the land of plaintiff. From this it is insisted that as there was an apparent invasion of the property rights of plaintiff from the time of the construction of the dam and ditch, a right of action to enjoin defendants' maintenance of them arose

then, and that the statute of limitations began to run from that time, whether there was any actual damage to plaintiff or not. We cannot agree with this view. Every property owner has a right to construct ditches or artificial drains upon his land, and by such channels carry away the surface water therefrom, and this right is only limited by the inhibition of the law, that by such means he shall not deflect or discharge it upon his neighbor's land. The ditch here was built entirely upon the land of Fisher, and he had a right to maintain it there for the purpose contemplated as long as it did not injure the plaintiff. The testimony of the plaintiff was not that immediate danger was to be apprehended therefrom when the ditch was first constructed. He did not so state, and it is apparent as a fact that no such immediate danger was to be apprehended or that any material injury accrued. No injury could necessarily result until the land of defendant had been so raised by the deposition of sand on it that it became higher than the slope of plaintiff's land from the ridge along which the ditch ran. This did not occur until at least 14 years after the construction of the ditch. Although it is shown that in the first year it was built—in 1889—there was an overflow at the extreme southwest corner of plaintiff's land doing some trivial damage, this did not proceed from the accumulation of sand on defendants' land which now creates the trouble and makes the maintenance of the ditch a continuing nuisance. This damage of 1889 was of a trivial character, arising from the unanticipated deposit of sand at the rectangular turn. The cause was immediately removed by Mr. Fisher, and the ditch was carefully taken care of by him and the defendants thereafter, and there was no further flow on plaintiff's land for 14, if not 17 years. The danger which the plaintiff apprehended, and which he stated would result from the deposition of sand on defendants' land through which the ditch ran, was not an immediate danger, but one which he was satisfied would result if the dam and ditch were maintained after the sand deposits had been made. As the ditch was in firm ground, and as the evidence shows deep and wide, when constructed, there was no immediate danger to be apprehended. While the injury occasioned by the overflow in 1889 gave plaintiff a right of action for nominal damages, as the injury was merely trivial, it gave him no rights to preventive relief in equity. The construction of the dam and ditch was not itself a nuisance, nor an invasion of the right of plaintiff, because they were not constructed on his land. As originally constructed, and while maintained as so constructed, they were not. The nuisance proceeded from the subsequent deposition of sand along the division fence on defendants' land and the destruction and obliteration thereby of the original ditch and

the impossibility thereafter of carrying the water in a direct channel through the sand deposit, so that what in its original construction had been lawful had subsequently, and, on account of changed conditions, become a nuisance. Because this might occur, however, did not require plaintiff to commence an action at once under penalty of being denied preventive relief when the nuisance became actually established. The original construction of the dam and ditch being lawful was not itself an invasion of any property right of the plaintiff, and, though it might be anticipated that at sometime in the future conditions might arise which might make its maintenance such an invasion, it was not to be presumed that, when it became such nuisance, it would be continued. On the contrary, as the defendants had no prescriptive right to maintain the dam or ditch, and never, of course, intended to maintain it to the injury of plaintiff, and certainly exerted themselves so that it should not be, plaintiff had a right to assume that, when conditions arose so that its further maintenance would cause actual and continuous injury to plaintiff and become a nuisance, defendants would abate it. There was no danger to be apprehended if the ditch was maintained as originally contemplated. There was only a probability that, if the dam and ditch were maintained by defendants under certain future and changed conditions, injury would follow. Plaintiff had a right to assume that when those conditions occurred and actual danger to plaintiff's land was not only threatened, but actually occurred, the nuisance would be abated, and as it was not, his right of action may be legally said to have then accrued, and, if such action was brought within the statutory time thereafter, the claim of defendants that it should have been brought when the dam and ditch were originally constructed is untenable.

It is insisted by appellants, however, that even if the plaintiff's right to maintain this action did not accrue until the specific injuries to his land, other than the overflow of 1889, occurred, still his right of action was barred by the statute of limitations. This claim is predicated upon the assertion of appellants that actual damage to plaintiff's land by overflow occurred after the changed conditions as to the dam and ditch as early first, as the winter of 1902; again in the winter of 1903, and in September, 1904. As this action was not commenced until 1907, the theory of the appellants is that the two years' limitation in subdivision 1 of section 339 of the Code of Civil Procedure, pleaded by them, applied to this character of action, as one upon "an obligation or liability not founded upon an instrument in writing" within the purview of that section. In support of their position, they rely upon language used in the case of *Piller v. Southern Pacific R. R. Co.*, 52 Cal. 42, which they

claim sustains this contention. Respondent insists that the proper section of the Code limiting his right to maintain this action for an injunction (because no objection was made to that part of the judgment for damages) is section 343, and relies on *Lux v. Haggin*, 69 Cal. 255, 4 Pac. 919, 10 Pac. 674, and *Dore v. Thornburgh*, 90 Cal. 64, 27 Pac. 30, 25 Am. St. Rep. 100. We perceive no reason for considering the discussion on this point. The evidence as to whether there was an overflow of plaintiff's land in the winters of 1902 and 1903 was conflicting, and, as the court decided that plaintiff's cause of action was not barred by the provisions of the code section pleaded by defendants, it necessarily decided the conflict, against any overflow having occurred in those years. As to the alleged overflow of 1904. The evidence of the witness whose testimony is relied on by appellants to sustain such an overflow is rather indefinite as to what fence he saw the water flowing through. He was not called by the defendants (whose witness he was) to prove that any water flowed upon the land of plaintiff in that year or any other. His testimony was as to what water flowed on defendants' land, and, while on cross-examination by counsel for plaintiff he stated that he saw a little bit of water running through a fence, he does not clearly specify what fence, and from the general trend of his testimony it is reasonably apparent that he was referring to an east and west partition fence, and not to the north and south division fence dividing plaintiff's and defendants' lands and along which the ditch ran. So that the only overflows upon the land of plaintiff having occurred during the heavy storm floods in February and March, 1906, and January and February, 1907, and as this action was brought in 1907, upon any theory as to the statute of limitations, it was brought in time.

As to laches. Under our law, as the statute of limitations is applicable to both legal and equitable actions, there can be no laches in delaying the bringing of an action if it is brought within the period of limitation (*Lux v. Haggin*, 69 Cal. 255, 4 Pac. 919, 10 Pac. 674; *Cahill v. Superior Court*, 145 Cal. 42, 78 Pac. 467; *Cohen v. Cohen*, 150 Cal. 99, 88 Pac. 267), unless there are some facts or circumstances attending the delay which have operated to the injury of the defendants. Nothing of the kind appears here. It is neither alleged nor asserted that defendants have in any way been injured, or at all affected, with respect to the relation of their lands to this dam and ditch by anything the plaintiff did or did not do. They took their title to the land from Fisher with full knowledge of the conditions with respect to the dam and ditch and of the liability under certain conditions of injury to

plaintiff's land by its maintenance, and they voluntarily assumed this liability. Hence, as the statute of limitations does not apply, neither can the bar of laches.

It is complained that the decree of injunction in the case is broader than the law allows. In that regard it is claimed that the decree literally construed, after ordering the defendants to remove the dam and ditch, enjoins them from doing three separate and distinct acts, first, restoring the dam and ditch; second, diverting the storm waters easterly from their natural course; and, third, turning the storm waters upon the land of plaintiff. Particular exception is taken to the second provision referred to; it being claimed that it is a limitation on defendants' undoubted legal right to divert surface waters from their lands in any course through their land that they see fit, so long as they do not injure their neighbor. Of course, defendants have this right and our examination of the decree satisfies us that the trial court by its decree has not curtailed it or attempted to do so; that it is not open to defendants' complaint that it does so. When the terms of the injunctive decree are examined, discarding verbal niceties, and with reference to the record in the case, and the case made to which it applies, it is evident that it does not, as contended by appellants, prohibit them from diverting the waters from the ancient and natural diagonal course across their lands, nor prohibit them from carrying them easterly over them or elsewhere across them, except that they shall not divert or carry them so that any part of the storm waters will flow upon the land of plaintiff.

The judgment and order appealed from are affirmed.

We concur: HENSHAW, J.; MELVIN, J.

(158 Cal. 551)

UNION LABOR HOSPITAL ASS'N v.
VANCE REDWOOD LUMBER CO.
et al. (S. F. 5,299.)

(Supreme Court of California. Nov. 17, 1910.
On Rehearing in Bank, Dec. 20, 1910.)

1. CONSPIRACY (§ 8*)—INJURY TO BUSINESS.

Defendants compelled all their employees to assent to deduction from their wages of \$1 a month for hospital protection, which entitled the employees to hospital tickets in one of four hospitals, of which plaintiff's was not one. *Held*, that as there was no contract between plaintiff and defendants and the defendants were not acting in an illegal manner, they had the right to exclude plaintiff from their list, so that plaintiff could not recover on the ground of conspiracy to injure his hospital business.

[Ed. Note.—For other cases, see *Conspiracy*, Cent. Dig. § 7; Dec. Dig. § 8.*]

2. TORTS (§ 1*)—NATURE OF ACT.

In the absence of contract, the master may dismiss the servant upon caprice or for any other reason, and the servant may leave his employment, and either one of them may exer-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

cise this option to injure some one else as long as it is done in a legal manner.

[Ed. Note.—For other cases, see Torts, Cent. Dig. § 1; Dec. Dig. § 1.*]

3. TORTS (§ 4*)—VIOLATION OF RIGHT, DUTY OR OBLIGATION NECESSARY — BAD MOTIVE FOR LAWFUL ACT.

As long as there is no right, duty, or obligation violated, bad motive will not make an act wrongful.

[Ed. Note.—For other cases, see Torts, Cent. Dig. § 4; Dec. Dig. § 4.*]

Department Two. Appeal from Superior Court, Humboldt County; George W. Hunter, Judge.

Action by the Union Labor Hospital Association against the Vance Redwood Lumber Company and others. From a judgment for plaintiff, defendants appeal. Reversed and remanded.

Denver Sevier, C. M. Wheeler, F. A. Cutler, and F. R. Sweasey, for appellants. J. F. Quinn, Coonan & Kehoe, for respondent.

HENSHAW, J. This action was brought by plaintiff against the named defendant and six other lumber companies, to obtain an injunction restraining and enjoining them from conspiring and combining together to vex, annoy, hinder, injure, and destroy the hospital business of plaintiff. The scheme of annoyance and destruction consisted in this: The defendants compelled every employé to consent to the deduction of \$1 from his monthly wage, 12½ cents of which went into a contingent fund to help needy employés who might be injured and 87½ cents of which went to a hospital for an employé's ticket. This ticket entitled the employé to medical and surgical care and attendance in case of injury. The hospital could be selected by the employé from a list of three or four presented to him, but the Union Labor Hospital was not mentioned and was not on this list. These facts form the foundation of the charge of malicious and willful conspiracy, combination, and boycott designed to vex, annoy, hinder, injure, and destroy the plaintiff's business, and coerce and intimidate its patrons and customers, to ruin its credit and to prevent it from selling its bonds, etc. There was no issue over the question of what these defendants were doing. The court found, generally, in favor of the allegations of the complaint, found that the defendant companies derived a benefit from the existing hospital arrangement and the fund created by the 12½ cents taken out of the monthly hospital dues of each employé, since thus they were relieved of the burden of caring for indigent and injured employés. The court also found that the relations existing between the defendants and the agents of plaintiff were of such a nature that the defendants were justified in not entering into an agreement with the Union Labor Hospital, such as existed between the

defendants and the other hospitals upon their list. And the court also found that the defendants, in entering into the agreement with the other hospitals, were acting solely for the purpose and with the intent to subserve their own (defendants') interests.

The defendants were all companies engaged in lumbering and milling in Humboldt county. The occupations of their men were dangerous. That provision should be made for the medical and surgical care of the men injured was most proper. No objection is made to this, nor to the means adopted to effectuate it, saving that plaintiff contends that because its hospital was not upon the list and because the employés were compelled to take out hospital tickets in one or another of the enumerated hospitals, a species of unlawful discrimination by the defendants against the plaintiff was thus established, a discrimination which it is urged and which the court found was an illegal boycott, against the continuance of which defendants were enjoined.

It is important to understand exactly what these defendants were doing. Essentially it was this: By agreement amongst themselves they selected a list of hospitals, of which plaintiff's was not one. By agreement amongst themselves, for their own protection and for the betterment of the condition of their men, they required of the men, as a condition of obtaining employment, or as a condition of remaining in employment, that they should assent to a deduction from their monthly wages of 87½ cents, which should be given to a hospital of the employé's own selection taken from the list presented. These defendants did not go so far as to discharge or even to threaten to discharge an employé who might buy a ticket entitling him to the service of the plaintiff's hospital. They insisted merely that he buy a ticket in one of their designated hospitals. An employé was at liberty to buy an additional ticket in plaintiff's hospital, but, in the nature of things, an employé having purchased a ticket in another hospital, would not be likely to lay out any more money for such a purpose.

There being no contractual relations between plaintiff and defendants, the defendants, individually or in combination, were under a duty only to refrain from inflicting a legal wrong upon plaintiff. The finding of the court is that defendants in making their agreements with the Sequoia, St. Francis, Marine View, and Trinity hospitals were acting solely for the purpose and with the intent to subserve their own interests. But if this were not so, and their purpose were to injure the business of plaintiff, nevertheless, unless they adopted illegal means to that end, their conduct did not render them amenable to the law, for an evil motive which may

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

inspire the doing of an act not unlawful will not of itself make the act unlawful. *Parkinson v. Building Trades Council*, 154 Cal. 581, 98 Pac. 1027, 21 L. R. A. (N. S.) 550; *Pierce v. Stablemen's Union*, 156 Cal. 70, 103 Pac. 324. Unquestionably there was nothing illegal in the measures employed to accomplish this result. The suasion or intimidation or coercion was purely moral, and went no further upon the part of the defendants than a refusal to employ or to retain in their employ any one unwilling to comply with their hospital regulation. This was purely a matter between employer and employé, and where no contract between them stands in the way, it is the unquestioned right of the employé to leave the employment at his pleasure, and it is equally the right of the employer to discharge at his pleasure, or to impose conditions upon the retention of the employé in his employment. If imposed conditions are regarded as unjust, unfair, or onerous, the employé need not comply with them, but may resign, and, as has been said in the cases above cited, he may do this as an individual, or he may do so by concerted action as a member of an organized body or trades union. Precisely as may the employé cease labor at his whim or pleasure, and, whatever be his reason, good, bad, or indifferent, leave no one a legal right to complain; so, upon the other hand, may the employer discharge, and, whatever be his reason, good, bad, or indifferent, no one has suffered a legal wrong. A man may have a profitable general merchandise business in the neighborhood of a mill or factory depending for its patronage upon the mill or factory hands. For reasons sufficient to them they may cease dealing at this store by concert of action, and so long as their methods (not their motives) are legal, they may perfect a boycott which will destroy the storekeeper's business. Upon the other hand, the millowner, being under no contractual obligation to the storekeeper, may indisputably shut down his mill at any time, and thus work a destruction of the storekeeper's business. It is conceivable that his motive may be so venomous that he shuts down his works merely to destroy the storekeeper's business and yet the storekeeper has no right of action, nor indeed has he right of inquiry into the motive which prompted the act. Since the millowner may do this, he may do less than this, and exact of his employes, as a condition of their continued employment, that they do not deal at that store, and for this, also, however grave the injury, the storekeeper will have no legal cause of complaint. These views touching the arbitrary right of the employé to labor or to refuse to labor, and the reciprocal arbitrary right of the employer to employ or discharge labor, without regard in either case to the actuating motives, are propositions settled beyond peradventure. "It is well settled," observes Chief Justice Shaw, in *Commonwealth v. Hunt*, 4 Metc. (Mass.) 133, 38 Am. Dec.

346, "that every man, whether skilled laborer, mechanic, farmer, or domestic servant, may work or not work, work or refuse to work, with any company or individual at his own option, except so far as he is bound by contract." In *Payne v. Railroad Co.*, 81 Tenn. 507, 49 Am. Rep. 606, it is said: "Railroad corporations have in this matter the same right enjoyed by manufacturers, merchants, lawyers, and farmers. All may dismiss their employes at will, be they many or few, for good cause, for no cause, or even for cause morally wrong, without being thereby guilty of legal wrong. A fortiori they may threaten to discharge them without thereby doing an illegal act."

The question will be found very elaborately discussed in *Heywood v. Tillson*, 75 Me. 225, 46 Am. Rep. 373, and in the more recent case of *Banks v. Eastern Ry. & Lumber Co.*, 46 Wash. 610, 90 Pac. 1048, 11 L. R. A. (N. S.) 483, a case very similar to the one at bar. Banks charged that he was conducting a public hospital, that the defendant was a corporation engaged in the manufacture of lumber and shingles, employing a large number of men; that 50 cents a month were retained from the wages of each man, to be disbursed for hospital and medical services; that 56 employes of the defendant selected plaintiff's hospital and served upon defendant a written demand that their hospital dues be thereafter paid to the plaintiff; that plaintiff, in consideration, issued to each of the employes a certificate entitling him to medical and surgical treatment in the hospital, and that defendant refused to pay the fees to plaintiff so demanded by the written request of its employes; but, to the contrary, notified its employes that all hospital dues would be paid to the Dumon hospital, and that any employé not consenting to such demand would be discharged. It was alleged that all the acts of the defendant were wanton, wilful, and malicious, and done with intent to harass plaintiff and injure his business. A demurrer to the complaint was sustained. In upholding the ruling of the trial court the Supreme Court of Washington said: "The respondent was entitled to employ its servants upon the conditions alleged. It had a perfect right to contract for the retention of reasonable hospital fees and reserve to itself the privilege of selecting the physician to whom such fees should be paid. The contract, which did not profit the respondent, was made for the direct benefit of its employes. Appellant made no agreement with the respondent. There was no privity of contract between him and respondent. The contract between the respondent and the employé was not made for the benefit of appellant and he had no right of action thereon. If appellant made any contract which has been violated, it was with the 56 employes to whom he issued hospital certificates. He cannot dictate the manner in which the respondent shall conduct its business, nor can

he, by any agreement with respondent's employes, to which respondent is not a party, compel it to change the terms of its contracts of employment. Appellant places much reliance on the allegations of malice, but if the respondent is conducting its business in a lawful manner, making and performing valid contracts with its employes, the mere incident of a malicious motive toward the appellant does not of itself warrant a recovery.

Appellant contends this is an action in tort, based on the malicious and wanton acts of the respondent, and seems to predicate his right to recovery upon respondent's wrongful motive. Judge Cooley, at page 1505 (832) of vol. 2 (3d Ed.) of his work on Torts, says: "Bad motive, by itself, then is no tort. Malicious motives make a bad act worse, but they cannot make that a wrong which in its own essence is lawful. An act which does not amount to a legal injury cannot be actionable because it is done with a bad intent. Where one exercises a legal right only, the motive which actuates him is immaterial. When in legal pleadings the defendant is charged with having wrongfully and unlawfully done the act complained of, the words are only words of vituperation, and amount to nothing unless a cause of action is otherwise alleged." In substance, the act of respondent of which appellant complains is that it has maliciously caused its employes to violate their contract with him; but the acts herein alleged give the appellant no cause of action as against respondent. *Boyson v. Thorn*, 98 Cal. 578, 33 Pac. 492, 21 L. R. A. 233.

We are unable to perceive where any element of monopoly enters into this consideration, as respondent contends. Defendants had the undoubted right to deal with any hospital which they might select. In fact they are dealing with four, and they are not even prohibiting their men from engaging the services of plaintiff. We repeat, that since the acts of defendants are within their legal rights, the motive for those acts is not a subject of inquiry. "To entitle a plaintiff to recover, there must be a wrong done. 'No one is a wrongdoer but he who does what the law does not allow.' He who does what the law allows cannot be a wrongdoer whatever his motive. So no one is guilty of a fraud, because he exerts his rights. The motive which may induce such exertion is immaterial." *Heywood v. Tillson*, 75 Me. 237, 46 Am. Rep. 373.

The judgment is reversed and the cause remanded.

We concur: LORIGAN, J.; MELVIN, J.

On Rehearing in Bank.

PER CURIAM. Rehearing denied.

BEATTY, C. J. In response to the petition for a rehearing of this cause I desire to say that, while concurring in the judgment

of reversal, I find some expressions in the opinion of Justice HENSHAW which I deem unnecessary to the conclusion of the court, and which, if not absolutely inconsistent with my views, as expressed in the case of *Parkinson v. Building Trades Council*, 154 Cal. 581, 98 Pac. 1027, 21 L. R. A. (N. S.) 550, are yet in apparent conflict with what I deem to be the true doctrine applicable in cases of this character. I take no exception to the proposition that an act in its essence lawful does not become actionable because inspired by a bad motive. But I am convinced that the weight of reason and authority is in favor of the view that the motive of a harmful act is material, where the act is not absolutely and unqualifiedly lawful in itself. This is illustrated by cases of malicious prosecution, unlawful imprisonment, and libel, in which the pleas of probable cause and privilege are defeated by proof of actual malice, and the doctrine of those cases rests upon a principle which makes it fully applicable to a case wherein it is made to appear that the ruin or injury of a legitimate business (by which I mean any useful vocation open to every citizen as of common right) is the direct result of a combination formed for the primary purpose of injuring that business, and this notwithstanding such injury may involve some incidental advantage to those who have caused it. This, which appears to be the necessary complement or counterpart of the proposition that injury incidentally resulting to a business from a combination entered into for the benefit by lawful means of those who engage in it, is not actionable, is supported, not only by reason, but by authority.

Besides the case of *Quinn v. Leatham*, referred to and commented upon in the *Parkinson* Case, I would call attention to the opinion of the Circuit Court of Appeals in *National Fireproofing Co. v. Mason Builders' Association*, 169 Fed. 259, 94 C. C. A. 535, 26 L. R. A. (N. S.) 148, from which I quote the following statement of the doctrine for which I am contending: "The direct object or purpose of a combination furnishes the primary test of its legality. It is not every injury inflicted upon third persons in its operation that renders the combination unlawful. It is not enough to establish illegality in an agreement between certain persons to show that it works harm to others. An agreement entered into for the primary purpose of promoting the interest of the parties is not rendered illegal by the fact that it may incidentally injure third persons. Conversely, an agreement entered into for the primary purpose of injuring another is not rendered legal by the fact that it may incidentally benefit the parties. As a general rule it may be stated that, when the chief object of a combination is to injure or oppress third persons, it is a conspiracy, but that, when such injury or oppression is merely incidental to the carrying out of a law-

ful purpose, it is not a conspiracy. Stated in another way: A combination entered into for the real malicious purpose of injuring a third person in his business or property may amount to a conspiracy, and furnish a ground of action for the damages sustained, or call for an injunction, even though formed for the ostensible purpose of benefiting its members and actually operating to some extent to their advantage; but a combination without such ulterior oppressive object, entered into merely for the purpose of promoting by lawful means the common interests of its members, is not a conspiracy."

This doctrine, however, cannot avail the respondent here as the case is presented by the record; for although it is found by the trial judge that the defendants, without any interests of their own to subserve, or any lawful object to promote, did conspire and confederate together for the purpose of unlawfully injuring the plaintiff in the manner alleged in the complaint, it is also found, as shown in the opinion of the court, that the agreement with the four favored hospitals was entered into by the defendants solely for the purpose and with the intent to subserve their own interests. These two findings appear to me to stand in absolute and irreconcilable opposition to each other, and the result is no finding at all upon a point essential to the validity of the judgment, which must therefore be reversed.

(159 Cal. 159)

In re GRAY'S ESTATE. (Sac. 1,823.)

(Supreme Court of California. Jan. 5, 1911.

Rehearing Denied Feb. 2, 1911.)

1. WILLS (§ 781*)—ELECTION.

A will may be so framed as to put the surviving spouse or any heir to his election whether he will take under the will or surrender such rights, and take what the statute grants.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2013-2017; Dec. Dig. § 781.*]

2. WILLS (§ 783*)—CONSTRUCTION—ELECTION.

A will bequeathing a sum to testatrix's widower and devising land to her sister did not put him to an election so as to preclude his receipt of the legacy after having a homestead granted on such land.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 2034; Dec. Dig. § 783.*]

3. WILLS (§ 783*)—INSTRUCTIONS—PRESUMPTIONS—HOMESTEAD RIGHTS.

Testatrix is presumed to have known that her power of disposition was subordinate to the power of the courts to grant to her surviving family a homestead for a limited period from her estate under Code Civ. Proc. §§ 1465, 1468.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 783.*]

Department 2. Appeal from Superior Court, Solano County; A. J. Buckles, Judge.

In the matter of the estate of Ellen McGarvey Gray, deceased. From an order denying a petition for distribution, Mary J.

Dowling appeals adversely to James H. Fitzgerald, executor, and another. Affirmed.

Perry Evans, for appellant. P. B. Lynch, Keogh & Olds, and Harvey & Goodman, for respondents.

HENSHAW, J. By the will of deceased, she bequeathed to her husband, Daniel J. Gray, the sum of \$1,000. To her sister she devised a lot of land in the city of Vallejo. The widower made application for a homestead upon the separate property of his wife, and the homestead was granted to him on the lot of land devised to the sister. No question arises as to the propriety of granting the homestead or the regularity of the proceedings to that end. Under proceedings for distribution, the widower made demand for his legacy of \$1,000, and this was opposed by the sister, Mrs. Dowling, upon the ground that, by the terms of the will, the widower had been to his election, and, in having set apart to himself the homestead out of the separate property of his wife so as aforesaid devised to her sister, Mrs. Dowling, he had waived and forfeited his right to the legacy left in the will. This contention presents the sole question advanced upon the appeal.

There is no manner of doubt that a will may be so framed as to put either the surviving spouse or any heir to his election whether he will take under the will, or surrender his rights under the will and take what the statute grants. A typical instance of this is found in Estate of Lufkin, 131 Cal. 291, 63 Pac. 469, where the provision of the will in question was: "I give, devise, and bequeath to my wife Lucy the sum of \$1,000, on the payment of which \$1,000 she relinquish all further claim to my estate." But there is in the will before us no language designed to put the surviving husband to his election, nor can such design be inferred, as it is sought here to have it inferred, from the mere fact that the property out of which the homestead was granted was specifically devised to the deceased's sister. As was said in Sulzberger v. Sulzberger, 50 Cal. 335, a devise which clearly appears to have been intended as in lieu of a homestead would present a different question from the one at bar. But there the court held that the devise made by the will was not intended to be in lieu of a homestead, and that the widow was entitled to the homestead in addition to the property left her by the will. There is no presumption arising from the fact that the deceased devised the property to another that she meant thereby to force an election upon her husband. The presumption is that she executed her will with knowledge that her power of disposition was subordinate to the power of the court to carve out a homestead for a limited period from her separate estate. Code Civ. Proc. §§ 1465, 1468; In re

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Sharp, 78 Cal. 483, 21 Pac. 182; In re Laffitt, 86 Cal. 153, 24 Pac. 850; In re Davis, 69 Cal. 458, 10 Pac. 671; Estate of Huelsman, 127 Cal. 275, 59 Pac. 776.

Wherefore the appeal from the order denying petition for distribution is denied, and the order appealed from is affirmed.

We concur: MELVIN, J.; LORIGAN, J.

(159 Cal. 172)

CRAIG v. WADE et al. (L. A. 2,551.)

(Supreme Court of California. Jan. 6, 1911.)
CORPORATIONS (§ 80*)—LIABILITY OF OFFICERS—FALSE REPORTS—GROUNDS OF ACTION—STATUTES.

A report in the form of a circular to stockholders concerning the corporation and its business and assets, containing the statement: "Value of wells, 31, at \$1,500.....46,500," was not fraudulent within the meaning of Civ. Code, § 316, providing that any corporate officer who willfully makes a report concerning the corporation or its business, which is false in any material representation, shall be liable, etc., the statement being a matter of opinion, and one who purchased stock in reliance thereon could not recover under the statute.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 244-265; Dec. Dig. § 80.*]

Department 2. Appeal from Superior Court, Los Angeles County; W. P. James, Judge.

Action by John W. Craig against R. D. Wade and others. Judgment for defendants, and plaintiff appeals. Affirmed.

H. T. Morrow, for appellant. G. P. Adams, for respondents.

HENSHAW, J. Appellant's action is founded on section 316 of the Civil Code of California, which provides as follows: "Any officer of a corporation who willfully gives a certificate, or willfully makes an official report, public notice, or entry in any of the records or books of the corporation, concerning the corporation or its business, which is false in any material representation, shall be liable for all the damages resulting therefrom to any person injured thereby, and if two or more officers unite or participate in the commission of any of the acts herein designated, they shall be jointly and severally liable." He charged that respondents, as officers and directors of the Oceanic Oil Company, a corporation, made an official report and public notice concerning the corporation and its business which contained the following false and untrue representations: "Value of wells, 31, at \$1,500.....46,500." He avers that, relying on the truth of this report, he purchased 20,000 shares of the capital stock of the Oceanic Oil Company for which he exchanged property of the value of \$8,000, that the stock at the time of the purchase was worth \$300, and no more, and he seeks a judgment for \$7,700 as damages. A

general demurrer to the complaint was sustained, and, plaintiff declining to amend, judgment was entered accordingly, and from this judgment plaintiff appeals.

His contention is that upon the authority of such cases as Woodland v. Hlatt, 58 Cal. 234, Cruess v. Fessler, 39 Cal. 338, and Loniza v. Superior Court, 85 Cal. 11, 24 Pac. 707, 9 L. R. A. 376, 20 Am. St. Rep. 197, a knowing misrepresentation of value is the misrepresentation of a fact within the meaning of section 316 of the Civil Code. To this answer is made by the respondents that under certain circumstances a misrepresentation of value may be a misrepresentation of fact, but that the general rule is that a representation of value is an expression of opinion and that under the circumstances here presented it cannot be construed as anything other than a mere expression of opinion. We think it needs no extended discussion but a mere presentation of the facts to show that respondents' position in this matter is impregnable. The circular in question was one addressed to the stockholders explaining the necessity of an assessment. It gave in itemized form the receipts and expenditures of the corporation for the current year and then proceeded to itemize the assets of the corporation as follows:

Number of producing wells owned by the company	31
Production in 1904, gross barrels	34,636
Average monthly product (in full operation) gross barrels	4,000
Amount of oil on hand	7,438
Number of pumping plants (complete)	5
Value of pumping plants	3,000
Value of wells, 31, at \$1,500	46,500
Value of tools, supplies, etc.	3,000
Value of real estate (town lots)	12,000
By order of the board of directors, Chas. F. Bicknell, Sec'y.	

One of these items, that setting forth the value of the wells, is the one, and the only one, which the plaintiff selects and charges to have been willfully and falsely made. There may be property of such a character that its value can be correctly estimated and declared. Such, for example, would be the value of the oil on hand at the wells, but, on the contrary, property such as an oil well itself is always of such uncertain value as to make an expression of its worth in terms of money necessarily a matter of opinion. Twenty thousand dollars may have been expended in sinking a well which has not yet reached oil sands, and which may never reach them. To a sanguine man in the expectation of soon striking oil, the well may have a value of many hundreds of thousands of dollars. To the pessimistic man, who believes oil will never be struck, the \$20,000 expended is money lost, and the well is valueless. So, too, if oil be in fact found, the duration of its flow is entirely uncertain, and the flow itself may increase or decrease without apparent reason. If the well yields 100 barrels

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

of oil to-day, it may yield 1,000 barrels, or none at all, to-morrow. To place a value in terms of money upon such a flowing well must therefore itself of necessity be a matter of opinion merely, since it is not within human knowledge to foresee the contingencies which may result in greatly enhancing or utterly destroying its output.

No such expression of value, which is inevitably but the statement of a mere opinion, is contemplated by the statute which denounces the falsification of facts, wherefore the judgment appealed from is affirmed.

We concur: MELVIN, J.; LORIGAN, J.

(14 Cal. App. 352)

BACIGALUPI et al. v. PHOENIX BLDG. & CONST. CO. et al. (Civ. 833.)

(Court of Appeal, First District, California.
Nov. 23, 1910.)

1. DAMAGES (§ 141*)—ACTIONS FOR BREACH OF CONTRACT—ALLEGATIONS OF COMPLAINT.

The complaint in an action for breach of defendant's contract to erect and complete a building for plaintiff alleged that defendant failed and refused to build "said building," but that it abandoned the work and left the "said" building in an uncompleted condition, and "that the reasonable cost to complete said building over and in excess of the contract price" was a certain sum. Held that, as against a general demurrer, the complaint sufficiently alleged damage to plaintiff by defendant's failure to perform its contract.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 406-408; Dec. Dig. § 141.*]

2. APPEAL AND ERROR (§ 762*)—BRIEF—OPENING BRIEF—POINTS NOT PRESENTED.

The appellate court need not decide points first presented in appellant's reply brief in absence of strong reason why they were not made in the opening brief.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3097; Dec. Dig. § 762.*]

3. APPEAL AND ERROR (§ 1040*)—HARMLESS ERROR—OVERRULING DEMURRER.

Where in an action for damages for failure to complete a contract to erect a building, the evidence showed that the building was completed pursuant to the original plans after it was abandoned by defendant, and the jury found that the reasonable cost of completing it was the amount of the verdict for plaintiff, defendant could not have been prejudiced by the overruling of a demurrer to the complaint on the ground of the insufficiency of the allegation as to damage claimed by plaintiff by defendant's breach.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4089-4105; Dec. Dig. § 1040.*]

4. DAMAGES (§ 189*)—BREACH OF CONTRACT—EVIDENCE.

The actual cost of completing a building after it was abandoned by the contractor is some evidence of the reasonable cost of such work.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 512; Dec. Dig. § 189.*]

5. DAMAGES (§ 189*)—BREACH OF CONTRACT—SUFFICIENCY OF EVIDENCE.

In an action to recover damages for breach of defendant's contract to erect and complete a building, evidence held to sustain a finding

that a certain sum was the reasonable cost of completing it after it was abandoned by the contractor.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 512; Dec. Dig. § 189.*]

6. DAMAGES (§ 86*)—LIQUIDATED DAMAGES—CONSTRUCTION CONTRACT.

A provision of a contract for the construction of a building that should the contractor fail to complete the building within the time fixed for completion he shall be liable to the owner for loss the latter suffers on account thereof, not to exceed \$5 a day for each day the work remains uncompleted beyond the time fixed for completion, related only to damages from delay in completion, and did not fix the measure of damages for a total breach, such as the contractor's abandonment of the contract and failure to complete the building.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 182; Dec. Dig. § 86.*]

7. ACTION (§ 62*)—PREMATURE COMMENCEMENT.

A cause of action for breach of a contractor's agreement to erect a building within a certain time by abandoning the work before the building was completed, accrued as soon as the contract was abandoned so that an action then commenced was not premature, though the building was afterwards completed by the owner.

[Ed. Note.—For other cases, see *Action*, Cent. Dig. §§ 718-723; Dec. Dig. § 62.*]

8. APPEAL AND ERROR (§ 882*)—ESTOPPEL TO ALLEGE ERROR.

Defendant's submission of a special interrogatory in an action for breach of contract to erect a building, as to what date the contractor abandoned the contract and refused to complete it, in effect conceded that there was an abandonment, so that defendant cannot contend on appeal that the contract was not abandoned.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3591-3610; Dec. Dig. § 882.*]

9. CONTRACTS (§ 306*)—BUILDING CONTRACTS—COMPLETION BY OWNER—NOTICE.

A provision of a building contract that should the contractor during the progress of the work neglect without the owner's fault to supply sufficient materials or workmen to complete the contract within the time stipulated for a period of more than three days after having been notified by the owner to furnish the same, the owner may furnish such materials or workmen to finish the work, and deduct the reasonable expense thereof from the contract price, does not entitle the contractor to the three days' notice, where he has completely abandoned the contract.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1528-1533; Dec. Dig. § 306.*]

10. CONTRACTS (§ 288*)—BUILDING CONTRACTS—PERFORMANCE—PAYMENT—"ARCHITECT."

A building contract required the erection of the building in conformity with the plans and specifications made by the owner's authorized architect, and provided that when payment became due certificates in writing should be obtained from the architect. Held, that the contractor and builder who was employed by the owner to make the plans and specifications for the building and to superintend its construction, though not a professional architect, was the "architect" authorized to make the certificates upon which payments were made.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1308-1317; Dec. Dig. § 288.*]

For other definitions, see *Words and Phrases*, vol. 1, pp. 490, 491.]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

11. PRINCIPAL AND SURETY (§ 123*)—SURETY'S LIABILITY — NOTICE OF LOSS — TIME — "PROMPTLY AND IMMEDIATELY."

The requirement in a surety bond that notice of default or loss should be given the surety "promptly and immediately" means only that it shall be given within a reasonable time after default.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. §§ 304-311; Dec. Dig. § 123.*

For other definitions, see *Words and Phrases*, vol. 6, p. 5684; vol. 4, pp. 3403-3410.]

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by M. S. Bacigalupi and another, administratrix, against the Phoenix Building & Construction Company and Title Guaranty & Surety Company. From a judgment for plaintiffs and an order denying a motion for a new trial, the last-named defendant appeals. Affirmed.

Wilson & Wilson, for appellant. Bacigalupi & Elkus, for respondents.

HALL, J. Plaintiffs entered into a contract with the Phoenix Building & Construction Company (which shall hereinafter be designated as the Building Company), for the construction of a building for the sum of \$14,000. The Title Guaranty & Surety Company gave a bond to plaintiffs in the sum of \$3,500, as sureties for the performance of the contract by the Building Company. The Building Company did not complete said building or perform its contract, but abandoned the same. The plaintiffs brought this action against the Building Company and the Surety Company to recover damages in the sum of \$3,500 for breach of the contract. The Building Company defaulted, but the Surety Company defended. The jury returned a verdict for plaintiffs for the sum of \$3,300, for which judgment was entered.

1. Appellant's first contention is that the complaint fails to state a cause of action, and that for that reason the court erred in overruling its demurrer to the complaint. The point of the attack made by the demurrer, as indicated in appellant's opening brief, is the alleged insufficiency of the allegation as to any damage caused plaintiffs by the failure of the Building Company to perform its contract. The allegation of the complaint upon this point is as follows: "That the reasonable cost to complete said building, over and in excess of the contract price, was thirty-three hundred (\$3,300) dollars." The complaint also concludes with a prayer for judgment in the sum of \$3,500. It is urged that it does not appear that the building was ever completed according to the original plans and specifications, or that the reasonable cost to complete the building according to the original plans and specifications was \$3,300, or any other sum. So far as the attack by gen-

eral demurrer is concerned we think the allegation is sufficient. The words "said building" fairly mean the building as contracted for, and not a different building or building other than as contracted for. It clearly appears from the allegations of the complaint that the Building Company failed and refused to build said building, but that it abandoned the work and left the said building in an uncompleted condition, and refused to continue under its contract. The facts stated would sustain a judgment for damages, and in such a case it has been held that the demand in the prayer is a sufficient statement of the amount of damages sustained, as against a general demurrer. *Riser v. Walton*, 78 Cal. 490, 21 Pac. 362. But, however that may be, the most that can be said against the allegation of damage in the case at bar is that it is not as definite and certain as good pleading demands.

In this connection appellant in its reply brief calls attention to the fact that the allegation as to damage was attacked in the demurrer for uncertainty. It is perhaps sufficient to say that we are not called upon to notice points not presented by appellant in its opening brief, and only do so when cogent reasons are presented why the point was not made in the opening brief. Furthermore, in the case at bar the evidence showed that the building was in fact completed according to the original plans and specifications, and the jury specially found that the reasonable and necessary cost for so doing was \$3,300. The appellant was thus not injured by the action of the court in overruling its demurrer for uncertainty. The allegation as to the reasonable cost of completing the "said building" was treated on the trial as an allegation as to the reasonable cost of completing the building according to the original contract, and the jury found \$3,300 to be the reasonable and necessary cost of completing the building according to the original contract. No reversible error was committed in overruling the demurrer.

2. Appellant's second contention is that "plaintiffs failed to prove any loss or damage for failure of the Building Company to carry out its contract." Under this head it is contended that although it was shown that the building was completed, it is not shown that it was completed in accordance with the original contract with the Building Company, and that though it was shown that it did in fact cost \$3,300 more than the price fixed in the original contract to complete the building, it was not shown that this cost was a reasonable cost or price.

As to the first contention the evidence in the record does show that the building was completed in accordance with the original contract. Plaintiffs did prove that the actual cost for completing the abandoned contract was \$3,300 in excess of the original contract

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

price; that plaintiff received bids for completing the work, and gave the contract to complete the work to the lowest bidder, which brought the total to a sum \$3,300 in excess of the original contract price. No witness testified in terms that the accepted bid was a reasonable price or represented the reasonable cost of completing the abandoned contract; but no objection was made to this evidence. No evidence was given that the reasonable cost of completing the building was less than what it actually cost plaintiffs to complete it, or that it could have been completed for any less amount. Under the circumstances the evidence was sufficient to prove the reasonable cost. In the absence of any evidence to the contrary it tended to prove the reasonable cost. The actual cost is some evidence of the value or reasonable cost. *Angell v. Hopkins*, 79 Cal. 181, 21 Pac. 729; *Bunting v. Salz* (Cal.) 22 Pac. 1132; *Greenebaum v. Taylor*, 102 Cal. 624, 36 Pac. 957; *Lery v. Scott*, 115 Cal. 39, 46 Pac. 892.

The appellant also claims that the original contract fixes the measure of damages. The clause relied on provides that, "should the contractor fail to complete this contract and the work provided for therein within the time fixed for such completion * * * he shall become liable to the owner for all loss and damages which the latter may suffer on account thereof, but not to exceed the sum of \$5 per day for each day said work shall remain uncompleted beyond such time for completion." Manifestly this clause has relation only to damages resulting from delay only, and has no bearing upon the measure of damages for an abandonment of the contract and failure to complete the work at all.

3. The action was not prematurely brought because brought before the building was completed. The cause of action accrued as soon as the Building Company abandoned the contract. *Taylor v. N. P. C. R. R.*, 56 Cal. 317; *Lawton v. Fitchburg R. R. Co.*, 8 Cush. (Mass.) 230, 54 Am. Dec. 753; *Cincinnati & Springfield Ry. Co. v. Village of Carthage*, 36 Ohio St. 631.

4. Appellant also contends that "plaintiffs had no right to consider the contract of the Building Company abandoned, and to complete the building themselves." Under this head it is contended that the Building Company did not abandon its contract, and that by the terms of the contract with the Building Company it was entitled to three days' notice in writing to proceed before the contract could be treated as abandoned. That the contract was in fact abandoned by the Building Company is perfectly clear from the evidence. Indeed, appellant, in a special defense predicated upon the claim that the plaintiffs did not, as required by the surety contract, give appellant prompt or immediate notice of the default of the Building Company, pleaded that the Building Company "did make default in the performance of the

terms, covenants and conditions of said contract, to wit, abandoned the performance of the said contract and failed to complete said building. * * *

There was no real contention as to the fact that the Building Company did abandon the contract, and the appellant in effect conceded that the contract was abandoned when it asked, as it did, the court to submit to the jury the question, "On what date did the Phoenix Building & Construction Company abandon its contract with the plaintiffs and refuse to complete the contract?" This question was answered as follows: "Feby. 14th, 1907." Furthermore, we find nothing in the specifications of the insufficiency of the evidence that hints at any failure of the evidence to support this answer.

The contention that the Building Company was entitled to three days' notice in writing is based upon the following provision of the contract, to wit: "Should the contractor, at any time during the progress of the work, refuse or neglect, without the fault of the owner, architect or superintendent, to supply a sufficiency of materials or workmen to complete the contract within the time limited herein, due allowance being made for the contingencies provided for herein, for a period of more than three days after having been notified by the owner in writing to furnish the same, the owner shall have power to furnish and provide said materials or workmen to finish said work, and the reasonable expense thereof shall be deducted from the contract price." This paragraph has no application to the case where the contractor entirely abandons the contract, but only applies where he is proceeding under the contract, but fails to supply a sufficiency of materials or workmen to complete the contract within the time limited by the contract. It was intended to give the owner the right, under such circumstances and after giving the notice, to take the completion of the contract into his own hands, and to deduct the cost thereof from the contract price. This we think to be the meaning of the paragraph as between the owner and the contractor, and by which the surety was bound. Such an interpretation was placed upon a similar provision in a contract in *National Contracting Co. v. Hudson River Water Power Co.*, 118 App. Div. 665, 103 N. Y. Supp. 641. We have no doubt it is the meaning of the paragraph in question in this contract.

5. Two payments were made by plaintiffs to the Building Company before it abandoned the contract. These payments were made upon the certificate of one Quagelli, who was not a professional architect, but was a contractor and builder. Appellant contends that under the contract these payments were unauthorized, as not made, on the certificate of the architect. Quagelli, however, did make the plans and specifications for the building, and was employed and paid so to do by the plaintiffs, and, acting as such architect,

superintended the construction of the building. The Building Company agreed to erect the building "in conformity with the plans and specifications for the same made by the authorized architect of the owner, and which are signed by the parties hereto," and the contract provided that when payments shall become due "certificates in writing shall be obtained from the said architect." The architect here referred to is the person who for the owner made the plans and specifications and superintended the construction of the building. He was the only "authorized architect of the owner," and was the "said architect" empowered to give certificates. The payments made by the plaintiffs were therefore not unauthorized payments for want of the architect's certificate. The contention that the certificates must be given by a professional architect is without merit.

6. The building contract provided that the second payment shall be made "when building is inclosed."

This payment was made before the tin roof was on, and before the windows or sashes, or doors, or door frames were in. The board roofing was on and the siding to the house. Both parties without objection introduced evidence as to what is meant in a building contract by the word "inclosed." Not only was there a conflict upon this point, but a majority of the witnesses supported the contention of plaintiffs that it meant roughly inclosed. Anderson, a builder of many years' experience, testified that "The meaning of that word as applied to frame buildings is when the outside sheathing is on, whether it is rustic, sheath lath, or tongued and grooved or shingles, and the roof boarding is on, the rough boarding is on the roof." Architects and builders testified to the same effect. Under this theory as to the meaning of the word "inclosed" in a building contract there is no doubt from the evidence but that the building was inclosed when the second payment was made.

The contention of the appellant that the second payment was prematurely made, because made before the building was "inclosed," cannot be sustained. The surety was therefore not released by reason of such payment.

7. The seventh and last question presented upon this appeal grows out of a provision of the surety bond providing that no liability shall attach to appellant for any default upon the part of the Building Company, unless the plaintiffs shall promptly and immediately upon knowledge thereof give written notice thereof to the appellant. On February 14, 1907, one of the plaintiffs learned that two carpenters had been suspended from working on the building, and on the same day went to the building and found no one at work. He then sought the architect, whom he succeeded in finding late in the day, and arranged with him to see the manager of the

Building Company the next day. He went to the office of the manager of the Building Company in the morning and afternoon of the next day, but did not succeed in finding him. He tried again the next day, which was Saturday, to find the manager of the Building Company, but without success. Either on the 15th or 16th of February he advised with his attorney, and on Monday, the 18th day of February, by advice of their attorney, plaintiffs gave the required notice to appellant. The court interpreted the provision of the contract, requiring plaintiffs to promptly and immediately give written notice of default, to mean that such notice must be given within a reasonable time, and he left it to the jury to determine whether or not such notice had been given within a reasonable time. The jury answered in the affirmative.

The correctness of the interpretation of the contract as to giving notice of default is presented by various rulings, to wit, the order denying the motion for a nonsuit, the refusal to give an instruction to the effect that if plaintiffs had knowledge of the default on February 14th, and did not give notice until February 18th, the verdict should be for defendant, and the substitution of a question as to whether or not the notice was given within a reasonable time, in place of one framed in the language of the bond. If the requirement of the bond that notice of default be promptly and immediately given is satisfied by notice given within a reasonable time, the action of the court in these various rulings was correct.

That the interpretation placed upon the clause of the bond in question was correct is supported by the great weight of authority. That the requirement in surety bonds, and in insurance contracts, that notice of default or of loss shall be given promptly and immediately means only that it must be given within a reasonable time, is sustained by the following cases: *Fidelity & Deposit Co. v. Courtney*, 186 U. S. 342, 22 Sup. Ct. 833, 46 L. Ed. 1193; *Remington v. Fidelity & Deposit Co.*, 27 Wash. 429, 67 Pac. 989; *Fidelity & Deposit Co. v. Courtney*, 103 Fed. 599, 43 C. C. A. 331; *People's Mut. Accident Ass'n v. Smith*, 126 Pa. 317, 17 Atl. 605, 12 Am. St. Rep. 870; *Van Buren v. Am. Surety Co.*, 137 Iowa, 490, 115 N. W. 24, 126 Am. St. Rep. 290; *Kentzler v. Am. Mutual Ass'n*, 88 Wis. 589, 60 N. W. 1002, 43 Am. St. Rep. 934; *Solomon v. Continental Fire Ins. Co.*, 160 N. Y. 595, 55 N. E. 279, 46 L. R. A. 682, 73 Am. St. Rep. 707; *Lyon v. Ry. Passenger Ass'n Co.*, 46 Iowa, 631; *Niagara Fire Ins. Co. v. Scammon*, 100 Ill. 644; *Ward v. Maryland Casualty Co.*, 71 N. H. 262, 51 Atl. 900, 83 Am. St. Rep. 514. The cases of *Fidelity & Deposit Co. v. Courtney*, 103 Fed. 599, 43 C. C. A. 331, and 186 U. S. 342, 22 Sup. Ct. 833, 46 L. Ed. 1193, and *Remington v. Fidelity & Deposit Co.*, 27 Wash. 429, 67 Pac. 989, both

arose out of a clause in a surety bond, and are in all respects identical with the case at bar.

The judgment and order are affirmed.

We concur: COOPER, P. J.; KERRIGAN, J.

(14 Cal. A. 526)

RIVERDALE MINING CO. v. WICKS.
(Civ. 712.)

(Court of Appeal, Third District, California.
Nov. 19, 1910.)

1. CORPORATIONS (§ 499*)—FILING OF COPY OF ARTICLES—TRIAL.

Though a corporation plaintiff did not comply with Civ. Code, § 299, providing that any corporation failing to file its articles of incorporation at the places indicated cannot maintain any action until after such filing, a stipulation, entered into before the allowance of the amendment to the plea, setting up such failure that plaintiff at some time pending the trial might introduce proof that a copy of the articles had been filed at the proper office cured the defect, as the stipulation related to the time it was entered into.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 499.*]

2. JUDGMENT (§ 570*)—CONCLUSIVENESS—JUDGMENT OF DISMISSAL.

The dismissal of an action brought by a corporation on the ground that it had failed to file its articles of incorporation, as required by Civ. Code, § 299, does not operate as a bar to another action to determine the merits after removal of the disability by compliance with the statute.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1028-1045; Dec. Dig. § 570.*]

3. CORPORATIONS (§ 499*)—ACTIONS—FAILURE TO FILE ARTICLES OF INCORPORATION.

The failure of a corporation to file a certified copy of its articles of incorporation, as required by Civ. Code, § 299, does not impose on the corporation a loss or forfeiture of its property, or impair or deprive it of any cause of action or defense it may have in reference to such property.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 499.*]

4. CORPORATIONS (§ 513*)—ACTION—FAILURE TO FILE ARTICLES OF INCORPORATION—DEMURRER.

In an action by a corporation, the absence of an averment in the complaint that plaintiff had filed its articles of incorporation, as required by Civ. Code, § 299, does not render the complaint subject to demurrer.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 513.*]

5. CORPORATIONS (§ 513*)—FAILURE TO FILE COPY OF ARTICLES—PLEADING.

The failure of a corporation to file its articles of incorporation before commencing suit, being merely a matter in abatement, is waived unless affirmatively pleaded.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 513.*]

6. PLEADING (§ 106*)—PLEAS IN ABATEMENT.

Pleas in abatement are dilatory, have never been favored, and are to be strictly construed.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 219; Dec. Dig. § 106.*]

7. JUDGMENT (§ 780*)—LIEN—PROPERTY AFFECTED—TITLE OF TRUSTEE.

Where a husband placed community property in the hands of an agent for sale, and executed to the agent a deed signed by himself and wife, which was placed in escrow to await a prospective purchaser, and, on a sale being effected, the deed was delivered to the agent, who on the same day executed his own deed to the purchaser, the agent took the naked legal title only as agent or trustee, and under Code Civ. Proc. § 671, providing that a judgment shall be a lien on all the property of the judgment debtor owned by him at the time of the rendition of the judgment or such as may be thereafter acquired, the land was not subject to the lien of a judgment existing against the agent.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1343-1349; Dec. Dig. § 780.*]

8. QUIETING TITLE (§ 43*)—ISSUES RAISED BY PLEADING.

A husband placed community property in the hands of an agent for sale, and executed to such agent a deed signed by the husband and wife, which deed was placed in escrow to await a prospective purchaser. On a sale of the land being effected, the deed was delivered to the agent who on the same day executed his own deed to the purchaser, who thereafter conveyed to plaintiff. The consideration actually paid to the husband was less than that stated in the escrow deed, which fact was not communicated to the wife. The land was sold at execution sale under a judgment against the agent. Held, in an action by plaintiff against the execution purchaser, defendant could not maintain that plaintiff's title was invalid on account of the fraud practiced on the wife, where such issue was not presented by the pleadings.

[Ed. Note.—For other cases, see Quieting Title, Dec. Dig. § 43.*]

9. QUIETING TITLE (§ 43*)—PARTIES TO ACTION.

Such issue could not be tendered, since the wife was not a party to the suit.

[Ed. Note.—For other cases, see Quieting Title, Dec. Dig. § 43.*]

10. HUSBAND AND WIFE (§ 267*)—COMMUNITY PROPERTY—FRAUD ON WIFE—PRESUMPTION.

Under Civ. Code, § 172, giving the husband management and control of community property, a husband having sold community property for an amount less than the consideration stated in the deed, executed by the wife, it must be presumed in an action between subsequent purchasers of the land to which the wife was not a party that the husband received an adequate consideration for the land notwithstanding the disparity between the amount actually received and that stated in the deed.

[Ed. Note.—For other cases, see Husband and Wife, Dec. Dig. § 267.*]

11. TRIAL (§ 37*)—STATEMENT TO COURT—EFFECT.

Where, in such case, defendant stated to the trial court that the only question before the court was not whether the husband could pass the title without being joined in the deed by his wife, but whether the agreement between the husband, the agent, and the purchaser, was such that the agent acquired no title to which the judgment lien could attach, defendant was precluded from asserting that the fraud practiced on the wife invalidated plaintiff's title.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 37.*]

Appeal from Superior Court, Plumas County; J. O. Moncur, Judge.

Action by the Riverdale Mining Company

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

against Corine Wicks. From a judgment for plaintiff, defendant appeals. Affirmed.

L. N. Peter, for appellant. Sam Bell McKee and Arthur Tashelra, for respondent.

HART, J. This is a suit to quiet title to certain land situated in Plumas county. Plaintiff obtained judgment, from which the defendant has taken this appeal.

The evidence from which the court made its findings of fact is undisputed, and may be epitomized as follows: On and prior to the 4th day of October, 1907, one W. W. Kellogg was the owner of the property in controversy. On said 4th day of October, 1907, Kellogg and wife, by deed, conveyed said property to one Lloyd P. Cornell. Said deed was delivered to said Cornell on the day of its execution, and was recorded on the same day in the office of the county recorder of Plumas county at 20 minutes past 4 o'clock p. m. Immediately after the delivery of said deed to Cornell, and on the said 4th day of October, 1907, the latter executed a deed to one Augustin S. McDonald, conveying to the latter the property concerned here, and said deed so executed to said McDonald was filed for record in the office of the county recorder of Plumas county at 22 minutes past 4 o'clock p. m. on the said 4th day of October, 1907. "On the 7th day of October, 1907, Augustin S. McDonald and wife conveyed the property to plaintiff, the deed having been recorded in the office of the county recorder of Plumas county on October 9th, 1907, at 30 minutes past 9 o'clock a. m." It appears that at the time of the happening of the several transactions so involving the property in dispute referred to in the foregoing statement there existed against said Cornell and in favor of one C. E. Wright an unsatisfied judgment for the sum of \$410.50, together with costs and interest, "said judgment having been recovered by Wright on the 9th day of December, 1903, and duly entered and docketed on that date. * * * On the 2d day of March, 1908, said judgment being still unsatisfied, an execution issued thereon was levied by the sheriff of Plumas county on the property described in the complaint, and on the 24th day of March, 1908, said property was sold at sheriff's sale to appellant, who paid therefor the sum of five hundred and sixty dollars, and on said date received from the sheriff a certificate of sale."

The plaintiff is a corporation, organized under the laws of California, and the first point urged against the validity of the judgment is that, having failed before the commencement of this action to file in the office of the county clerk of the county of Plumas a copy of the copy of its articles of incorporation, certified by the Secretary of State, as required by section 299 of the Civil Code, the plaintiff is not entitled to maintain this action. Said section reads, in part, as follows: "Any corporation failing to comply

with the provisions of this section cannot maintain or defend any action or proceeding in relation to such property, its rents, issues, or profits, until such articles of incorporation and such certified copy of its articles of incorporation, and such certified copy of the copy of its articles of incorporation are filed at the places directed by the general law and this section." It appears from the record that the original answer contained nothing by way of averment with regard to the failure of the plaintiff to file a certified copy of the copy of its articles of incorporation in the office of the county clerk of Plumas county. On the day on which the cause was called for trial, the attorney for defendant applied to the court for permission to amend the answer so that he could interpose a special plea against plaintiff's right to maintain the action, and in support of said application stated that he had learned for the first time only a half an hour prior to the hour at which court was opened that plaintiff had omitted to comply with the provisions of section 299 of the Civil Code. Counsel for plaintiff objected to the amendment, and at the same time requested a continuance of the trial of the case for a reasonable time within which to enable his client to file a certified copy of the copy of its articles of incorporation. He stated that he had up to that time supposed that such copy had been filed in the clerk's office, and that the application of defendant for permission to amend the answer had taken him by surprise. Finally, the court allowed the amendment upon an understanding between the attorneys for both sides and the court that preferably to a postponement of the trial for that purpose the trial might be proceeded with, and that either during its progress the filing of the articles might be shown, or, if found necessary for that purpose, the case might be kept open after the conclusion of the taking of testimony addressed to the merits, so that proof, if available, might be introduced of plaintiff's compliance with the terms of said section. Defendant objected, at the times that it was offered, to all the testimony submitted in behalf of plaintiff on the ground that said plaintiff was not entitled to maintain the action for the reason stated, and the court overruled said objections, subject to a reversal of its rulings thereon should plaintiff, as it was agreed that it might do, fail to prove that a copy of the copy of its articles had been filed in the office of the county clerk. Agreeably to the said understanding or stipulation, plaintiff, before the case was closed, offered, and, over the objection of defendant, was allowed by the court, to prove that subsequently to the beginning of the trial it had complied with section 299 in the respect referred to. The contention of the defendant is that the filing of the articles under the indicated circumstances could not have the effect of curing plaintiff's incapacity to maintain the action at the time

the court permitted the amendment to the answer so that it would include the plea challenging its right to do so. The defense against the incapacity of a plaintiff to maintain an action involves a mere dilatory plea—in other words, a plea in abatement going only to the disability of plaintiff to maintain the action until such disability is removed. The disability having been removed before the close of the case, the plaintiff was properly allowed, under the stipulation to that effect, to show its capacity to maintain the action. If the court had, after allowing this plea to be added to the answer, and before plaintiff had complied with the terms of the statute, sustained the plea, the effect of such ruling would have been to abate the action only, and even if a dismissal of the action necessarily followed from the mere allowance of such a plea, which we do not decide, we know of no reason why it would operate as a bar to another suit upon the merits after the removal of the disability. As is said in the case of *California Savings & Loan Society v. Harris*, 111 Cal. 133, 43 Pac. 525, "the failure to file this certified copy does not impose upon the corporation a loss or forfeiture of its property, or impair or deprive it of any cause of action or defense it may have in reference to such property. A previous filing of the certified copy is not a fact essential to the cause of action, or of an element constituting the plaintiff's right of action; and the omission of such an averment in the complaint is not a ground of demurrer (*South Yuba Water Co. v. Rosa*, 80 Cal. 333 [22 Pac. 222]), or for the reversal of the judgment (*Labory v. Orphan Asylum*, 97 Cal. 270 [32 Pac. 231]), and consequently not a jurisdictional element in the suit. Nor does such failure afford to the other party any defense to the cause of action upon which a suit has been commenced, but is merely a special defense in the nature of a plea in abatement (*Ontario State Bank v. Tibbits*, 80 Cal. 68 [22 Pac. 66]), by which the right of the plaintiff to maintain the action is suspended until the statute is complied with, and is subject to the same rules of pleadings as are other pleas in abatement. Being matter merely in abatement, it is a defense which may be waived by the defendant, and which is waived by him unless it is affirmatively pleaded." See *Labory v. Orphan Asylum*, 97 Cal. 270, 32 Pac. 231; *First National Bank of San Luis Obispo v. Henderson*, 101 Cal. 307, 35 Pac. 899; *Ward Land & Stock Co. v. Mapes*, 147 Cal. 747, 82 Pac. 426; *Nicholson v. Auburn Gold Min. & Mill. Co.*, 6 Cal. App. 547, 92 Pac. 651; *Reed & Co. v. Harshall*, 12 Cal. App. 703, 108 Pac. 719, and cases therein cited.

But appellant here undertakes to differentiate the foregoing cases from the case at bar by the fact that, while in the cited cases a copy of the articles was not filed before the actions were instituted, they were never-

theless filed before the special plea was interposed, which, it is claimed, is not the case here. But under the circumstances of this case the plaintiff is to be considered as having complied with the requirements of the statute before the interposition of the special plea, since the court declared, before allowing the amendment to the answer, that said amendment would be allowed only upon the understanding and agreement between the parties that plaintiff might, before the case was finally submitted for decision, introduce proof, if it could, that it had filed a copy of the articles in the office of the county clerk. In the first instance, the defendant had presumptively waived any objection to plaintiff's right to maintain the action for the reason urged under the special plea, and the order permitting the amendment, so that the answer would embrace the special plea was one of grace and not of right. The court could have disallowed the amendment, and such ruling would have involved only the exercise of a discretion with which no reason for interference by a court of review could well have been suggested; for "pleas in abatement, or dilatory pleas, have never been favored, and are to be strictly construed." *Cal. Sav. & L. Soc. v. Harris*, supra; *Tooms v. Randall*, 3 Cal. 438; *Larco v. Clements*, 36 Cal. 132; *Parmele Company v. Haas*, 171 N. Y. 583, 64 N. E. 440. "The party pleading them relies on technical law to defeat the plaintiff's action, and is held to a technical exactness in his pleading." *Thompson v. Lyon*, 14 Cal. 39. The general rule is, it is true, that a copy of the articles of incorporation must be of record in the clerk's office at the time the plea is interposed, otherwise the plea is good. But in this case, as we have seen, the court, in the exercise of its discretion, allowed the amendment so that the special plea could be interposed upon the condition, agreed to by the defendant, that the plaintiff might at some time pending the trial, or before the formal submission of the case for decision was made, introduce proof that a copy of the articles was on file in the proper office, and it seems to us that when such proof was made, in accordance with said agreement, it related back to the time of the making of the agreement, which was before the plea was interposed. Under this view, it seems to us, the order allowing the amendment being upon the condition mentioned, and such condition having as agreed been complied with before the close of the trial, amounted to nothing less, in substantial effect, than a refusal by the court to allow said amendment. Or, if we view the proposition in the light of a rebuttal by competent testimony of the special plea, the result is the same. In short, the defendant, by agreeing to allow plaintiff to make proof of its compliance with the requirements of the statute, stipulated away the force of her special plea as effectually as if it had never been interpos-

ed—that is, such was the effect of the stipulation the moment competent proof was offered and received of the filing of the articles.

On the merits of the suit, it is contended by appellant that the judgment lien in favor of said Wright and against Cornell immediately attached to said property upon the execution of the deed by Kellogg to said Cornell. This contention, it is asserted, is supported by the provisions of section 671 of the Code of Civil Procedure, which reads: "From the time the judgment is docketed, it becomes a lien upon all the real property of the judgment debtor not exempt from execution in the county owned by him at the time or which he may afterwards acquire, until the lien ceases." Under the facts of the several transactions concerning the property in dispute, as they are revealed by the record, this contention cannot be maintained. These facts may be summarized as follows: In the year 1906, Senator Kellogg, then owner of the property, desired to dispose of the same, and with that object in view had an interview with Cornell. "I tried to induce Cornell to get some parties to buy the place outright," testified Kellogg, "or open it up for development. Mr. Cornell agreed that he would take the matter up, take the matter under consideration, and do the best he could. I then made a bargain with him that I would sell the place for \$6,500 clear to me; that any commission, that anything he did making the sale or developing the mine, he must look to those parties for. We talked of giving a bond on the mine, which I refused, but I made out to him a deed of the whole property, and had my wife also sign the deed, stating the consideration. I then deposited that deed in the Plumas County Bank under certain written instructions." These instructions, which accompanied the deed in escrow, were to the effect that the witness would execute a deed, conveying said property free from all liens, incumbrances, etc., to Cornell or his assigns, provided that within one year from the date of said deed the sum of \$6,500 was paid to witness. In accordance with this understanding with Kellogg, Cornell entered into negotiations with a Mr. McDonald, of Oakland, said negotiations resulting in an effort on the part of said McDonald to work and develop the property for mining purposes. This venture failed, and after the year within which Cornell was authorized to dispose of the property or otherwise handle it for Kellogg, as agreed, McDonald, through Cornell (several different extensions of time within which Cornell might be able to sell the place having been accorded to the last named by Kellogg), started negotiations for the purchase of said property. Kellogg testified that these latter negotiations were conducted by and between himself and McDonald, although Cornell was present certain parts of the time

during which they were in progress. McDonald was unwilling to pay for the property the sum of \$6,500, the price demanded by Kellogg, and, after considerable discussion, the latter agreed to reduce the amount of the consideration to the sum of \$3,250. McDonald accepted the proposition as thus modified, and so bought the property. Thereupon Kellogg delivered the deed in escrow to Cornell, who, in turn, as already seen, immediately conveyed the property to McDonald, the grantor of plaintiff. The purchase price was paid by McDonald to Kellogg; Cornell claiming and receiving no part thereof. With regard to the reason which inspired the act of delivering the deed in escrow to Cornell, rather than executing a conveyance of the property direct to McDonald, Kellogg testified: "After I reduced the price of the place from \$6,500 to \$3,250, I knew in my own mind that my wife would not sign it. I wanted to get rid of it. Therefore I told Mr. McDonald, I says, 'That deed, Cornell's deed, let that deed from me to Cornell, and Cornell make you a deed right here to-day. It would be just as good as if I made a new deed. I don't believe I can give you what you want.' * * * I used Mr. Cornell as a sort of trustee for a few minutes just to convey that title." Cornell's testimony was substantially the same as that given by Kellogg. He declared that he never had any interest in the property in dispute, and that his part in the transaction culminating in the conveyance of the property to McDonald was only that of a trustee, in which capacity he acted for about 15 minutes. The court found that Cornell was never at any time "the owner in fee simple, or otherwise, of said property," etc., and, as before declared in effect, this finding, under the evidence of which we have presented a brief résumé, is impregnable against successful attack.

The proposition that a judgment lien can operate as a lien only on the interest of the judgment debtor whatever it may be is too obvious to require the citation of authorities in its support. Freeman on Judgments (4th Ed.) § 357; Black on Judgments (2d Ed.) §§ 420, 421. Cornell, it is clear, had absolutely no interest in the property in controversy. The original arrangement between him and Kellogg involved no more than the relation of principal and agent, or, at best, amounted to no more than a mere option by which Cornell was given the right to buy the property within the time stipulated in the instructions accompanying the deed in escrow. If it was an option, Cornell did not exercise his right thereunder. But the fact is the legal relation existing between Kellogg and Cornell as to the property was at all times only that of principal and agent. In the conveyance of the property to McDonald, it transpired that it was more convenient for Kellogg to use Cornell as an instrumentality

or a trustee—a conduit, so to speak, through which that act might be consummated. Cornell first proposed that the property be bonded to him, but Kellogg refused to accede to that proposition and then suggested the deed in escrow, said deed to remain undelivered until Cornell either bought the property himself or it was sold to others, and finally the delivery of the deed to Cornell was not because Cornell had bought the property or had acquired any interest whatever in it, but for the sole reason, as suggested, that, under the circumstances, that was the most convenient way of conveying to McDonald, the actual purchaser. Cornell's part in the transaction was therefore as both he and Kellogg declared on the witness stand that of a mere trustee of Kellogg.

The case of *Atkinson v. Hancock et al.*, 87 Iowa, 452, 25 N. W. 701, is very similar to the case at bar. There one Cummins, against whom a judgment lien subsisted, purchased certain town lots for one Slead. Cummins took the deed in his name and conveyed to Slead, who paid the purchase price to the grantor. It was claimed that the judgment lien against Cummins attached to said lots, but the Supreme Court of Iowa held against the contention, and said: " * * * But, if it be conceded that Cummins paid the purchase money to Harrison, and the deed was delivered to him, the fact remains that the money so paid belonged to Slead, and that the payment was made for the purpose of vesting the title to the lots in the latter. Cummins was, it is true, vested with the naked legal title. The conveyance was made to him as a matter of convenience. He was a mere conduit and held the legal title in trust for Slead. Under the circumstances, Cummins had no interest on which the judgment became a lien. His creditors can only get what he had, and what he had was of no pecuniary value." See *Blaney v. Hanks*, 14 Iowa, 401; *Cresswell v. McCaig*, 11 Neb. 222, 9 N. W. 52; *Fleming v. Wilson*, 92 Minn. 303, 100 N. W. 4; *Dalrymple v. Security Loan & Trust Co.*, 11 N. D. 65, 88 N. W. 1033; *Meier v. Kelly*, 22 Or. 136, 29 Pac. 267. In *Dalrymple v. Security Loan & Trust Co.*, supra, it is said: " * * * There must be an interest to which the lien can attach. The law is well settled that the lien of a judgment does not attach to a naked title, but only to the judgment debtor's interest in the real estate; and if he has no interest, though possessing the naked title, then no lien attaches." In *Hays v. Reger*, 102 Ind. 524, 1 N. E. 386, it is said: "The interest which the lien of a judgment affects is the actual interest which the debtor has in the property, and a court of equity will always permit the real owner to show (there being no intervening fraud) that the apparent ownership of another is or was not real; and, when the judgment debtor has no other interest except the naked legal title, the lien of the judgment does not attach." See *Lounsbury*

v. Purdy, 11 Barb. (N. Y.) 490; *White v. Carpenter*, 2 Paige (N. Y.) 217; *Kelrsted v. Avery*, 4 Paige (N. Y.) 9; *Brown v. Pierce*, 7 Wall. 205, 19 L. Ed. 134; *Hydraulic Co. v. Loughry*, 72 Ind. 562; *Moyer v. Hinman*, 17 Barb. (N. Y.) 137; *Freeman on Judgments*, §§ 355, 356; *Black on Judgments*, 421. The cases of *Eby v. Foster*, 61 Cal. 282, 286, *Hibberd v. Smith*, 50 Cal. 511, and *First National Bank v. Hays*, 7 Idaho, 139, 61 Pac. 287, cited by appellant, are not in point. Those cases hold that a judgment lien attaches to property during the smallest interval of time during which the real interest may be vested in the judgment debtor, while the judgment, having been docketed, subsists. No one has ever controverted this proposition, and it is not disputed here. But the proposition that the judgment debtor must have a real interest in the property before the judgment lien can attach thereto is equally as incontrovertible. As we have already seen, Cornell had no real interest in the property involved here, having acted in the transaction with relation thereto simply and solely as a trustee, and, as such, never having been invested with anything higher than the mere naked legal title.

Counsel for appellant declares that the "plaintiff, after participating in a fraud upon a third person in reference to the property in controversy, seeks to hold advantage of and at the same time obtain relief in equity from the result of its own fraud." This declaration results from the testimony of Kellogg to the effect that in conveying the property to McDonald the grantor of the plaintiff he used Cornell as a trustee for that purpose in order to prevent his wife, Mrs. Kellogg, from learning of the reduction of the purchase price of the property from \$6,500 to \$3,250, the insinuation being that Mrs. Kellogg was thus defrauded of her rights, and that, therefore, the appellant has thus placed itself in a position wherein it cannot ask relief from a court of equity consistently with the principles practiced in a court of conscience. In the first place, it is to be said, in reply to this contention, that no such issue is submitted by the pleadings, nor was there any such issue tried and adjudicated by the trial court. Secondly, it is to be observed that it is plainly manifest that no such issue as to Mrs. Kellogg could have been appropriately tendered in this case, for Mrs. Kellogg was and is not a party to the suit, and has not intervened to claim any rights as to the property in controversy. Thirdly, it is to be said that Kellogg himself was vested with plenary power to sell or dispose of the property, even assuming it to have belonged to the community, so long as he did not dispose of it by gift (section 172, Civ. Code), and that, having sold it, it is to be assumed that he received in return for it an adequate consideration, notwithstanding the fact that he accepted a much less sum for it than he had originally asked. Besides, counsel for

respondent expressly and correctly declared to the court below during the trial that the only question before the court was, not whether Mr. Kellogg could pass the title without being joined in the deed of conveyance by his wife, but whether "the understanding and agreement between Mr. McDonald and Mr. Cornell and Mr. Kellogg at that time were such that Mr. Cornell had no title upon which this lien could operate and have effect." Thus it is to be observed that, if there had been anything in the pleadings which would have furnished a handle for erroneously lugging into the trial the question whether Mrs. Kellogg had been defrauded through the acts of her husband, McDonald, and Cornell, such issue would have been expressly eliminated by the statement of appellant's counsel himself.

Appellant has not disclosed to us any reason why the judgment should not stand, and it is therefore affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

(14 Cal. A. 538)

KRIEGER v. FEENY et al. (Civ. 731.)

(Court of Appeal, Third District, California.
Nov. 19, 1910.)

1. SALES (§ 353*)—ACTION BY ASSIGNEE—COMPLAINT—SUFFICIENCY.

A complaint, alleging that defendants as partners became indebted in specified sums to plaintiff's assignors for merchandise furnished defendants at their special request; that before suit the assignors assigned the claims and their right, title, and interest therein to plaintiff, who remains the owner; that though requested defendants have not paid any part of the amounts due; and that such amounts are owing and unpaid—is sufficient as against a general demurrer, sustaining a judgment for the reasonable value of the merchandise, though no express promise to pay a stipulated sum for the merchandise is stated.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 353.*]

2. PLEADING (§ 8*)—ACCOUNT—CONCLUSION.

In an action on account, an allegation that defendant "has not paid any part of the amount due as aforesaid" is not bad as being a legal conclusion and is a sufficient averment of breach of the contract or of nonpayment.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 12-28; Dec. Dig. § 8.*]

3. SALES (§ 33*)—IMPLIED AGREEMENTS.

The furnishing of merchandise by plaintiff's assignors and their acceptance by defendants constituted sufficient consideration to support defendant's promise to pay therefor, implied by law, and to render them liable thereon.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 60; Dec. Dig. § 33.*]

4. CONTRACTS (§ 4*)—CONSIDERATION.

The performance of services by plaintiff's assignors and their acceptance by defendants constituted sufficient consideration to support defendants' promise to pay therefor, implied by law, and to render them liable thereon.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 4-6; Dec. Dig. § 4.*]

5. ASSIGNMENTS (§ 131*)—ACTIONS BY ASSIGNEE—PLEADING—SUFFICIENCY.

A complaint on an account by the assignee thereof sufficiently shows his ownership at the time of suing as against a general demurrer, where it is fairly inferable from the allegations that plaintiff claimed ownership at that time.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 220-226; Dec. Dig. § 131.*]

6. PLEADING (§ 204*)—DEMURRER—SEVERAL COUNTS.

A demurrer to a complaint containing several counts is properly overruled if any count states a cause of action.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 486-490; Dec. Dig. § 204.*]

7. APPEAL AND ERROR (§ 1040*)—HARMLESS ERROR—PLEADING.

A judgment for plaintiff will not be reversed for error in overruling a demurrer for uncertainty in the complaint, unless some substantial right of defendant has been affected.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4089-4105; Dec. Dig. § 1040.*]

Appeal from the Superior Court, Sacramento County; P. J. Shields, Judge.

Action by Philip Krieger against James Feeny and others. Judgment for plaintiff, and defendants, Feeny and Dyas appeal. Affirmed.

George Clark and W. A. Anderson, for appellants. Arthur H. McCurdy, for respondent.

HART, J. This is an action for the recovery of a judgment on a number of claims assigned to plaintiff by the owners of said claims. The complaint alleges that Feeny, Dyas, and Barnes are copartners, engaged as such in carrying on and conducting the hotel and saloon business in the city of Sacramento, and that the several claims upon which this action is brought are the result of goods and merchandise furnished and money loaned to and services performed for the defendants by the several parties assigning said claims to plaintiff. There are 12 of these claims, each separately pleaded in the form of a common count, and they aggregate in amount the sum of \$1,558.68. The court gave plaintiff judgment for the sum of \$1,096.74, having found against some of the claims. This appeal is by Feeny and Dyas from said judgment, on the judgment roll alone.

A demurrer, general and special, was interposed to the complaint by the defendants Feeny and Dyas; the defendant Barnes making no appearance. The demurrer was overruled, and Feeny and Dyas filed an answer, denying the material allegations of the complaint, and, by way of a "further and separate defense," averring certain facts which amount to a denial that they and Barnes ever constituted themselves partners for the purpose of carrying on the hotel and saloon business in the city of Sacramento. The principal point urged is that the complaint

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

is bad for want of facts. The general demurrer is addressed to the entire complaint and not to any particular count therein set forth. The argument is that in none of the counts is there an allegation "that defendants agreed to pay any one any sum of money whatever"; that there is nothing in the allegations to show that plaintiff's assignors ever furnished goods, services, etc., to defendants at their request; that there is no allegation of any consideration supporting any promise to pay for any merchandise, services, etc.; that there is no direct averment of ownership in plaintiff of the various claims at the time of the institution of the action; that the allegations in all the several causes of action at best involve only legal conclusions. The court's findings follow the averments of the complaint; that is, without directly finding the facts as to each count, the court finds that the material allegations of certain causes of action set out in the complaint (designating said causes by number) are sustained by the testimony or not so sustained, according as the court found the facts. As against the force of a general demurrer, the facts pleaded as to each of the counts declared upon will stand as a sufficient statement of a cause of action.

The averments of the second count or cause of action may be taken as a sample of those of all the other pleaded counts, with the exception of the first, and said averments, following a paragraph reaverring in general language paragraph 1 as to the partnership of defendants, read as follows: "(2) That, within two years last past in the county of Sacramento, state of California, before the filing of this action, defendants became indebted to McCaw & Son, a copartnership, for and on account of wood and coal furnished defendants by McCaw & Son at the special instance and request of defendants, in the sum of \$35. (3) That, before the filing of this action, said McCaw & Son sold and assigned said claim to plaintiff, and all their right, title and interest in and to said claim and account against defendants arising out of said claim as aforesaid, and plaintiff ever since has been and now is the owner and holder thereof. (4) That said defendants, although often requested, have not paid any part of the amount due as aforesaid, and there is now due, owing, and unpaid from the said defendants to the said plaintiff the sum of \$35."

Thus it will be noticed that the complaint alleges the indebtedness to the assignors of plaintiff, an assignment of the claim to plaintiff, and that the plaintiff "ever since has been and now is the holder and owner thereof," and that no part of said claim has been paid. There can arise no uncertainty as to the meaning of these averments, and, while they do not involve the statement of an express promise to pay a stipulated sum for the merchandise furnished, they are nevertheless sufficient to entitle plaintiff to a judg-

ment for whatever the evidence may disclose that the merchandise is reasonably worth *Manning v. Dallas*, 73 Cal. 420, 15 Pac. 34; *Preston v. Central Cal., etc., Irr. Co.*, 11 Cal. App. 197, 104 Pac. 462. Each count alleges that said defendant "has not paid any part of the amount due as aforesaid," and this is not a legal conclusion, but a sufficient averment of the breach of the contract or of non-payment. *Ryan v. Holliday*, 110 Cal. 333, 42 Pac. 891; *Knox v. Buckman Contracting Co.*, 139 Cal. 598, 73 Pac. 428; *Richards v. Lakeview Canal Co.*, 115 Cal. 642, 47 Pac. 683; *Preston v. Cal. Irr., etc., Co.*, supra. Indeed, the complaint in the case at bar, as to all the causes of action except the first, is no less inartificial in any particular than those approved, as against the force of a general demurrer, in *McFarland v. Holcomb*, 123 Cal. 84, 55 Pac. 761, and *Aydelotte v. Billing*, 8 Cal. App. 673, 97 Pac. 698. In the first-mentioned case the complaint alleged, as the basis of plaintiff's claim, "that William A. Holcomb was at the time of his death indebted to the plaintiff in the sum of \$7,500 as a balance due to plaintiff for nursing, boarding, lodging, counseling, advising, and taking care of the said William A. Holcomb almost continuously from the 29th day of November, 1870, down to the 4th day of November, 1895, in the city and county of San Francisco, state of California." The particular criticism urged against said complaint was that it did not aver that the services of the plaintiff were rendered at the request of the deceased, and that therefore it did not state a cause of action. Holding against that contention, the Supreme Court said: "Under the system of pleading at the common law, it was requisite that the declaration in an action in assumpsit upon an executed consideration should show that the consideration for the promise by the defendant was sufficient to support his promise, and it was sufficient to aver that the consideration was executed at his request; but this averment was unnecessary when the consideration as well as the promise were implied from the nature of the transaction set forth in the declaration—as an action for goods sold and delivered to the defendant, or for money loaned to him by the plaintiff. *Fisher v. Pyne*, 1 Man. & G. 265, note. Under our system of pleading, where only the facts which constitute the cause of action are to be alleged, it is not requisite to aver either the consideration or the promise, when they are implied as a legal conclusion from the facts which are alleged."

In the case at bar, the furnishing of the merchandise and the performance of the services by the several assignors of plaintiff and the acceptance from them of such merchandise and services by the defendants constituted a sufficient consideration to support the promise for compensation therefor which is implied in law, and to render them liable therefor. *McFarland v. Holcomb*, supra.

But it is claimed that the first cause of action sought to be stated in the complaint is defective in that, while it discloses the assignment of the claim therein pleaded by the assignor to plaintiff, it does not show that plaintiff was the owner thereof at the time of the filing of the complaint. In *Irish v. Sunderhaus*, 122 Cal. 308, 54 Pac. 1113, which was an action brought by the plaintiff as assignee of certain claims of creditors, the complaint, after pleading the debt of each creditor, and after an averment that the debt was still due and unpaid, alleged: "That said claim was duly assigned to this plaintiff before the commencement of this action." No other averment appeared in the complaint from which it appeared that the plaintiff was the owner of said claim at the time the suit was filed. It was contended there, as it is here, that the complaint failed to state a cause of action by reason of the omission to aver that plaintiff, when he filed the complaint, was still the owner of the assigned claim. The Supreme Court held that, while the complaint would fall before a special demurrer, it would stand as against a general demurrer. There is to be gathered from the complaint here a fair implication that plaintiff, in his first-stated cause of action, claimed ownership of the claim at the time of the commencement of the action, and, as stated, that is sufficient as against a general demurrer. See *Amestoy v. Electric, etc., Co.*, 95 Cal. 311, 30 Pac. 550, and *Alexander v. McDow*, 108 Cal. 25, 41 Pac. 24.

But, even if we might well concede that the first cause of action which plaintiff attempts to state is fatally defective for want of averment of present ownership of the claim therein set forth, still the point could be of no avail to appellants since the complaint, as a whole, states a cause of action, and both the general and special demurrers are aimed at the complaint as a whole, and not specifically directed to any particular one or more of the several counts set out. It is well settled that, where a complaint sets forth a number of causes of action in separate counts, a general demurrer, interposed to the complaint as a whole, will not be sustained if any single one of such counts states facts sufficient to constitute a cause of action. *Pfister v. Wade*, 69 Cal. 136, 10 Pac. 369. If any one of the counts is bad for want of sufficient facts, the demurrer for insufficient facts must, in order to achieve its purpose, be specifically aimed at such count. And, if there is any uncertainty in the averments of any one or more of the several causes of action set out, the special demurrer should have particularized such causes of action and pointed out wherein they were subject to the criticism of uncertainty. But the only point which appears to be urged under the special demurrer, apart from the

charge of misjoinder of parties defendant and that of the incapacity of the plaintiff to maintain this action, is that it cannot be ascertained from the complaint what "relief plaintiff demands therein." We perceive absolutely no difficulty in readily determining, from the averments of the complaint and the prayer, what the plaintiff is seeking to attain through this action. There is certainly no uncertainty in the complaint in that regard. Indeed, the defendants themselves seem to have experienced no such trouble in comprehending the averments of the complaint and the purpose of the action as prevented them from submitting by their answer a clear-cut issue on their alleged indebtedness to plaintiff upon the several assigned claims set forth in the complaint. Uncertainty in a pleading must be such as to work a substantial injury or disadvantage to the defendant. The averments of a pleading may be cast in such form of language as to throw about them some degree of uncertainty, using that term in its technical sense, yet if, notwithstanding such uncertainty, the opposing party sufficiently comprehends the meaning of the averments and the intention of the pleader to enable him to reply to them and so tender a clear and direct issue upon the pleaded facts, then the order overruling a demurrer for uncertainty does not involve prejudicial error. In other words, "when a case has been tried and a judgment rendered on the facts, in order to warrant a reversal upon the ground of error in overruling a demurrer interposed upon the ground of uncertainty in the complaint, it must appear that some substantial right of the defendant has been affected, some prejudicial error, as distinguished from abstract error, suffered by him, or he has no room for complaint. *Rooney v. Gray Bros.*, 145 Cal. 753, 79 Pac. 523; *Alexander v. Central L. & M. Co.*, 104 Cal. 532 et seq., 38 Pac. 410; *Bank of Lemoore v. Fulgham*, 151 Cal. 234-237, 90 Pac. 936; *Peterson Bros. v. Mineral King, etc.*, 140 Cal. 624-627, 74 Pac. 162; *Huffner v. Sawday*, 153 Cal. 80-81, 94 Pac. 424.

As stated, it does not appear that the defendants suffered in the slightest degree from the order overruling the special demurrer. The issue upon the question of the indebtedness of defendants to plaintiff upon the pleaded claims was squarely and clearly tendered and tried.

There is obviously nothing in the suggestion that there is a misjoinder of parties defendant, and that the plaintiff is without capacity to maintain this action.

The judgment is affirmed.

We concur: CHIPMAN, P. J; BURNETT, J.

(14 Cal. App. 686)

WASHINGTON v. PACIFIC ELECTRIC RY. CO. (Civ. 835.)

(Court of Appeal, Second District, California. Nov. 28, 1910. Rehearing Denied by Supreme Court Jan. 27, 1911.)

1. DAMAGES (§ 186*)—PERSONAL INJURIES—LOSS OF EARNING POWER.

In a personal injury action by a physician, that there was no evidence as to the amount that she earned or was earning in her practice would not preclude her recovery for loss of earning power where there was evidence of several witnesses that she had attended them professionally, and that she had practiced her profession for a number of years prior to the date of injury.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 509; Dec. Dig. § 186.*]

2. APPEAL AND ERROR (§ 932*)—PRESUMPTIONS.

In a personal injury action, wherein the amount of \$25,000 damages were sought, including \$600 for loss of earning power, and the court charged that the amount of damages awarded should not exceed the amount sued for, and there was no claim in the complaint for more than \$600 for loss of earning capacity, it will be assumed that in estimating the damages the jury did not allow more than that sum on such account.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 932.*]

Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by Lucy L. Washington against the Pacific Electric Railway Company. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Affirmed.

Gibson, Trask, Dunn & Crutcher (Robert C. Gortner, of counsel), for appellant. E. P. Drake and Jones & Drake, for respondent.

JAMES, J. Plaintiff was awarded a judgment for damages in the superior court for personal injuries alleged to have been suffered by her through the negligence of defendant. The amount which she was found entitled to recover was the sum of \$4,250.

It was admitted by the answer that the collision between the car upon which plaintiff was riding at the time she was injured and a car of the Los Angeles Railway Company was caused by the negligence of defendant. The issues, therefore, left for the jury to determine were: (1) What injuries, if any, were sustained by the plaintiff; and, (2) what amount of money would justly compensate her therefor. Defendant presented to the trial court a motion for a new trial and appealed from the order denying such motion, and also from the judgment entered against it. The giving of certain instructions, and the refusal of the court to give others offered by the defendant, are assigned as errors.

It was alleged in the complaint that at the time she suffered the injuries complained of the plaintiff was a practicing physician, that by reason of her injuries she had been

unable to follow her profession since the accident, and in that respect was damaged in the sum of \$600. Damages in all were claimed in the complaint in the sum of \$25,600. The evidence showed that the plaintiff was a woman of the age of 67 years, that her business was that of a physician, and that she had practiced her profession for a number of years prior to the date when she sustained the injuries complained of. There was evidence of several witnesses that she attended them at different times professionally. There was no evidence as to the amount of money that plaintiff had earned or was earning in her practice as a physician, and upon this state of facts defendant offered an instruction by which it was sought to have the jury advised that they could not take into account the loss of earning power, if any had been suffered by the plaintiff, in estimating the amount of damages to be awarded. In this behalf it is insisted that without proof of some specific or particular sum of money which had been or was at the time of the accident being earned by the plaintiff no recovery could be had on this account. A number of decisions of the courts of other states are cited in support of appellant's view on this proposition, but the question seems to have been very definitely determined adversely to appellant's contention by the Supreme Court of this state. In this case of *Storrs v. Los Angeles Traction Co.*, 134 Cal. 93, 66 Pac. 72, the point insisted upon by appellant here was there made. In its discussion of that matter the Supreme Court said: "The objection of the appellant that, as there was no specific testimony that the plaintiff was earning anything at the time of the injury, or of the amount that he was capable of earning, any verdict of the jury under this instruction would be merely conjecture, is untenable. His right to recover does not depend upon the fact that at the time of the injury he was actually employed in the service of another, nor does the amount of his recovery depend upon the amount of wages which he was receiving. The fact that he was not in the receipt of any salary or wages, but was attending to his own business, does not deprive him of right to compensation for the loss of his earning capacity, since it is what he was capable of earning, rather than what he was actually earning, that was to be considered by the jury. It may be conceded that, in the absence of all evidence tending in any respect to show an impairment of his earning capacity, the jury would not have been authorized to include any compensation therefor in their verdict, but it does not follow that it was necessary that there should be direct or specific testimony that he was in the actual receipt of wages, or capable of earning a specific sum in any particu-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

lar employment." This decision was followed by this court in the case of *Evarts v. Santa Barbara Consolidated Ry. Co.*, 3 Cal. App. 713, 86 Pac. 830. In that case, like the one here, the plaintiff was a physician, and there was an absence of testimony showing what amount of money he had been or was earning in the practice of his profession at the time he sustained the injuries for which he recovered damages. This court there said: "In this case there was not presented to the jury the value of the services of the deceased to his patients, or the amount of his earnings, yet there was evidence that he was a regular practicing physician, that he possessed a number of patients, some of whom he was attending at the time of his injury, and that he was a strong man in the prime of life, from which facts alone the jury would be authorized to give substantial damages." Upon similar evidence was the issue presented to the jury as to whether or not there had been in this case an impairment of the earning capacity of the plaintiff.

Complaint is made because the court did not instruct the jury in terms that the amount for which recovery could be had because of the loss of earning capacity was limited to the sum of \$600, as alleged in the complaint. It is true that the jury were not so specifically instructed, but in several of the instructions of the court it was stated that the amount of damages awarded should not exceed the amount sued for. The jury had the complaint of plaintiff before it, and in that complaint there was no claim for any greater amount of damages on account of loss of earning capacity than the sum of \$600. It must therefore be assumed that in estimating the total amount of damages to be allowed the jury took into consideration the claim made by the plaintiff, and did in fact allow no more than that sum on such account.

What is said upon the points discussed disposes of other alleged errors.

The judgment and order are affirmed.

We concur: ALLEN, P. J.; SHAW, J.

(14 Cal. App. 683)

SERPIGLIO v. DOWNING et al. (Civ. 795.)
(Court of Appeal, Second District, California.
Nov. 28, 1910.)

APPEAL AND ERROR (§ 977*)—REVIEW—DISCRETION OF COURT—RULINGS ON MOTION FOR NEW TRIAL.

The action of the trial court in granting or denying a motion for a new trial will not be disturbed on appeal, unless it appears that there has been an abuse of discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3865; Dec. Dig. § 977.*]

Appeal from Superior Court, Los Angeles County; George R. Davis, Judge.

Action by John Serpigli, an infant, by D. Serpigli, his guardian, against H. C. Downing and others. From a judgment for defendants and an order denying a new trial, plaintiff appeals. Affirmed.

Chas. Atkinson, for appellant. Haas, Garrett & Dunnigan, for respondents.

SHAW, J. Action for the recovery of damages alleged to have been sustained by plaintiff on account of the negligence of defendants.

The appeal is from a judgment in favor of defendants and an order of court denying plaintiff's motion for a new trial. The sole ground upon which the motion for a new trial was made was newly discovered evidence, which plaintiff could not with reasonable diligence have discovered and produced at the trial. The record discloses that at the hearing of the motion one affidavit was presented in support thereof, but the evidence upon which the court made its findings is not brought up for examination. The action of the trial court in granting or denying a motion for a new trial is so largely a matter in the court's discretion that its rulings should not be disturbed, save and except in those cases where it is made to affirmatively appear that there has been an abuse of such discretion. In the absence of the evidence introduced at the trial, we cannot say that the court erred in denying the motion; indeed, the material facts averred in the affidavit are not necessarily inconsistent with the findings of the court. The action was based upon the theory that defendants were the owners of and engaged in the operation of a printing plant, from which was issued a newspaper known as the "San Pedro Tribune"; that plaintiff, who was a minor nine years of age, was in the employ of defendants, and while so employed was directed to ink one of the printing presses, in the performance of which work his hand was crushed; that by reason of his lack of appreciation of the dangerous character of the work, due to his tender years, defendants were guilty of negligence in directing plaintiff to engage in work the dangerous nature of which was unknown to him and known to defendants.

In his argument on the appeal from the judgment counsel for appellant lays much stress upon the alleged fact that the answer of defendants, as well as the findings, disclose the relation of a partnership existing between defendants. Conceding this to be true, we are unable to perceive how such fact can benefit appellant. It appears from the complaint and findings that the defendants, who with a number of others, including one Z. W. Craig, were the owners of a paper and printing plant, had let the pos-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

session thereof to the latter, and "that the said Z. W. Craig was in the sole management, possession, custody, and control of said printing plant and said newspaper." Conceding, further, that we should construe this finding as establishing the fact that Craig was operating the plant merely as the agent of defendants (which interpretation would be contrary to the rule that findings should be so construed, if possible, as to support the judgment based thereon), we are met with the finding "that it is not true that by reason of any act, or neglect, or carelessness, or default, or conduct on the part of said defendants, or either or any of them, or their agents or servants, or employes, or any of them (plaintiff) was injured or sustained injury, or sustained damages in any sum or in any manner whatsoever."

Upon this record we are unable to find any merit in either appeal, and the judgment and order are affirmed.

We concur: ALLEN, P. J.; JAMES, J.

(14 Cal. A. 689)

LAW CREDIT CO. v. PROVIDENT MUT. BUILDING-LOAN ASS'N. (Civ. 861.)

(Court of Appeal, Second District, California. Nov. 28, 1910. Rehearing Denied by Supreme Court. Jan. 27, 1911.)

BUILDING AND LOAN ASSOCIATIONS (§ 14*)—MATURITY RESERVE FUND — RIGHTS OF SHAREHOLDERS.

The by-laws of a building and loan association provided for a maturity reserve fund of 2 per cent. of the matured value of all installment shares to be taken from the first payment made, and that withdrawing members should be entitled to a certificate showing the amount of such reserve, and might thereafter subscribe for stock and be credited upon the dues with the amount of such certificate. *Held*, that the provision applied to all contracts for purchase of stock, and such certificate was available only as a credit in case he desired to take out new shares, and his assignee thereof could not recover thereon against the association, though at the time the certificate was issued Civ. Code, §§ 633 to 648a, were in force, having been enacted after the shares were purchased, providing that such association could only charge an entrance or withdrawal fee of not exceeding \$1 on each share and a transfer fee not exceeding 10 cents on each share, and the by-laws embraced no provision for retention of the 2 per cent. reserve fund.

[Ed. Note.—For other cases, see Building and Loan Associations, Dec. Dig. § 14.*]

Appeal from Superior Court, Los Angeles County; W. P. James, Judge.

Action by the Law Credit Company against the Provident Mutual Building-Loan Association. Judgment for defendant, and plaintiff appeals. Affirmed.

Tanner, Taft & Odell, for appellant. Milton K. Young, for respondent.

ALLEN, P. J. Plaintiff and defendant were found by the court both to be corpo-

rations, the latter organized under the laws of California as a building and loan association; that one Wadleigh, plaintiff's assignor, was the secretary of the defendant corporation from its incorporation until the 19th of June, 1905; that prior to 1900 various persons had become members of said building and loan association, and while Wadleigh was secretary they desired to surrender their stock and accordingly delivered the same to Wadleigh, who thereafter made payments thereon of his own means, but carried the same on the books of the corporation in the names of the members. Wadleigh thereafter surrendered the stock so assigned to him and received the amount thereof, less \$2 per share retained by the corporation under its by-laws as a maturity reserve fund, by which transaction he profited to the extent of \$12,000. Under the by-laws of the association, it was stipulated that withdrawing members were entitled to a certificate showing the amount of this maturity reserve fund, and, if they were so advised, might thereafter subscribe for stock and be credited upon the dues with the amount of such certificate. Thereafter Wadleigh made application to retain his membership in the corporation and mature his stock and returned said maturity reserve certificates, together with \$200 in cash, the same being received by the association as five months' advanced dues upon the new subscription, and in 1908 received back from the association the \$200 paid and a maturity certificate as follows: "This certifies that G. H. Wadleigh of Los Angeles, county of Los Angeles, state of California, has paid into the maturity reserve fund of this association, the sum of one thousand dollars, on five hundred shares, stock of this association, and that he is entitled to a credit of one thousand dollars on taking a like number of shares and paying one month's dues thereon, and surrendering this receipt. This receipt is transferable." Afterwards Wadleigh assigned this certificate to plaintiff, who brings suit thereon.

In 1907 sections 633 to 648a, Civ. Code, went into effect, which provide that such loan associations should only have power by their by-laws to charge an entrance or withdrawal fee of not exceeding \$1.00 on each share, and a transfer fee not exceeding 10 cents on each share; that no other fee, charge, or deduction shall be made, or permitted to be made, against any shareholder, or against his shares; that, on the expiration of the notice required, the shareholder shall be entitled to receive the full amount paid upon the stock or investment certificate, exclusive of entrance or withdrawal fee, together with a proportion of the profits, and so forth. Under these facts and under the law, the court found that plaintiff as the assignor of Wadleigh was not entitled to recover a judgment for the amount of the cer-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

tificate and interest, and from this judgment plaintiff appeals.

It is insisted by appellant that on the findings of fact judgment should have been entered for plaintiff as prayed for in the complaint, and that said judgment for defendant is not supported by the findings. The precise questions involved upon this appeal were presented to the trial court on a motion to vacate the judgment and the entry of a judgment in favor of plaintiff. There is contained in the record an opinion of the trial judge in denying such motion, which upon examination seems to cover all of the points involved and to state concisely and clearly the reason why the judgment is supported by such findings. This opinion, which we adopt as the decision of this court, is as follows: "Plaintiff in this action moves to vacate the judgment entered herein in favor of defendant, on the ground that the findings of fact do not support the judgment, but that upon said findings of fact a judgment should be entered in favor of plaintiff. If it were to be conceded that the receipt issued on the 25th of February, 1908, to plaintiff, wherein it is recited that plaintiff has paid into the maturity reserve fund of defendant corporation the sum of one thousand dollars, is conclusive against any right in defendant to show the entire transaction which resulted in the issuance of its receipt, then the motion is well taken. The plaintiff's assignor, G. H. Wadleigh, however, had been an officer of defendant association and was familiar with the entire transaction, which led up to the issuance of the receipt in question, and he was also familiar with the by-laws of the association and their various provisions at all times prior to the date of the receipt. The receipt was finally issued upon account of certain stock transactions had with the association by Wadleigh and partially by the assignors of Wadleigh. Wadleigh acquired stock of the association by assignment from holders thereof, and he, in turn, surrendered this stock, finally receiving the receipt, which upon its face recites that he has paid the sum of \$1,000 on 500 shares of stock of the association, and that he is entitled to a credit of \$1,000 on taking a like number of shares and paying one month's dues thereon, and surrendering the receipt. The \$1,000 mentioned in the receipt was a part of the maturity reserve fund, which, under the by-laws of the association as they stood at the time of the issuance of the original stock acquired by Wadleigh, was to be retained by the association and was available only to be used as a credit on the purchase of new or additional shares. All contracts for the purchase of stock made at the time the original stock surrendered by Wadleigh was acquired were impressed with the condition declared in the by-laws that 'the maturity reserve fund shall consist of an amount equal

to 2 per cent. of the matured value of all installment shares, and is taken from the first payment made. A member having paid this, and who is afterwards compelled to withdraw, shall be allowed to renew his membership and mature his stock, his new share being credited with the amount so paid.' Under this provision the association had the right to retain the 2 per cent. mentioned, which was only available for use by the surrendering stockholder as a credit upon new or other shares of stock taken out by him. I do not think that the fact that the receipt was issued at a time when the by-laws were without such a provision, and the statute of the state made it illegal for such a deduction to be made on account of a maturity reserve fund, affects at all the question involved in this case. The condition made by the by-laws at the time the subscription for stock was taken became a part of the contract from which Wadleigh, or his assignors, had they continued as holders of stock, have no escape. If the plaintiff here has the right to demand and receive \$1,000, which appears to be a credit available to him, then there is no reason at all why each and every subscriber for stock, who took out shares during the time that the by-laws provided for the withholding of the percentum on account of maturity reserve fund, has not the right to make and enforce a similar claim. This I do not believe they are entitled to do. The motion for a different judgment to be entered will be denied."

Judgment affirmed.

We concur: SHAW, J.; JAMES, J.

(14 Cal. App. 696)

PEOPLE v. KOSTA. (Cr. 285.)

(Court of Appeal, First District, California.
Nov. 30, 1910.)

1. CRIMINAL LAW (§ 507*)—ACCOMPLICES OF DEFENDANT.

Because certain witnesses were jointly indicted with accused does not necessarily require them to be considered accomplices as against the state at every stage of the case, whether they are so in fact or not.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1082-1096; Dec. Dig. § 507.*]

2. CRIMINAL LAW (§ 507*)—ACCOMPLICES—ADMISSION OF EVIDENCE.

The filing of an information against several defendants and its subsequent dismissal as against one for want of evidence does not establish for the purposes of the trial of the remaining defendants that the defendant dismissed was an accomplice.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1096; Dec. Dig. § 507.*]

3. CRIMINAL LAW (§ 780*)—TRIAL—INSTRUCTIONS—ACCOMPLICE.

An instruction that an accomplice is one who willfully and knowingly aids, encourages, or assists another in the commission of the crime is not objectionable because the disjunc-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

tive conjunction was used, in view of the use of the qualifying words "willfully and knowingly."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1859-1863; Dec. Dig. § 780.*]

4. CRIMINAL LAW (§ 1172*)—APPEAL—PREJUDICE.

Where accused was prosecuted as a principal, an instruction defining accomplices which was faulty only in that it required too high a degree of proof on the part of the people was not prejudicial to accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3154-3163; Dec. Dig. § 1172.*]

5. CRIMINAL LAW (§ 720*)—ARGUMENT OF PROSECUTING ATTORNEY—PROOF.

A district attorney was not guilty of misconduct in his argument where he did not make any statement of fact not fairly deducible from the evidence, though his reasoning might have been faulty or his deductions illogical.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1670, 1671; Dec. Dig. § 720.*]

Appeal from Superior Court, City and County of San Francisco; Geo. H. Cabaniss, Judge.

George Kosta was convicted of arson, and he appeals. Affirmed.

Geo. B. Keane and J. K. Ross, for appellant. Attorney General Webb, C. M. Flickert, Dist. Atty., and James F. Brennan, Asst. Dist. Atty., for the People.

HALL, J. Defendant, together with four other persons, was charged by information with the crime of arson. Upon his trial defendant Kosta was found guilty, and in due time appealed to this court from the judgment and order denying his motion for a new trial.

At the trial of defendant the four persons jointly charged with him were witnesses for the prosecution. Two of these witnesses were undoubtedly accomplices of defendant, and gave ample evidence to justify the conviction of defendant, provided it was sufficiently corroborated by other evidence, as required by section 1111 of the Penal Code. The charge as to the other two defendants, Glannetos and Cochomihos, was dismissed by the court, upon motion of the district attorney, upon the ground that the evidence against them was insufficient to justify a trial, and they gave evidence for the prosecution. The evidence which they gave in itself, and without the aid of the testimony of the other two defendants, tends to connect appellant with the commission of the offense.

It is now contended that, because these witnesses have been jointly charged with defendant, they must be conclusively presumed to be accomplices of appellant, as against the state, at every stage of the case, whether so in fact or not. The only case cited in support of this contention is *Commonwealth v. Desmond*, 5 Gray (Mass.) 80, and it does

not support the contention. It only decides that where the defendant argues that a given witness is an accomplice of the defendant, and the district attorney in his reply assumes and claims that such witness is such accomplice, and that his testimony was so corroborated as to make it the duty of the jury to convict the defendant, it was error for the court to leave it to the jury to find whether or not the witness was an accomplice. In the case cited the district attorney in open court, in his argument to the jury, admitted the witness to be an accomplice, and the court said that "the admission of the fact in court by the district attorney, for the purposes of the trial, was, as against the government, conclusive evidence of such fact." No such condition exists in the case at bar. The filing of an information against several defendants, and the subsequent dismissal of such information as against one of the defendants for want of evidence, is certainly not an admission, for the purposes of the trial of the remaining defendants, that the defendant dismissed was an accomplice. Such a proceeding bears no analogy to what occurred in the *Desmond* Case. The district attorney did not admit that either Glannetos or Cochomihos was an accomplice of appellant, and the evidence does not compel the conclusion that either of them was in fact such accomplice. It is not contended that it does. On the contrary, the evidence is ample that neither of these two witnesses had any criminal or guilty connection with the appellant or the offense of which he was found guilty, and about which they gave evidence. Their evidence, therefore, was sufficient corroboration of the evidence of the admitted accomplices, and the verdict is sufficiently supported by the evidence.

It is claimed that the court erred to the prejudice of appellant in instructing the jury as to what constitutes an accomplice. The court, in explaining what is an accomplice, said: "An accomplice to a crime is one who willfully and knowingly aids, encourages, or assists another in the commission of a crime." The objection made to the instruction is that in the sentence above quoted and in other parts of the instruction the court connected the words "aids, encourages, and assists" by the disjunctive "or." But the court qualified the words by the words "willfully and knowingly," and thus committed no error under the very cases cited by appellant. *People v. Dole*, 122 Cal. 486, 55 Pac. 581, 68 Am. St. Rep. 50; *People v. Warren*, 130 Cal. 683, 63 Pac. 86; *People v. Morine*, 138 Cal. 626, 72 Pac. 166. Furthermore, this appellant was not prosecuted as an accomplice, but as the one who actually with his own hands set fire to the building, and such was the case proved. The instruction complained of was given in connection with

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep't Indexes

the charge concerning the necessity for corroboration of the evidence of accomplices. If it was faulty in the respects complained of, it bore too hard upon the witnesses for the prosecution, and was for the advantage of the appellant and to the disadvantage of the people. Appellant could not have been prejudiced by the fault claimed to exist in the instruction.

Complaint is made that the district attorney was guilty of such misconduct as to entitle appellant to a new trial. We do not think that the district attorney was guilty of conduct that invaded the right of appellant to a fair trial. He does not seem to have made any statement of any fact in his address to the jury that may not be said to be fairly deducible from some evidence in the record. "Counsel have the right to present to the jury their views of the proper deductions or inferences which the facts warrant. Their reasoning may be faulty, their deductions from the premises illogical, but this is a matter for the jury ultimately to determine, and not a subject for exception on the part of opposing counsel." *People v. Willard*, 150 Cal. 543, 89 Pac. 124.

The judgment and order are affirmed.

We concur: COOPER, P. J.; KERRIGAN, J.

(14 Cal. App. 706)

LANE v. GLENN et al. (Civ. 902.)

(Court of Appeal, Second District, California.
Dec. 1, 1910.)

APPEAL AND ERROR (§ 1071*)—HARMLESS ERROR—FINDING NOT WITHIN ISSUES.

The court having found, in an action for false imprisonment by police officers, that plaintiff was not actually damaged, he was not prejudiced by a finding outside the issues that when arrested on another charge, on which he was convicted earlier in the day of the particular arrest, he was intoxicated and had not recovered when released from the first arrest.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4234-4239; Dec. Dig. § 1071.*]

Appeal from Superior Court, Los Angeles County; Leon F. Moss, Judge.

Action by Austin Lane against William W. Glenn and others. Nominal judgment for plaintiff, and he appeals. Affirmed.

W. B. Coleman, for appellant. Leslie R. Hewitt, City Atty., and Charles D. Houghton and C. D. Pillsbury, Deputies, for respondents.

SHAW, J. Action to recover damages alleged to have been sustained by reason of plaintiff's arrest and false imprisonment. The court made findings to the effect that the arrest and imprisonment was wrongful and without warrant, but further found that plaintiff had sustained no actual damage by

reason thereof. Thereupon judgment was given in his favor for nominal damage only, from which he appeals upon the judgment roll alone.

Appellant claims the court committed prejudicial error by finding facts not within the issues. It appears both by the answer and findings that on the morning of the day of his arrest plaintiff had been convicted upon a charge of disturbing the peace and a fine imposed therefor, upon payment of which he was released. The wrongful arrest, made upon complaint that he threatened a further disturbance by doing violence to his wife, occurred on the evening of the day upon which he was so released. The court made a finding to the effect that at the time when plaintiff was arrested upon the complaint for which he was convicted and fined he was intoxicated and had not recovered from the effects of such intoxication when released from custody on the morning of the day when again arrested without warrant. Conceding there was no issue to which such finding could be deemed responsive, nevertheless, the court having found that plaintiff sustained no actual damage, he could not have been prejudiced by this immaterial finding of fact outside the issues.

It is also urged that the findings are inconsistent, in that they both justify the acts of defendants and also find them liable for such acts. There is no merit in this contention. The findings as to all material facts, save alone upon the question of damage sustained, are in plaintiff's favor.

Our attention is directed to no prejudicial error, and the judgment is therefore affirmed.

We concur: ALLEN, P. J.; JAMES, J.

(14 Cal. App. 842)

LIGHTNER MINING CO. v. SUPERIOR COURT OF CALAVERAS COUNTY et al. (Civ. 785.)

(Court of Appeal, Third District, California.
Nov. 23, 1910. Rehearing Denied by
Supreme Court Jan. 16, 1911.)

1. MINES AND MINERALS (§ 51*)—ACTION FOR DAMAGES—JURISDICTION.

Rev. St. U. S. § 2325 (U. S. Comp. St. 1901, p. 1429), provides how patents for mineral lands may be obtained, and declares that if no adverse claim is filed at the expiration of the 60 days of publication it shall be assumed that the applicant is entitled to a patent and that no adverse claim exists, and thereafter no objection from third parties to the issuance of a patent shall be heard except it be shown that the applicant has failed to comply "with the terms of this chapter." Section 2320 (page 1430) provides that where an adverse claim is so filed all proceedings, except the publication of notice and making and filing of the affidavit thereof, shall be stayed until the controversy is settled by a court of competent jurisdiction. In an action for damages for encroaching on plaintiff's mining claim, defendant answered

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

that plaintiff had made application for a patent on his mine, and that defendant had filed its protest against the issuance of a patent, and the Land Department had ordered a hearing. *Held*, that under section 2326 the superior court had jurisdiction of the action; for, if the protest was not an adverse claim within the statute, there was no controversy to be settled by the Land Department, and, if it was an adverse claim, the court had jurisdiction to decide the controversy.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. §§ 137-141; Dec. Dig. § 51.*]

2. MINES AND MINERALS (§ 51*)—ACTION FOR DAMAGES—JURISDICTION.

In a suit by an owner of a mining claim against the owner of an adjoining claim for damages for encroaching on the plaintiff's claim, in which both plaintiff and defendant allege title to the property in question, the superior court has jurisdiction of the controversy, and the question is one of law for a court of competent jurisdiction and not for the Land Department.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. §§ 137-141; Dec. Dig. § 51.*]

3. PROHIBITION (§ 3*)—NATURE AND GROUNDS—ADEQUACY OF REMEDY AT LAW.

The owner of a mining claim sued the owner of an adjoining claim for damages for encroaching upon plaintiff's claim. Defendant alleged title to the property in question and further claimed that there was a contest before the United States Land Department involving the title of the property, and applied for a writ of prohibition to restrain the judge of the superior court from proceeding with the trial of the action for damages until the determination of the Land Department of the controversy before it. *Held*, that the writ would not lie, as defendant had a plain, speedy, and adequate remedy in the ordinary course of proceedings at law by appeal from any judgment of the superior court.

[Ed. Note.—For other cases, see *Prohibition*, Cent. Dig. §§ 4-19; Dec. Dig. § 3.*]

Appeal from Superior Court, Calaveras County; A. I. McSorley, Judge.

Application by the Lightner Mining Company for a writ of prohibition to restrain the Superior Court of Calaveras County and A. I. McSorley, Judge thereof, from proceeding in the trial of the action of James V. Coleman against the Lightner Mining Company. Writ denied.

Nutter & Orr, Street & Street, and J. P. Snyder, for petitioner. C. E. McLaughlin and W. J. McGee, for respondents.

BURNETT, J. This is an application for a writ of prohibition to restrain the judge of said superior court from proceeding with the trial of the action of James V. Coleman, Plaintiff, v. Lightner Mining Company, Defendant, until the final determination by the Land Department of the United States of an application for a patent to the land involved in the controversy. Among other facts, it appears that the complaint in said action was filed in 1903. Therein it was alleged that "plaintiff for more than 15 years last past has been and now is the owner and in the possession and entitled to the possession

of all that certain quartz mine, mining property situate, lying, and being in the Altaville townsite, in the county of Calaveras, known as and called the 'Billings' quartz mine." Then follows a particular description of the property. "That within the surface lines of the said Billings quartz mine extended downwards vertically are certain lodes, ledges, and veins of quartz and rock in place carrying gold and other valuable minerals. That the said Billings quartz mine is contiguous to and adjoins on the east the so-called Lightner quartz mine owned and operated by the said defendant corporation. That said defendant has sunk upon the said Lightner quartz mine a shaft, and within three years last past has by means of said shaft and crosscuts, levels, drifts, winzes, and stopes connected therewith wrongfully and unlawfully and without the consent of plaintiff entered into and upon the said Billings quartz mine and property, * * * and has taken out and extracted therefrom and converted to its use large quantities of quartz and rock carrying gold and other valuable minerals to the value of \$150,000." The prayer is for this amount and costs of suit. In the answer the material allegations of the complaint are denied, and it is averred: "That on the 20th day of April, 1875, the government of the United States issued a patent to W. B. Norman, county judge of Calaveras county, Cal., in trust for the several use and benefit of the occupants of the townsite of Altaville in the county and state aforesaid, for the lands therein described. That by mesne conveyances the defendant became and now is the owner of, and it and its grantors for more than forty years last past have been the owners of, in the occupation and possession of and entitled to the possession of lot 13 in block 5 of said Altaville townsite, the north 77 feet of which is within the exterior boundaries of the so-called and alleged Billings quartz mine in the amended complaint described. That on or about the — day of —, 1909, plaintiff made application, through the United States land office at Sacramento, Cal., for United States patent for the so-called and alleged Billings quartz mine. Thereafter this defendant duly filed in said land office its protest against the issuing of a patent for said alleged Billings quartz mine, and the Land Department ordered that a hearing be had on the 20th day of April, 1910, before the register and receiver of the said Sacramento land office, to determine whether at the date of the said Altaville townsite entry the alleged Billings quartz claim was known to be a valid mining claim and as such was excepted by operation of law from the said townsite patent." It was therefore claimed by defendant that the Land Department of the United States has

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the exclusive power to determine whether the alleged Billings quartz mine was known to be a valid mining claim at the date of said Altaville townsite entry, and that the trial of the case should be stayed until the determination of that question by said department. A motion was made to that effect in the court below. It was heard upon affidavits and denied, and the case was set down for trial. That was the occasion for this application. In response to the order to show cause a demurrer and an answer have been presented by the trial judge. It is necessary to consider only the demurrer, and our attention need not extend beyond the ground "that said petition does not state facts sufficient to warrant or authorize the issuance of a writ of prohibition by the above-entitled court against the respondents or either of them."

Two questions are involved herein and these we now proceed to consider. The first is, does it appear that the court below has exceeded its jurisdiction? and, secondly, if so, is it a proper case for prohibition? The answer to each of these must unquestionably be in favor of respondents.

The office of the writ of prohibition has been so frequently considered by this and other appellate courts and so well settled that no extended discussion of the subject is here required. It is sufficient to refer to the sections of the Code of Civil Procedure (1102 and 1103) wherein it is provided in what instances the writ will issue.

As to the court's jurisdiction to deny the defendant's application for a continuance and to set the case for trial, it is contended by respondents that the court was called upon simply to determine whether certain evidence was required to establish one of the issues made by the pleadings, and in the exercise of its judgment as to this it is difficult to understand why the court did not have the juridical power to reach a wrong as well as a right conclusion. Since admittedly this court has jurisdiction of the parties and of the subject-matter of the action, and the issue being properly framed, it had authority to try the cause at any time—so it is claimed—and its refusal to continue the trial was no more in excess of its jurisdiction than would be the denial of a similar motion made upon some other ground. But petitioner does not concede the jurisdiction of the court as to the entire subject-matter of the action, although admitting that the parties were properly before it and that it had the authority to grant the relief prayed for. It is insisted, however, that exclusive jurisdiction to determine one of the issues, without which no judgment could be rendered, was vested in another tribunal. Therefore, it is said, the court should have pursued the course pointed out in *Potter v. Randolph*, 126 Cal. 461, 58 Pac. 906, wherein it is declared: "The court, very properly,

then delayed the trial until the question as to the character of the land was determined by the Land Department, which alone had the power to decide that controversy. The court had jurisdiction of the action, but could not try that particular controversy which was involved in the action." But that case and others cited by petitioner are inapplicable to the situation here. The pleadings disclose that an application was made in due form to the Land Department for a patent to a quartz mining claim. Section 2325 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 1429) provides how "patents for mineral lands" are obtained, and therein it is declared that, "if no adverse claim shall have been filed with the register and the receiver of the proper land office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter." And section 2326 (page 1430) provides that: "Where an adverse claim is filed during the period of publication, * * * all proceedings, except the publication of notice and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived. It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession and prosecute the same with reasonable diligence to final judgment." The case before us is brought clearly within the contemplation of said section. It may be that the paper filed by petitioner in the Land Department could not be said to constitute an "adverse claim" in the sense of the statute, it being denominated a "protest against the issuance of the patent"; but in that event there was no controversy to be settled by said tribunal, and it was proper for the said superior court to determine the issue between the parties. Whether the opposition be considered an adverse claim or not, therefore, it would seem that the court was justified in denying the motion to continue the trial.

But, viewing the case from a somewhat different point of view, it is clear that the superior court had complete jurisdiction over the entire subject-matter of the controversy. The question of jurisdiction must be determined, of course, by the averments of the pleadings. It thereby appears, both by the allegations of the complaint and those of the answer, that there is no issue as to who is entitled to a patent, but it is assumed

that a complete title has long since vested, and the controversy is as to the ownership of the property, it being averred by plaintiff that he has been for many years and is now the owner in the possession and entitled to the possession of said property, while, in defendant's answer, we find the equally positive allegation, as before stated, that it is now the owner and it and its grantors for 40 years past have been the owners of and in the occupancy and entitled to the possession of said property. Thus is a question of law presented for the determination, not of the Land Department, but of a court of competent jurisdiction. This may be made clear by a reference to some of the decisions. In *Gage v. Gunther*, 136 Cal. 338, 68 Pac. 710, 89 Am. St. Rep. 141, we have a comprehensive statement of the function of the Land Department in such matters. There it is declared that "the decision of the Land Department of the United States upon any question of fact, in determining the right of any person to receive a patent for any of the public lands under the laws of the United States, is conclusive upon all other tribunals, in the absence of fraud, mistake, or imposition in obtaining the patent"; but "if in making its determination of fact the Land Department has disregarded the law applicable thereto, or has erred in its construction of the law or by mistake has issued to one person a patent, which upon undisputed facts should have been issued to a contestant, the patentee will be held a trustee for the contestant in proceedings to be taken in a court of equity and governed by the rules of equity procedure."

In *Potter v. Randolph*, 126 Cal. 461, 58 Pac. 906, it is said: "The Land Department of the United States is not a special tribunal organized to determine who is the owner of land. The department is the medium through which parties may acquire the title of the United States. Its functions are mostly administrative and only incidentally judicial. It determines the existence or non-existence of alleged facts, to enable it to select the person who is entitled to purchase. The proceeding is to acquire title, not to determine who has it."

In *Iron Silver Mining Co. v. Campbell*, 135 U. S. 286, 10 Sup. Ct. 765, 34 L. Ed. 155, it is declared that, "when a person has once obtained a patent of the United States for his land, he should be only required to answer persons who have some established claim, and to contest with the party not before the administrative departments, but in courts of justice, by the regular proceedings which determine finally the rights of parties to property. * * * We have more than once held that, when the government has issued and delivered its patent for lands of the United States, the control of the department over the title to such land has ceased, and the only way in which the title

can be impeached is by a bill in chancery; and we do not believe that, as a general rule, the man who has obtained a patent from the government can be called to answer in regard to that patent before the officers of the Land Department of the government." If a patent to this land was issued in 1875, as claimed by defendant in its answer, then, of course, the control of the Land Department over it must have ceased, and the issue as to whether the defendant or plaintiff had been the owner of the land for many years was within the exclusive jurisdiction of the superior court.

Again, the writ of prohibition should not issue for the reason that there is a plain, speedy, and adequate remedy at law. It is not disputed that the court's action can be reviewed on appeal, and there is no sufficient reason why petitioner should have invoked this extraordinary remedy instead of pursuing the usual course. The determination of causes on appeal is probably not always as speedy as it should be but that is not the fault of the law. It may be admitted also that as to this question there is some conflict in the decisions; but we think the true rule is declared in the cases cited by respondents.

In *Jacobs v. Superior Court*, 133 Cal. 364, 65 Pac. 826, 85 Am. St. Rep. 204, it is held that: "Since the amendment in 1897 [St. 1897, c. 62] to section 939 of the Code of Civil Procedure, allowing an appeal from an order appointing a receiver, and the amendment at the same time of section 943, providing for the staying of the order by an undertaking on appeal, a writ of prohibition will not lie to arrest proceedings under such an order, as the party aggrieved has 'a plain, speedy and adequate remedy in the ordinary course of law,' within the meaning of section 1603 of that Code, notwithstanding a question of jurisdiction is involved in the application for the writ." In the course of the opinion it is declared that: "There might, perhaps, be exceptional facts in a case which would call for a writ of prohibition, notwithstanding an appeal from an order appointing a receiver; but the general rule is as stated above, and applies to the case at bar."

In *Cross v. Superior Court*, 2 Cal. App. 342, 83 Pac. 815, it is said: "There are cases on the border line in which it is a matter of some difficulty, and generally, in this state, a matter of discretion, as to whether or not there is a plain, speedy, and adequate remedy in the ordinary course of law. It is the general rule that, where there exists an opportunity for a review and correction of the wrong complained of in a higher court on appeal, prohibition will not lie."

In line with the foregoing are the other cases, cited by respondents: *Agassiz v. Superior Court*, 90 Cal. 103, 27 Pac. 49; *Lindley v. Superior Court*, 141 Cal. 220, 74 Pac.

765; *McAdoo v. Sayre*, 145 Cal. 351, 78 Pac. 874; *McAneny v. Superior Court*, 150 Cal. 10, 87 Pac. 1020; *Johnston v. Superior Court*, 4 Cal. App. 92, 87 Pac. 211; *Lange v. Superior Court*, 11 Cal. App. 6, 103 Pac. 908; *Burge v. Justice Court*, 11 Cal. App. 215, 104 Pac. 581.

The cases cited by petitioner to the contrary involve peculiar features that led the Supreme Court to determine that an appeal was not an adequate remedy.

In *Glide v. Superior Court*, 147 Cal. 21, 81 Pac. 225, it appeared from the undisputed facts, as stated by the court, "that the superior court of Yolo county has taken unto itself the determination of a question of fact, jurisdiction to determine which question of fact is in the first instance exclusively vested by law with the board of supervisors of Yolo county. Further it appears that the superior court of Yolo county, as it shall determine the fact to be, will proceed to enjoin the board of supervisors in the performance of a legislative duty, the execution of which is made their sole province under the law." In such a case the higher court should undoubtedly exercise its discretion in granting the writ. Sound public policy requires that an attempt, whether intentional or otherwise, on the part of a court to usurp the functions of the legislative department of the government, should not be tolerated, but should immediately be arrested.

In *Dungan v. Superior Court*, 149 Cal. 99, 84 Pac. 770 (117 Am. St. Rep. 119), the writ was issued to restrain the superior court of Fresno county from taking any further proceedings in the matter of the settlement of an estate. It appeared that said court had no jurisdiction whatever, and it is quite apparent, as said by the court, that, "in view of the complications which will necessarily follow the attempted exercise of jurisdiction in the matter by two superior courts, it cannot be said that there is a plain, speedy, and adequate remedy in the ordinary course of law."

The other cases cited will also be found, upon examination, to be clearly distinguishable from the one at bar. Here the court could only render judgment for damages. An appeal would effectively correct any wrong that might be done to petitioner. No harm could possibly result except some delay in affording appropriate relief. The cases seem to be agreed, as stated in *Agassiz v. Superior Court*, 90 Cal. 103, 27 Pac. 50, that "a remedy does not fail to be speedy and adequate because by pursuing it through the 'ordinary course of law' more time would probably be consumed than in the proceeding here sought to be used."

We think no sufficient reason has been shown for delaying any further the trial of said action in said superior court.

The order to show cause is therefore discharged, and the writ denied.

We concur: CHIPMAN, P. J.; HART, J.

(14 Cal. App. 706)

PEOPLE v. ERNSTING. (Cr. 162.)

(Court of Appeal, Second District, California. Dec. 1, 1910.)

1. HOMICIDE (§ 254*)—MURDER IN THE SECOND DEGREE—EVIDENCE.

Where the jury believed from the evidence that accused took decedent to his room and robbed him, and that in the accomplishment of the robbery he either intentionally or otherwise injured decedent so that death resulted, they could find accused guilty of murder in the second degree.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 533-538; Dec. Dig. § 254.*]

2. CRIMINAL LAW (§ 1159*)—VERDICT—CONCLUSIVENESS.

The jury must consider the facts and weigh the testimony, and their verdict, sustained by evidence, will not be disturbed on the ground alone of insufficiency of testimony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.*]

3. CRIMINAL LAW (§ 1163*)—ERRONEOUS ADMISSION OF EVIDENCE—PREJUDICIAL ERROR.

In a close case the court, on appeal, must assume that the jury weighed every small fact, and if the trial court erred in admitting or rejecting proof of any such fact, the error will be deemed prejudicial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3090-3099; Dec. Dig. § 1163.*]

4. HOMICIDE (§ 338*)—ERRONEOUS ADMISSION OF EVIDENCE—PREJUDICIAL ERROR.

Where, on a trial for murder, the case was a close one on the evidence, the error in admitting the testimony of a witness as to statements by a bystander at the time of the finding of decedent's body, disclosing a demeanor indicating a brutal and unfeeling disposition on the part of the bystander, was prejudicial; the only testimony to identify the accused as the bystander being the similarity of appearance between the bystander and accused, based on their build.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 700-713; Dec. Dig. § 338.*]

5. WITNESSES (§ 393*)—IMPEACHMENT.

Where the testimony of a witness at the preliminary examination was contrary to his testimony at the trial, it was proper to show that fact to impeach the witness.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1252-1257; Dec. Dig. § 393.*]

6. CRIMINAL LAW (§ 1120*)—RULINGS ON EVIDENCE—RECORD—APPEAL.

The ruling of the court in excluding the testimony of a witness at the preliminary examination to impeach the witness testifying at the trial cannot be considered, where the testimony given at the preliminary examination is not made a part of the record of the trial in any way, but is merely set out in the brief of counsel of accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2931-2937; Dec. Dig. § 1120.*]

7. CRIMINAL LAW (§ 485*)—EVIDENCE—OPINION EVIDENCE—FORM OF QUESTION.

A question put to a physician as to whether a small instrument implanted with force against a human body would leave more surface marking than a larger one implanted in the same way calls for an answer involving the assumption of many different conditions and is objectionable.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1073, 1074; Dec. Dig. § 485.*]

8. CRIMINAL LAW (§ 476*)—EVIDENCE—OPINION EVIDENCE.

The question is also objectionable as calling for an opinion on a matter not within the scope of expert testimony, and the admission of an affirmative answer thereto is erroneous.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1062; Dec. Dig. § 476.*]

9. CRIMINAL LAW (§ 730*)—IMPROPER ARGUMENT—EFFECT.

Where a statement by the prosecuting attorney in his argument to the jury was not warranted by the evidence, but he told the jury that he was presenting it as an inference only, and the court, at the conclusion of the trial, instructed the jury that inferences must be founded on facts legally proved, the statement was not ground for reversal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1693; Dec. Dig. § 730.*]

10. CRIMINAL LAW (§ 829*)—TRIAL—REFUSAL OF INSTRUCTIONS COVERED BY THE CHARGE GIVEN.

It is not error to refuse requested instructions sufficiently covered by the instruction given correctly stating the law applicable in the case.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

Willis Ernsting was convicted of murder in the second degree, and he appeals. Reversed, and new trial ordered.

W. H. Dehm and Earl Rogers, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

JAMES, J. Defendant was charged by an information of the district attorney with having, on or about the 15th day of August, 1909, in Los Angeles city, murdered one William Salter. The jury by their verdict found him guilty of that crime and of the second degree thereof. He was sentenced to serve a term of 20 years' imprisonment. An appeal having been taken from the judgment, and from an order denying defendant's motion for a new trial, the record of the proceedings had in the superior court is brought here for review. Insufficiency of the evidence to sustain the verdict and judgment, and errors claimed to have been committed by the trial court in admitting and refusing to admit testimony, and in giving and refusing to give to the jury certain instructions, are the grounds upon which a reversal of the judgment and order is sought.

William Salter at the time of his death

was a man about 70 years of age, in good health, well preserved physically, and very active. He weighed nearly 200 pounds. On the 15th day of August, 1909, he resided at a lodging house at 618½ South Spring street, in Los Angeles city. Nearby about one-half a block from the intersection of Spring and Sixth streets, a saloon known as "The Gordon Bar" was located. This bar was situated in the block bounded by Main and Spring streets on the east and west and Fifth and Sixth streets on the north and south, respectively. An alley running midway between Main and Spring streets from Fifth to Sixth streets divided the block into two sections and furnished a passageway wide enough for teams to travel on between the streets last mentioned. This alleyway was paved down its central portion with rough cobble stones. At 515½ South Main street was located the lodging house where defendant resided. This lodging house was kept by Mrs. Margaret E. Osgood, and it had a rear entrance which led from the alley referred to through a brick archway to a flight of stairs. As near as can be gathered from the record, the rear entrance to this lodging house was distant at least 150 feet from the intersection of the alley with Sixth street.

Salter was addicted to the use of intoxicants to excess, and on the 15th day of August had been drinking heavily. He appeared at the Gordon Bar at about 10:30 or 11 o'clock that night so much intoxicated that he was refused more liquor by the barkeeper on that account. At that time defendant was conversing with a friend named Bob Marquis near the end of the bar counter. Salter, whom defendant had not been acquainted with theretofore, approached the latter and placed his arm about defendant and attempted to embrace him affectionately. Salter used terms of endearment toward Ernsting and finally attempted to fondle him in a lewd manner, at the same time making by words a proposal that Ernsting permit the commission of a disgusting and degenerate act for the gratification of Salter. Ernsting repulsed the intoxicated man and treated the matter lightly. The acts of Salter in embracing Ernsting were observed by Gordon, the proprietor of the bar, and Bob Marquis, who had met defendant by appointment at that place. No further attention was paid to the men by Gordon, Marquis, or the barkeeper. Marquis left the place at about 11:30 p. m. and at that time Ernsting and Salter were still there. No witness testified to having noticed the two men leave the place. Up to this point in the narrative given at the trial there is no conflict of evidence. When next seen together both Salter and Ernsting were in the lodging house at 515½ South Main street, where Ernsting resided. Mrs. Osgood, the landlady, testified that about 1 o'clock in

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the morning she heard the noise of a heavy fall and opened her door to see what caused the disturbance. She saw defendant and Salter on the floor; defendant being on top of Salter and in the act of arising. Defendant helped Salter up and took him down the stairway at the rear of the house leading to the alley heretofore referred to. Salter kept saying, "Don't! Don't!" and resisted the efforts of Ernsting to take him down. At the foot of the stairs both men fell to their knees, and Ernsting arose, and, as Mrs. Osgood believed, carried Salter out through the rear archway into the alley. Another witness, a woman lodger, testified that the men appeared to walk from the foot of the stairs into the alleyway. Ernsting was of the age of 41 years, and physically about the same size and weight as Salter. He was afflicted, however, with a hernia or rupture, which interfered slightly with his ability to work. Mrs. Osgood testified that after Ernsting and Salter disappeared through the archway into the alley Ernsting returned in about 20 minutes and went to his room. Between 1 and 1:30 o'clock of the same night a garbage gatherer was driving through the alley. He was driving three animals hitched abreast—a horse on either side with a mule between them. It was quite dark in the alleyway, but a lantern hung on the left side of the wagon at the front threw some little light between and ahead of the animals hitched to the wagon. At a point about 60 feet from the intersection of the alley with Sixth street, the animals pulling the garbage wagon suddenly came to a standstill. The driver saw some dark object in front of their feet at the left and threw on his brake. He then got down and found the body of a man lying close to the foot of the team. He pulled it out of the way. The body proved to be that of William Salter, who was then in a dying condition. As was developed at the post mortem examination, Salter's breast bone and all of the ribs on either side of it had been broken in. The ends of the broken ribs had penetrated the liver, causing a great hemorrhage from which death resulted. Salter never spoke after being found by the garbage gatherer. He made no sound at all except to groan a few times, and he died before he could be removed. About \$5 in silver coins were found by the officers in the pockets of Salter when the body was searched.

The defendant when arrested made several conflicting statements as to when he had last seen Salter on the night of August 15th, but finally admitted and testified at the trial that he had seen him at the lodging house at 515½ South Main street and had taken the man down the back stairs. He testified that he had disengaged himself from Salter at the saloon and had gone to his room; that upon leaving his room to get some water a short while afterward he

found Salter in the hallway; that the latter again embraced him and wanted him to consent to the consummation of the lewd act before suggested by Salter; that Salter gave him \$15; that he refused to consent to the desire of Salter and took the man down the rear stairs, telling him he must go away; that in his struggle with Salter to force the latter to leave the house the two had fallen down at the head of the stairs; that after getting Salter down to the alley he proceeded with him south to Sixth street; and that Salter there went on his way toward Spring street, he (Ernsting) calling at the saloon for a package and then returning to his room.

The contention was made at the trial on behalf of defendant that the injury received by Salter must have been caused by the team of the garbage gatherer. If the story told by defendant was true, of course, he would not have been guilty of murder. Neither would he have been guilty had the injury been caused to Salter at the time the two fell together in the hallway of the lodging house, under the circumstances testified to by defendant; for, if defendant's statement that he was followed by Salter from the saloon to the lodging house was true, then defendant would have had the right to cause Salter to leave the place, using all necessary force to accomplish that purpose. On the other hand, if the jury believed, as they must have, that defendant took Salter to his room and robbed him of money, and that in the accomplishment of that act he, either intentionally or otherwise, injured him so that his death resulted, the verdict was right. It was for the jury to consider the facts and circumstances and weigh them, and their determination cannot be disturbed on the ground alone that there was no evidence warranting the conclusion reached, for there was evidence to sustain it.

In considering the alleged errors of the court in the admission or rejection of testimony, or in the giving or refusing to give instructions to the jury, examination of those questions is approached with the consideration in mind that the charge against defendant is a most serious one and the punishment visited upon him necessarily of great severity. Further, that the evidence upon which he was convicted presents a case where, had the jury decided in his favor, it could not be said with assurance that such a verdict was not in accordance with the evidence, or that there had been thereby a miscarriage of justice. In a "close case," such as the one under consideration, it must be assumed that the jury weighed every small fact and circumstance, and, if the court erred in admitting or rejecting proof of any such, the error will be deemed prejudicial. Very differently will the same questions be viewed in cases where the proof is plain and abundant of a defendant's guilt.

1. The court erred to the prejudice of de-

defendant in admitting the testimony of witness S. F. White as to statements made by a bystander at the time the body of Salter was found in the alley. This witness did not pretend to have known defendant at that time. He saw a man there who apparently came in through the alley from Sixth street, but because of the darkness he had no opportunity to observe the man's face. White testified that when he inquired of the man where an officer could be found the person addressed replied: "What the hell do you want to call an officer for? It makes no difference if he is drunk, an officer is the last one you want to call. What are you doing here anyway? Are you a damned hobo?" White testified that he told the man that he was driving the garbage wagon, and that the man then said, "Oh!" and turned and walked out of the alley. The only testimony as to any similarity of appearance between this man whom White saw and held the conversation with and the defendant was the following given by White: "Q. How did he correspond in appearance with defendant? A. About the build, just the build." This was not sufficient evidence of identification (and there was none other) upon which to permit proof of the statements made by the bystander. The evident purpose of the testimony was to show that the defendant was present at the body of Salter at that time; that he was harsh of demeanor as indicating a brutal and unfeeling disposition; and that he desired to avoid the coming there of police officers. The admission of this testimony was prejudicial to defendant. The same observations may be made of the admission of the statements of witness Gomez, who told of a conversation had by him with an unknown man in the alley while the body of Salter was lying there.

2. Willard F. Smith, a police officer, testified that he found no marks on the clothing on the front of the body of Salter; that the vest was white; and that he examined it with the aid of a flash light and saw no marks or dirt thereon. Defendant's counsel proceeded to show the witness a transcript of his testimony as given at the preliminary examination of Ernsting, and asked him if he did not testify as shown by that transcript. An objection made to the question by the district attorney was sustained. If the testimony given by the witness at the preliminary examination was contradictory of his then testimony, it was proper for that fact to be shown; but nowhere in the record presented does it appear just what the testimony offered to be proved was. Counsel for defendant, upon being halted by the objection and ruling of the court, said: "Your honor, to have it shown in the record that we offer to show the transcript of the preliminary examination, commencing at line 27, on page 148, and running to and including line 4 of page 149, offer that in order

to impeach the witness to show that he has testified different at another time." There was an objection by the district attorney to the offer, and the objection was sustained. There the matter was allowed to rest. Counsel sets out the testimony given by Smith at the preliminary examination in his brief, but it was not made a part of the record of the trial in any way that entitles this court to consider it.

3. Dr. George W. Campbell, a witness, was asked by the district attorney this question: "Q. A small object inflicted the same kind of a wound it would be more likely to leave an impression on the outside of the skin than a large object?" This question, which was answered by the witness in the affirmative, was not clear in the form it was put; but the evident intent was to ask whether a small instrument implanted with force against a human body would leave more surface markings than a larger one implanted in the same way. The question was not intelligible, and an answer to it necessarily would involve the assumption of many different conditions. Besides being incompetent because of this fact, it called for an opinion upon a matter not properly within the scope of expert testimony. The admission of the answer was, therefore, error.

4. Complaint is made of certain statements of the district attorney used in his argument to the jury. O. A. Jones, a police officer, testified that when he went to arrest the defendant he did not disclose the true charge upon which he was making the arrest, but told defendant at that time, when asked for a reason, that "there had been some little holler made about his living there." In his argument to the jury the district attorney said, referring to the defendant: "At the time he was arrested the neighbors complained about him living there. What sort of a man is this, that the neighbors should be complaining about his living there?" Defendant's counsel objected to the statement that the neighbors had complained, and the district attorney retorted that he was drawing an inference from the testimony. It is true there was no evidence proving, or tending to prove, that the neighbors had complained of the residence of Ernsting at the place where he lived when arrested. He was not then living at the lodging house of Mrs. Osgood, but in a district remote from that locality. While the statement was not warranted by the testimony, it does not appear that defendant was prejudiced by it, for the district attorney told the jury that he was presenting it as an inference only, and with the testimony before them the jury could determine whether such an inference was well founded or not. Furthermore, the court at the conclusion of the trial instructed the jury that inferences which they were entitled to draw must be founded upon a fact legally proved.

The instructions given by the trial judge

covered sufficiently all matters upon which defendant asked further instructions to be given. The law applicable to the case was fully and, in our opinion, correctly stated in the charge to the jury.

Because of the rulings made at the trial in the admission of testimony, which, for the reasons given, constituted prejudicial error, the judgment and order are reversed, and a new trial ordered.

We concur: ALLEN, P. J.; SHAW, J.

(61 Wash. 607)

BOOK et al. v. THOMAS et al.

(Supreme Court of Washington. Jan. 17, 1911.)

1. CONTRACTS (§ 169*)—CONSTRUCTION—EX-TREMSIO CIRCUMSTANCES.

Where the entire contract of parties is reduced to writing, their intention is to be gathered from the writing alone.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 752; Dec. Dig. § 169.*]

2. PUBLIC LANDS (§ 185*)—WASHINGTON TIDE LAND—PREFERENTIAL RIGHT TO PURCHASE.

The owner of uplands bordering on tide land entered into contracts in 1902 for the sale of an undivided three-fourths interest in the land, and respondents became the owners of such contract by assignment in 1905, and in the same year entered into a provisional agreement with the vendors dividing the land, and stipulating that, on payment of the balance of the purchase price, the vendor would deliver a warranty deed to the assignee, which deed was then executed and placed in escrow. The provisional agreement further provided that it should not be construed to abrogate or modify the original contracts of sale, but that the same should remain in full force until canceled by a full performance of the provisional contract and the mutual conveyances of the land, and that the parties to such provisional agreement should have the mutual enjoyment of the dock or wharf now on the land, and that the vendors reserve the mutual use and enjoyment with such assignees of such dock or wharf. The dock or wharf was in fact located on the tide land. *Held*, that respondents did not thereby become the owners of the legal title to the uplands, so as to be entitled to the preferential right to purchase the adjoining tide lands under the statute enacted after the execution of such provisional agreement, though the deed as delivered after such statute took effect, and, after the expiration of the time allowed by the statute for the exercise of the right of purchase, contained the habendum clause: "To have and to hold the said premises together with the tenements and appurtenances."

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 598; Dec. Dig. § 185.*]

3. PUBLIC LANDS (§ 185*)—WASHINGTON TIDE LANDS—PREFERENTIAL RIGHT OF PURCHASE.

The deed cannot be held to relate back to the time of its delivery in escrow so as to confer on the grantee therein such preferential right of purchase.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 598; Dec. Dig. § 185.*]

Fullerton, J., dissenting.

Department 1. Appeal from Superior Court, Chehalis County; Mason Irwin, Judge. Applications by Ella J. Book and another,

and by George H. Thomas and others, to purchase certain tide lands. The Board of State Land Commissioners awarded the preference right to the first-named applicants, and, on appeal to the superior court, that ruling was reversed, and such first named applicants appeal. Reversed, with directions.

G. C. Israel, for appellants. John C. Hogan and Blaine, Tucker & Hyland, for respondents.

GOSE, J. On the 16th day of February, 1907, the plat of the Aberdeen tide lands was filed in the office of the commissioner of public lands. On March 23d following the appellant Ella J. Book filed in the same office an application to purchase all the tide lands involved in this action. On April 13th following the respondents Thomas filed their application to purchase the same tide lands. After hearing on the merits, the Board of State Land Commissioners awarded the preference right to purchase to the appellants. Upon appeal to the superior court, this judgment was reversed, and the preference right to purchase was awarded to the respondents Thomas. The Books have appealed.

The material facts upon which the respective preference rights are asserted are as follows: On the 6th day of December, 1902, the appellants Book were the owners of about 900 acres of upland lying along the Chehalis river where the tide ebbs and flows, and in and adjoining the city of Aberdeen. On that day they entered into a written contract with one Coughlin, whereby they agreed to sell and convey to him an undivided one-half of the land for a consideration of \$12,500, of which \$5,000 was then paid. The balance of the purchase price, with interest, was to be paid on or before November 29, 1907. On the same day they entered into a similar contract with one Gregory, by the terms of which they agreed to sell to him an undivided one-fourth of the land for \$1,000, to be paid on November 29, 1907. If the final payment was made on the Coughlin contract at the time agreed upon, Gregory was to receive a deed without further payment. The one-fourth interest in the land evidenced by his contract was to be conveyed to him in payment of his commission for effecting the sale to Coughlin, but only upon the fulfillment of the contract by the latter. Time was made of the essence of each of the contracts, and Coughlin and Gregory took possession of the property. On the 18th day of March, 1905, Gregory conveyed his interest in the land to the respondent Lizzie G. Thomas by a deed of quitclaim. On the 4th day of May following Coughlin and his wife assigned their contract to the same party. The respondents Thomas then entered into and continued in the possession of the land. On December 6, 1905, the appellants Book and the respondents Thomas entered into a provisional agreement, dividing the land, and providing the part or

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

portion which each thereof should have, and stipulating that the property should be conveyed by a warranty deed, that the abstract should show a clear title, and that the conveyance should be made "upon payment by said second party (meaning the respondents Thomas) to the said first parties (the appellants) of the balance due under the Coughlin contract," and that "nothing in this agreement shall be construed as abrogating or modifying the Coughlin or Gregory contracts relating to said ranch, held by the parties of the second part, and said contracts shall remain in full force and effect, and, when this agreement is fully performed by both of the parties hereto and the mutual conveyances herein provided for made, said Coughlin and Gregory contracts shall be canceled." On the 18th day of May, 1906, the appellants executed a warranty deed in favor of respondents Thomas, and placed it in escrow. This deed embraced the property which the provisional agreement between the same parties stipulated should be conveyed to them. In November, 1907, and before the 29th day of the month, final payment was made as required by the Coughlin and Gregory contracts, and the escrow deed was delivered. It conveyed certain upland, and the habendum clause contained the language: "To have and to hold the said premises, together with the tenements and appurtenances, unto the said party of the second part," etc. The trial court found that in entering into the provisional partition agreement the parties took into consideration the tide lands in front of the property, and that it was their intention to acquire the tide lands in front of the uplands, respectively assigned to them. This finding was made effective by the decree, and its correctness is challenged by the appeal. Whether it is correct is the pivotal question in the case. It must be kept in mind that all the contracts are in writing. We must therefore look to the instruments themselves to get the intention of the parties. The respondents insist that language may be found in both the provisional agreement and the deed to support the finding. The former provides, among other things: "Also that said parties shall have the mutual enjoyment of the dock now upon said ranch." The deed provides: "There is further reserved by the said first parties the right to the mutual use and enjoyment with the parties of the second part, their grantees or assigns, of that certain dock or wharf now situate upon the lands herein conveyed," with the right of ingress and egress. The court found, and we find nothing in the record to contradict it, that the dock or wharf was situate wholly upon the tide lands in front of the uplands described in the deed. A reference to the dates already stated will disclose that the respondents did not become the owners of the legal title to any part of the uplands until long after the 60 days expired for the exercise of the preference right given by the statute, nor did

they become the owners of any thereof until after the appeal had been taken from the order of the Board of State Land Commissioners.

The argument of the respondents that the agreement and deed operate as an express and intentional assignment of the preference right to purchase the tide lands in front of the uplands, set apart and conveyed to them by these instruments, cannot be upheld. Nor is the argument that such right passed as an incident to the upland based upon any secure foundation. We think this court is committed to the view that the statute, giving the preference right to purchase tide lands to the owner of the abutting uplands, means the owner of the legal title during the 60 days when such right must be exercised.

In *Hays v. Merchants' Bank*, 10 Wash. 573, 39 Pac. 98, it was held that one who had acquired the legal title to the upland through a sheriff's deed, before the hearing was had before the Board of State Land Commissioners to determine who had the preference right to purchase the tide lands, but who only had a sheriff's certificate of sale until some months after he had filed his application to purchase, was not the owner within the meaning of the statute. In passing upon the conflicting claims, the court said: " * * * And it would be altogether unjust to allow a contestant who has no present right to contest to go into the land office and file a claim based on no title in himself, and, after months of delay beyond the time permitted for the filing of contests, give him the land upon the basis of some after-acquired title. Moreover, we do not think it was the intention of the Legislature that these applications for purchase of tide lands by shore owners should be based upon anything but legal title. The board is not a court of equity, and it is not constituted for the adjudication of either equitable or inchoate rights. It must be satisfied, of course, that ownership exists, but it takes things as they are at the time of application and within the time allowed for contest." It is said, however, that there is such a difference between a judicial sale and a sale arising out of an express contract that the *Hays* Case may be distinguished upon that ground. The vice of this view is that the *Hays* Case is not put upon that ground, but upon the ground that the statute only applies to the holder of the legal title at the time the right is sought to be exercised. In *Book v. West*, 29 Wash. 70, 69 Pac. 630, the owner of the upland mortgaged it, "together with all and singular the appurtenances and tenements now or hereafter belonging." The title to the tide lands was then in the state. The upland owner had erected upon the tide lands a wharf and building, which projected a short distance on to the upland, and was in the possession of the same when the mortgage was executed. The contention that the mortgage embraced such right, title, and possession as the mort-

gator had in the tide lands and the improvements thereon was rejected. In *Gifford v. Horton*, 54 Wash. 595, 103 Pac. 988, it was held that the preference right given to the upland owner to purchase tide lands is not a right of property, but a mere gratuity; and in *State ex rel. Wilson v. Grays Harbor, etc.*, 110 Pac. 676, we held that such right is not a vested right against the state prior to purchase.

The respondents cite *Seattle, etc., Ry. Co. v. Carraher*, 21 Wash. 491, 58 Pac. 570, and *Hotchkin v. Bussell*, 46 Wash. 7, 89 Pac. 183. Neither of these cases affords them any aid. In the *Carraher* Case it was held that the grantee of the uplands had the preference right to purchase the tide lands as against one claiming under a later conveyance of the tide lands by the same grantor. In the *Hotchkin* Case it was held that a preference right to purchase tide lands may be abandoned or assigned, and that it will descend to the heirs upon the death of the ancestor in whom the right exists. All the contracts have reference to uplands. Had it been the intention of the parties in the partition agreement that each should have the preference right to purchase the tide lands in front of their respective uplands, without regard to who held the legal title when the right was to be exercised, it seems that they would have so provided in direct terms. The intention could have been expressed in a few words. Before this contract was executed, it had been held in the *Hotchkin* Case that the right was assignable. We will not infer the intention to assign the right from the reservation of the mutual use of the dock. The language of the reservation in the deed shows either that the dock was then thought to be wholly or in part upon the upland, or that, being used in connection with the upland, it was thought that it might pass as an appurtenance unless some reservation was made.

Respondents' contention that it can invoke the equitable doctrine of relation we think is without merit. They cite *Cummings v. Newell*, 86 Minn. 130, 90 N. W. 311; *Krakow v. Wille*, 125 Wis. 284, 103 N. W. 1121; *Scott v. Stone*, 72 Kan. 545, 84 Pac. 117; *Tharaldson v. Hatch*, 87 Minn. 168, 91 N. W. 467. In the *Cummings* Case the owner of a tract of farm land entered into a contract with another to sell him the land, received a payment upon it, executed a deed, and placed it in escrow. Pending the perfecting of the title the crop was harvested and appropriated by the vendor. In a suit to recover for the value of the crop it was held that the actual delivery of the deed must be construed as having taken place by relation at the time of its execution, and that the purchaser was entitled to recover. In the *Gregory* Case the owner of the land agreed to convey it to another upon his making certain payments. The contract provided that the purchaser

should have possession of the property. Later the land was regularly conveyed. Between the date of the contract and the execution of the deed the owner cut and converted into lumber and cordwood a large number of trees which had been standing and growing on the premises, and sold the product and appropriated the proceeds. Applying the doctrine of relation, it was held that the vendor was liable to the purchaser in an action for conversion. The *Scott* Case arose out of a transaction identical with that in the *Cummings* Case, and it was held that the purchaser was entitled to the rents. In the *Tharaldson* Case it was held that, when a deed is placed in escrow, the title does not pass until the second delivery; but that "this rule is not inflexible, and does not apply where justice and necessity require a resort to fiction. In such cases the deed takes effect by relation from the first delivery, in order that the operation of the deed may not be frustrated by events transpiring between the first and second delivery." In the *Cummings*, *Gregory*, and *Scott* Cases, it will be observed that the doctrine of relation was applied so as to protect a right in or arising out of the subject-matter of the contract.

We do not think the case at bar calls for the application of equitable principles. Tide lands under our former holdings are neither a part of, nor an appurtenance to, the uplands. The owner of the legal title to the uplands at the time when the right must be exercised is by the grace of the state given the preference right to purchase. The respondents contracted for the purchase of the uplands, and have received all they contracted for. They did not acquire the legal title to the uplands until more than nine months had expired after the filing of the plat of the tide lands. We have not overlooked the oral testimony. The contracts, however, are unambiguous, and the intention of the parties must be ascertained from them.

The judgment is reversed, with directions to affirm the order of the Board of State Land Commissioners.

RUDKIN, MOUNT, and PARKER, JJ., concur.

FULLERTON, J. I think the judgment of the trial court should be affirmed. I therefore dissent from the judgment directed by the majority.

(61 Wash. 639)

GIBSON v. CHICAGO, M. & P. S. RY. CO.
(Supreme Court of Washington. Jan. 20, 1911.)

1. NEGLIGENCE (§ 32*)—DUTY TO INDEPENDENT CONTRACTOR.

Defendant engaged in removing a rock bluff, incident to the construction of its railroad, contracted with plaintiff to drive a tunnel in the face of the bluff in which to explode powder. A heavy blast in another tun-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

nel, for the purpose of loosening part of the face of the bluff, brought down a quantity of rock immediately in front of plaintiff's tunnel, blocking the entrance to it. Plaintiff, at the direction of defendant's foreman, commenced to remove the debris, but being alarmed by the fall of a rock, ceased work, and reported such fall to defendant's foreman, who said he would make the bluff safe. Plaintiff did not return to work till the next morning, after the foreman had assured him that he had caused the wall and slope to be made safe. Held that, even if plaintiff was an independent contractor, and not an employé, defendant having told him the wall would be made safe, and assured him that this had been done, owed him the duty of making it safe, in so far as this could be done by inspection and barring down of loose rock; so that, plaintiff having a right to rely on the assurance that it had been made safe, defendant was liable for injury to him through the falling of a rock, caused by negligence in not making the place safe.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 42-44; Dec. Dig. § 32.*]

2. NEGLIGENCE (§ 121*)—EVIDENCE—BURDEN OF PROOF.

That a rock fell, injuring plaintiff, a few hours after he went to work removing debris at the base of a rock bluff, immediately after work by defendant on the face thereof to make it safe against falling rocks, and after being told by defendant that it had been made safe, is some evidence of negligence, placing on defendant the burden of overcoming it.

[Ed. Note.—For other cases, see Negligence, Dec. Dig. § 121.*]

3. TRIAL (§ 140*)—TAKING CASE FROM JURY—CREDIBILITY OF INTERESTED WITNESS.

Defendant's foreman, who did the work claimed to have been negligently done, is an interested witness, as respects the right of the court to take the case from the jury, on the ground of the presumption of negligence being overcome by his testimony alone.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 334, 335; Dec. Dig. § 140.*]

4. TRIAL (§ 140*)—QUESTION FOR JURY—CREDIBILITY OF WITNESS.

Where the party, on whom rests the burden of proving a disputed fact in a jury case, seeks to do so by no other evidence than the testimony of a single interested witness, the court may not determine as a matter of law that such fact has been proven; but even if the testimony if believed is sufficient, the credibility of the witness is for the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 334, 335; Dec. Dig. § 140.*]

5. NEGLIGENCE (§ 108*)—COMPLAINT—FACTS INFERRABLE FROM ALLEGATION.

The facts that defendant knew, or in the exercise of reasonable care could have known, of the danger, and that plaintiff was ignorant of the danger, though not specifically stated in the complaint, are to be inferred from the facts alleged therein, it averring that plaintiff working as a laborer, under the direction and supervision of defendant, was directed by defendant to shovel away dirt at the foot of an embankment, and was assured by defendant that there was no danger of rocks falling from the embankment; that relying thereon he went to work, and that while so working without any notice or knowledge of any danger, and without any fault on his part, a rock rolled down and injured him; that it was defendant's duty to furnish plaintiff a safe place to work, and particularly to see that there were no loose rocks on the embankment; and that defendant negligently failed to make the place safe and to remove loose rocks from the embankment, and

to warn and notify plaintiff of the danger, but assured him that the place had been made and was safe.

[Ed. Note.—For other cases, see Negligence, Dec. Dig. § 108.*]

Department 1. Appeal from Superior Court, Spokane County; E. H. Sullivan, Judge.

Action by Gilbert Gibson against the Chicago, Milwaukee & Puget Sound Railway Company. Judgment for defendant. Plaintiff appeals. Reversed, with instructions for a new trial.

B. M. Branford, for appellant. F. M. Dudley and H. H. Field, for respondent.

PARKER, J. This is an action to recover damages for personal injuries. The negligence of the defendant and the injuries resulting to the plaintiff therefrom, are alleged in his complaint as follows: "That on the 16th day of September, 1909, and for some time prior thereto the plaintiff was in the employ of the defendant and working upon the construction of said defendant's railway in camp No. 75, near bridge No. 17, about one and one-half miles west of Falcon, Idaho, a small station on defendant's railway. That said plaintiff was, at the said time, working as a laborer under the direction and supervision of said defendant, and that said defendant directed the said plaintiff to go and shovel away a quantity of loose dirt which had fallen down from the embankment above, and became lodged in front or at the opening of a 'coyote hole,' the latter being a hole which was made in the hillside, for the purpose of blasting loose dirt and rock to be removed in the construction of a road-bed for said defendant's railroad, and that the defendant assured said plaintiff that the said place where said plaintiff was directed to work was safe, and particularly assured said plaintiff that there was no danger of rocks falling down from the embankment above at the place where said plaintiff was directed to work. That in pursuance to the said order and direction on the part of the said defendant, the said plaintiff, relying upon the statement and assurance of said defendant that the said place was safe, went to work to shovel dirt at the said place as directed. That about 11 o'clock on the forenoon of said day, while said plaintiff was working for said defendant at the said place as directed, without any notice or knowledge of any danger whatsoever, and without any fault on the part of said plaintiff, a large rock rolled down over the edge of the embankment about fifty feet above where the plaintiff was at work, and came down with great force and velocity, and struck plaintiff's right arm about four or five inches above the wrist, then and there and thereby breaking the bone known as the ulna in the said plaintiff's right arm, and caused what is commonly known and termed as compound

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

fracture of the said bone, and injured the skin, nerves, tendons, muscles, and ligaments of the said plaintiff's right arm, and then and there and thereby the said plaintiff's right arm was seriously and permanently injured and disabled. That at all times herein mentioned it was the duty of said defendant to furnish to said plaintiff a safe place to work, and particularly to see that there were no loose rocks in or on the embankment above, which could fall down upon the plaintiff at the said place of work, and that said defendant carelessly and negligently failed to make the said place safe, and failed to remove from the said embankment loose rocks, and failed to warn and notify said plaintiff of said danger, but assured said plaintiff that said place had been made and was safe and then violated its duty to plaintiff, and that by reason of said negligence on the part of said defendant the injuries set forth were inflicted upon said plaintiff without any fault on his part."

The defendant demurred to the complaint upon the sole ground that it does not state facts sufficient to constitute a cause of action. This demurrer was overruled by the court, and the defendant answered denying the acts of negligence charged against it; and as affirmative defenses alleged that in the performance of his work at the time of his injury the plaintiff was not a servant of the defendant, but was an independent contractor; that he assumed the risk of being injured in the manner alleged; and that his injuries were the result of his own negligence. Upon these issues the cause proceeded to trial. At the conclusion of the plaintiff's evidence counsel for the defendant challenged the sufficiency of the evidence to warrant the submission of the cause to the jury, which was by the court overruled. At the conclusion of all of the evidence counsel for the defendant renewed their challenge to the evidence and moved the court to discharge the jury and enter judgment in favor of the defendant, which motion was granted. From this disposition of the case, the plaintiff has appealed to this court.

The contentions of learned counsel for the respective parties have to do with these questions: (1) Was the evidence bearing upon respondent's negligence and appellant's assumption of risk such as to require the submission of these questions to the jury? (2) Was respondent freed from liability for appellant's injuries because he was performing his work as an independent contractor? We will now review the facts bearing upon these questions.

There was competent evidence tending to show the following: In September, 1909, respondent was engaged in removing a rock bluff incident to the construction of its railway. In the performance of this work, small tunnels, called "coyote holes," were run into the face of the bluff some 20 feet or more at a level of about 200 feet above the foot of

the bluff, in which tunnels large quantities of powder would be exploded, breaking and loosening the rock over the tunnels so that it could be removed by a steam shovel and a small construction train. At the time in question, a ledge had been made along the bluff where the tunnels were being driven, some 20 feet or more wide, on which the train could run upon a temporary track. From this ledge, at the point where appellant was injured, the rock wall of the bluff raised almost perpendicular about 35 feet, and then sloped back precipitously until it attained a height of 100 feet or more. It was composed of rock seamed horizontally from 8 inches to 3 feet apart, which dipped into the hill. The tunnels were driven in on a level with the ledge and were on an average of about 40 feet apart. The upper part of the bluff was covered with about a foot of earth except in some few places the rock came to the surface. This extended down to within about 60 feet of the ledge, probably down to where the earth and surface rock had been removed in making the ledge. A person standing on the ledge could not see near all of the wall and slope above him. On Saturday, September 11th, appellant and two other men associated with him, applied for work to Mr. Horrocks, the engineer in charge of the construction of respondent's railway. They were all experienced rock workers. It is clear that they then made arrangements with Horrocks to go to work for respondent, though there is a dispute as to the exact nature of their contract. Appellant testified:

"Q. State when, if at any time, you were hired by the defendant in this case, the Chicago & Milwaukee Railway Company to work for them. * * * A. Why, I was hired at the east portal by an assistant engineer by the name of Horrocks, and he gives me a slip of paper to take over to his foreman by the name of Dan McKinnon, and get the orders from him what to do. We were hired to go over there and do rock work, to get orders from him to work, or what to do.

* * * Q. Did the defendant hire any one else besides you at this time to go to this place to work? * * * A. There was three of us hired, I and Anderson and Hans Christopherson. The three of us was hired to go to this place and do rock work. Q. Now where is this East Portal that you were hired at? A. I couldn't say exactly how many miles to it. It is in the neighborhood—or at least I was told by Mr. Horrocks there that it should be seven or eight miles. It is about seven miles, I think, as far as I can remember. Q. From the camp where you were to work? A. From East Portal to this camp where I went to work. I don't remember that particular or exactly, but my recollection is that Horrocks told me I could make it by walking over there in seven miles, he says. Q. Did you walk over? A. No, sir; we took the train in the evening and went

over. Q. What was your agreement as to wages with Mr. Horrocks? * * * A. Well, we were told that we should get three dollars seventy-five a foot for digging this coyote hole, and any other day work that was mentioned how much we should get a day for that."

On cross-examination he testified: "Q. Now, tell us what you first said to Mr. Horrocks when you met him. A. I asked him if he had any work to let out, or any work to give to anybody; we were looking for work. He says he had some coyote hole digging over there, he said; and he says, 'contract work or day work.' He says, 'You can get it on contract,' he says. And I asked him how much he was paying. He says, 'Three dollars seventy-five a foot. So if you want to go over there and look at it,' he says, 'you can go over and take that one particular hole,' he says, 'if it suits you. If it don't, see the foreman, and you will get something else.'"

This testimony tends to show the authority of the foreman McKinnon, as well as the contractual relation of the parties, though we will probably find as we proceed that the exact nature of the latter is of little consequence. Appellant and his associates went with the note to McKinnon, the foreman in immediate charge of the work. McKinnon showed them the hole, which was then driven in about 18 feet, and they went to work and drove it in about 4 feet farther during the next few days, the material therefrom being carried out across the ledge, where it was dumped over the outer edge, by a wheelbarrow. On Tuesday evening, September 14th, about 6 or 7 o'clock, charges of dynamite, which had been prepared in two tunnels, the first and second ones west of the one appellant and his associates were working at, were exploded. This blast was not one merely for the purpose of extending those tunnels, but was a heavy blast put in upon their completion, and was for the purpose of loosening the face of the bluff for the steam shovel. The effect of this blast was to break the rock wall above the ledge for some distance, over towards the tunnel appellant and his associates were working at. This shattered zone widened as it went higher up the bluff where it extended out to within a few feet of, if not over, the tunnel appellant was working at. This blast also jarred down a quantity of rock immediately in front of the opening to appellant's tunnel, blocking its entrance. The foreman, upon having his attention called to this material in front of the tunnel and its preventing work in the tunnel, told them to clear it away, and that they would get paid by the day for that work. They thereupon proceeded with that work during Wednesday September 15th, until about 2 o'clock in the afternoon, when some rock fell from the cliff about them. Being alarmed by this, they ceased work, and appellant went to McKin-

non and told him of the falling rock and requested him to have the bluff made safe. McKinnon said he would make it safe and returned with appellant to the tunnel. After looking at the face of the wall he sent three men with ropes and tools to bar down the loose rock from the face of the bluff, superintending the work himself. He testified in substance that this was done with care, so as to leave no loose rock there liable to fall so far as could be then determined. We have no testimony as to the care then exercised in this particular save that of McKinnon himself. Appellant and his associates had entered the tunnel just before this barring down of the loose rock commenced and continued their work there, but could not take any material out of the tunnel, and could not safely go out until about 5 o'clock in the evening, when the barring down had ceased. They then went out and quit work for the day. The next morning, September 16th, appellant and his associates returned and looked at the face of the wall so far as they could see it from the ledge. Whether or not they went to work before McKinnon came is not very clear, but in any event he very soon came there and told them that the place was now safe, and for them to go ahead and clear it out, referring to the loose rock in front of the tunnel. They then proceeded with their work, two of them removing the debris from in front of the tunnel, and one working at drilling in the tunnel. Nothing further occurred indicating danger until about 11 o'clock in the forenoon, when a quantity of rock fell from the wall or slope above, one of the pieces striking appellant and inflicting the injuries for which he seeks damages by this action. There was no appreciable shock or physical disturbance of any kind occurring at the time in the neighborhood. The rock evidently fell only because of its loose condition. The proper manner of barring down the loose rock and of testing their looseness was testified to in considerable detail, and the evidence tended to show that loose rock on such a wall and slope could be discovered with great certainty. Appellant, a man of many years' experience in rock work of this nature, after describing the manner of testing the wall, testified: "Q. Now, was the rock on this wall of such character that it could be barred down, as you have described here? A. Yes, sir; it could be barred down, so it would be as safe as this room right here is." Appellant and his associates did not inspect the wall on the morning of the injury other than by looking at it from the ledge, where they could not see all of it. They evidently depended upon the assurance of McKinnon as to its safety. The mere fact that McKinnon had apparently completed the barring down was some assurance to that effect, and this was strengthened in their minds by his conversation with them that morning.

Let us first inquire what was the duty of

respondent towards appellant and his associates, as to the rendering the wall and slope safe from falling stone. We have noticed that appellant's foreman McKinnon was advised of the danger from falling stone on the day preceding the injury; that he then told appellant that he would send men up and make it safe; that he did send men up who under his supervision went over at least a portion of the wall barring down loose rock; that this work was apparently completed that afternoon; and that when appellant and his associates went there to work the following morning they were then told by the foreman, in substance, that the wall and slope were safe, and to go ahead and clear away the debris from in front of their tunnel. In the light of these facts it seems clear to us that respondent then owed to appellant and his associates the duty of making the wall safe in so far as it could be rendered safe by inspection and barring down of loose rock, and that appellant then had the right to rely upon the assurance of respondent's foreman that he had caused the wall and slope to be made safe. Appellant and his associates had no occasion at that time to inspect the face of the bluff, even should it be considered that they might have been bound to inspect it in the absence of these facts. This being respondent's duty, and appellant having the right to rely upon the assurance of the foreman that such duty had been performed in such manner as to render the place safe, we think it follows that the falling of the rock so soon thereafter was such evidence of respondent's negligence in failing to make the place safe as required the submission of that question to the jury, unless the case is to be taken from the jury and decided as a matter of law against appellant because of the conclusiveness of respondent's evidence which we will now notice.

For the purpose of determining whether or not respondent's evidence as a matter of law conclusively disproved its negligence inferable from the facts we have noticed, we must regard the burden of such proof as resting upon respondent. We have seen that the only evidence tending to show due care in the inspection of the wall and the barring down of the loose rock was the testimony of the foreman McKinnon. He testified as to the manner in which the men under him tested and barred down the loose rock tending to show that it was carefully done. Also, that the men as well as himself were experienced in that kind of work; and that he looked over the work after its completion and found the place safe. He was of course, by reason of his relation to respondent and his connection with the work, an interested witness. This brings us to the question, was the learned trial court warranted upon this evidence alone in deciding as a matter of law that respondent had exercised such care in making the place safe as to relieve it from

liability for the injury to appellant. When the burden of proving some disputed fact in a jury case rests upon a party, and such fact is sought to be proven by no other evidence than the testimony of a single interested witness, a trial court is not warranted in determining as a matter of law that such fact has been proven. This rule we apprehend is subject to few if any exceptions. Its force as applicable to the facts of this case is well illustrated in the case of *Volkmar v. Manhattan Railway Co.*, 134 N. Y. 418, 31 N. E. 870, 30 Am. St. Rep. 678. In that case the plaintiff was driving under the company's elevated railway when an iron plate with part of a broken bolt fell and struck him, causing injuries for which he sued the company. But little question was made as to the fact of the falling plate establishing a prima facie showing of negligence against the company. The cause was taken from the jury upon the testimony of an interested witness, tending to show a careful inspection and failure to discover the loose plate. Discussing this ruling of the lower court, Justice Haught, speaking for the Court of Appeals, said: "The learned General Term, in its opinion, admits this proposition, and concedes that the fall of the plate or clip in the absence of an explanation raises a presumption of negligence. That court, however, reached the conclusion that the presumption was overthrown by the evidence produced on behalf of the defendant. As we have seen, that evidence was given by the witness Roach. It was his duty, as he testified, to examine carefully all rails, switches, signals, bolts, and fastenings of all kinds, and to keep them tight. He further states that in June, 1885, he was engaged in following out his instructions and performed them to the best of his ability. In no place does he testify that he ever examined the bolt and clip which fell upon the plaintiff. He does not tell us how often he passed over the track, or to what extent he examined the bolts and fastenings. He only gives us his own conclusion that he performed his duty to the best of his ability. It does not appear to us that this was sufficient to remove the presumption which necessarily follows from the established fact that the bolt was broken, and in that particular the structure was out of repair and dangerous. But even if this evidence was sufficient to remove the presumption as held by the General Term, the credibility of the witness would still be involved and be a question for the jury. This witness was the defendant's track walker. It was his duty to examine the bolt which was broken. If there was any negligence for which the defendant was chargeable, it was that of this witness. He was, therefore, a person interested, and possibly actuated by a motive to shield himself from blame." It is true that decision had reference to an artificial structure maintained by the company; but in view of the evidence in this case tend-

ing to show the relation of appellant to respondent, the promise of its foreman to make the place safe, his assurance thereafter that it had been made safe, and respondent's ability to make it safe, we are not able to see that respondent's duty to appellant and his associates was in principle any different than it would have been had the wall been an artificial structure maintained by respondent. We are of the opinion that the testimony of McKinnon was not conclusive evidence, enabling the court to decide as a matter of law that respondent was not negligent in failing to make the place safe. The following authorities are in harmony with this view: *Ireland v. Scharpenberg*, 54 Wash. 558, 103 Pac. 801; *Firemen's Fund Ins. Co. v. O. R. & N. Co.*, 58 Wash. 332, 338, 108 Pac. 770; *Kennedy v. McAllaster*, 31 App. Div. 453, 52 N. Y. Supp. 714; *Kavanagh v. Wilson*, 70 N. Y. 177; *Babcock v. Chicago & Northwestern Ry. Co.*, 62 Iowa, 593, 13 N. W. 740, 17 N. W. 909; *A. & N. R. Co. v. Bailey*, 11 Neb. 332, 9 N. W. 50; *Cunningham v. Union Pac. Ry. Co.*, 4 Utah, 206, 7 Pac. 795; *Felton v. Bullard*, 94 Fed. 781, 37 C. C. A. 1.

A considerable portion of the argument of learned counsel for respondent is devoted to their contention that appellant was performing his work as an independent contractor at the time he was injured, and for that reason respondent owed him no duty to make the place safe. We deem it unnecessary to determine whether the technical legal relation between them was that of owner and independent contractor or master and servant. There may be room for argument that either of these relations then existed between them. We are of the opinion that whichever of these relations existed the negligence of respondent, which this evidence tends to show resulted in appellant's injuries, rendered respondent liable. It seems to us that since appellant was there at the instance of respondent, in pursuance of a business relation between them, and the assurance of the safety of the place made by respondent's foreman at so short a time prior to the injury, it is of no consequence whether appellant was there as an independent contractor or as a servant of respondent. *Curtis v. Barber Asphalt Paving Co.*, 44 Wash. 334, 87 Pac. 345.

It is contended that appellant's complaint does not state a cause of action. This contention of course would in no event call for an affirmance of the court's decision upon the challenge to the evidence, though it might call for a reversal of the overruling of the demurrer and permit an amendment of the complaint. It is insisted that "two matters are noticeably missing from this complaint: First, all allegation that the respondent knew, or, in the exercise of reasonable care, could have known, of the danger; and, second, that the appellant was

ignorant of the danger." Under the liberal rules of pleading adopted in this state we think these facts are to be inferred from the facts alleged in the complaint, though they are not specifically stated therein. We are of the opinion that the facts pleaded constitute a cause of action.

Some effort is made to liken this case to that of *White v. S. & I. E. R. Co.*, 54 Wash. 670, 103 Pac. 1119. We think, however, the cases are distinguishable. In that case the company was as a matter of law relieved from the duty of inspection because the undisputed facts showed that there was no apparent danger calling for inspection and had not been for a month or more previous. In this case the danger was admittedly present only a few hours before the injury and was known to respondent. The question here was not as to the necessity of inspection and removal of the danger, but as to whether or not the duty to remove the danger rested upon respondent and as to whether or not it negligently performed that duty. These we think were questions for the jury.

The judgment is reversed, with instructions to grant appellant a new trial.

RUDKIN, MOUNT, FULLERTON, and GOSE, JJ., concur.

(61 Wash. 672)

NELSON v. WESTERN STEEL CORPORATION.

(Supreme Court of Washington. Jan. 23, 1911.)

APPEAL AND ERROR (§ 1005*) — REVIEW — AMOUNT OF RECOVERY—PERSONAL INJURIES.

Where the jury in action for personal injuries returned a verdict for \$3,000 and the trial court refused a new trial on condition that the plaintiff remit \$2,000 and the injuries consisted largely of personal disfigurement, which was observed by the jury and trial judge, the verdict will be considered conclusive on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3943-3954; Dec. Dig. § 1005.*]

Department 2. Appeal from Superior Court, Pierce County; John A. Shackelford, Judge.

Action by A. F. Nelson against the Western Steel Corporation. From a judgment for the plaintiff, defendant appeals. Affirmed.

Lyter & Folsom, for appellant. Govnor Teats, Hugo Metzler, and Leo Teats, for respondent.

RUDKIN, J. The injuries for which a recovery was here sought arose out of the same accident as those involved in the case of *Mrozevich v. Western Steel Corporation* (just decided) 112 Pac. 925. In this case, however, liability on the part of the defendant company was admitted; the amount of damages was the only question submitted to the jury, and the claim that excessive damages were allow-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ed, under the influence of passion and prejudice, is the only question presented to this court. The jury returned a verdict in favor of the plaintiff in the sum of \$8,000, but the court below refused a new trial only upon condition that the plaintiff remit the sum of \$2,000 from the verdict. The remission was made as directed, and from a judgment on the verdict as reduced this appeal is prosecuted.

The pain and suffering endured by respondent in this case, and the disfigurement of his person, do not differ materially from those present in the case cited, but here there was no evidence of permanent disability, unless the jury might infer such disability from the condition of the respondent at the time of the trial and from his appearance on the witness stand. It must be conceded that the recovery in this case was liberal, even as reduced by order of the trial court, but so much depends upon the physical appearance of the respondent, who appeared before the trial judge and jury, that we do not feel warranted in overriding their judgment in the matter of damages. Aside from the pain and suffering, loss of time and at least temporary disability, the respondent must go through life marred and disfigured, deprived in a large measure of the comfort and companionship of others, an object of pity and abhorrence to his fellow men, and an object of ridicule to the thoughtless and unfeeling. *Gray v. Washington Water Power Co.*, 30 Wash. 665, 71 Pac. 206.

Under all the circumstances, therefore, we do not feel called upon to further reduce a verdict which has already been reduced by the trial court, nor do we feel that we would be justified in so doing.

Finding no error in the record the judgment is affirmed.

DUNBAR, C. J., and CHADWICK, CROW, and MORRIS, JJ., concur.

(61 Wash. 668)

MROZEVICH v. WESTERN STEEL CORPORATION.

(Supreme Court of Washington. Jan. 23, 1911.)

1. MASTER AND SERVANT (§ 278*)—MASTER'S LIABILITY — RELATIONS — VERDICT—SUFFICIENCY OF EVIDENCE.

In an action by an employé against a mining corporation for injuries received in the mine, evidence held to show that the injury was caused by defendant's negligence.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 954-972; Dec. Dig. § 278.*]

2. APPEAL AND ERROR (§ 837*)—PRESENTATION OF GROUNDS OF REVIEW IN LOWER COURT—RECEPTION OF EVIDENCE—OBJECTIONS.

Evidence received without objection, regardless of whether it was admissible under the pleadings, will be considered on appeal in deter-

mining whether a motion for nonsuit should have been granted.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 837.*]

3. EVIDENCE (§ 265*)—ADMISSIONS BY AGENT — ADMISSIONS BY ATTORNEY—EFFECT.

An admission of liability made by an attorney in one suit cannot be accepted as proof in a similar action.

[Ed. Note.—For other cases, see *Evidence*, Dec. Dig. § 265.*]

4. APPEAL AND ERROR (§ 1053*)—REVIEW — HARMLESS ERROR—RECEPTION OF EVIDENCE.

In an action against a mining corporation for injuries resulting from an explosion in the mine, a witness testified to a previous explosion, but after the admission of this testimony it was made to appear that he was not then present, whereupon his testimony was stricken from the record, and the jury instructed to disregard it, so that the previous ruling was harmless even if erroneous.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 1053.*]

5. MASTER AND SERVANT (§ 270*)—EVIDENCE — MATERIALITY—SIMILAR CONDITIONS.

Where the conditions in a mine remained unchanged, and the person testifying was the first to enter after an explosion, evidence as to its condition three weeks after the explosion was admissible in an action for injuries caused by the explosion.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 917; Dec. Dig. § 270.*]

6. DAMAGES (§ 132*)—MEASURE OF DAMAGES — EXCESSIVE DAMAGES.

A verdict for \$7,000 against a mining company in favor of a miner injured in an explosion was not excessive where his hands, arms, face, neck, and back were badly burned and disfigured, the injuries being painful and long continued, one hand being permanently disabled, and reducing his earning capacity, which had been over \$100 per month, to the scanty returns for hard manual labor.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 178, 372-385, 396; Dec. Dig. § 132.*]

Department 2. Appeal from Superior Court, Pierce County; John A. Shackelford, Judge.

Action by Joe Mrozevich against the Western Steel Corporation. From a judgment for plaintiff, defendant appeals. Affirmed.

Lyter & Folsom, for appellant. Govnor Teats, Hugo Metzler and Leo Teats, for respondent.

RUDKIN, J. This was an action to recover damages for personal injuries. On the 6th day of December, 1909, the defendant was engaged in developing a coal mine at Ashford in this state. The entrance to the mine was through a tunnel extending into the mountain side a distance of upwards of 4,000 feet. For the greater part of this distance the tunnel was constructed through rock, but for the last 400 feet it followed the vein of coal. The tunnel was 10 feet wide and 8 feet high, constructed on an incline of about 1 per cent. The mine or tunnel was ventilated by a system of fans and air boxes, and was lighted by electricity. For the first

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

3,000 feet the air box was 3 feet 10 inches by 16 inches, in dimensions, for the next 700 feet, 2 feet 10 inches by 16 inches in dimensions, and from that point to a point within 80 feet of the face of the tunnel the larger sized box was again used. From this latter point smaller boxes extended to within 8 or 10 feet of the face of the tunnel with a nozzle extending upwards to catch or admit the gas. A fan was connected with the air box at the entrance, and a second one about 700 feet from the entrance. The wire conducting the electrical current into the mine was attached to the timbers at the side of the tunnel. On the above date the plaintiff and three of his coemployés, at work near the face of the tunnel, were severely burned and injured by an explosion of gas, and the present action was instituted in the plaintiff's behalf to recover damages for the injuries by him received. From a judgment in favor of the plaintiff in the sum of \$7,000 this appeal is prosecuted.

The principal assignment of error is based on the contention that there was no testimony tending to show actionable negligence on the part of the appellant, and that a nonsuit should have been directed at the close of the respondent's testimony. It appears from the record, without apparent contradiction, that a form of gas, commonly known as marsh gas, was continually accumulating in the mine or tunnel, and that it came in in quantities at different places through seams or fissures in the rocks and veins. This gas is lighter than the air and will naturally rise to the top of the tunnel among the timbers. When mixed with air in certain proportions it is highly explosive, and the mine was never entirely free from it. The testimony further showed that for some days before the accident this gas entered the mine in considerable quantities at a point about 135 feet distant from the face of the tunnel, where the men were at work; that the tunnel at this point was very damp or wet; that the insulation on the wiring was there defective; that under such circumstances an arc could easily be formed, and that a spark from the wire would ignite the gas and cause an explosion. It further appeared that the explosion occurred at this point, that it could only result from the gas coming in contact with a flame or spark, and that there was no person at or near the place of the explosion, at the time of its occurrence. It also appeared that the air boxes were leaky at different points, permitting the gas to escape therefrom, and that the box was not large enough to take up all the gas accumulating in the tunnel and driven to its face. Under this testimony the jury was

fully warranted in finding that the injury resulted from a defective ventilating system and the defective wiring. In fact we do not see how a different conclusion could have been reached. It is said the complaint does not allege negligence in the lighting system, but the proof was received without objection, and must therefore be considered by this court on motion for nonsuit or directed judgment. An admission of counsel in one case cannot be accepted as proof in another, yet it is a significant fact that in the case of Nelson against the same appellant (112 Pac. 924), which arose out of the same accident, counsel for appellant in open court admitted liability and questioned only the amount of the recovery. We think the record in this case fully justified the course pursued in the Nelson Case.

We will now refer briefly to the remaining assignments of error. Error is assigned in the admission of testimony tending to show another explosion in the same mine some months before. After this testimony was admitted, it was made to appear that the witness was not present at the time of the former explosion, and his testimony was thereupon stricken from the record and the jury instructed to disregard it. The ruling was therefore harmless, if erroneous. The ruling of the court admitting testimony tending to show the condition of the mine at the point where the explosion occurred some three weeks after the accident is also assigned as error. This testimony was given by the first person to enter the mine after the explosion, and it would seem immaterial whether it was three hours or three weeks after the accident, so long as the conditions in the mine remained unchanged. Errors are assigned in the charge of the court and in a refusal to charge as requested, but the charge as a whole was clear and specific, and exceedingly fair, to the appellant.

It is lastly contended that the verdict is excessive. The respondent was badly burned about the hands, arms, face, neck and back. His pain and suffering was necessarily great and long continued. He was badly scarred and disfigured, and will remain so through life. His hands were injured, one of them permanently so. His earning capacity at the time of the accident was upwards of \$100 per month, and his earning capacity in the future will be slight, at hard manual labor, and he is ill fitted for anything else. Under such circumstances, the verdict is neither unreasonable nor excessive, and the judgment is accordingly affirmed.

DUNBAR, C. J., and CHADWICK, CROW, and MORRIS, JJ., concur.

(61 Wash. 681)

STATE ex rel. SCHWABACHER BROS. & CO., Inc., v. SUPERIOR COURT OF KING COUNTY.

(Supreme Court of Washington. Jan. 26, 1911.)

1. VENUE (§ 32*)—ACTIONS—WAIVER.

Under Rem. & Bal. Code, § 208, permitting trial in an improper county, unless defendant on appearing demands trial in the proper county, the superior court of one county acquired jurisdiction of the subject-matter and of the parties, in an action on a note wherein defendant appeared though he was served in another county.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 47-50; Dec. Dig. § 32.*]

2. VENUE (§ 84*)—AGREEMENT—CHANGE OF VENUE.

In view of Rem. & Bal. Code, § 216, permitting the parties to an action to agree to trial in any county, the maker of a note can bind himself by an agreement therein that the venue of suit thereon be laid in a particular county, in which he does not reside, so as to waive the right to a change of venue.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 146-148; Dec. Dig. § 84.*]

3. CERTIORARI (§ 5*)—RIGHT TO RELIEF—ADEQUACY OF REMEDY BY APPEAL.

The right to certiorari to review an order changing the place of trial of an action on a note is not precluded on the ground of completeness of remedy by appeal.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. §§ 5, 6; Dec. Dig. § 5.*]

Fullerton, J., dissenting.

Certiorari by the State, on the relation of Schwabacher Bros. & Co., Incorporated, to review an order of the Superior Court of King County changing the place of trial of an action by relator against Don M. Thomas. Reversed and remanded.

Leopold M. Stern, for relator.

MOUNT, J. This case is upon a writ of certiorari to review an order of the superior court of King county, changing the place of trial from King county to Chelan county, in the case of Schwabacher Bros. & Co., Inc., against Don M. Thomas. The facts are as follows: On April 15, 1910, Don M. Thomas, for value, executed and delivered his promissory note for \$372.50, to Schwabacher Bros. & Co., Inc., payable on or before September 1, 1910. The note contained the following provision: "And in case suit be brought to collect this note or any part thereof * * * the maker agrees that the venue of said suit or action may be laid in King county, Washington." On December 7, 1910, after the maturity of the note, Schwabacher Bros. & Co., Inc., brought an action upon said note in the superior court of King county. The complaint was in the usual form. Service was made upon the defendant in Chelan county. On December 8th the defendant appeared in that action, and filed a general demurrer to the complaint. He also filed a motion for a change of venue for the reason

that the county designated in the complaint was not the proper county. This motion was accompanied by an affidavit stating that the defendant was served with process in Chelan county, which county was at the time of the commencement of the action and now is his bona fide residence, and that the defendant is not a resident of King county. Upon this showing the order changing the place of venue was made. Our statutes bearing up, on the question are as follows:

"The action must be tried in the county in which the defendants, or some of them, reside at the time of the commencement of the action, or may be served with process, subject, however, to the power of the court to change the place of trial. * * * " Rem. & Bal. Code, § 207.

"If the county in which the action is commenced is not the proper county for the trial thereof, the action may, notwithstanding, be tried therein, unless the defendant, at the time he appears and demurs or answers, files an affidavit of merits, and demands that the trial be had in the proper county." Rem. & Bal. Code, § 208.

"The court may, on motion, in the following cases, change the place of trial, when it appears, by affidavit or other satisfactory proof: (1) That the county designated in the complaint is not the proper county. * * * " Rem. & Bal. Code, § 209.

"Notwithstanding the provisions of section 209, all the parties to the action by stipulation in writing or by consent in open court entered in the records may agree that the place of trial be changed to any county of the state, and thereupon the court must order the change agreed upon." Rem. & Bal. Code, § 216.

It is apparent from these sections that the superior court of King county had jurisdiction both of the subject-matter of the action and of the parties thereto. If that county was not the proper county for the trial, the defendant might demand a change of venue. The question therefore to be determined in this action is, Did the defendant by the agreement in the note, waive his right to demand a change of venue for the reasons stated in the motion? If the action had been brought originally in Chelan county, the residence of the defendant, there can be no doubt that the parties by stipulation might have agreed to the change to King county, for the statute, at section 216, expressly so provides. The policy of the law, therefore, is that the parties may agree that the place of trial shall be in any county of the state. If the parties may do this after the action is begun, they may certainly do so before; and this is clearly what they did. It is argued by respondent that this agreement in the note is void as against public policy. If the place of trial had been fixed by statute, there would no doubt have

been force in this position. But, as we have seen above, the policy of this state is that the parties themselves may fix the place of trial in any county of the state, by stipulation in writing or by consent in open court. Cases from states having different statutes are, therefore, not in point, and we are satisfied that the court erred in making the order.

Respondent also asserts that the relator has a complete remedy by appeal. This question was decided adversely to such contention in *State ex rel. Wyman v. Superior Court*, 40 Wash. 443, 82 Pac. 875, 2 L. R. A. (N. S.) 568, 111 Am. St. Rep. 915.

The order changing the venue is reversed, and the cause remanded for further proceedings.

DUNBAR, C. J., and PARKER and GOSE, JJ., concur. FULLERTON, J., dissents.

(61 Wash. 659)

DALGARDNO v. TRUMBULL et al.

(Supreme Court of Washington. Jan. 21, 1911.)

1. APPEAL AND ERROR (§ 1203*)—DISPOSITION—REMAND—PROCEEDINGS AFTER REMAND.

Where, in an action to recover possession of a lot, to quiet title against defendant's claim, and to declare a lien thereon for taxes paid, a judgment of dismissal was rendered on demurrer to the complaint, and the Supreme Court sustained the ruling on the demurrer, but held that plaintiff was entitled to a lien for taxes paid, and remanded the cause with instructions to ascertain the amount of taxes paid and declare a lien on the lot therefor, the only question for consideration upon remand was the ascertainment of the amount of taxes paid by plaintiff, so as to decree a lien therefor on the lot.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 1203.*]

2. APPEAL AND ERROR (§ 1097*)—REVIEW—SECOND APPEAL—LAW OF CASE.

The judgment of the Supreme Court becomes the law of the case on a second appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4358-4368; Dec. Dig. § 1097.*]

3. TAXATION (§ 531*)—LIEN FOR TAXES PAID BY STRANGER.

The payment of taxes in good faith by one not the owner, in order to protect the property from seizure, gives the person paying the taxes a lien upon the property therefor.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 986, 987; Dec. Dig. § 531.*]

Department 2. Appeal from Superior Court, Jefferson County; Lester Still, Judge.

Action by James Dalgardno against John Trumbull and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Trumbull & Trumbull, for appellants. U. D. Gnagey, for respondent.

MORRIS, J. In June, 1904, respondent brought an action against appellants, alleging the ownership of the south half of lot 2,

block 109, of the original townsite of Port Townsend, and praying judgment for the recovery of possession; for the rental value while out of possession; to quiet his title as against any claim, interest, or right of defendants; to enjoin defendants from asserting any claim to the premises; and to declare a lien for the taxes paid thereon. A demurrer was interposed to the complaint, which being sustained, respondent refused to plead further, and judgment of dismissal was entered against him, from which judgment he appealed to this court. On September 18, 1905, this court filed an opinion, in which the ruling of the court below in sustaining the demurrer was affirmed. The court held, however, that plaintiff was entitled to a lien upon the premises for the amount of taxes paid thereon, and remanded the cause to the court below with instructions to ascertain the amount of taxes paid, and to declare the same a lien. *Dalgardno v. Barthrop*, 40 Wash. 191, 82 Pac. 285, an examination of which will convey a better understanding of the then opinion of this court, and its reasons for the holding made and the judgment here entered. The judgment of this court being filed in the court below, respondent moved for judgment for the amount of taxes paid as shown by his complaint, and that the same be declared a lien, which was denied, and the appellants ordered to file an answer. This order was complied with by appellants, Trumbull filing an answer raising an issue upon all the allegations of the complaint, to which answer respondent made reply. The cause coming on for trial, the court found, among other matters, the amount of taxes paid by respondent to be the sum of \$301.80, and entered a decree adjudging such sum, with interest and costs, a lien upon the easterly $\frac{40}{100}$ of the south half of said lot 2, from which this appeal is taken.

In the trial below, many unnecessary issues were made and passed upon by the court in its findings, to a number of which appellants take exception. Upon the judgment of this court there was but one issue to be tried—the amount of taxes paid by respondent, which amount being found, it was the duty of the court below, as directed by this court, to decree a lien upon the premises. Appellants in their brief raise many questions concerning matters prior and subsequent to the first appeal, which they urge should be taken into consideration by us in determining the rights of the parties. We have no concern with any controversy between the parties, save only the one properly before us, and that is the finding and decree made by the court below determining the amount of taxes paid and establishing the same as a lien. That was the plain mandate of this court in its judgment upon the first appeal, and was the only matter proper to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

be inquired into; the first judgment of this court having become the law of the case and determined respondent's right to a decree in the amount of taxes paid. The only legal question that could in any event arise in connection with the mandate of this court upon the first appeal, which could be urged against such a decree, would be that it appears that respondent was not acting in good faith in paying these taxes, nor under a belief that he was the owner of the property and entitled to the possession thereof, and we do not so find. It being the established rule in this state and elsewhere that, when taxes are so paid in good faith, which protect the property from seizure and thus insure to the benefit of the real owner, a lien is imposed upon the premises. *Rothchild Bros v. Rollinger*, 32 Wash. 307, 73 Pac. 367; *Ball v. Clothier*, 34 Wash. 299, 75 Pac. 1099; *Spokane v. Savings Society*, 46 Wash. 150, 89 Pac. 466; *Childs v. Smith*, 58 Wash. 148, 107 Pac. 1053.

Finding no error committed by the court below in obeying and following the mandate of this court as contained in the judgment and remittitur upon the first appeal, the judgment is affirmed.

DUNBAR, C. J., and CROW, J., concur.

RUDKIN, J. I concur solely on the ground that the question sought to be raised on this appeal is foreclosed by the opinion of this court on the former appeal.

(61 Wash. 684)

STATE ex rel. BURKE et al. v. BOARD OF COUNTY COM'RS OF KING COUNTY et al.

(Supreme Court of Washington. Jan. 27, 1911.)

APPEAL AND ERROR (§ 1218*)—JURISDICTION OF APPELLATE COURT—REMAND—RECALLING REMITTITUR.

Where an appeal has been determined, the opinion filed, petition for rehearing denied, and remittitur transmitted to the trial court, and judgment entered in accordance therewith, the appellate jurisdiction of the Supreme Court has ceased, and it cannot recall the remittitur and consider the effect of a subsequent statute, notwithstanding a stipulation of the parties to that effect.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1218.*]

On rehearing. Denied.

For former opinion, see 109 Pac. 350.

CROW, J. This cause has heretofore been heard by this court on an appeal prosecuted from a judgment in mandamus, requiring the commissioners of King county to equalize a local improvement assessment levied in aid of the construction of the Lake Washington Canal, and on May 28, 1910, in an opinion which states the issues (58 Wash. 511, 109 Pac. 350), a reversal of the judgment and

a dismissal of the cause were ordered. Respondents' petition for rehearing was thereafter denied, and on July 19, 1910, the remittitur from this court was transmitted to the superior court of King county. On June 25, 1910, after the filing of the opinion, the Congress in an act making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes (Act June 25, 1910, c. 382, 36 Stat. 666), made the following appropriations: "Puget Sound-Lake Washington Waterway: Continuing improvement by the construction of a double lock, with the necessary accessory works, to be located at 'The Narrows,' at the entrance to Salmon Bay, in accordance with the project set forth in House Document numbered nine hundred and fifty-three, Sixtieth Congress, First Session, one hundred and fifty thousand dollars; and the Secretary of War may enter into a contract or contracts for such material and work as may be necessary to complete said locks and accessory works, to be paid for as funds may be provided from time to time by law, not to exceed in the aggregate two million two hundred and seventy-five thousand dollars, including the amount herein appropriated: Provided, that before beginning said work, or making such contract or contracts, the Secretary of War shall be satisfied that King county, or some other local agency, will do the excavation in the waterway above the lock to the dimensions recommended in said project, and will also secure the United States from liability for any claims or damages on account of the grant made to James A. Moore or his assigns by the act of Congress approved June eleventh, nineteen hundred and six, or on account of the lowering of the level of Lake Washington, raising the level of Salmon Bay, or any other alteration of the level of any part of said waterway. Improving waterway connecting Puget Sound with Lakes Union and Washington: For maintenance of improvement, five thousand dollars."

A certified copy of resolution adopted by the commissioners of King county was received by the clerk of this court on October 5, 1910, and filed herein, as follows: "Be it resolved by the board of county commissioners as follows: Whereas, on the 28th day of May, 1910, the Supreme Court of this state rendered a decision in the case of the state of Washington on the relation of Thomas Burke and Frank Hunter, plaintiff and respondent, vs. this Board and others, defendants and appellants, reversing the lower court on the ground that the United States government was not intending or proposing to construct or operate the Lake Washington Canal; and, whereas, since the filing of said decision the Congress of the United States has passed an act appropriating the sum of two million two hundred seventy-five

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

thousand dollars (\$2,275,000) for the construction of locks in said canal, and the respondent has filed a petition for a rehearing of the issue heretofore decided and of the other issues not decided; and, whereas, this board is desirous of continuing the proceedings thereunder in co-operation with the United States government, if it can do so legally, but is reluctant to spend the public funds, or issue bonds under the provisions of said act or place liens upon the thousands of parcels of property embraced in the assessment rolls filed with said board, thereby clouding the title thereto and incumbering the transfer thereof, until *all* the issues in said cause affecting its right to take such further proceedings shall have been decided. Now, therefore, in order that the principal purpose of said appeal may be accomplished and this board may be guided in its further proceedings, and be saved a multiplicity of litigation over matters already before said court, the prosecuting attorney is directed to petition for a rehearing of *all* the issues involved in said cause. It is not the intent of this resolution or of this board to suggest as to how any point shall be or should be decided, but only to ask a reconsideration of all points having in view said subsequent legislation, in order that the board as a public tribunal shall be able to intelligently and advisedly govern its future proceedings. Dated this 18th day of July, A. D. 1910."

At the same time a stipulation between respondents' attorneys and the prosecuting attorney of King county acting for and on behalf of appellants, was filed, whereby they in writing consented that the remittitur might be returned to this court, and the cause reconsidered. On October 21, 1910, this court, in pursuance of the stipulation entered an order recalling the remittitur and granting a rehearing. When the cause came on for rehearing, other attorneys heretofore associated with the prosecuting attorney, who also represented other interested parties, appeared and contended that this court is without jurisdiction to recall the remittitur or grant a rehearing. Citing *Wolferman v. Bell*, 8 Wash. 140, 35 Pac. 603, and *Ward v. Springfield Fire & Marine Ins. Co.*, 12 Wash. 631, 42 Pac. 119, they insist that a petition for rehearing having been heretofore denied, and the remittitur having been filed in the superior court, we have lost jurisdiction; that no further petition for rehearing can be filed or considered; that the term at which our final judgment was rendered has expired; that if there be any limit of time within which this court would finally lose jurisdiction of the appeal herein, such time has long since passed; that no sufficient reason for recalling the remittitur has been shown, and that this court as an appellate tribunal cannot again acquire jurisdiction by stipulation of the parties. In *Wolferman v. Bell*, supra, we said: "Courts of original jurisdiction generally have the power, for some

time after a judgment has been rendered, to set it aside or modify it as legal circumstances may require. The time within which this may be done depends either upon statute or upon the common practice of the courts. Where the latter is the only guide the end of the 'term' has been the universal limit. Of course, if a judgment be void on its face, it may be ignored or attacked in any wise at any time; or, if it has been procured by fraud, it may be set aside on motion within the limited period, or an independent suit to that end may be maintained afterward. But after the time fixed by law, or the well-established practice, a judgment which is neither void on its face nor affected by fraud in its procurement or want of jurisdiction, stands for absolute verity; and neither the court which rendered, nor the appellate court which has affirmed it, has jurisdiction to vacate, modify or otherwise affect it. This is the universal rule, and there are no exceptions to it."

In *Titlow v. Cascade Oatmeal Company*, 16 Wash. 676, 48 Pac. 406, and *Port Angeles, etc., Co. v. Cooke*, 38 Wash. 184, 80 Pac. 305, we held that a remittitur might be recalled, upon timely application, for the purpose of enabling this court to correct a mistake made in entering its final judgment. In the former case we said: "The appellate court has inherent power to correct its judgment during the terms in which the judgment was entered. The respondent, under our practice, has no notice of what the judgment is until it is remitted. The presumption must be that the judgment is entered in accordance with the opinion of the court, and it would be a hard and unjust rule to announce that, if by inadvertence or mistake the judgment should be entered not in conformity with the opinion, the respondent would have no redress. We think that in all jurisdictions, under a practice similar to ours, the court has power to recall the remittitur and enforce the judgment according to the opinion rendered in the case."

It is not contended that any such inadvertence has occurred or that any such mistake has been made by not entering judgment in conformity with the opinion heretofore filed in this cause. In fact, it seems to be conceded that the judgment actually entered was in accordance with, and was authorized by, the opinion. The primary purpose for now recalling the remittitur is that this court may determine what effect, if any, the act of Congress above quoted has on the right or duty of the county commissioners to proceed with the further consideration or equalization of the assessment already made, which is the subject-matter of this action. This objection that we are without jurisdiction to recall the remittitur, even upon the stipulation, must be sustained. When the appeal had been determined, the opinion filed, the petition for rehearing denied, and the remittitur transmitted to the superior court,

our appellate jurisdiction ceased. Having ceased, it cannot, for the purpose of further considering the same appeal, be again invoked or conferred by an order recalling the remittitur predicated upon a stipulation of the parties. Consent is not sufficient to confer jurisdiction. 11 Cyc. 673.

The act of Congress above referred to, having been passed after the filing of our former opinion, was not considered by us when the petition for rehearing was denied, and being without jurisdiction to further consider the appeal herein, we cannot and do not now express any opinion as to the effect of that act upon the right or duty of the county commissioners to further consider or now equalize the assessment heretofore made.

The application for a rehearing is denied, and it is ordered that the remittitur be again transmitted to the superior court of King county.

DUNBAR, C. J., and RUDKIN, GOSE, MOUNT, PARKER, and CHADWICK, JJ., concur. MORRIS, J., having been disqualified to act in the main case, took no part on this hearing.

(61 Wash. 674)

STATE v. ANDERSON.

(Supreme Court of Washington. Jan. 26, 1911.)

1. INFANTS (§ 13*)—ALLOWING MINORS IN POOLROOMS—STATUTES.

The phrase "where intoxicating liquors are sold or given away," in Laws 1909 (Sp. Sess.) c. 27, § 1, declaring guilty of an offense one who admits to or allows to remain in a "drinking saloon, dance house, public pool or billiard hall, concert saloon, or in any place, except a restaurant or dining room, where intoxicating liquors are sold or given away," a minor, qualifies all the preceding terms; so that allowing a minor in a poolroom where liquor is not sold or given away is not an offense.

[Ed. Note.—For other cases, see Infants, Cent. Dig. § 14; Dec. Dig. § 13.*]

2. STATUTES (§ 174*)—CONSTRUCTION.

A statute being capable of two constructions, one only of them making an act criminal, it will be construed in favor of innocence.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 174.*]

Department 1. Appeal from Superior Court, Pierce County; C. M. Easterday, Judge.

Axel Anderson appeals from a conviction. Reversed and remanded, with instructions.

Bates, Peer & Peterson, for appellant. J. L. McMurray and F. G. Remann, for the State.

PER CURIAM. Axel Anderson was convicted of a gross misdemeanor and appeals from the judgment and sentence pronounced against him.

The material part of the statute under which the defendant was convicted, as amended by the special session of 1909, reads as fol-

lows: "Section 193. Every person who (1) Shall admit to or allow to remain in any drinking saloon, dance house, public pool or billiard hall, concert saloon, or in any place except a restaurant or dining room, where intoxicating liquors are sold or given away, * * * any person under the age of twenty-one years * * * shall be guilty of a gross misdemeanor," Laws 1909 (Sp. Sess.) p. 66, c. 27, § 1.

The information charged: "That the said Axel Anderson in the county of Pierce, in the state of Washington, on or about the 5th day of March, 1910, then and there being, unlawfully did admit to and allow to remain in that certain public pool and billiard hall, known as the Washington Pool Hall, William Dwyer, Henry Crowl, and Alfred Harrington, all being then and there male persons under the age of twenty-one years, said public pool and billiard hall being then and there owned, kept, and managed by him the said Axel Anderson, and located in that certain building known and designated as No. 1020 South K. street, in the city of Tacoma, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the state of Washington." To this information a demurrer was interposed on the ground that it did not state facts sufficient to constitute a crime; the precise objection being that it was not alleged therein that the public pool and billiard hall which it was charged that the defendant kept, owned, and managed, and into which the minors were admitted and allowed to remain, was a place where intoxicating liquors were sold or given away. The demurrer was overruled, whereupon a trial was had in which it was shown in evidence that the appellant conducted a public pool and billiard hall to which the persons named in the information had been admitted and allowed to remain, and that such persons were under the age of 21 years. No evidence was introduced, however, tending to show that intoxicating liquors were sold or given away in such place, or that it was connected with any place where such liquors were sold or given away; on the contrary, it was conceded by the state that the facts were otherwise. The appellant challenged the sufficiency of the evidence to support a conviction which challenge was likewise overruled, and the conviction of the appellant followed as before stated.

The court was in error we think in allowing the appellant to be convicted. We think the phrase found in the statute, namely, "where intoxicating liquors are sold or given away," was intended to qualify all of the preceding terms, making it an offense to allow minors to enter and remain in public pool and billiard halls only in those instances where intoxicating liquors are sold or given away in such halls. The statute may be of

doubtful meaning on the question here suggested; but, if it be so, it is only another reason for giving it the more narrow construction. Laws are interpreted in favor of liberty, and, if a statute is capable of two constructions one of which makes a given act criminal and the other innocent, the statute will be given the construction which favors innocence.

The judgment is reversed, and the cause remanded, with instructions to discharge the appellant.

(62 Wash. 12)

SHEPPARD v. CŒUR D'ALENE LUMBER CO., Limited, et al.

(Supreme Court of Washington. Jan. 23, 1911.)

1. EVIDENCE (§ 80*)—PRESUMPTIONS—LAWS OF ANOTHER STATE.

In the absence of pleading and proof, the laws of another state are presumed to be the same as the local laws.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 101; Dec. Dig. § 80;* Common Law, Cent. Dig. §§ 14-16.]

2. VENUE (§ 5*)—ACTION FOR USE AND OCCUPATION.

An action for use and occupation, based on Rem. & Bal. Code, § 8805, providing that one obtaining possession of land without the owner's consent shall be deemed a tenant by sufferance and liable for reasonable rent, is not one affecting title to land, which, under section 204, must be brought where the land is situated, though the answer sets up title in defendant.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 4-11; Dec. Dig. § 5.*]

3. LANDLORD AND TENANT (§ 3*)—ATTORNEYMENT.

The Legislature had power to change the common-law rule by requiring one in possession of land to attorn to the actual owner, as is provided by Rem. & Bal. Code, § 8805.

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. § 3.*]

Chadwick and Mount, JJ., dissenting.

Department 1. Appeal from Superior Court, Spokane County.

Action by Huldah A. Sheppard against the Cœur d'Alene Lumber Company, Limited, and another. Judgment of nonsuit, and plaintiff appeals. Reversed.

H. N. Martin, H. P. Knight, and O. C. Moore, for appellant. R. E. McFarland, Wakefield & Witherspoon, and A. C. Shaw, for respondents.

GOSE, J. This is a suit to recover rent for the use and occupation of real estate situated in the state of Idaho. At the close of plaintiff's case, a judgment of nonsuit was entered, and she has appealed.

It is alleged that, for some time prior to October, 1903, the respondent corporation, limited, occupied the premises under a lease which expired on that day; that it continued to occupy the premises until the 19th day of

February, 1904; that the other respondent has since occupied and been in possession of the premises; that the two respondents, while differing in name, "are identical in interest"; and that the stock of the two corporations "is owned and the business affairs and the management thereof are under the direction and control of the same persons." The respondent Cœur d'Alene Lumber Company pleads affirmatively that, for more than 10 years last past, it and its predecessors in interest have owned the premises in fee simple, and have been and continue "in open, notorious possession" thereof, and have paid the taxes levied thereon by the county in which it is situated. This was put in issue by the reply. At the trial it was shown by documentary evidence that the respondents have been adjudged to be trespassers upon the land, by a judgment entered in the district court of the First judicial district of Idaho, and that the judgment has been affirmed by the Supreme Court of that state. The appellant bases her right to recover upon Rem. & Bal. Code, § 8805, which provides: "Whenever any person obtains possession of premises without the consent of the owner or other person having the right to give said possession, he shall be deemed a tenant by sufferance merely, and shall be liable to pay reasonable rent for the actual time he occupied the premises, and shall forthwith on demand surrender his said possession to the owner or person who had the right of possession before said entry, and all his right to possession of said premises shall terminate immediately upon said demand." In the absence of pleading and proof that the laws of the state of Idaho are different from the laws of this state, they will be presumed to be the same. *Gunderson v. Gunderson*, 25 Wash. 459, 65 Pac. 791.

The judgment of nonsuit was entered, on the ground that the action is one "affecting the title" to real property, and that the court was without jurisdiction. This is the only question presented for our determination. Rem. & Bal. Code, § 204, provides that actions "for the recovery of, for the possession of, for the partition of, for the foreclosure of a mortgage on, or for the determination of all questions affecting the title or for any injuries to real property," shall be commenced in the county in which the subject of the action, or some part thereof, is situated. We do not think the action affects the title to the property within the meaning of the statute. The purpose of the action is to recover a money judgment for the reasonable rental value of the property. In other words, the action is for the breach of an implied contract. Under the averments of the complaint, the respondents are tenants by sufferance and liable for the reasonable rental value. The fact that the answer

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

sets up title in the respondent, and brings the title incidentally into issue, does not make the action a local one. It is not sought to obtain a judgment which will in any manner affect title. That question must be left to the courts of the *forum rei sitæ*. If a suit was brought in the courts of this state upon a promissory note, and the answer alleged that the consideration for the note was the sale and conveyance of real property in another county or state, and that there was no title to the property conveyed, a like question would be presented. Obviously such an action would be transitory. This view, we think, is supported by the authorities. *Henwood v. Cheeseman*, 3 Serg. & R. (Pa.) 500; *Menominee River Lumber Co. v. Philbrook*, 78 Wis. 142, 47 N. W. 188; *Hogg v. Mack*, 53 Hun (N. Y.) 463, 6 N. Y. Supp. 301; *Nichols v. Voorhis*, 74 N. Y. 28; *Schroeder v. Wittram*, 66 Cal. 636, 6 Pac. 737; *Smith v. Schlink*, 6 Colo. App. 228, 40 Pac. 478; 12 Enc. Pl. & Pr. 852; 2 Taylor, *Landlord & Tenant* (8th Ed.) 625; *Morgan v. Bell*, 3 Wash. St. 554, 28 Pac. 925, 16 L. R. A. 614; *State ex rel. Scougale v. Superior Court*, 55 Wash. 328, 104 Pac. 607, 133 Am. St. Rep. 1030.

In the *Henwood* Case, it was held that the courts of Pennsylvania had jurisdiction of an action of assumpsit for the use and occupation of land lying in the state of New Jersey; that the action was founded on privity of contract, not privity of estate; and that, "when the title is incidental, the court possessing jurisdiction of the contract which is in its nature transitory may even inquire into the very title, let the lands lie where they may." The *Menominee* Case was an action for the unlawful detention of premises after the expiration of the lease. The action was commenced before a justice of the peace. The defendant pleaded facts showing that it was the owner of the equitable title to the property. It was held that, if the facts stated in the answer were true, the defendant was the equitable owner of the premises, and that the relation of landlord and tenant did not exist between the parties, but that the title to the land was not involved within the meaning of the statute. The *Hogg* Case was an action to recover money paid on a written agreement for the purchase of real estate. The complaint alleged that the defendant agreed to convey the premises in fee simple free from all incumbrances, but that, owing to certain defects and incumbrances, the defendant could not convey a good and clear title as he had agreed to do. The defense was that the defendant had a good title and was ready to convey it to the plaintiff. The action was not brought in the county where the land was situated, and it was contended that, under the New York statute which is similar to ours, the action was local. It was held that the real purpose of the suit was to recover a judgment for money, and

that the fact that the question of title to real estate may have to be passed upon in a suit does not make it imperative that the case should be tried in the county where the property is situated. The *Schroeder* Case arose out of a similar state of facts. It was there held that the jurisdiction of the justice court was not ousted by the fact that the title to the land was incidentally called in question. The *Nichols* Case was an action to have it adjudged that an assessment which was an apparent lien upon real property was not such in fact. It was held that it did not affect the title or an interest in real estate; that the mere fact that the action relates to real property, or in some way affects it, does not raise a jurisdictional question. It was said that whether the assessment was held valid or invalid would in no way affect the title. In the *Morgan* Case, it was held that an action for the specific performance of a contract to convey real estate is a transitory action, and that "it would not determine any question affecting the title in the sense in which the word title is evidently employed in the statute." In *State ex rel. Scougale*, it was held that an action to impress a trust on real estate is not a local action within the meaning of the statutory provision we have quoted.

The respondents have cited a line of authorities which hold that actions for injuries to real property must be brought in the *forum rei sitæ*. Our statute expressly so provides. They further contend that an action to recover rent will not lie against one who is claiming an adverse title, and cite *Pico v. Phelan*, 77 Cal. 86, 19 Pac. 186, and *Fender v. Rogers*, 97 Ill. App. 230. These cases announce the rule that an action for use and occupation does not lie where possession from the beginning was adverse and hostile to the owner. They proceed from the common-law principle that rent is not recoverable of a tenant by sufferance. *Wood, Landlord & Tenant*, § 11; *Taylor, Landlord & Tenant* (8th Ed.) § 21. In the case at bar the possession was not hostile in the beginning, but, as the complaint avers, was obtained by an express written contract. Moreover, it was competent for the Legislature to change the common-law rule and require the party in possession to attorn to the actual owner of the property. We think the section we have quoted has accomplished that purpose. It is true that the statute permits a recovery of rent for use and occupation where possession has been obtained without the consent of the owner, while another statute is running in favor of the occupant which, if continued for a sufficient length of time, would ripen into title. While there is an inconsistency in the two statutes, neither trenches upon the power vested in another branch of the government. The authorities are not in entire harmony, but we think the better rule is that the action is transitory.

It follows that the learned trial court erred in granting the nonsuit.

The judgment is reversed.

PARKER and FULLERTON, JJ., concur.

CHADWICK and MOUNT, JJ. (dissenting). The plaintiff is the widow of one Tony A. Tubbs, who homesteaded the present site of Cœur d'Alene City in Kootenai county, Idaho. She became by the death of her husband the owner of certain property fronting on Lake Cœur d'Alene. A particular description of the property is not material. The waters in front of this property, for some time prior to December 23, 1903, were occupied as a booming and sorting ground by the Cœur d'Alene Lumber Company, Limited. I shall refer to that company hereafter as the "Limited Company." During its occupancy of the property, it deposited some sawdust and waste and piled lumber on the upland, and built a road over or around the tract near the water's edge. After February, 1904, the ground and abutting waters were used by the Cœur d'Alene Lumber Company, an independent company, which bought out and took over the mill and business of the Limited Company, and which I shall refer to as the "Lumber Company." There is nothing in the record to show that these companies ever had anything in common, or that the Lumber Company ever at any time assumed the contracts or acknowledged any liability for the torts of the Limited Company. It is not shown, nor is it attempted to be shown, that either of the defendants ever had a lease of the property. The only testimony upon the subject of leases is in the cross-examination of the plaintiff, where she finally says: "Q. Did you give a lease to the Cœur d'Alene Lumber Company? A. No. They absolutely took possession of the land. Q. Did you give any lease to the Cœur d'Alene Lumber Company, the Idaho corporation [which is the Limited Company]? A. No, I did not. They took possession of the land."

This action was begun in June, 1906; plaintiff alleging that: "(5) That for some time prior to the 1st day of October, 1903, defendant Cœur d'Alene Lumber Company, Limited, occupied said described premises, the shore line and lake front thereof, under and by virtue of a lease therefor. That said lease expired on the 1st day of October, 1903, but that said defendant, Cœur d'Alene Lumber Company, Limited, did not thereupon surrender said premises or remove therefrom, though often requested so to do, but, on the other hand, continued in the open, acknowledged, and exclusive possession and occupancy thereof at all times prior to the 19th day of February, 1904, piling and stacking lumber and dumping and depositing sawdust and other refuse thereon, also floating, anchoring, and collecting large numbers of logs in the lake and along the shore line of said

premises, throughout the entire length thereof, thereby fully and completely blocking all means of ingress and egress to and from said premises by means of the waters of said lake. (6) That defendant Cœur d'Alene Lumber Company was organized, as aforesaid, on or about the 19th day of February, 1904, and claims to have thereupon succeeded to all the rights and privileges, likewise to have assumed all liabilities, of said Cœur d'Alene Lumber Company, Limited; the occupancy and use, however, of said described premises, has at all times continued in the manner above alleged without interruption, and plaintiff therefore alleges that said premises have been occupied and used in the manner aforesaid at all times since about the 19th day of February, 1904, and are now so occupied and used by the said defendant, Cœur d'Alene Lumber Company. (7) That at all times since the 1st day of October, 1903, said described premises have been and now are of the reasonable rental value of \$150 per month, no part of which has been paid, though demand therefor has often been made by the plaintiff and refused by said defendants."

The complaint was held good on demurrer because of these allegations; it there appearing that the only controversy was as to the reasonable value of the use of the property, which in its nature is a transitory action and maintainable in the courts of this state. Defendants denied all of the allegations of the complaint, and in addition set up title in the Lumber Company, acquired through an open and notorious possession running over a period of 10 years, during which time it and its predecessors had paid all taxes levied upon the property in the county of Kootenai, state of Idaho. The case went to trial upon these issues. As I have said, no attempt was made to prove a lease to either the Limited Company or the Lumber Company; the testimony showing that the Lumber Company, the present occupant of the land, was a trespasser. In fact, plaintiff's case was prosecuted on the trial upon the theory of tort, and not of contract, and to sustain that theory findings and judgment which had been made and entered in the district court of the state of Idaho, in a case prosecuted by plaintiff against the defendants, involving the same property, were offered and received in evidence. In the Idaho case the court found that plaintiff was the owner of the property, that the defendants were trespassers upon the land to the great damage, loss, and inconvenience of the plaintiff, and that unless restrained would continue to use the property to her great and irreparable damage; and a judgment declaring defendants to be trespassers and perpetually enjoining them from continuing the use and occupation of the property was rendered by the Idaho court. Other testimony was offered tending in some slight degree to show that the reasonable rental val-

ve of the property was \$150 per month. When defendants rested, plaintiff demurred to the evidence. After argument of counsel the trial judge excused the jury, and directed a judgment without prejudice or of nonsuit in favor of defendants.

The judgment rests upon two grounds: Insufficiency of the evidence to sustain the judgment, and that under the evidence the action was local to the courts of Idaho, and not transitory, as contended by plaintiff. It is a rule of primary quality that, "when an action is founded on the privity of the estate and not on contract, it is local and must be brought in the county where the land lies." Taylor, Landlord & Tenant (9th Ed.) vol. 2, § 622. To defeat this rule and maintain her action in the courts of this state, plaintiff has verified and filed a sufficient complaint, but has made no pretense of sustaining it by her proofs. The first and possibly the only question before us then is: Is the jurisdiction of our courts to be determined as against a demurrer to the testimony, by reference to the complaint alone? Or does the right to maintain the action depend upon the proofs offered in support of the complaint? The majority of the court has resolved that it shall be measured by the allegations of the complaint. Beyond this instrument it has not seen fit to go. It has taken no concern of, but, on the contrary, has shut its eyes to, the evidence. In this view I cannot concur. The true rule was declared by the trial judge. In passing upon the motion for judgment, he held that it would be impossible for him to submit the case under the issues made by the pleadings and the evidence, without requiring the jury to find the ownership and title to the property; that being the first question of fact to be decided. The statute fixing the venue in such cases (section 204, Rem. & Bal. Code) is as follows: "Actions for the following causes shall be commenced in the county in which the subject of the action, or some part thereof, is situated: (1) For the recovery of, for the possession of, for the partition of, for the foreclosure of a mortgage on, or for the determination of all questions affecting the title or for any injuries to real property."

The situation is simply this: Plaintiff has recovered a judgment in the Idaho courts, establishing a trespass. With it she has come into our courts and set up a false issue in order to pass a demurrer, and, under pretense of recovering rent, seeks the damages which the Idaho court held that she had suffered but which it did not measure, but which she might have recovered, or at least prayed for, in the foreign action. It is an evasion of the law and an abuse of the rules of state comity. Intraterritorial jurisdiction is sustained under the doctrine of comity and not as a matter of right. Therefore, when it appeared that appellant had established a trespass upon her prop-

erty in the Idaho courts and waived the incidental damages, the courts of this state should not give ear to her accessory action. The incident should follow the principal action. It cannot be set up as an independent right of action in a foreign court, without violating the rule of comity upon which the right to invoke the jurisdiction of our courts rests. To illustrate: Assuming the law of Idaho to be the same as our own, appellant could not maintain her present action in that state. She would be barred under the doctrine of *res judicata*. Having then no action or right of action in Idaho, she would have none here, although her proofs were otherwise sufficient.

The rule differentiating a local from a transitory action is reduced to its essence by the writer of the opinion in *McGonigle v. Atchison*, 33 Kan. 726, 7 Pac. 550: "The distinction between transitory and local actions, both at common law and under the Code, is generally and substantially as follows: If the cause of action is one that might have arisen anywhere, then it is transitory; but, if it is one that could only have arisen in one place, then it is local. Hence actions for injuries to real estate are generally local, and can be brought only where the real estate is situated; while actions for injuries to persons or to personal property, or relating thereto, are generally transitory, and may be brought in any county where the wrongdoer may be found." This case is quoted by the editor of *Ency. Pl. & Pr.*, vol. 22, p. 726, who also quotes from *Oliver v. Loye*, 59 Miss. 320, as follows: "It is the settled doctrine in England and America at common law that no local action can be maintained out of the jurisdiction in which it arose, and although this is, in many instances, to deprive a party of all remedy, the rule is said to be peremptory and inflexible. Accordingly, it has been repeatedly held that trespass for injuries to land in one country or state cannot be maintained in another, and that no recovery can be had on a covenant running with land by an assignee of the covenant, except in the state where the land lies, even when the covenantor resides elsewhere." Overwhelming authority is there cited to sustain the text that actions to "recover for injuries done to real property" are local.

A tenancy is never initiated in trespass. "To create the relation of landlord and tenant, an agreement, either express or implied, must exist. Neither appears from the facts in this case. All the authorities establish the principle that where a person occupies the land of another, not as a tenant, but adversely, or where the circumstances under which he enters show that he does not recognize the owner as his landlord, this form of action will not lie. *Pico v. Phelan*, 77 Cal. 86 [19 Pac. 186]." *Dixon v. Ahern*, 21 Nev. 65, 24 Pac. 337.

The action brought in the courts of this state is the same identical action that was

brought in the Idaho courts. The one was in equity. This is a legal action. But both sound in tort, and whether the relief be injunctive, or by way of damages, the trespass must be proven in either case. Under all authority, the action of trespass is held to be local, and the damage following the trespass is of the same class. And, although it may be held that a plaintiff may split his cause of action, he cannot try out the principal action in the local forum and put his action for damages on wheels under the guise of recovering rents. "But there must be a test by which it may be determined whether a particular cause of action sounding in damages is local or transitory; and an unerring one inheres in the nature of the subject of the injury as differing from the means whereby and the mere place at which the injury is inflicted. If the subject of the injury be real estate or an easement such as a right of way, whether private or public, obviously the action must be local, for the reason that the injury to that particular real estate or easement could not possibly have arisen anywhere else than where the thing injured was actually situated." *Gunther v. Dranbauer*, 86 Md. 1, 38 Atl. 33. The vice of the majority opinion lies in this: It permits an appellant to invoke jurisdiction of our state courts by the tender of a feigned issue, submit her proof of title by showing a judgment for trespass, and thereupon enter a judgment upon the theory that title is not involved, although without proof of it the action would have failed.

A case directly in point is that of *Ellenwood v. Marietta Chair Co.*, 158 U. S. 105, 15 Sup. Ct. 771, 39 L. Ed. 913. There an action was brought in the state of Ohio, setting up a trespass to real property in the state of Virginia and the removal and conversion of a large quantity of timber. The court said: "By the law of England, and of those states of the Union whose jurisprudence is based upon the common law, an action for trespass upon land, like an action to recover the title or the possession of land itself, is a local action, and can only be brought within the state in which the land lies. * * * But the petition, as amended by the plaintiff, on motion of the defendant, and by order and leave of the court, contained a single count, alleging a continuing trespass upon the land by the defendant, through its agents, and its cutting and conversion of timber growing thereon. This allegation was of a single cause of action, in which the trespass upon the land was the principal thing, and the conversion of the timber was incidental only; and could not, therefore, be maintained by proof of the conversion of personal property, without also proving the trespass upon real estate. *Cotton v. United States*, 11 How. 229 [13 L. Ed. 675]; *Eames v. Prentice*, 8 Cush. [Mass.] 337; *Howard v. Willson*, 1 Denio [N. Y.] 181; *Dodge v. Colby*, 108 N. Y. 445 [15 N.

E. 703]; *Merriman v. McCormick Co.*, 88 Wis. 142 [56 N. W. 743]. The entire cause of action was local. The land alleged to have been trespassed upon being in West Virginia, the action could not be maintained in Ohio. The Circuit Court of the United States, sitting in Ohio, had no jurisdiction of the cause of action, and for this reason, if for no other, rightly ordered the case to be stricken from its docket, although no question of jurisdiction had been made by demurrer or plea." Reference to that case will show that the sole object of the action was to recover the value of the timber which it was alleged had been removed and converted, the ownership of which could not be proved without proving title to the real property from which it had been removed.

The writer of the majority opinion has met the moot case made by the complaint, but has wholly misapplied the statute. Section 8805, Rem. & Bal. Code. Granting, but not admitting, that a trespass can be converted into a tenancy at sufferance at the will of the owner of real property, and that the laws of Idaho are the same as the law in this state, appellant is in no position to urge that theory, for she voluntarily abandoned the theory of contract in the Idaho suit, and grounded her action in tort. It is upon that judgment that her rights now depend. She has waived the benefit of the statute if it be applicable. But the statute cannot apply in any event; it can only be invoked where there is no assertion of title in the defendant, or the facts imply the relation of landlord and tenant. Any other construction would deprive a defendant, as the majority would in this case, of the defense of title altogether, and bind him by the foreign judgment, which was admittedly introduced to show title and not to establish a tenancy. Tenancy by sufferance is not an elastic cloak to be thrown over every invasion of right in real property, but from the nature of the term implies a contract relation of landlord and tenant. In *Meyer v. Beyer*, 43 Wash. 368, 88 Pac. 661, a somewhat similar question was noticed by this court. "Appellants urge that, inasmuch as Meyer obtained the legal title and respondent remained in possession of the premises thereafter, it must be presumed that she did so with his permission, and that she became, by operation of law, a tenant by sufferance whose tenancy appellants could terminate by an action for unlawful detainer as prosecuted herein. It is possible, although we do not pass upon the question, that this contention could be upheld if there were no claim or showing of ownership, right or equity in the property by respondent"—indicating that it was the idea of the court at that time that a tenancy by sufferance depended upon contract, express or implied, and could not be established by operation of law from mere occupancy under a hostile claim.

Section 8805 cannot be construed as it has been by the majority without doing violence to other sections of the statute, as well as its own terms. Not only would other sections, in reference to the law of ejectment, forcible entry and detainer, trespass, and waste, become dead letters, but the measure of damage in all cases would be the reasonable rental value of the property. For the statute does not make its favor optional with the owner; it creates a legal condition available to owner and tenant alike, in that it says, "without the consent of the owner," implying that it is only applicable where the possession is an issue and the ownership is admitted. Moreover, the intent of the statute is plain when viewed in the light of the common-law rule which it obviously intended to supplement with a remedy unknown and unavailing in the common-law courts. That suit will not lie to recover rent from a tenant at sufferance is so familiar to every lawyer as to be platitudinous in its character; and that rent can only be recovered when the remedy is sanctioned by some statute is equally well understood. 24 Cyc. 1042; 18 Am. & Eng. Ency. Law, 180. Therefore the statute was enacted to cure an omission in the law, and is not *sui generis*, as the opinion of the majority would imply.

The case of *State ex rel. Scougale v. Superior Court*, 55 Wash. 323, 104 Pac. 607, 133 Am. St. Rep. 1021, and other Washington cases not noted in the majority opinion, are relied on by appellant. It will require no more than a mere reference to this case to show that it, as well as the other Washington cases cited therein, is in line with that current of authority holding that an action brought to establish a trust, whether in real or personal property, is transitory. This jurisdiction is distinct and dependent upon other principles not necessary to notice here. If it be of interest, the authorities are collected and may be found in 22 Ency. Pl. & Pr. p. 140.

I have discussed the question raised by the majority opinion; but, as I have said, the motion for a nonsuit included failure of proof as a ground for dismissal. The judgment might be affirmed on that ground alone. The judgment of the Idaho court is in my opinion insufficient to prove title in appellant. Respondents may have been trespassers at the time it was rendered; but it does not follow that the title to the property was then or is now in appellant.

An apology is due for the inordinate length of this opinion; but I feel that a departure from accepted and established rules of law and practice should not be made by this court without some assurance that the question has been fully considered, and that the departure is deliberate.

The judgment of the lower court is in accord with, not only the weight of authority, but all authority, and should be affirmed.

(61 Wash. 676)

GRONNING v. ELLIOTT BAY MILL & LUMBER CO.

(Supreme Court of Washington. Jan. 26, 1911.)

1. EVIDENCE (§ 408*)—PAROL EVIDENCE—RECEIPT.

A receipt, which acknowledges payment of a specified sum on a particular account, but which does not purport to settle any differences between the parties, nor recite that the payment is of any particular account or for any balance due, is merely *prima facie* evidence of the receipt of the money on the day named, but is not conclusive either on that fact nor on the fact that no other sum is due, and parol evidence may show an additional sum due.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1829-1842; Dec. Dig. § 408.*]

2. SALES (§ 87*)—CONTRACTS—EVIDENCE—ADMISSIBILITY.

On the issue of the terms of a contract of sale, evidence of the market price at the place of delivery at the time of the contract is admissible to show the probability or improbability of the contentions of the parties as to what the contract actually was; but evidence of a specific sale, not made in the open market and under ordinary conditions, is inadmissible.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 244; Dec. Dig. § 87.*]

3. SALES (§ 87*)—ACTION FOR PRICE—EVIDENCE—ADMISSIBILITY.

Where a buyer contracted to buy logs without inspection, and agreed to pay a fixed price for the several grades as the scaler should report them, evidence of the quality of the logs delivered was inadmissible in an action for the price to show the improbability of the buyer's agreement to pay for the logs of a specified grade the prices contended for by the seller.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 244; Dec. Dig. § 87.*]

Department 1. Appeal from Superior Court, King County; Wilson R. Gay, Judge.

Action by Mons Gronning against the Elliott Bay Mill & Lumber Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Blaine, Tucker & Hyland and James B. Kinne, for appellant. George Olson and Edward Judd, for respondent.

FULLERTON, J. The respondent, Mons Gronning, entered into a contract with the appellant, Elliott Bay Mill & Lumber Company, by the terms of which he agreed to sell it certain sawlogs then owned by him located near Hoodsport in this state. The contract was made in Seattle, at the office of one George Olson, then acting as the attorney for the respondent. At that time the officers of the appellant had not seen the logs, but agreed to take them at the then going price of the log dealer's association, less a certain discount. It is conceded that the association at that time divided sawlogs into three grades, known as "No. 2," "mer-

chantable," and "clear," and that the association price for the several grades was \$6 per thousand feet for No. 2, \$9 per thousand feet for merchantable, and \$12 per thousand feet for that denominated clear. It is agreed also that the logs scaled a given quantity of each of the several grades, and that they were duly delivered and received by the appellant. The dispute that gives rise to this action is over the amount of the discount that was agreed to be allowed from the association price. The respondent contends that the discount was to be 25 cents on each 1,000 feet of logs as shown by the scaler's report of quantities, plus 2 per centum off for cash; while the appellant contends that the discount was to be 25 per centum off the purchase price as determined by the scaler's estimates of quantities, plus 2 per centum off for cash, or a total, as they estimate it, of 27 per centum less than the price would have been had there been no discount from the association price. After the logs had been scaled and delivered, the appellant made a statement of the quantities and price in each grade, deducted from the total thereof the discount as contended for by it, and presented the statement with its notes for the balance to Olson, who in his capacity as respondent's representative accepted the notes and receipted the statement. Some day or two later the respondent discovered that the discount deducted was not in accord with his understanding of the contract, and brought the present action to recover the difference between the discount as he estimated it and that deducted by the appellant. On the trial the jury returned a verdict in his favor, and judgment was entered thereon from which this appeal was taken.

The appellant first assigns error on the rulings of the court allowing the respondent to question the conclusions of the receipt given at the time payment for the logs was made on grounds other than fraud, coercion, or mutual mistake. The argument is that the receipt constitutes a written contract between the parties, conclusive and binding upon them until set aside on some equitable ground recognized as sufficient to avoid the solemn written agreement of parties. But the appellant mistakes the nature of this receipt. It was in no sense an agreement between the parties. It did not purport to settle any differences between them. It was an acknowledgment of the payment of a given sum of money on a particular account, nothing more. It did not even recite that the payment was in fact of any particular account or for any balance due from the one to the other. While it was prima facie evidence that the respondent received from the appellant on the day named a given sum of money, it was not conclusive evidence even of that fact, much less was it conclusive evidence that no other or further sum was due. The effect of a receipt in full of all

claims and demands arising on account of certain dealings between the parties given by one party to another is discussed by this court in *Allen v. Tacoma Mill Company*, 18 Wash. 216, 51 Pac. 372. In that case we held that even such a receipt could be explained by parol evidence; this language being used: "It is the contention of the appellant that the exhibit introduced constituted a contract; that, the execution of it being established, its construction became a question for the court; and that it was not attacked upon any ground recognized by the law as sufficient to set it aside. We think counsel are mistaken as to the character of the instrument. In our opinion it is a mere receipt, and, as such, parol evidence was admissible to explain its provisions. * * * For a receipt is not evidence of a contract, but of payment, and it has always been permitted to show that something short of the actual terms of the receipt was intended; it being conclusive only as to the amount of money paid, and not even for that, provided any mistake can be shown to have taken place in the adjustment between the parties." *Stackpole v. Arnold*, 11 Mass. 27, 6 Am. Dec. 150. See, also, *Brooks v. White*, 2 Metc. [Mass.] 283, 37 Am. Dec. 95; *Bridge v. Gray*, 14 Pick. [Mass.] 55, 25 Am. Dec. 358; *Shotwell v. Hamblin*, 23 Miss. 156, 55 Am. Dec. 83. The rule that permits receipts to be explained or even contradicted by parol evidence in no wise conflicts with the rule upon which appellant's contention is based, viz., that oral testimony is not admissible to vary or contradict a written contract."

The appellant argues, however, that this case was modified by the later case of *Sherman v. Sweeny*, 29 Wash. 321, 69 Pac. 1117. But in that case the so-called receipt was a part of a contract of settlement between the parties, entered into for the purpose of adjusting the differences between them growing out of a sale of a mine, and the receipt could not be set aside without in effect vacating the contract of settlement. It is not so in the case at bar. Here there was no special contract of settlement.

The court admitted evidence tending to show the market value of logs at the time of the sale as compared with the association price, and the cost of towing them from the place of delivery to the appellant's sawmill at Seattle, on the theory that these facts tended to show the reasonableness of the several contentions of the parties, and the probability that a person would enter into such a contract as the parties severally contended was entered into in this instance. Evidence of this character was allowed to go to the jury without objection; in fact, evidence bearing thereon was tendered by each of the parties. The appellant, however, offered to show the price paid for a specific boom of logs purchased by it some few days before the contract was entered into with the respondent. This evidence the court ex-

cluded, we think, correctly. Evidence of the market price of logs at the place of delivery at the time the contract was entered into was admissible as tending to show the probability or improbability of the several contentions of the parties as to what the contract actually was; but a specific sale would throw but little, if any, light upon the question. The market value of logs at that time was the only material question, and a single sale, unless it be made in open market and under the ordinary conditions, affords no evidence of market value. Whether or not the sale was so made was not shown.

The court refused to admit evidence tending to show the quality of the logs delivered under the contract, which also is assigned as error. The purpose of the evidence was, as counsel state, to show the improbability of the appellant's contracting to pay for logs of this grade the prices contended for by the respondent. But the contract was made before the appellant had inspected the logs; it agreeing to pay a fixed price for the several grades as the scaler should report them. It would hardly seem, therefore, that the quality of the logs could in any manner have affected the contract.

The other assignments of error are but different forms of the assignments already noticed, and need no separate consideration.

The judgment is affirmed.

RUDKIN, GOSE, PARKER, and MOUNT, JJ., concur.

(62 Wash. 1)

MYHRA v. CHICAGO, M. & P. S. RY. CO.

(Supreme Court of Washington. Jan. 28, 1911.)

1. MASTER AND SERVANT (§ 280*)—INJURIES TO SERVANT—ASSUMPTION OF RISK—NEGLIGENCE.

In an action by a railroad brakeman for injuries sustained while signaling the engineer, caused by slipping and falling between a car and the tender on account of a defective car, evidence *held* sufficient to show that the company on complaint by the plaintiff promised to furnish a better car.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 280.*]

2. MASTER AND SERVANT (§ 280*)—INJURIES TO SERVANT—ASSUMPTION OF RISK—EVIDENCE.

In an action by a brakeman for injuries caused by falling between a defective car and the tender, evidence *held* sufficient to show that the promise to furnish a better car was made by an authorized agent.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 280.*]

3. MASTER AND SERVANT (§ 288*)—INJURY TO SERVANT.

Where a brakeman testified in an action against a railroad for injuries caused by falling between a car and tender that he was apprehensive in attempting to signal from the end of the car, and that he relied upon the promise to substitute another car, the question of notice of

defects and promise to remedy them was for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1068-1088; Dec. Dig. § 288.*]

4. MASTER AND SERVANT (§ 221*)—ASSUMPTION OF RISK—NOTICE OF DEFECTS—PROMISE TO REMEDY.

A servant need not state in exact words that he apprehended danger to himself from the defects complained of, nor expressly state that he will leave the service unless the defect be remedied, but it is sufficient if it can be fairly inferred that the servant complained on his own account, and that he was induced to remain in the service by reason of the promise.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 638-647; Dec. Dig. § 221.*]

5. CORPORATIONS (§ 399*)—REPRESENTATION BY AGENTS—POWER OF AGENTS.

A corporation can act only through its agents, and they must be held to have such power as inheres in the duties they are assigned to perform.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1588, 1602-1610; Dec. Dig. § 399.*]

6. MASTER AND SERVANT (§ 286*)—SAFE APPLIANCES.

Whether a car was reasonably safe for a brakeman to give signals from *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 286.*]

7. MASTER AND SERVANT (§ 289*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE.

Where a brakeman stepped on a drawhead or coupler between cars and there was evidence that it was safer to step on the grabiron, but he testified that he could get a better foothold on the coupler, the question of contributory negligence was for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089-1132; Dec. Dig. § 289.*]

8. MASTER AND SERVANT (§ 289*)—INJURIES TO SERVANT—QUESTION FOR JURY.

Where the evidence was conflicting whether it was safer for the brakeman to signal the engineer from windows of a certain car, it was for the jury to say whether the brakeman was negligent in not signaling from the windows.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089-1132; Dec. Dig. § 289.*]

9. EVIDENCE (§ 548*)—EXPERT TESTIMONY.

Physicians who examined plaintiff at the request of counsel to ascertain his condition, and not for treating him, may testify as to the condition found based on subjective symptoms, including involuntary expressions of present pain and suffering, where all statements made to them by the plaintiff and all acts of his, which were within the control of his will power, were excluded from consideration.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2365; Dec. Dig. § 548.*]

10. TRIAL (§ 296*)—INSTRUCTIONS—INJURIES TO SERVANT.

In a brakeman's action for personal injuries against a railroad company, an instruction that, if the jury found for the plaintiff, the verdict should be for such sum as to fully and fairly compensate the plaintiff as shown by the evidence, "even though the amount is for a large sum of money," was not prejudicial, where the court instructed the jury that the damages

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

could not be awarded in excess of the sum claimed.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-718; Dec. Dig. § 290.*]

11. DAMAGES (§ 1*)—NATURE AND THEORY.

Damages in general legal acceptation means compensation for the loss incurred or the injury sustained in the given case.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 1; Dec. Dig. § 1.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1812-1820; vol. 8, pp. 7625, 7626.]

12. TRIAL (§ 252*)—INJURIES TO SERVANT—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

In an action by a brakeman against a railroad for injuries, an instruction that, "if you find from the evidence that the plaintiff was a trainman of experience and in line for promotion, you have a right to consider these facts in awarding the damages to him if you find in his favor," was properly given, where plaintiff showed that he was promised a position as conductor in his turn after one or two others were provided for.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 252.*]

13. TRIAL (§ 295*)—INSTRUCTIONS TO JURY.

If the instructions as a whole fairly and correctly state the law of the case, there is no error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 703-717; Dec. Dig. § 295.*]

14. DAMAGES (§ 132*)—PERSONAL INJURIES—EXCESSIVE DAMAGES.

In an action for injuries to a brakeman, he showed that he was 41 years old, with a life expectancy of over 27 years. His earnings as a brakeman were from \$80 to \$90 monthly, and as a conductor, in which capacity he had served and to which place he was promised early advancement, his earnings were \$100 to \$120 a month. His sexual vigor was impaired, his capacity for manual labor was destroyed, and his body was permanently drawn to one side. *Held*, that a verdict of \$11,250 was not excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 372-385; Dec. Dig. § 132.*]

Department 1. Appeal from Superior Court, King County; John F. Main, Judge.

Action by Michael Myhra against the Chicago, Milwaukee & Puget Sound Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

H. H. Field and Geo. W. Korte, for appellant. Arthur E. Griffin, for respondent.

GOSE, J. The plaintiff brought this action to recover damages for personal injuries sustained while in the service of the defendant. This appeal is prosecuted from a verdict and judgment in plaintiff's favor.

The essential facts are that the respondent, who had had about 15 years' experience as a railway brakeman and about 5 years' experience as a railway conductor, sustained a serious injury on the 7th day of December, 1908. At that time he had been employed by the appellant as a brakeman for some four or five weeks. He was injured by falling, or being thrown, from a car while attempting to give the engineer a stop signal. The train crew consisted of the conductor, engineer,

fireman, and one brakeman beside the respondent. They were engaged in hauling material from Seattle to the Puyallup river for the construction of a bridge at the latter point. The road was being used for construction work only. Flat cars were used for carrying the material. When the accident occurred, the flat cars had been detached, and the train, consisting of the engine and one box car, was returning to Sumner for the night. The accident happened near the end of a long trestle, and on a descending grade of about 1 per cent. The box car was in front of the engine. The train was near the switch, and the respondent had been told by the conductor to give the stop signal at that point, so that the car could be switched and transferred to the rear of the engine. The car had two or three side windows, and a door upon each side and in both ends. The side doors had been closed by nailing 1 by 12 boards across them. The evidence is conflicting as to whether the windows were closed. There was no platform or railing upon either end of the car. At both ends of the car there was a door sill six or eight inches in width. The respondent testified that preparatory to giving the signal he stepped to the front end of the car with a lantern upon his right arm, took hold of the door casing, put the left foot upon the draw-head or coupler, which was some four or six inches below the door sill, took hold of the grabiron to the right, placed his right foot upon the lower grabiron, and that, in swinging around toward the car, his foot slipped from the grabiron or climber, and he was thrown beneath the car, and crushed and mangled by the tender to the engine. The box car had been in use three or four weeks at the time of the accident, and the respondent was familiar with its deficiencies. It had been furnished originally as a sleeping car.

He bases his right to recover upon an alleged promise to substitute a better car. The appellant upon this branch of the case makes two principal contentions: (1) It asserts that the evidence does not tend to show the essential elements of a complaint and a promise; and (2) that the promise, if any, was not made by one having authority to represent it in that behalf. The court instructed the jury: "You are instructed that, before the plaintiff can avail himself of any promise in respect to the said car claimed by him to have been made by the defendant, he must prove by a fair preponderance of the evidence that said car was defective and unsafe for the purposes for which it was being used; that the plaintiff objected to the use of said car and complained to the defendant that his personal safety was in imminent danger; that, in pursuance of said complaint, the defendant promised plaintiff to substitute said car with a safer car; that

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

plaintiff relied upon said promise; and that said promise was made by an authorized agent of said company." The respondent further testified that a short time after he entered the service of the appellant he had a conversation with a Mr. Osgood, its terminal engineer, in which the respondent suggested to him that the boards should be removed from the side doors so that they could be opened, and "that would give us a chance to stay there and give signals, and also to get out if it was necessary"; that the latter replied that the appellant's use of the car was only temporary; that it did not belong to it, but that "we will hold out the first box car," or that "we [meaning the crew] could hold out the first small box car—if we saw any small box car come to the coast—hold it out and they would fix it up for a caboose;" that he said, "We will fix it up." Upon cross-examination the witness further stated that Osgood, the conductor, and himself, were in the car when the conversation took place, and that "they were talking about how the car was there and such like."

We have somewhat hesitatingly reached the conclusion that the complaint and the promise fulfill the requirements of the law as defined in the instruction. It is obvious from what has been said that the car when in motion was not a safe place for giving signals. The conversation occurred in the car between two men experienced in rail-roading. They both knew that the car had neither platform nor brakes. Osgood knew that the brakeman was the signal man, and that the giving of signals from either end of the car when the car was in motion was dangerous. When the respondent said to him that the removal of the boards and the opening of the door "would give us a chance to stay there and give signals and also to get out if it was necessary," he knew that the complaint had reference to the hazard incurred by the brakeman in giving signals. The complaint was made on behalf of himself and the other brakemen. It is said that he did not point out the particular peril to be avoided. The jury, however, was warranted in inferring that this was known to Osgood. They were talking about a car the defects of which were well known to them. The jury had a right to infer that the conversation was not altogether without purpose. That which may be reasonably inferred from a fact stated is as legitimate evidence as the statement itself. The respondent testified that he was apprehensive of attempting to signal from the ends of the car, and that he relied upon the promise to substitute another car. We said, in *Alkire v. Myers Lumber Co.*, 57 Wash. 300, 106 Pac. 915, quoting from 1 Labatt, Master & Servant, § 421: " * * * It is not necessary that the servant shall state in exact words that he apprehends danger to himself by reason of the defects, nor need there be a formal notification that he will leave the

service unless the defect be removed or remedied. It is sufficient if, from the circumstances of the case, it can be fairly inferred that the servant is complaining on his own account, and that he was induced to continue in the service by reason of the promise. It is ordinarily for the jury to say whether the servant's reliance on the promise by the master induced him to continue work." The true criterion is aptly stated in *Thorpe v. Missouri Pacific Ry. Co.*, 89 Mo. 650, 2 S. W. 3, 58 Am. Rep. 120, as follows: "The dependent position of servants generally makes it reasonable to hold any notice on their part sufficient, however timid and hesitating, so long as it plainly conveys to the master the idea that a defect exists, and that they desire its removal; that the real question to be determined in each case is whether, under all the circumstances, the master had a right to believe, and did believe, that the servant intended to waive his objections to the unfitness of his fellow servant, or the defect in the materials provided for the work." See, also, *Rothenberger v. Northwestern Consol. Milling Co.*, 57 Minn. 461, 59 N. W. 531; *Gulf, C. & S. F. Ry. v. Donnelly*, 70 Tex. 371, 8 S. W. 52, 8 Am. St. Rep. 608; *Anderson v. Seroplan*, 147 Cal. 201, 81 Pac. 521. In the *Rothenberger Case* it was said that these are questions of fact rather than of law, and consequently for the jury, "at least, if not entirely free from doubt." A review of the cases cited by the appellant would not be profitable. Suffice it to say that they are either based upon facts essentially different from the facts in this case or announce a principle at variance with the view adopted by this court in the *Alkire Case*.

The court instructed the jury that the respondent must prove by a preponderance of the evidence that the promise was made by an authorized agent of the appellant. It is stoutly urged that he failed to sustain this burden. The weight of the evidence was, of course, for the jury. The only question for us to determine is whether there is competent evidence to support the verdict in this particular. Upon this phase of the case we are free from doubt. It is shown that Osgood was styled a terminal engineer. However, he had charge of the material yards, the loading of the cars, and directed the conductor of the train when and where he should take the material. The conductor looked to him for directions, and he was regarded by the entire crew as the officer in charge of the train. Moreover, it was upon the application of the conductor to him that the particular car was furnished at an earlier date. Osgood says that he acted only as an intermediary. However this may be, he got results. He says, further, that the superintendent and trainmaster controlled the distribution of the cars. The superintendent says that the trainmaster furnished the car from which the respondent fell. The train-

master testified that he did not have authority to secure a coupler for use as evidence. It is significant that the conductor mailed notice of the accident to Osgood. As we said in *Staats v. Pioneer Ins. Ass'n*, 55 Wash. 51, 104 Pac. 185: "A corporation can act only through its agents, and they must be held to have such power as inheres in the duties they are assigned to perform." We think that the jury were warranted in concluding that Osgood's agreement to furnish a better car was a mere incident to the general work in which he was engaged. *Haggard v. City of Seattle*, 112 Pac. 503.

It is also urged that the facts show that the car was reasonably safe for the use to which it was put, that like cars are ordinarily used for construction work, and that the promise to substitute a safer car cannot be made the basis of an action for damages. It may be said in answer to this contention that it cannot be ruled as a matter of law that the car was reasonably safe, and that there is competent evidence that cabooses with end platforms and railings or cars with side doors and ladders are commonly used in construction work.

It is said, also, that the respondent was guilty of contributory negligence in stepping upon the coupler or drawhead. There is evidence that the safer and better way would have been to have stepped upon the grabirons only. However, the respondent testified that the coupler gave him a firmer and safer foothold, and in this respect he is corroborated by other witnesses. The question of contributory negligence in this respect was therefore for the jury.

It is also contended that the respondent could have given signals from the windows or the other end of the car without incurring danger. There is evidence, however, tending to show that giving a signal from the end of the car next the engine would have been attended with greater danger than the method pursued. It is said, however, that the photographs in the record disprove such evidence. There is abundant evidence that, to have signaled in that way, he would have been required to expose his body between the car and the moving engine, holding to the door casing with one arm and signaling with the other. Whether such method was safe and proper was under all the evidence a question for the consideration of the jury. Nor can we rule as a matter of law that he should have signaled from the windows. The evidence leaves it doubtful whether the windows could have been opened. Moreover, there is competent evidence tending to show that signals are not given from car windows.

Certain physicians, who examined the respondent at the request of his counsel for the purpose of ascertaining his condition, and not for the purpose of treating him, testified to the condition which they found. They admitted that their opinions were based upon both subjective and objective symp-

toms, as tested by their experience and observation. They were not, however, permitted to testify either as to the statements made to them by the respondent or as to any of his acts within the control of his will power. It is insisted that it was error to permit them to express an opinion obtained from subjective symptoms. *Chesapeake & O. Ry. Co. v. Wiley*, 134 Ky. 461, 121 S. W. 402, and *Etzkorn v. City*, 142 Iowa, 107, 120 N. W. 636, are cited. In the *Wiley* Case the physicians who examined the injured party, not for the purpose of treatment or advice, were permitted to state in detail the symptoms which he described. They also testified that their information was based upon his statements of his symptoms. It was held that his statements made under such conditions were self-serving, hearsay, and inadmissible, and that opinion evidence founded upon such basis should have been excluded. In the *Etzkorn* Case a witness was permitted to state that the injured party said to her that "her limbs hurt her. Her side hurt her. She felt dizzy." This was held to be hearsay and inadmissible. In both these cases, however, it is said that a witness may testify to involuntary declarations, expressive of present pain and suffering, made within his hearing.

The court instructed the jury: "If you find from a fair preponderance of the evidence that the plaintiff is entitled to a verdict against the defendant, your verdict should be for such a sum as will fully and fairly compensate the plaintiff for the injuries received, as alleged, in his complaint and shown by the evidence, even though the amount is for a large sum of money." The point is pressed that the phrase "even though the amount is for a large sum" worked prejudice to the appellant. It is said that "it is the instruction of an advocate, and not of a judge." Under our practice, the pleadings are sent to the jury room. The complaint alleges damages in the sum of \$24,750. The court had instructed the jury that damages could not be awarded in excess of that sum. While the expression was not a happy one and its use in such cases is not to be commended, we cannot think it was prejudicial. "Damages," in general legal acceptance, means compensation for the loss incurred or the injury sustained in the given case. This is ordinarily true, whether that loss or injury be large or small, and an instruction of this kind would be correct.

The court also instructed the jury: "If you should find from the evidence that the plaintiff was a trainman of experience and in line for promotion, you have a right to consider these facts in determining the amount of damages to be awarded to him if you find in his favor." In criticism of this instruction, it is argued that promotion is dependent upon so many and varied contingencies that it left the jury to wander in the field of conjecture and speculation. The

testimony on this question, admitted without objection, was as follows: "Q. What position did you hold with the Columbia & Puget Sound in regard to being in line for promotion? A. When I came back from the North, I got back as brakeman and was told that I would get the first train they had a chance to give me. I would get the run when my turn came. Q. What did you know as to whether or not there were others ahead of you in service entitled to promotion before you were upon the Columbia & Puget Sound? A. I believe there was one or two men ahead of me that I had to wait for." In *Richmond, etc., R. Co. v. Elliott*, 149 U. S. 260, 13 Sup. Ct. 837, 37 L. Ed. 728, cited by the appellant, the plaintiff was permitted to give evidence in respect to what he thought as to the probability of his promotion and a consequent increase of wages to a stated amount. In condemning that character of testimony as creating a problematical and uncertain basis for damages, it was said: "Of course, there are possibilities and probabilities before every person, particularly a young man, and a jury in estimating the damages sustained will doubtless always give weight to those general probabilities, as well as to those springing from any peculiar capacities or faculties." We do not think there was any error in the instruction.

There are many other criticisms of the court's instructions which we cannot discuss without an undue extension of the opinion. Suffice it to say that they are technical, and merely attack the phraseology of the whole or some part of a particular instruction. We have repeatedly held that, if the instructions as a whole fairly and correctly state the law of the case, there is no error. The instructions cover some 23 typewritten pages. It follows that there are needless repetitions and minor inaccuracies. The issues in cases of this character are usually few and simple, and it would seem that the jury would have a better understanding of the law of the case if they were less elaborately instructed.

There was a verdict for \$11,250, which the trial court declined to reduce. It is finally insisted that the damages awarded are excessive. The respondent was 41 years of age and robust at the time of the injury. His life expectancy was 27.45 years. His earnings as a brakeman were from \$80 to \$90 a month. As a conductor he had earned \$100 to \$120 a month. There is competent testimony that his sexual vigor is impaired, and that he will never be able to perform manual labor. There is a sharp conflict in the evidence as to his ability to work at some time in the future. Some of the physicians expressed the belief that there will be a practical recovery, whilst the physicians who testified for the appellant gave it as their opinion that he will never be able to work. The trial began more than a year

after the injury occurred, and continued for five days. The respondent at all times sits and walks with his body drawn to one side. The appellant insists that the position is simulated. Both the jury and the trial court had ample opportunity to observe him, and it is apparent that they were of the opinion that his body was out of alignment and his injury most serious.

While the judgment is large, it is within the evidence, and will be affirmed.

RUDKIN, FULLERTON, MOUNT, and PARKER, JJ., concur.

(62 Wash. 26)

PEASE et al. v. CLAYTON et ux.

(Supreme Court of Washington. Jan. 31, 1911.)

1. APPEAL AND ERROR (§ 680*)—RECORD—QUESTIONS PRESENTED FOR REVIEW—EXCEPTIONS—DEMURRER.

An assignment of error that the trial court overruled a demurrer to the complaint cannot be reviewed on appeal, where the record contains no such demurrer.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2880-2882; Dec. Dig. § 680.*]

2. APPEAL AND ERROR (§ 274*)—EXCEPTIONS—SCOPE AND EFFECT—FINDINGS BY THE COURT.

Where a trial court makes findings of fact and conclusions of law upon which judgment is rendered, exceptions at the conclusion thereof, "to all of which the defendants except, and their exceptions are allowed," are general exceptions, and not available for any purpose, and the only question reviewable on appeal is whether the findings support the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 274.*]

3. APPEAL AND ERROR (§ 1010*)—EXCEPTIONS—EXCEPTION TO THE JUDGMENT.

Where the evidence is sufficient to support the findings and judgment, exception to the judgment will be overruled on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3079-3982; Dec. Dig. § 1010.*]

4. APPEAL AND ERROR (§ 260*)—TRIAL—SPECIFIC EXCEPTIONS.

Where no adequate exceptions are taken to findings of the trial court, alleged errors in the admission of evidence cannot be reviewed on appeal; the findings being taken as correct and justified by proper evidence.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 260.*]

5. APPEAL AND ERROR (§ 270*)—EXCEPTIONS—MOTION FOR NEW TRIAL.

A motion for new trial, based upon the records and evidence taken at the trial, containing all the statutory grounds, but preserving no adequate or proper exceptions, is not reviewable on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1609, 1610, 1759-1763; Dec. Dig. § 270.*]

Department 2. Appeal from Superior Court, Pierce County; J. A. Shackelford, Judge.

Action by Ida M. Pease and another against W. E. Clayton and wife. From a

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

judgment for plaintiffs, defendants appeal affirmed.

E. D. Wilcox and Wesley Lloyd, for appellants. R. F. Laffoon, for respondents.

PER CURIAM. Respondents brought this action to recover under a clause in a building contract providing for recovery against appellants in case respondents should be compelled to pay any sum in "discharging any lien on said premises made obligatory in consequence of said contractors' default." Issue being taken upon the complaint alleging payments because of such default, trial was had, resulting in judgment against appellants in the sum of \$500, from which they appeal.

The errors assigned are the overruling of a demurrer to the complaint, errors in the admission of evidence, in rendering judgment for respondents, and in denying a motion for a new trial. We find no such demurrer in the record, and hence cannot review the complaint upon that assignment. Upon the trial the court below made findings of fact and conclusions of law, upon which judgment was entered. The only exception appearing to these findings is at the conclusion thereof, "to all of which the defendants except, and their exceptions are allowed." These are general exceptions, and it has been the rule of this court ever since its first announcement in *Hannegan v. Roth*, 12 Wash. 65, 40 Pac. 636, that such exceptions are not available for any purpose, and that the only question reviewable by this court in such cases is, Do the findings support the judgment? *Fender v. McDonald*, 54 Wash. 130, 102 Pac. 1026, where the cases so holding are collected and cited. The findings before us are ample to support the judgment, and the exceptions to the judgment must be overruled.

Since no adequate exceptions have been taken to the findings, the alleged errors in the admission of evidence cannot be reviewed, the findings being taken as correct and justified by proper evidence. For the same reasons, the ruling upon the motion for a new trial is not reviewable here, such motion, while containing all the statutory grounds, being based upon the records and evidence taken at the trial and no adequate or proper exception preserved.

The judgment is therefore affirmed.

(4 Okl. Cr. 537)

JAMES et al. v. STATE.

(Criminal Court of Appeals of Oklahoma.
Jan. 5, 1911.)

(Syllabus by the Court.)

1. GAMING (§ 94*)—BANKING AND PERCENTAGE GAME—EVIDENCE—SUFFICIENCY.

Under an information charging a defendant with conducting a banking and percent-

age game, played with certain devices, for money and other representatives of value, a conviction cannot be had upon proof that the accused conducted a "turf exchange" where his patrons congregated and bet upon horse races run at another place.

[Ed. Note.—For other cases, see *Gaming*, Cent. Dig. §§ 274-283; Dec. Dig. § 94.*]

2. GAMING (§§ 68, 71*)—GAMBLING DEVICES—WHAT CONSTITUTE.

To be guilty of violating section 2422, Snyder's Comp. Laws Okl. 1909, the accused must deal, play, carry on, open, or conduct the game upon which money or other representative of value is wagered, and the game which he so deals, plays, carries on, opens, or conducts must be one of those specially mentioned in said section, or some banking or percentage game played with dice, cards, or some other device.

[Ed. Note.—For other cases, see *Gaming*, Cent. Dig. §§ 140-162, 166, 167; Dec. Dig. §§ 68, 71.*]

3. GAMING (§ 74*)—"DEVICE"—WHAT CONSTITUTE.

By the word "device," as used in section 2422, Snyder's Comp. Laws Okl. 1909, is meant the means, instrument, contrivance, or thing by which a banking or percentage game is played.

[Ed. Note.—For other cases, see *Gaming*, Cent. Dig. §§ 190-198; Dec. Dig. § 74.*]

For other definitions, see *Words and Phrases*, vol. 3, pp. 2045-2046.]

4. GAMING (§ 75*)—COMMON GAMBLING HOUSE—WAGERS ON HORSE RACES.

A house or place kept for the purpose of enabling persons to place bets or wagers upon horse races is a common gambling house, is a nuisance per se, and those who conduct it are indictable and punishable under section 2465, Snyder's Comp. Laws Okl. 1909.

[Ed. Note.—For other cases, see *Gaming*, Cent. Dig. §§ 199-201; Dec. Dig. § 75.*]

Appeal from Canadian County Court; H. L. Fogg, Judge.

E. P. James and others were convicted of carrying on a gambling game, and bring error. Reversed and remanded.

Gillette, Libby & Gillette, Davidson & Malloy, Kistler & Haskell, and Flynn, Ames & Chambers, for plaintiffs in error. Charles West, Atty. Gen., and Smith C. Matson, Asst. Atty. Gen., for the State.

RICHARDSON, J. The charging part of the information in this case was as follows: "The said defendants, E. P. James, Ollie James, C. E. Hillswick, and Gale Pendleton, did then and there unlawfully conduct as owners and for hire a certain banking and percentage game, played with and by means of a certain device, to wit, a blackboard and telegraph connections, together with tickets with the name of the supposed horses and the amounts wagered on them, for money, checks, and other representatives of value." To this information plaintiffs in error interposed a demurrer, on the ground that the act charged did not constitute an offense. This was overruled. After trial and verdict, plaintiffs in error filed a motion for new trial in which they alleged that the court erred

in overruling the demurrer, and that the verdict of the jury was contrary to the law and the evidence, which motion was overruled. These are the only assignments we deem it necessary to consider.

The statute under which this information was drawn, being section 2422, Snyder's Comp. Laws Okl. 1909, reads as follows: "That every person who deals, plays or carries on, or opens or causes to be opened, or who conducts, either as owner or employee, whether for hire or not, any game of faro, monte, poker, roulette, craps, or any banking or percentage game played with dice, cards, or any device, for money, checks, credit, or any representative of value, is guilty of a misdemeanor, and is punishable by a fine of not less than one hundred dollars nor more than one thousand dollars, and by imprisonment in the county jail for a term not less than thirty days nor more than six months."

This statute makes it an offense for any person to conduct, either as owner or as employé, whether for hire or not, any banking or percentage game played with any device, for money, checks, credit, or any representative of value. This information alleged that plaintiffs in error did conduct, as owner and for hire, a certain banking and percentage game played with and by means of certain named devices, for money, checks, and other representatives of value. The information is substantially in the words of the statute, and though inartificially drawn, is probably sufficient. The devices named are unusual ones for that purpose, but the court could not say as a matter of law that they could not be so used.

We think, however, that the allegations of this information were not supported by the evidence. The evidence tended to show that plaintiffs in error were engaged in operating what is known as a "turf exchange" in the city of El Reno. It was shown that they had rented a building for that purpose, and kept therein a blackboard, a telegraph instrument, and a telegraph operator; that this was conducted for the purpose of enabling patrons of the exchange to lay bets and wagers upon horse races run in other states; that on the day previous to the running of such races the names of the horses entered therein were sent to the exchange by leased wires, and were posted on the blackboard, as were also the odds on the horses as made by bookmakers at the tracks. When the odds were posted the patrons of the exchange selected the horse or horses which they wished to back, and placed their bets thereon. They were given tickets showing the amount of money wagered, the name of the horse upon which they had bet, and the terms of the wager. After the race was run, the result was telegraphed to the exchange, and the wagers were settled accordingly. Generally all bets were taken by the exchange.

The authorities are to the effect that running a horse race is a game, but in this case the games were not played at the turf exchange, and were not conducted by plaintiffs in error. They did not conduct the races, and therefore did not conduct the game. Neither was the game played by means of the devices alleged in the information; that is, the races upon which the money, checks, credits, or representatives of value were wagered and were won or lost were not run in any sense by means of telegraph wires, telegraph instruments, blackboards, or tickets. The game—the horse race—was run and played by means of horses. All that was done in the turf exchange was to make bets upon the result of the races. The tickets given the gamblers were only memoranda of their bets, and the telegraph wire and instrument and the blackboard were merely means of showing what horses were to run, the odds placed, and of making known the result of the race. They furnished advance information in regard to the game, and made known the result as determined upon the track.

Section 2019, Snyder's Comp. Laws Okl. 1909, provides that no act or omission shall be deemed criminal or punishable, except as prescribed or authorized by the Code. In *U. S. v. Wiltberger*, 5 Wheat. 76, 5 L. Ed. 37, it is said by Chief Justice Marshall: "To determine that a case is within the intention of the statute, its language must authorize us to say so. It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated." We think the above quotation applicable to this case, and are of the opinion that the facts proven herein are within neither the letter nor the spirit of the statute under which the information was drawn. Statutes identical with or similar to the one under consideration have been enacted in many of the states, and have often been construed by the courts; and so far as we have been able to ascertain, it has been uniformly held that the conducting of a turf exchange or the selling of pools upon races in the manner shown here was not a violation of such statute. Thus it is said in *State v. Hayden*, 31 Mo. 35: "It is a great perversion of language to call a horse race a gambling device. If the Legislature desires to prohibit horse races, it is easy for them to say so in plain terms. No one would even suppose that penalties inflicted upon keepers of faro banks and tables and such like gaming devices were intended to apply to horse races, or foot races, or boat races. A criminal code cannot be so loosely interpreted."

The same question was before the Supreme Court of New York in the case of *People*

v. Engeman, 129 App. Div. 462, 114 N. Y. Supp. 174, the syllabus of which case is as follows: "A 'device or apparatus for gambling' is a device or apparatus designed for carrying on actual gambling, or determining whether the player is to win or lose, like a wheel of fortune and contrivances of that sort. A paper commonly called 'advance information,' conveying information as to horses entered to take part in a race to be run, the names of the jockeys, the names of the horses withdrawn, the length of the race and its number, though useful to a gambler in placing his wager, is not a 'device or apparatus for gambling' denounced by Pen. Code, § 344." And in the body of the opinion it is said: "This is the test: Whether the implement or device is used in determining who shall win or lose; whether it is an integral part of the actual gambling. A gambling device is defined (20 Cyc. 871) as an invention often used to determine the question as to who wins and who loses, that risk their money on a contest or chance of any kind; anything which is used as a means of playing for money or other thing of value, so that the result depends more largely on chance than skill." And this decision was affirmed by the Court of Appeals of New York in 195 N. Y. 591, 89 N. E. 1107.

In construing a similar statute the Supreme Court of Minnesota, in the case of *State v. Shaw*, 39 Minn. 153, 39 N. W. 305, said: "The statute enumerates cards, dice, and gaming tables, which are well-defined devices used in gambling, and then follow the words 'or any other gambling devices whatever.' Gambling is defined to be 'a risking of money or other property between two or more persons on a contest of chance of any kind, where one must be the loser and the other the gainer.' A horse race may therefore be a game, and betting on a horse race gambling, and undoubtedly the parties charged in the indictment were gambling, and it might well be held that persons betting on such games would be liable to prosecution under section 296 of the Penal Code, and that the house or place kept by defendants was a common nuisance, and the keepers might have been indicted under the common law for 'keeping a common gaming house.' But the offense here charged is gambling with 'gambling devices,' and 'keeping gambling devices designed to be used in gambling.' The term 'device' has the same meaning in both sections. Though the words 'any other gambling device whatever' are doubtless intended to include any kind of apparatus, contrivance, or any instrument which may be used in games of chance, and upon the manipulation or operation of which the result of the game is determined, yet these terms, 'gambling devices,' must be construed ejusdem generis with the particular devices which are described in the preceding portion of the same section in fixing the gen-

eral character of such device referred to in the statute. In *re Lee Tong* [D. C.] 18 Fed. 257. A horse race is not a gambling device, nor are descriptive lists of such races, or statements or announcements of the particulars thereof, from which those desiring to bet on the races may more conveniently obtain information in respect to the same, and we are unable to see that the boards and lists or records of pool sold described in the indictment are anything more. There is no element of chance in their use, which we think is the test. The defendants' methods undoubtedly serve to facilitate gambling, and so does the fact that they keep open a place for gambling, and the same may be said also of the published schedule of races and games, and many other acts and things, which, however, cannot be denominated 'gambling devices' within the meaning of the statute. The betting is on the races exclusively and the result is in no way determined by the use of the instrumentalities in question, and no additional element of chance is introduced thereby."

A similar statute was passed upon in the case of *Ives v. Boyce*, 85 Neb. 324, 123 N. W. 318, 25 L. R. A. (N. S.) 157, and it was there held that the telegraph wires and instruments, blackboard and tickets alleged in this information to be gambling devices, were not such within the meaning of the statute. In that opinion the court said: "Plaintiff seeks to bring the action within the scope of the above proviso by alleging that the telegraph wire, the blackboard, and the ticket constituted a 'gambling device'; but we think this would be a forced and strained construction of the same. The appliances mentioned may be and are used for legitimate purposes, and are no more 'gambling devices' than many other instrumentalities of trade and commerce."

And the Supreme Court of the territory of Oklahoma, in *Proctor v. Territory*, 18 Okl. 378, 92 Pac. 389, in construing this statute, said: "When the charge is for playing at some one of these unnamed games, it will be necessary to set out the description of the game or device sufficiently to show that it was played with dice or cards, or some other device upon which something was hazarded, for money or something of value." See, also, *James et al. v. State*, 63 Md. 242; *Crow v. State*, 6 Tex. 334; *McElroy v. Carmichael*, 6 Tex. 454; and *State v. Bryant*, 90 Mo. 534, 2 S. W. 836. We deem it useless to multiply authorities upon this question; we believe that none can be found holding that the acts proved constituted a violation of this statute, and we do not think that any such conclusion can be drawn from even a casual reading of the section in question.

We concur with many good people in believing that the operations of these so-called "turf exchanges" are pernicious and should be specifically prohibited; but the making

of laws to that end is a legislative and not a judicial function, and the Legislature has clearly negatived its intention to bring them within the terms of this particular statute by the language it employed in framing the statute.

There is no doubt but that the making of bets and wagers in these exchanges constitutes gambling, and the exchanges themselves are common gambling houses, and are therefore nuisances per se. *Rex v. Rogler*, 1 B. & C. 272, 8 E. C. L. 117, 2 Dowl. & R. 431; *U. S. v. Dixon*, 4 Oranch C. C. 107, Fed. Cas. No. 14,970; *Vanderworker v. State*, 13 Ark. 700; *State v. Layman*, 5 Har. (Del.) 510; *State v. Black*, 94 N. C. 809; *People v. Weithoff*, 51 Mich. 203, 16 N. W. 442, 47 Am. St. Rep. 537; *Anderson v. State* (Tex. App.) 12 S. W. 863. See, also, 14 Am. & Eng. Enc. Law, p. 694, and cases there cited. They are such under our statutes. Under section 5771, *Snyder's Comp. Laws Okl.* 1909, their operation may be enjoined; they may be abated as provided in chapter 71 of said laws; and under section 2465 of said laws their operation constitutes a misdemeanor, and those who conduct them may be prosecuted criminally and have inflicted upon them the punishment prescribed by section 2032; but a prosecution will not lie on an information based upon section 2422.

Reversed and remanded.

FURMAN, P. J., and DOYLE, J., concur.

(4 Okl. Cr. 603)

BONAPARTE v. STATE.

(Criminal Court of Appeals of Oklahoma. Jan. 5, 1911.)

(Syllabus by the Court.)

1. INDICTMENT AND INFORMATION (§ 3*)—NECESSITY OF INDICTMENT.

Article 5 of the amendments to the Constitution of the United States, providing that "no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury," guarantees to a defendant charged with the commission of a felony in the Indian Territory prior to statehood an unalterable right to be accused by indictment only.

[Ed. Note.—For other cases, see *Indictment and Information*, Dec. Dig. § 3.*]

2. INDICTMENT AND INFORMATION (§ 3*)—NECESSITY OF INDICTMENT.

In such cases the indictment is a necessary prerequisite to give the court jurisdiction.

[Ed. Note.—For other cases, see *Indictment and Information*, Dec. Dig. § 3.*]

Appeal from District Court, Pushmataha County; Malcolm E. Rosser, Judge.

Nabert Bonaparte was convicted of uttering a forged instrument, and he appeals. Reversed and remanded.

J. E. Whitehead, for plaintiff in error. Chas. West, Atty. Gen., and Smith C. Matson, Asst. Atty. Gen., for the State.

DOYLE, J. Nabert Bonaparte, plaintiff in error, was prosecuted for the crime of uttering a forged instrument, alleged to have been committed in that part of the Indian Territory that is now Pushmataha county, on the 5th day of June, 1907. On August 24, 1908, A. J. Arnote, county attorney of Pushmataha county, filed a verified information in the district court of said county charging the defendant with said crime. Upon arraignment the defendant filed a demurrer on the ground that the court had no jurisdiction of the cause, which demurrer was overruled and exception taken. On this information at the February, 1909, term, the defendant was tried, and the jury returned a verdict, which, omitting the formal parts, reads as follows: "We, the jury, duly impaneled and sworn in the above-styled cause, do upon our oaths find from the law and the evidence the above-named defendant, Nabert Bonaparte, guilty in manner and form as charged in the information herein, and assess his punishment at imprisonment for the term of two years and six months in the state penitentiary." The defendant filed a motion for new trial and a motion in arrest of judgment, which motions were by the court overruled and exceptions allowed. Judgment and sentence in accordance with said verdict was entered on February 25, 1909. The defendant appealed by filing with the clerk of this court on June, 1909, his petition in error with case-made attached.

It is assigned as error "that the district court of Pushmataha county had no jurisdiction of the said case, for the reason that the same was an offense alleged to have been committed prior to the admission of the state of Oklahoma into the Union, and that there was no indictment returned by a grand jury against the plaintiff in error in said cause." On the part of the state, the Attorney General concedes that the district court of Pushmataha county was without jurisdiction to proceed to the trial of the defendant, for the crime charged by information and without indictment, and therefore confesses that this cause should be reversed.

The offense is alleged to have been committed prior to statehood in that part of the State of Oklahoma which was formerly the Indian Territory. In section 20 of the amendments to the enabling act, approved March 4, 1907, c. 2911, 34 Stat. 1287, it is provided that: "All criminal cases pending in the United States courts in the Indian Territory, not transferred to the United States Circuit or District Courts in the state of Oklahoma, shall be prosecuted to a final determination in the state courts of Oklahoma under the laws now in force in that territory."

In *Garnsey v. State of Oklahoma*, 4 Okl. Cr. —, 112 Pac. 24, this court said: "These provisions of the enabling act and the schedule preserve the rights of persons who are

charged with the commission of offenses prior to the admission of the state and render them liable to punishment under the law. For this reason we are clearly of opinion that the constitutional provision providing for the prosecution of felonies by information was not intended to be retrospective or retroactive in its operation, and has reference only to prosecutions for crimes committed after statehood. However, it is immaterial whether the enabling act permitted, or the framers of our Constitution intended to provide, a new method for the prosecution of crimes committed before statehood, because in respect to such crimes the Constitution of the United States gave to the accused an unalterable right to be accused by indictment only." And continuing, said: "The courts of this state in exercising the jurisdiction conferred upon them by the enabling act and the state Constitution over crimes committed in Oklahoma Territory cannot deprive the accused of substantial rights secured to him by the Constitution of the United States; such as depriving him of the right to be accused by indictment for an infamous crime, or the right to be tried by a common-law jury."

We are of opinion that the district court of Pushmataha county did not upon the information filed by the county attorney acquire jurisdiction to try, convict, and sentence the defendant for a felony charged to have been committed in the Indian Territory before statehood.

The judgment is therefore reversed and the cause remanded.

FURMAN, P. J., and RICHARDSON, J., concur.

(4 Okl. Cr. 594)

In re OPINION OF THE JUDGES.

(Criminal Court of Appeals of Oklahoma. Jan. 5, 1911.)

HOMICIDE (§ 354*)—SUFFICIENCY OF EVIDENCE—PUNISHMENT.

On a conviction of murder imposing the death penalty and submission of the evidence by the Governor to the Criminal Court of Appeals under Snyder's Comp. St. 1909, §§ 6927, 6928, held that the conviction was warranted, and punishment of death justified.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 731; Dec. Dig. § 354.*]

Application of Charles N. Haskell, Governor of the state, for opinion of the judges upon the propriety of a conviction of Frank Henson for murder imposing the death penalty in response to a request therefor from the Governor pursuant to statute. Opinion approving conviction.

DOYLE, J. The Criminal Court of Appeals, responding to your official communication of December 17th ult., addressed to this court, accompanied by the record and a

transcript of the testimony in the case of the State of Oklahoma v. Frank Henson, being case "No. 708, Criminal," in the district court of Tulsa county, Okl., wherein said defendant, Frank Henson, upon his trial was by the verdict of the jury found guilty of murder, and the death penalty assessed, and thereafter on the 3d day of December, 1910, said defendant was sentenced by the court in accordance with the verdict to be hanged on January 27, 1911, with the request that we give an opinion thereon pursuant to section 6928 of Snyder's Statutes 1909. We hereby respectfully submit the following opinion of the court:

From the record it appears that in compliance with section 6927 of Snyder's Statutes, which prescribes: "The judge of a court at which a conviction requiring a judgment of death is had, must, immediately after the conviction, transmit to the Governor, by mail or otherwise, a statement of the conviction and judgment, and of the testimony given at the trial."

In the town of Dawson, Tulsa county, Okl., on Sunday, October 9, 1910, the defendant, a negro, in a fight with another negro or Indian, fired 8 or 10 shots. The deceased, Charley Stamper, a deputy sheriff, living at Dawson, attempted to arrest the defendant, whereupon defendant with a .55 caliber pistol shot him, the ball shattering his jaw, and passing out through his neck, from which wound he died that day. Several persons were present. The evidence shows that the defendant seeing Stamper with several other persons coming toward him said: "That if an officer came near him he was going to shoot his damn brains out." All the witnesses testify that, when the deceased told the defendant to "consider yourself under arrest," the defendant fired the fatal shot. After the shooting, the defendant attempted to escape and was captured by those present when the shooting occurred. A plea of self-defense was interposed, and the defendant in his own behalf testified that he did not know that Charley Stamper was an officer; that the deceased with another man walked up to him, and said, "Consider yourself under arrest, young man," and that he told him "all right"; that the deceased then shot at him, hitting him on his right leg; that he then pulled his gun and shot the deceased; that the deceased then shot him a second time. The defendant is not corroborated by any person present when the shooting occurred. All the witnesses testify that the deceased shot at the defendant only after the defendant had shot him.

No question requiring discussion is presented in the record. The information correctly charges the crime of murder, and the demurrer thereto was properly overruled. The instructions as given by the court fully and correctly state the law, and are more

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

favorable to the defendant in some particulars than the evidence demands. There can be no doubt as to the sufficiency of the evidence. The deceased, as an officer in the performance of his duty, attempted to arrest the defendant for a felony committed in his presence. The killing of a peace officer in resisting a lawful arrest is not only murder, but is deemed a murder of more than usual aggravation. Thus, it has been said by an author of high authority that: "Ministers of justice, while in the execution of their offices, are under the peculiar protection of the law. This special protection is founded in great wisdom and equity, and in every principle of political justice. For without it the public tranquillity cannot possibly be maintained, or private property secured, nor, in the ordinary course of things, will offenders of any kind be amenable to justice; and for these reasons the killing of officers so employed hath been deemed murder of malice prepense."

Premeditated design as well as the motive actuating the defendant to commit the murder are conclusively shown by the evidence. It was a brutal and deliberate murder, well meriting the extreme penalty assessed by the jury.

We are of opinion that by a fair and impartial trial the defendant has been adjudged to suffer the just penalty of the law. All the Judges concurring.

(4 Okl. Cr. 606)

HEACOCK et al. v. STATE.

(Criminal Court of Appeals of Oklahoma. Jan. 25, 1911.)

(Syllabus by the Court.)

1. INDICTMENT AND INFORMATION (§ 52*)—ADULTERY (§ 4*)—PROSECUTION—INFORMATION—VERIFICATION.

(a) The statute requiring that an information should be verified by the oath of the county attorney or some other person applies only to prosecutions for misdemeanors.

(b) If, in a prosecution for adultery, the husband or wife of one of the defendants verifies the information filed before the committing magistrate, this constitutes commencing the prosecution as provided for by section 2366, Snyder's Comp. Laws 1909.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 163-168; Dec. Dig. § 52.* Adultery, Cent. Dig. §§ 8, 9; Dec. Dig. § 4.*]

2. INDICTMENT AND INFORMATION (§§ 47, 133*)—SUFFICIENCY OF ACCUSATION—ALLEGATION OF PRELIMINARY HEARING—MOTION TO SET ASIDE INFORMATION.

(a) In prosecutions for felonies by information, it is not necessary for the state to either allege or prove that the defendant has had a preliminary hearing or examining trial before a magistrate, and that upon such trial defendant was bound over to answer the charge preferred against him in the information, or that the defendant had waived such examining trial.

(b) Where felonies are being prosecuted by

information, if, in fact, defendant has not had a preliminary examination and been bound over to answer the charge contained in the information, or the defendant has not waived such examination, those matters can only be presented by a motion to set aside the information, and cannot be raised by motion to exclude the testimony of witnesses.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 157, 459; Dec. Dig. §§ 47, 133.*]

3. WITNESSES (§ 58*)—HUSBAND AND WIFE—NATURE OF OFFENSE.

Under section 2366, Snyder's Comp. Laws 1909, adultery is a personal offense against an injured wife or husband, and such wife or husband is a competent witness to prove the offense.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 162, 164; Dec. Dig. § 58.*]

4. CRIMINAL LAW (§ 811*)—TRIAL—INSTRUCTIONS—SINGLING OUT WITNESSES.

It is error for the trial court to single out any witness, and direct special attention to such witness, and instruct the jury as to the credibility of such witness.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1969-1972; Dec. Dig. § 811.*]

Appeal from District Court, Woodward County; R. H. Loofbourrow, Judge.

Lucy A. Heacock and another were convicted of adultery, and they appeal. Reversed and remanded.

Charles Swindall and S. M. Smith, for appellants. Smith C. Matson, Asst. Atty. Gen., for the State.

FURMAN, P. J. First. The information in this case is as follows: "Information. State of Oklahoma, Woodward County—ss.: In the district court in and for Woodward county, Oklahoma, for the Nineteenth judicial district, May term, 1908. State of Oklahoma v. Lucy A. Heacock & Sid Morris. In the name and by the authority of the state of Oklahoma, now comes B. F. Willett, county attorney in and for the state and county aforesaid, and gives the court to know and be informed that one Lucy A. Heacock and Sid Morris, late of the county of Woodward and state of Oklahoma, on the 23d day of January, in the year of our Lord one thousand nine hundred and eight, at and within the said county and state, did then and there unlawfully, voluntarily, and feloniously have sexual intercourse with each other, the said Lucy A. Heacock then and there being a married woman and the wife of Joseph Heacock, and not the wife of the said Morris, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Oklahoma. B. F. Willett, County Attorney." Appellants were duly arraigned, and pleaded not guilty. The case being called for trial, both parties announced ready for trial, and after the jury had been selected

and sworn, and the county attorney had made his opening statement, the appellants objected to the introduction of any evidence under the information because the information was not verified by the husband of the accused Lucy A. Heacock, or the wife of Sid Morris. This objection was overruled by the court. In a prosecution for a felony, it is not necessary that the information should be sworn to by any person. The statute requiring that an information should be verified by the oath of the county attorney or some other person applies only to prosecutions for misdemeanors. In *re Talley*, 112 Pac. 36, and *A. H. Davis v. State*, 113 Pac. 220, both decided at the present term of court. It appears from the record that the original affidavit filed before the justice of the peace on which the examining trial of appellants was had was verified by the affidavit of the husband of the defendant Lucy A. Heacock. This established the fact that he commenced this prosecution. The trial court therefore did not err in overruling the objection to the introduction of evidence upon the ground named.

Second. The appellants further objected to the introduction of any testimony under this information because no showing had been made that the justice of the peace or committing magistrate had bound them over upon an examining trial to answer the charge preferred against them in the information, or that they had waived such examining trial. We have time and again held that in prosecutions for felonies by information it is not necessary for the state to either allege or prove that the defendant has had a preliminary hearing or examining trial before a magistrate, and that upon such trial the defendant had been bound over to answer the charge preferred against him in the information, or that the defendant had waived such examining trial, and that these matters should be presented by the defendant in a motion to set aside the information, if, in fact, there had been no preliminary examination, and the defendant has not been held to answer the charge contained in the information, or that the defendant had not waived such examination. *Ran Wood v. State*, 3 Okl. Cr. 553, 107 Pac. 937. The court therefore did not err in overruling the objections made by counsel for appellants to the introduction of the testimony.

Third. Joseph H. Heacock being sworn as a witness for the state, counsel for appellants objected to his giving any testimony upon the ground that he was the husband of one of the defendants. This objection was by the court overruled, to which counsel excepted. This objection was based upon section 6834, Snyder's Comp. Laws 1909, which, among other things, provides "that neither husband nor wife shall in any case be a witness against the other except in a crim-

inal prosecution for a crime committed one against the other." The courts of the different states have placed a different construction upon statutes similar to this. So far as numbers are concerned, the majority of the courts hold that the wife or husband cannot testify against the other except as to personal offenses committed by one against the other. Upon the other hand, it has been held under a similar statute that on a charge of adultery the testimony of the injured husband or wife is competent to prove the charge. See *Lord v. State*, 17 Neb. 526, 23 N. W. 507; *State v. Hazen*, 39 Iowa, 648; *State v. Vollerand*, 57 Minn. 225, 58 N. W. 878; *State v. Russell*, 90 Iowa, 569, 58 N. W. 915, 28 L. R. A. 195. But, be this as it may, we are of the opinion that under our statute upon the subject of adultery the husband or wife of the offending party is a competent witness to prove the offense. Section 2366, Snyder's Comp. Laws 1909, is as follows: "Adultery is the unlawful voluntary sexual intercourse of a married person with one of the opposite sex; and when the crime is between persons, only one of whom is married, both are guilty of adultery. Prosecutions for adultery can be commenced and carried on against either of the parties to the crime only by his or her own husband or wife as the case may be, or by the husband or wife of the other party to the crime. Provided: That any person may make complaint when persons are living together in open and notorious adultery." Anything short of living together in open and notorious adultery is not an offense against society in general. If a husband or wife assaults the other, the offender may be prosecuted, convicted, and punished, although the injured party may not consent to or even may oppose such prosecution. But in cases of ordinary adultery no grand jury can indict and no person can prefer a charge, and no prosecuting attorney or court can present or try a defendant or defendants upon the charge of ordinary adultery, unless such prosecution is commenced and carried on by the husband or wife of one of the defendants. This clearly makes adultery a personal offense against the injured husband or wife. If it is not a personal offense, what character of an offense is it? The law has not made it only a public offense, because the public officers are prohibited from prosecuting it, unless the prosecution is commenced and carried on by the injured husband or wife. How could a husband or wife commence and carry on a prosecution unless he or she could testify in support of such prosecution? It is a familiar rule of statutory construction that whenever the law gives a right to do a certain thing that this by necessary implication carries with it the power to do all other things which are necessary to the complete accomplishment of the right expressly given. To

deny to such husband or wife the right to testify would practically make a dead letter of this statute. We therefore hold that under our statute adultery is an offense against the marital relation and against the injured husband or wife, and that such husband or wife is a competent witness to prove the offense.

Fourth. Upon the trial of this cause, the court instructed the jury, among other things, that in determining the degree of credibility that should be accorded the testimony of the defendants the jury had the right to take into consideration the fact that they were interested in the result of the prosecution, as well as their demeanor and deportment while upon the witness stand, and during the trial, and all other evidence, facts, and circumstances on the case tending to corroborate or contradict them, if any such are shown or proven. This instruction was duly excepted to at the time of the trial. We have time and again held that it is error for the trial court to single out the defendant or any other witness, and instruct the jury as to his credibility. This would be equivalent to allowing the court to suggest to the jury that any such witness was likely to swear falsely. Such a suggestion coming from the court could not have other than an injurious effect, whenever the witness so singled out and personated had testified to any facts material to the rights of the defendant. It is all right for the prosecuting attorney to give reasons why any witness may testify falsely, but such an intimation should never come from the trial court. See *Hughes v. State*, 3 Okl. Cr. 387, 106 Pac. 548, and authorities there cited.

For error of the trial court in instructing the jury as above indicated, the judgment of the lower court is reversed and remanded for a new trial.

DOYLE and RICHARDSON, JJ., concur.

(4 Okl. Cr. 662)

Ex parte SIMMONS.

(Criminal Court of Appeals of Oklahoma. Jan. 21, 1911.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS (§ 592*)—POWERS.

Under the constitutional provision (section 3, art. 18, Const.) providing that "any city containing a population of more than two thousand inhabitants may frame a charter for its own government, consistent with and subject to the Constitution and laws of this state," a city adopting a charter is accorded full power of local self-government, and, as such municipal corporation under its charter, it has power to enact, ordain, and enforce ordinances for the purpose of protecting the public peace, order, health, morals, and safety of the inhabitants, even

though general statutes exist relating to the same subjects.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1311-1314; Dec. Dig. § 592.*]

2. INTOXICATING LIQUORS (§ 11*)—ORDINANCES—PROHIBITION OF SALE OF INTOXICANTS.

The adoption of the prohibition ordinance by the people, and the enactment of the prohibition law, does not prevent cities of the first class from enacting ordinances prohibiting the sale of intoxicating liquor within the limits of such cities.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 13; Dec. Dig. § 11.*]

3. MUNICIPAL CORPORATIONS (§ 592*)—OFFENSES—CRIME AGAINST STATE AND CITY.

The same act committed by a person may constitute a crime against the state law and a different petty offense against the city ordinance, and, the two offenses being different, the offender may be proceeded against under either the city ordinance or the state law, or both.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1311-1314; Dec. Dig. § 592.*]

4. CRIMINAL LAW (§ 201*)—PROSECUTION—BAR—FORMER CONVICTION.

A conviction under an ordinance of a city of the first class for being in possession of intoxicating liquors with intent there to barter, sell, give away, or otherwise furnish contrary to law is not a bar to a prosecution for the same act under the prohibitory law of the state.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 404-406; Dec. Dig. § 201.*]

5. JURY (§ 21*)—RIGHT TO JURY TRIAL—CONSTITUTIONAL PROVISIONS.

The constitutional provision (Bill of Rights, § 19) that "the right of trial by jury shall be and remain inviolate" was adopted with reference to the procedure theretofore generally existing, and if, in a given class of offenses, trials without a jury were the prevailing rule, this rule is not changed by this constitutional provision.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. §§ 134-142; Dec. Dig. § 21.*]

6. JURY (§ 17*)—RIGHT TO JURY TRIAL—CONSTITUTIONAL PROVISIONS.

Where a statute authorizes a trial before a municipal court without a jury, for a violation of a city ordinance, and at the same time secures to the defendant an appeal therefrom, hampered by no unreasonable restrictions, to an appellate court where he has a right to a trial by jury, such summary proceeding is not in conflict with the constitutional provisions: "The right of trial by jury shall be and remain inviolate." Bill of Rights, § 19. "In all criminal prosecutions the accused shall have the right to a speedy and public trial by an impartial jury of the county in which the crime shall have been committed." Bill of Rights, § 20.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. §§ 95-98; Dec. Dig. § 17.*]

7. MUNICIPAL CORPORATIONS (§ 635*)—MUNICIPAL COURTS—PROSECUTION FOR VIOLATION OF ORDINANCE—NATURE.

A prosecution in a municipal court for a violation of a municipal ordinance which prohibits an act which is also an offense under the general criminal law of the state is a quasi criminal proceeding.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1400, 1401; Dec. Dig. § 635.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

8. MUNICIPAL CORPORATIONS (§ 639*)—MUNICIPAL COURTS—PROSECUTION FOR VIOLATION OF CITY ORDINANCE—PARTIES.

A prosecution in a municipal court for a violation of a city ordinance may be in the name of the city.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1406; Dec. Dig. § 639.*]

(Additional Syllabus by Editorial Staff.)

9. MUNICIPAL CORPORATIONS (§ 1*)—DEFINITION.

A municipal corporation in its historical and proper sense is the incorporation by the authority of the government of the inhabitants of a particular place or district and authorizing them in their corporate capacity to exercise subordinate specified powers to legislation and regulation with respect to their local and internal concerns. This power of local government is the distinctive purpose and the distinguishing feature of a municipal corporation proper.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1; Dec. Dig. § 1.*]

For other definitions, see *Words and Phrases*, vol. 5, pp. 4620-4627; vol. 8, p. 7726.]

Petition of T. H. Simmons for a writ of habeas corpus. Writ denied.

The petitioner, T. H. Simmons, on December 16, 1910, filed in this court a petition, which, omitting the title and verification, reads as follows:

"Your petitioner, T. H. Simmons, represents and states to this honorable court that he is restrained of his liberty, and is unlawfully imprisoned and restrained at Tulsa, in the county of Tulsa, in the state of Oklahoma, by C. W. Connelly as chief of police of the city of Tulsa. The cause of said restraint according to the best of the knowledge and belief of your petitioner is as follows: On the 14th day of December, 1910, one Ben F. Latham made complaint before C. A. Houston, as judge of the municipal court of the city of Tulsa, Okl., charging your petitioner with the offense of violating section 1 of Ordinance No. 756 of the city of Tulsa, Okl. A certified copy of said complaint is filed herewith, attached hereto, and made a part hereof, marked for identification 'Exhibit A.' A certified copy of said Ordinance No. 756 of the city of Tulsa, Okl., is attached hereto and made a part hereof, and filed herewith, marked for identification 'Exhibit B.' That said purported ordinance was passed and adopted by the board of commissioners of the city of Tulsa on the 26th day of July, 1910, and published as required by law in the issues of July 27, 28, and 29, 1910, in the *Tulsa Daily Democrat*. That on the 22d day of November, 1910, the board of commissioners of the city of Tulsa, Okl., passed and adopted a purported ordinance No. 822, which said purported ordinance was published in the *Tulsa Daily Democrat* as required by law in the issues of November 28, 29, 30, 1910. A certified copy of said purported ordinance is attached hereto and

made a part hereof, and marked for identification 'Exhibit C.' That the alleged violation of section 1 of Ordinance No. 756 of the city of Tulsa is charged in said complaint to have been committed in the city of Tulsa, Okl., on the 12th day of December, 1910. That on the 14th day of December, 1910, your petitioner was placed upon trial in the municipal court of the city of Tulsa, Okl., and demurred to said complaint on various and sundry grounds, among which was that the said court had no jurisdiction to try your petitioner on said charge, and that the aforesaid ordinances of the city of Tulsa, Okl., were void because the acts alleged to have constituted said offense are made a public offense under the statutes of the state of Oklahoma, and the Constitution of Oklahoma, and jurisdiction to try such offense conferred exclusively upon the county court of Tulsa county, Okl., and because the board of commissioners of the city of Tulsa, Okl., were without authority to pass, approve, or adopt said ordinances, or either of them. That the municipal court aforesaid overruled said demurrer, and required your petitioner to go to trial in said court upon said complaint. That thereupon your petitioner demanded a trial by jury, and the said court refused your petitioner a jury trial on said charge. That thereupon a trial was had in said court upon said complaint, and your petitioner found guilty by the court, and his punishment fixed at a fine of \$100 and 10 days' imprisonment in the city jail of the city of Tulsa, Okl., and the court ordered commitment to issue for your petitioner until said fine was paid and said imprisonment was satisfied. A certified copy of the docket entry on the records of said court is attached hereto, made a part hereof, marked for identification 'Exhibit D.' That your petitioner excepted to each and every ruling of the court at the time made. That thereupon the aforesaid C. A. Houston, as judge of the municipal court of the city of Tulsa, Okl., signed and issued a commitment for your petitioner in accordance with the aforesaid judgment. A certified copy of said commitment is attached hereto, made a part hereof, filed herewith, and marked for identification 'Exhibit E.' That at all times herein mentioned C. W. Connelly was chief of police of the city of Tulsa, Okl., and that said commitment was issued to C. W. Connelly as chief of police of the city of Tulsa, Okl., and that your petitioner is now being held in custody in the city jail of the city of Tulsa, restrained of his liberty by the said Connelly under authority and by virtue of said commitment and the aforesaid proceeding. Your petitioner alleges that the municipal court of the city of Tulsa, Okl., had no jurisdiction to try your petitioner on said charge; that the board of commissioners for the city of Tulsa, Okl., had no authority to pass, ap-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

prove, or adopt said ordinances or either of them, and that the aforesaid proceedings in the municipal court of the city of Tulsa were illegal and void, and that the aforesaid restraint of your petitioner is illegal and unauthorized because of the aforesaid facts. Wherefore your petitioner prays this honorable court to grant a writ of habeas corpus, and that he be discharged without delay from such unlawful imprisonment, and that, pending the hearing of the return of said writ, your petitioner be admitted to bail in an amount to be fixed by this court."

Exhibit B.

Published in the Tulsa Democrat, July 27, 28, 29, 1910. Wm. Stryker, Publisher.

"Ordinance No. 756.

"An ordinance prohibiting persons having the possession of intoxicating liquors with intent to barter, sell, give away or otherwise furnish the same contrary to law, except as hereinafter provided, and declaring an emergency.

"Be it ordained by the board of commissioners of the city of Tulsa, state of Oklahoma:

"Section 1. That it shall be unlawful for any person or persons to have in his, or their possession, or under his, or their, control any intoxicating liquors of any kind, including beer, ale and wine, within the city of Tulsa, with intent to barter, sell, give away or otherwise furnish the same contrary to law, except the same be held by such person, or persons, by virtue of an agency created and authorized by the Legislature to dispense such liquors for medicinal, mechanical, industrial and scientific purposes.

"Section 2. Any person, or persons, who shall violate any of the provisions of section one (1) of this ordinance shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of fifty (\$50) dollars and imprisonment for a period of thirty (30) days for each offense.

"Section 3. The payment of the special tax required of liquor dealers by the United States by any person within the said city of Tulsa, except local agents appointed and acting as provided by the Legislature, shall be prima facie evidence of his intention to violate the provisions of this ordinance.

"Section 4. An emergency is hereby declared, by reason whereof it is necessary for the immediate preservation of the public peace, health and safety of the inhabitants of the city of Tulsa, that this ordinance shall take effect and be in full force from and after its passage and approval as required by law.

"Passed and approved this 26th day of July, 1910. L. J. Martin, Mayor.

"Attest:

"John R. Ramsey, City Atty.

"Approved:

"E. B. Cline, City Auditor."

Exhibit C.

Published in the Tulsa Daily Democrat, November 28, 29, and 30, 1910. Wm. Stryker, Publisher.

"Ordinance No. 822.

"An ordinance amending Ordinance No. 756, entitled 'An ordinance prohibiting persons having the possession of intoxicating liquors with intent to barter, sell, give away or otherwise furnish the same contrary to the law, except as hereinafter provided, and declaring an emergency,' and declaring an emergency.

"Be it ordained by the board of commissioners of the city of Tulsa, Oklahoma:

"Section 1. That section 2 of Ordinance No. 756, entitled, 'An ordinance prohibiting persons having the possession of intoxicating liquors with intent to barter, sell, give away or otherwise furnish the same contrary to law, except as hereinafter provided, and declaring an emergency,' be and the same is hereby amended to read as follows, to wit: Any person who shall violate any of the provisions of section one (1) of this ordinance shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than five dollars (\$5.00) nor more than one hundred dollars (\$100.00) or by imprisonment in the city jail for not more than ninety (90) days or by both such fine and imprisonment.

"Section 2. That an emergency exists for the preservation of public health and safety, by reason whereof this ordinance shall take effect from and after its passage, approval and publication.

"Passed and approved this 22nd day of November, 1910. L. J. Martin, Mayor.

"Approved:

"John R. Ramsey, City Attorney.

"Attest:

"E. B. Cline, City Auditor."

And on said day a rule to show cause why said petitioner should not be discharged was made upon respondent Connelly, chief of police of the city of Tulsa, answerable December 19th. And it was ordered that pending the determination of said cause petitioner be admitted to bail in the sum of \$300. December 19th respondent filed a general demurrer to said petition. The case was thereupon argued and submitted, with five days to serve and file brief on the part of petitioner, and five days additional to file brief on the part of respondent.

Davidson & Malloy, for petitioner. John R. Ramsey, City Atty., and C. A. Houston, for respondent.

DOYLE, J. (after stating the facts as above). The petitioner was charged with having on December 10, 1910, violated Ordinance No. 756 of the city of Tulsa, by then and there unlawfully having in his possession intoxicating liquors with intent to bar-

ter, sell, give away, and otherwise furnish the same contrary to the statute and said ordinance. Upon his arraignment in the municipal court of said city he filed a demurrer to said complaint, on the grounds that said municipal court had no jurisdiction to try petitioner on said charge, for the reason that the aforesaid ordinances of the city of Tulsa were void, because the acts alleged to have constituted said offense are made a public offense under the statutes and the Constitution of Oklahoma; and jurisdiction to try such offense is conferred exclusively upon the county court of Tulsa county, wherefore the board of commissioners of the city of Tulsa were without authority to pass, approve, or adopt said ordinances or either of them. The demurrer was overruled by the court, whereupon petitioner demanded a trial by jury, which demand was refused by the court. Thereupon the trial was had in said court upon said complaint, and petitioner was found guilty by the court, and his punishment assessed at a fine of \$100 and 10 days' imprisonment in the city jail of the city of Tulsa.

The principal question presented for our consideration is: Has the board of commissioners of the city of Tulsa power to prohibit by ordinance the possession of intoxicating liquors within said city with intent to sell, barter, give away, or otherwise furnish the same contrary to law and to prescribe the punishment for a violation thereof?

The city of Tulsa is a city of the first class and is under a charter form of government, adopted under the authority and in pursuance to section 3, art. 18, of the Constitution, and this question must be determined upon a consideration of the powers granted under the constitutional provision, the statutes, and under its charter.

Section 3, art. 18, of the Constitution, provides that: "Sec. 3. (a) Any city containing a population of more than two thousand inhabitants may frame a charter for its own government, consistent with and subject to the Constitution and laws of this state, by causing a board of freeholders, composed of two from each ward, who shall be qualified electors of said city, to be elected by the qualified electors of said city, at any general or special election, whose duty it shall be, within ninety days after such election, to prepare and propose a charter for such city, which shall be signed in duplicate by the members of such board or a majority of them, and returned, one copy of said charter to the chief executive officer of such city, and the other to the register of deeds of the county in which said city shall be situated. Such proposed charter shall then be published in one or more newspapers published and of general circulation within said city, for at least twenty-one days, if in a daily paper, or in three consecutive issues, if in a weekly paper, and the first publication

shall be made within twenty days after the completion of the charter; and within thirty days, and not earlier than twenty days after such publication, it shall be submitted to the qualified electors of said city at a general or special election, and if a majority of such qualified electors voting thereon shall ratify the same, it shall thereafter be submitted to the Governor for his approval, and the Governor shall approve the same if it shall not be in conflict with the Constitution and laws of this state. Upon such approval it shall become the organic law of such city and supersede any existing charter and all amendments thereof and all ordinances inconsistent with it. A copy of such charter, certified by the chief executive officer and authenticated by the seal of such city, setting forth the submission of such charter to the electors and its ratification by them shall, after the approval of such charter by the Governor, be made in duplicate and deposited, one in the office of the Secretary of State, and the other, after being recorded in the office of said register of deeds, shall be deposited in the archives of the city; and thereafter all courts shall take judicial notice of said charter. The charter so ratified may be amended by proposals therefor, submitted by the legislative authority of the city to the qualified electors thereof (or by petition as hereinafter provided) at a general or special election, and ratified by a majority of the qualified electors voting thereon, and approved by the Governor as herein provided for the approval of the charter."

Section 2 of article 2 of the Charter of the City of Tulsa provides: "The city of Tulsa shall have power to enact and to enforce ordinances necessary to protect health, life and property and to prevent and summarily abate and remove nuisances, and to preserve and enforce the good government, order and security of the city and the inhabitants of said city, and to enact and enforce any and all ordinances upon any subject; provided that no ordinance shall be enacted inconsistent either with the Constitution or law of the state of Oklahoma, or inconsistent with the provisions of this charter; and provided further, that the specifications of particular powers herein authorized shall never be construed as a limitation upon the general powers herein granted, it being intended by this charter to grant to and bestow upon the inhabitants of the city of Tulsa full power of self-government, and it shall have and exercise all powers of municipal government not prohibited to it by this charter, or by some general law of the state of Oklahoma, or by the provisions of the Constitution of the state of Oklahoma."

And subdivision 3 of section 3 of article 2 of said charter in part provides: "The city of Tulsa shall have power, by ordinance duly passed, to prohibit dramshops, drinking saloons and other places where intoxicating liquors are sold."

Section 2 of article 18 of the Constitution provides that: "Every municipal corporation now existing within this state shall continue with all of its present rights and powers until otherwise provided by law, and shall always have the additional rights and powers conferred by this Constitution."

Section 683, Snyder's Comp. St. 1909, provides: "The city council shall have power to enact ordinances to restrain, prohibit and suppress tippling shops, billiard tables, bowling alleys, houses of prostitution and other disorderly houses, and practices, games and gambling houses, desecrations of the Sabbath day, commonly called Sunday, and all kinds of public indecencies."

Regarding the foregoing constitutional, statutory, and charter provisions, counsel for petitioner contend and argue that: "These are all general grants of powers for the general welfare of the city. We contend that the power to adopt the ordinances in question cannot rest in these general grants of power. Municipal corporations under the usual grant of power, generally known as the general welfare clause, cannot by ordinance declare those acts offenses against the city, which by the general statutes of the state are defined and made punishable as offenses against the state. In other words, that, in order to pass valid ordinances covering such offenses as are already covered by the state law, the city must have express power granted to it for that purpose by the Legislature, and that, under the police power inherently vested in it, the city has no power to punish for an offense which is a crime against the state"—citing numerous authorities from at least a dozen states.

The cases cited all maintain that under a general grant a city has no power by ordinance to punish for offenses provided for by the general laws of the state, and that such ordinances are absolutely void. Upon this question there is a great and serious conflict in the authorities, and in one state the courts of last resort have disagreed. *Ex parte Coombs*, 38 Tex. Cr. R. 648, 44 S. W. 854; *Harris Co. v. Stewart*, 91 Tex. 133, 41 S. W. 630. Under our Constitution and laws the doctrine of those cases have no application here. The foregoing provision of our Constitution contemplates the organization of municipal corporations, not by general or special legislative charter, but under a charter formulated and adopted by the citizens of the municipality. And, when a city formulates and adopts a charter under the constitutional provision, the municipal corporation so organized may be considered a separate government, invested with full power of local legislation under its charter; the same being the organic law of the corporation.

A "municipal corporation" has been tersely defined to be: "The investing of the people of a place with the local government thereof."

Judge Dillon says: "We may therefore

define a municipal corporation, in its historical and proper sense, to be the incorporation by the authority of the government of the inhabitants of a particular place or district and authorizing them in their corporate capacity to exercise subordinate specified powers of legislation and regulation with respect to their local and internal concerns. This power of local government is the distinctive purpose and the distinguishing feature of a municipal corporation proper." *Dill. Mun. Corp.* par. 20. The general rule as to the powers possessed and which may be exercised as defined by Judge Dillon are: "First, those granted in express words; second, those necessarily or fairly implied in, or incident to, the powers expressly granted; third, those essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable." *Ex parte Jones*, 4 Okl. Cr. —, 109 Pac. 570. "When the state delegates to municipal corporations the powers of local self-government, it also delegates the power to pass all needful rules and regulations in the form of ordinances for this purpose. Charters generally contain specific enumerations of the subjects upon which the municipal corporation may legislate. This enumeration is usually followed by a general delegation of authority to pass all ordinances which may be necessary for the promotion of the police and sanitary affairs of the city, its good order, advancement of commerce, and general welfare of the locality, which shall be consistent with the Constitution and general laws of the state and the local charter. This latter grant is generally, though not always, considered to give authority to enact ordinances upon all other subjects within the scope of municipal jurisdiction which are not mentioned in the specific enumeration. Of course, the passage of such ordinances must be reasonably necessary for the purpose of enabling the corporation to fulfill the objects of its creation. In other words, the detailed enumeration is not construed as denying the inherent power of the municipal corporation to make all proper or necessary ordinances respecting matters not specified, unless the intention to do so is clear. The limitation is that all such ordinances must be confined strictly to corporate or municipal purposes, and be in harmony with the charter, Constitution, general laws, and public policy of the state." *McQuillin, Muni. Ordin.* par. 50. "The proposition cannot be denied that organized government has the inherent right to protect health, life, and limb, individual liberty of action, private property and legitimate use thereof, and provide generally for the safety and welfare of its people. Not only does the right exist, but this obligation is imposed upon those clothed with the sovereign power. This duty is sacred and cannot be evaded, shifted, or bartered away without violating a public trust." *McQuillin, Muni. Ordin.* par. 430. "The police regulations of municipal

corporations are usually enforced by ordinance. What police powers the local corporation may exercise and the manner in which they are to be enforced will depend upon its charter or legislative acts applicable, and the general policy of the state with respect thereto. Generally, cities may make and enforce within their limits all such local, police, sanitary, and other regulations designed to promote the health, safety, comfort, convenience, and welfare of the local community which are not in conflict with the Constitution or the general laws. Crowded urban populations require numerous police regulations which would be unreasonable in rural districts or sparsely populated territory. This difference was quickly recognized, and from the first establishment of local corporations, invested with civil government, the local community has been empowered to enact and enforce all sorts of such regulations which restrict more or less the liberty of the individual, his personal movements, and the use of his property. These are absolutely essential to life in crowded centers. From the beginning their necessity has been sanctioned by the public authorities, and they have been sustained generally by the courts. The police power primarily inheres in the state; but, if the state Constitution does not forbid, the Legislature may delegate a part of such power to the municipal corporations of the state, either in express terms or by implication." *McQuillin, Muni. Ordin. par. 433.*

As we construe the constitutional provision and the powers granted in the city charter, no power could be or has been conferred upon the board of commissioners of the city of Tulsa to enact or adopt ordinances for the punishment of offenses under the general laws of the state. The powers conferred by the charter are for municipal purposes only, and the object of the ordinance in question was not to punish an offense against the criminal laws of the state, but to provide a mere police regulation for the purpose of protecting the public peace, "and to preserve and enforce the good government, order and security of the city and the inhabitants of said city." The general law of the state, which punishes this offense as a misdemeanor, has not been superseded by the charter and ordinances of the city. The jurisdiction of the state to try the offense remains wholly unaffected and unimpaired. The general law and the local ordinances must stand together, the one an offense against the state law, and the other a different petty offense against the city ordinance; and, the two offenses being different, the offender may be proceeded against under either the city ordinance, the state law, or both. The one contemplates the preservation of the good government, order, and security of the city; the other provides for the maintenance of the public peace and dignity of the state.

"Unless it is prohibited by some express

constitutional or statutory provision, by the great weight of authority municipal corporations may, by ordinance, prohibit and punish acts which are also prohibited and punishable as misdemeanors under the general statutes of the state, or which may involve a common-law offense; and while many such ordinances contain provisions for matters peculiar to communities of dense population, which are not noticed by the general law, many others are mere municipal repetitions or re-enactments of state statutes. The latter, after much strenuous contention, are now generally recognized as valid ordinances; although some cases declare them nonenforceable as being a secondary exercise of a sovereign power, which may not be employed by a municipality without express authority. Other cases favor the implication of police power in the municipality under authority to pass laws for the public peace, safety, etc., where the offense does not vitally affect the public interests, but specially concerns the municipal welfare." 28 Cyc. 697, and cases cited.

Says Mr. Cooley: "But in these cases the control of the state is not excluded if the Legislature afterward see fit to exercise it; nor will conferring a power upon a corporation to pass by-laws and impose penalties for the regulation of any specified subject necessarily supersede the state law on the same subject, but the state law and the by-law may both stand together if not inconsistent. Indeed, an act may be a penal offense under the laws of the state, and further penalties, under proper legislative authority, be imposed for its commission by municipal by-laws, and the enforcement of the one would not preclude the enforcement of the other." *Cooley's Constitutional Limitations* (7th Ed.) 279, and cases cited.

A few cases illustrative of this principle are as follows:

In *Mayor v. Rouse*, 8 Ala. 518, the court said: "Such by-laws, though given the force of law by the charter for the purpose of municipal government, yet relate to that solely, and prosecutions for mere violation have no reference, as a general rule, to the administration of criminal justice by the state."

In *Major, etc., of Mobile v. Allaire*, 14 Ala. 400, the validity of a municipal by-law, imposing a fine of \$50 for an assault and battery committed within the city, was brought in question. *Collier, Ch. J.*, says: "The object of the power conferred by the charter, and the purpose of the ordinance itself, was not to punish for an offense against the criminal justice of the county, but to provide a mere police regulation, for the enforcement of good order and quiet within the limits of the corporation. So far as an offense has been committed against the public peace and morals, the corporate authorities have no power to inflict punishment, and we are not informed that they have attempted to abrogate it. It is altogether immateri-

al whether the state tribunal has interfered and exercised its power in bringing the defendant before it to answer for the assault and battery; for whether he has there been punished or acquitted is alike unimportant. The offense against the corporation and the state we have seen are distinguishable and wholly disconnected, and the prosecution at the suit of each proceeds upon a different hypothesis. The one contemplates the observance of the peace and good order of the city; the other has a more enlarged object in view, the maintenance of the peace and dignity of the state."

In the case of *State v. Lee*, 29 Minn. 445, 13 N. W. 913, it was held: "That an offense against a municipal by-law proceeding from the same act which also constitutes a felony under the state law is not for that reason to be considered the same offense. The two are distinct in their legal character, both as to the nature and quality of the offenses and the jurisdictions offended against." Quoting from the opinion: "One who is within the limits of a municipal jurisdiction must not only obey the laws of the state, but must adjust his conduct to the requirements of local by-laws. An act which, outside a city, would subject him to punishment by the state only, committed inside its limits, by reason of the place and the consequent aggravation attending it, will render him liable also for the additional penalty. The same act prohibited by both the city and the state may thus constitute two offenses, which are intrinsically and legally distinguishable."

In the case of *McInerney v. City of Denver et al.*, 17 Colo. 307, 29 Pac. 517, Helm, Judge, used the following language: "We encounter greater difficulty in disposing of the remaining general objection urged by counsel for petitioner, viz., that the ordinances through which petitioner's conviction took place are invalid, and therefore the police court is proceeding illegally. Great reliance is placed upon the proposition that since, by general statute, the act with which petitioner is charged is made a misdemeanor punishable by indictment or information, trial by jury, etc., the ordinances involved are obnoxious to a number of constitutional provisions touching criminal cases. The Legislature may undoubtedly delegate to municipal corporations power to adopt and enforce by-laws or ordinances on matters of special local importance, even though general statutes exist relating to the same subjects. An ordinance must be authorized, and must not be repugnant to a statute in force over the same territorial area; but if there be no other conflict between the provisions of the statute and ordinance, save that they deal with the same subject, both may be given effect. The resulting or correlative doctrine is now too firmly established to admit of serious question that the same act may constitute two offenses, viz., a crime against the public law of the state, and also a petty offense against

a local municipal regulation. The weight of authority likewise fairly sustains the view that a prosecution and punishment for one of these offenses is no bar to a proceeding for the other, though, if it be not so provided by statute, every fair-minded judge will, when pronouncing judgment in the second prosecution or proceeding, consider a penalty already suffered. Since the act constitutes two distinct offenses against separate jurisdictions, it is analogous to those cases where the same act is punishable under a congressional statute, and also under a state law. The offenses being different, there is no violation of the constitutional inhibition against putting one twice in jeopardy for the same offense. These views have already, in substance, been sanctioned by this court (*Hughes v. People*, 8 Colo. 336, 9 Pac. 50), and they are sustained by the following, among other, authorities; *Cooley*, Const. Lim. (5th Ed.) 241, 242, and note 1; *Dill. Mun. Corp.* par. 367, 368, and note 1; *Bish. St. Crimes*, par. 23; *Whart. Crim. Pl. & Pr.* 440; *State v. Lee*, 29 Minn. 453, 13 N. W. 913; *Waldo v. Wallace*, 12 Ind. 569; *State v. City of Topeka*, 38 Kan. 76, 12 Pac. 310 [59 Am. Rep. 529]; *Greenwood v. State*, 6 Baxt. [Tenn.] 567 [32 Am. Rep. 539]; *Howe v. Treasurer*, 37 N. J. Law, 145; *Mayor, etc., v. Allaire*, 14 Ala. 400; *Hamilton v. State*, 3 Tex. App. 643; *Shafer v. Mumma*, 17 Md. 331 [79 Am. Dec. 636]; *State v. Sly*, 4 Or. 277; *Johnson v. State*, 59 Miss. 543; *Wragg v. Penn. Tp.*, 94 Ill. 11 [34 Am. Rep. 199]; *McLaughlin v. Stephens*, 2 Cranch, C. C. 148 [Fed. Cas. No. 8,874]; *City v. Cafferata*, 24 Mo. 96; *Rogers v. Jones*, 1 Wend. [N. Y.] 238 [19 Am. Dec. 493]; *Cross v. North Carolina*, 132 U. S. 131, 10 Sup. Ct. 47 [33 L. Ed. 287]."

Under the prohibition ordinance of the Constitution the minimum punishment for a violation of any of its provisions is by a fine not less than \$50, and by imprisonment not less than 30 days for each offense. The punishment fixed by statute for a violation of any of the provisions of the prohibition law is: "A fine of not less than fifty dollars nor more than five hundred dollars and by imprisonment for not less than thirty days, nor more than six months." Section 4180, *Snyder's Comp. St.* 1909. The maximum punishment permitted for a violation of a police ordinance of a city of first class is as follows: "For any purpose, or purposes, mentioned in the preceding sections, the council shall have power to enact and make all necessary ordinances, rules and regulations, and they shall, also, have power to enact and make all such ordinances, by-laws, rules and regulations, not inconsistent with the laws of the state as may be expedient for maintaining the peace, good government, and welfare of the city, and its trade and commerce; and all ordinances may be enforced by prescribing and inflicting, upon inhabitants or other persons violating the same such fine,

not exceeding one hundred dollars, or such imprisonment not exceeding three months, or both such fine and imprisonment, as may be just, for any offense, recoverable with costs of suit, together with judgment of imprisonment, until the fine and costs be paid or satisfied; and any person, committed for the nonpayment of fine and costs, or either, while in custody, may be compelled to work on the streets, alleys, avenues, areas and public grounds of the city, under the direction of the street commissioner or other proper officer, and at such rate per day, as the council may by ordinance prescribe, until such fine and costs are satisfied." Section 701, Snyder's Comp. St. 1909.

Thus we see that, if a prosecution under a municipal ordinance would be a bar to a prosecution for the same act as an offense under the general criminal laws of the state, in all cases in which a prosecution is first had under the municipal ordinance, the result would be a material abridgment of the punishment which the constitutional provision and the statute imposes, and in effect it would thus virtually repeal or modify the constitutional provision and the statute. As was said by Mitchell, Judge, in *State v. Lee*, supra: "There are other considerations, founded on public policy and public necessity, which, although not controlling, are entitled to weight. The principle involved is far-reaching. There are many things besides keeping houses of ill fame which municipal corporations are authorized to suppress by ordinance, which are crimes under the general laws of the state. Now, if, on the one hand, it be held that all such ordinances are void as repugnant to the general statutes, and that a municipal corporation cannot prohibit by ordinance any act which is a crime under such statutes, the corporations would be shorn of many police powers which they have always been supposed to possess, and which are absolutely necessary to the preservation of good order within their limits. On the other hand, if it be held that a so-called prosecution under a city or village ordinance is a bar to a prosecution for the same act as a crime under the general criminal laws of the state, it would virtually amount to a repeal pro tanto of these general laws in every city, town, and village in the state. Such a sweeping abdication on the part of the state of her authority to punish crime, in favor of the uncertain and variable ordinances of every city and village, would be too alarming in its consequences to be seriously entertained. It would result in the anomaly of the same crime being liable to be punished in as many various ways as there are cities and villages in the state, and of the same crimes when committed within the limits of a city or village being punishable only by a petty fine, which, if committed in the rural districts of the state, would be

punishable by imprisonment in the state prison."

The prohibition ordinance of the Constitution and the statutes prohibiting the manufacture, sale, barter, giving away, and otherwise furnishing of intoxicating liquors exemplify the public policy of the state in relation to the traffic in intoxicating liquors, and in view of the public policy of the state, we believe that it is a proper exercise of the police power of a municipal corporation to prohibit the sale and the unlawful possession of intoxicating liquors within the confines of the corporation. Prohibiting the possession of intoxicating liquors with intent to barter, sell, give away, and otherwise furnishing the same contrary to law is so necessarily incidental and relevant to prohibiting "drumshops, drinking saloons, and other places where intoxicating liquors are sold," and is so evidently a legitimate means to that end, as to render either argument or citation of authorities to that effect superfluous, and the power so expressly granted necessarily carries with it the power to prohibit the unlawful possession for the purpose of sale.

We are of opinion that the provisions of the charter of the city of Tulsa are broad enough to, and do, include the power to prohibit by ordinances, the possession of intoxicating liquors within the confines of the corporation for the purpose of sale, barter, giving away, and otherwise furnishing contrary to law. Also, power to enforce the punishment prescribed for violation thereof.

Counsel further contend that: "The offense charged against petitioner is essentially criminal under the general laws of the state, and petitioner is entitled to a jury trial. The fact that an appeal lies to a court in which a jury trial may be had does not meet the requirements of the Constitution"—citing the case of *Callan v. Wilson*, 127 U. S. 540, 8 Sup. Ct. 1301, 32 L. Ed. 223. This important question is now for the first time presented for determination by this court.

Section 19 of the Bill of Rights provides that: "The right of trial by jury shall be and remain inviolate." Section 20 of the Bill of Rights provides that: "In all criminal prosecutions the accused shall have the right to a speedy and public trial by an impartial jury of the county in which the crime shall have been committed."

A careful examination of the authorities leads us to the conclusion that prosecutions for violations of municipal ordinances, enacted under the police power for the preservation of peace, good order, safety, and health, and otherwise promoting the general welfare within cities, have been generally prosecuted without the intervention of a jury at least in the first instance.

Judge Dillon says: "One of the questions which most frequently arises is whether the defendant is entitled to a trial by jury, and

the cases on this subject cannot all be reconciled. The general principles applicable to its solution, however, are plain. Violations of municipal by-laws proper, such as fall within the description of municipal police regulations, as, for example, those concerning markets, streets, waterworks, city officers, etc., and which relate to acts and omissions that are not embraced in the general criminal legislation of the state, the Legislature may authorize to be prosecuted, in a summary manner, by and in the name of the corporation, and need not provide for a trial by jury. Such acts and omissions are not crimes or misdemeanors to which the constitutional rights of trial by jury extend." And again: "Where the act or omission sought to be punished by imprisonment under a municipal ordinance is in its nature not peculiarly an offense against the municipality, but rather against the public at large, where it falls within the legal or common-law notion of a crime or misdemeanor, and especially where, being of such a nature, it is embraced in the Criminal Code of the state, there the constitutional guaranties intended to secure the liberty of the citizen, and the right to a trial by jury cannot be evaded by the nature of the powers vested in the municipal corporation or the nature of the jurisdiction conferred upon the municipal courts." 1 Dill. Mun. Corp. (3d Ed.) par. 433.

"It has been held sometimes that under Constitutions summary proceedings of this kind can be employed only in the trial of such offenses as are 'not embraced in the public criminal statutes of the state,' and that, where the act charged constitutes an offense against the criminal law of the state, a person charged with such act cannot be tried by a municipal court without a jury, even though such act may be a violation of an ordinance of the municipality. This view seems based on the idea that otherwise a person might be liable to be tried and punished twice for the same offense. But this reason can have no force in these states where the same act may constitute an offense against both the state and the municipal corporation, and both offenses be punished without violating any constitutional principle. In the courts where this view is held it has been denied that the test is whether the act prohibited by ordinance is embraced in and made indictable by the Criminal Code of the state, and the true criterion declared to be rather whether it may not be an act not only against the peace and dignity of the state, but also subversive of, or dangerous to, the peace, good order, safety, or health of the municipality." 27 A. & E. Enc. of Law, p. 376.

As we construe these constitutional provisions, the first means that a jury trial is preserved in all cases in which it existed at the time of the adoption of the state Constitution. It does not extend the right of trial by jury; it simply secures it in all

cases in which it was a matter of right before. The second secures to the accused in all criminal prosecutions the right of trial by a jury of the county.

A prosecution for the violation of a municipal ordinance which prohibits an act which also constitutes an offense under the general criminal law is a quasi criminal proceeding.

At the time the state Constitution was adopted, the laws in force in the territory of Oklahoma provided two modes of appeal from police courts. These provisions were as follows:

"That from any final judgment of the justice of the peace or the police judge the defendant may appeal to the probate court of the county, upon filing, within ten days from the date of the judgment, a good and sufficient bond in double the amount of the fine and costs, signed by two or more sureties to be approved by the justice of the peace, conditioned that the appellant will appear before the probate court of the next regular term thereof, and will pay and satisfy any fine and all costs that may be rendered against him in the probate court, and that he will submit himself for imprisonment if imprisonment be adjudged against him, and will obey all orders and judgments of the probate court in the disposition of the appeal; provided, however, the judgment of the probate court shall be final, unless the defendant desires to appeal on questions of law alone, then an appeal may be taken to the district court of the county as herein provided, substituting in the new bond the district court in place of the probate court. Upon the filing of said bond, either in the justice of the peace, or the probate court, the defendant must be given his liberty. I'rovided, further, if the defendant desires to appeal without giving bond as herein provided, he must be confined in jail until the appeal is disposed of; and if the defendant remain in jail before the appeal is disposed of long enough to liquidate the fine and costs of the court below, at the rate of two dollars per day, then he must be discharged and no further prosecution shall be had in the case." Section 1, c. 29, Act 1, Sess. Laws 1905; Section 7195, Snyder's Comp. St. 1909.

"In all cases before the police judge arising under the ordinances of the city, an appeal may be taken by the defendant to the district court, but no such appeal shall be allowed unless the defendant, within ten days, shall enter into a recognizance with good and sufficient sureties, to be approved by the police judge, conditioned for the personal appearance of the appellant before the district court of the county on the first day of the next term thereof." Section 432, Wilson's Rev. & Ann. St. 1903; Section 746, Snyder's Comp. St. 1909.

The first provision evidently was intended to provide a mode of appeal from justices of

peace or police judges in cities, towns, and villages organized under the provisions of chapter 15, Snyder's Comp. St. 1909. The second provision secures to the accused an unqualified right of appeal to a court in which he may have a trial by jury, requiring only a sufficient recognizance, conditioned for the personal appearance of the appellant before the appellate court on the first day of the next term thereof.

It is provided in section 10, art. 7, of the Constitution, that: "The district courts shall have such appellate jurisdiction as may be provided in this Constitution, or by law." By Act June 4, 1908 (section 1979, Snyder's Comp. St. 1909), it is provided that: "The county court shall have concurrent with the district court, appellate jurisdiction of judgments of justices of the peace and of judgments of police judges in all civil and criminal causes." The constitutional provisions simply secure the right to a trial by jury without directing the mode or manner in which it shall be enjoyed, and it is the province of the Legislature to enact laws regulating the mode in which the rights secured to the citizen by the Constitution shall be enjoyed.

A similar provision was construed in the case of the City of Emporia v. Volmer, 12 Kan. 622, wherein Judge Brewer used this language: "The statute plainly authorizes such summary proceeding in the police court. And the only question that can be raised is whether such section conflicts with the provision in paragraph 5 of the Bill of Rights, which declares that 'the right of trial by jury shall be inviolate.' Without attempting to decide as to the extent or limits of this constitutional provision, it is enough for us in this case to decide that, where the summary proceeding, authorized by statute, is in a municipal court, for the violation of one of the city ordinances, and the defendant may have an appeal, clogged by no unreasonable restrictions, to an appellate court in which he has a right to a trial by jury, this is sufficient"—citing Byers v. Commonwealth, 42 Pa. 39; McGear v. Woodruff, 33 N. J. Law, 213.

In the case of Jones v. Robbins, 8 Gray (Mass.) 329, it was said: "And we believe it has been generally understood and practiced here and in Maine, and perhaps in other states having a similar provision, that as the object of the clause is to secure a benefit to the accused, which he may avail himself of or waive, at his own election; and as the purpose of the provision is to secure the right, without directing the mode in which it shall be enjoyed—it is not violated by an act of legislation, which authorizes a single magistrate to try and pass sentence, provided the act contains a provision that the party shall have an unqualified and unfettered right of appeal, and a trial by jury in the appellate court, subject only to the common liability to give bail, or to be committed to

jail, to insure his appearance and to abide the judgment of the court appealed to. This is a necessary inconvenience, as is also the delay of the trial till the sitting of such court; they are the same and no greater than they would be in case the magistrate, instead of passing sentence, should, on examination, bind the accused over, or, as the necessary alternative, commit him to jail. Such seems to have been the construction of a similar provision in other states. Emerick v. Harris, 1 Bin. [Pa.] 416; Murphy v. People, 2 Cow. [N. Y.] 815; Jackson v. Wood, 2 Cow. [N. Y.] 819; Beers v. Beers, 4 Conn. 535 [10 Am. Dec. 186]; Sullivan v. Adams, 3 Gray, 477. It appears to us, therefore, that such a provision is not void, as a violation of that clause, which, in criminal cases, secures to the accused a right of trial by jury."

These provisions undoubtedly secure the right of appeal without unreasonable restrictions from the municipal court of the city and a trial by jury in the appellate court.

Our conclusion is that the defendant's constitutional guaranty of a trial by jury has not been impaired.

It is also contended that, as the case was prosecuted in the name of the city of Tulsa, it was in violation of section 19, art. 7, of the Constitution, which provides: "The style of all writs and processes shall be 'the state of Oklahoma.' All prosecutions shall be carried on in the name and by the authority of the state of Oklahoma." The charter of the city of Tulsa provides (section 14, art. 11): "All writs, subpoenas, or other process issuing out of the city court, shall run in the name of the city of Tulsa, and may be executed and served by the chief of police or his deputies, or policemen of said city anywhere in Tulsa county, Oklahoma." We are of opinion that the constitutional provision does not extend to prosecutions in violation of city ordinances, and that this provision of the city charter is not in conflict with the constitutional provision.

The Constitution of the state of Iowa contains a similar provision. The charter of the city of Davenport authorizes prosecutions for violations of ordinance to be instituted in the name of the city, and it was contended that this portion of the charter was in conflict with the Constitution. In the case of Davenport v. Bird, 34 Iowa, 524, it was held otherwise. Miller, Judge, delivering the opinion of the court, says: "Is it necessary, under the Constitution, that all prosecutions for violations of municipal police ordinances shall be conducted in the name and by the authority of the state of Iowa? Or, in other words, is that clause of the city charter of Davenport, which directs that 'all suits, actions, and prosecutions be instituted, commenced, and prosecuted in the name of the city of Davenport,' in conflict with the constitutional provision before referred to? We are of the opinion that it is not. This clause of the Constitution occurs

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in article 5, which treats of the judicial department of the government. This article vests and defines the judicial power of the state, establishes the tenure of office of the judges, and defines the mode of their election, fixes their salary and limits the number of judicial districts, provides for the election of an Attorney General, and other matters pertaining to the judicial arm of the state, among which is the clause under consideration. From all this it seems manifest that the requirement 'that all prosecutions shall be conducted in the same of the state of Iowa' contemplates such criminal prosecutions as shall be instituted and prosecuted before the tribunals which are provided for in that article of the Constitution under the statutes of the state. It is fitting and appropriate that prosecutions for violations of the criminal laws of the state should be carried on in the name of the government. But there is no fitness or propriety in requiring the state to be a party to every petty prosecution under the police regulations of a municipal corporation. Such a construction of this article of the Constitution seems to us to be unwarranted, and not intended by the framers of the Constitution. It was held by the Supreme Court of Pennsylvania that the word 'process,' in the twelfth section of the fifth article of the Constitution of the state, which provides that 'the style of all process shall be the commonwealth of Pennsylvania,' was intended to refer to such writs only as should become necessary to be issued in the course of the exercise of that judicial power which is established and provided for in the article of the Constitution, and forms exclusively the subject-matter of it. On the same principle we are of the opinion that the word 'prosecutions,' in the eighth section of article 5 of our Constitution, was intended to refer only to such criminal prosecutions under state laws as should be cognizable by the judicial power, which is established and provided for in that article, and that it was not intended to include prosecutions under ordinances of municipal corporations cognizable before police magistrates." See, also, *People v. Justices*, 74 N. Y. 406; *Williams v. Augusta*, 4 Ga. 509; *Ex Parte Hollwedell*, 74 Mo. 395; *Williamson v. Comm.* 4 B. Mon. (Ky.) 146; *Seattle v. Chin Let*, 19 Wash. 38, 52 Pac. 324; *Abbeville v. Leopard*, 61 S. C. 99, 39 S. E. 248; *Platteville v. McKernan*, 54 Wis. 487, 11 N. W. 798.

For the reasons stated, we conclude that the municipal court of the city of Tulsa had jurisdiction of the subject-matter and petitioner, and that petitioner's imprisonment is not illegal.

The writ of habeas corpus is denied, and petitioner is remanded to the custody of the chief of police of the city of Tulsa.

FURMAN, P. J., and RICHARDSON, J., concur.

EDWARDS v. KING.

(Supreme Court of Oklahoma. Nov. 16, 1910.)

(Syllabus by the Court.)

1. LANDLORD AND TENANT (§ 239*)—LIEN FOR RENT—WHEN AUTHORIZED.

The lien the statute creates (Mansf. Dig. § 4453 [Ind. T. Ann. St. 1899, § 2920]) for the payment of rent arises only from the relation of landlord and tenant.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Dec. Dig. § 239.*]

2. APPEAL AND ERROR (§ 1001*)—REVIEW—FINDINGS OF FACT.

Where a finding of fact by the trial court is not reasonably supported by the evidence, a judgment rendered thereon will be reversed on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3922, 3928-3934; Dec. Dig. § 1001.*]

Error from Pontotoc County Court; Joe L. Terrell, Judge.

Action by R. F. King against W. W. Edwards. Judgment for plaintiff, and defendant brings error. Reversed. Action dismissed.

B. H. Epperson and J. E. Grigsby, for plaintiff in error.

TURNER, J. On October 9, 1907, R. F. King, defendant in error, as plaintiff, sued W. W. Edwards, plaintiff in error, before a United States commissioner at Ada for \$250 rent due and to enforce his lien as landlord by attachment (alleging statutory grounds—Mansf. Dig. § 4459 [Ind. T. Ann. St. 1899, § 2926]) on the crops grown by defendant that year on certain lands alleged to have been rented by plaintiff to defendant. After answer filed, in effect, a general denial and controverting affidavit, and that defendant was holding under a five-year lease from one Henry Shields, which latter allegation was stricken, the cause was, by consent, transferred to the county court of Pontotoc county, where, after trial to the court, which resulted in judgment for plaintiff for \$89 and cost, defendant brings the case here, and assigns for error that the judgment is contrary to law, in that the evidence fails to prove the relation of landlord and tenant between plaintiff and defendant. This relation must exist, or this suit must fail. Mansf. Dig. § 4459; *Collins v. Whigham*, 58 Ala. 438.

The evidence discloses that prior to the allotment of one Johnson Gift on the lands in question defendant was in possession thereof, claiming the right thereto under a five-year lease from one Henry Shields, dated March 17, 1906; that, after allotment, on June 18, 1906, Gift died indebted to plaintiff, who qualified as his administrator, and also as guardian for his two minor children; that as such guardian under proper order of the court he sold said land, the father and mother of said Gift conveying to the pur-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

chaser about the same time their interest therein; that by parol agreement with the purchaser, in payment of his debt, plaintiff reserved the right to rent the land for the year 1907; that defendant, being in possession thereof under his lease, continued so to hold, and so far as the record discloses in no wise agreed to attorn to plaintiff. There was some conversation between plaintiff and defendant and Dr. Eby, to whom plaintiff sent defendant with reference thereto; but the most plaintiff claims is that he thought defendant "would do the right thing." In striking that part of defendant's answer setting up his lease from Shields, and excluding evidence in support thereof, we think the court erred; and, there being no evidence reasonably tending to support the finding of the court that the relation of landlord and tenant existed, the attachment must fall, and this suit be dismissed at the cost of defendant in error, who has not seen fit to favor us with a brief in this case.

It is so ordered. All the Justices concur.

(27 Okl. 534)

KUHN v. POOLE.

(Supreme Court of Oklahoma. Nov. 16, 1910.)

(Syllabus by the Court.)

1. FRAUDS, STATUTE OF (§ 60*)—AGREEMENT FOR PARTY WALL—VALIDITY.

An executory parol agreement for the erection of a party wall falls within that portion of section 3371, Mansf. Dig. Ark. (Ind. T. Ann. St. 1899, § 2305), in force in the Indian Territory prior to the admission of the state, which requires that any contract for the sale of lands or any interest in or concerning them shall be in writing, and is void.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 94, 95; Dec. Dig. § 60.*]

2. FRAUDS, STATUTE OF (§ 129*) — PAROL AGREEMENT FOR PARTY WALL.

But, where an oral agreement is made between two owners, P. and K., of adjoining lots that P. shall erect a party wall and staircase on the line between their lots and pay therefor, and that K. shall, upon using the wall, pay one-half of the cost thereof, if the wall is built before any revocation, and K. thereafter accepts the benefit of the contract and uses the wall, the contract is taken out of the statute, and an action thereon may be maintained.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 287-292; Dec. Dig. § 129.*]

3. WITNESSES (§ 388*) — IMPEACHMENT—CONTRADICTORY STATEMENTS.

Before a witness can be impeached by proof of contradictory statements made by him outside of the courtroom, his attention must first be called to the time, place, and person involved in the supposed contradictory conversation in a manner sufficiently definite that there is a reasonable certainty that the recollection of the witness will be refreshed, and his attention directed to the alleged conversation.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1233-1242; Dec. Dig. § 388.*]

4. WITNESSES (§ 392*) — CONTRADICTORY STATEMENTS—BEST AND SECONDARY EVIDENCE.

If the contradictory statement consists of a written statement, made by the witness, the writing is the best evidence of the contents of the statement; and, in the absence of a showing that the written instrument is lost or destroyed or that the person seeking to prove the contents of the same is unable to produce it in court, parol evidence as to the contents thereof is not admissible.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1249-1251; Dec. Dig. § 392.*]

Error from District Court, Craig County; T. L. Brown, Judge.

Action by C. W. Poole against W. J. Kuhn. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

W. H. Kornegay, for plaintiff in error. Seymour Riddle, for defendant in error.

HAYES, J. This action was brought by defendant in error, plaintiff below, in the United States Court for the Northern District of the Indian Territory before the admission of the state, to recover one-half the cost of the construction of a party wall. He alleges in his complaint filed in the court below that he is the owner of two certain lots in the town of Chelsea, in this state; that defendant is the owner of the lot adjoining his two said lots on the east; that during the year 1899 plaintiff entered into a contract with a firm of contractors to erect on his lots a two-story rock store building; that while said contractors were constructing said building a parol contract was made between plaintiff and defendant, whereby it was agreed that defendant should pay to the plaintiff the cost of that portion of the wall next to plaintiff in error's lot which had already been erected and the cost of tearing it down, and that plaintiff should rebuild said wall on the line between the lots of plaintiff and defendant, half of the wall to rest upon the lot of each party, and also a party staircase and sidewalk; that plaintiff should pay for same; and that defendant would pay to plaintiff half the cost thereof. Plaintiff alleges that he has fully executed the contract; that defendant has paid a portion of the cost thereof, but refuses to pay the remainder, for which he asks judgment. Defendant, by his answer, denies that he agreed to pay plaintiff anything whatever on account of the work done upon the building before the agreement was made for the construction of the party wall, and alleges the facts to be that one Hutton constructed the party wall up to the second story, and that for said work defendant was to pay one-half to the said Hutton, and that he had paid to Hutton one-half of the cost of the erection of said wall, to the second story, that, after the first story of the said wall was constructed, Hutton left the country, and the completion

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

of the wall was taken charge of by plaintiff, that defendant agreed to pay plaintiff half the cost of the erection of the wall above the first story, and that he has paid same.

The evidence of plaintiff supports all the allegations of his petition, while the evidence of defendant tends to support the allegations of his answer; but the general verdict of the jury found all the issues in favor of plaintiff, and, under the state of the evidence, the verdict is conclusive upon us upon all controverted questions of fact. Defendant demurred to plaintiff's complaint and also to his evidence, upon the ground that since the contract sued upon is not in writing and attempts to convey an interest in real estate it is violative of the statute of frauds and void. Section 3371, Mansf. Dig. Ark. (Ind. T. Ann. St. 1899, § 2305), in force in the Indian Territory at the time the alleged contract was made, provides: "No action shall be brought: * * * Fourth. To charge any person upon any contract for the sale of lands, tenements or hereditaments, or any interest in or concerning them," unless the agreement, promise or contract upon which such action shall be brought, or some memorandum or note thereof, shall be made in writing, and signed by the party to be charged therewith, or signed by some other person by him thereunto properly authorized.

Plaintiff in error cites and relies upon Walker v. Shackelford, 49 Ark. 503, 5 S. W. 887, 4 Am. St. Rep. 61, Rudisill v. Cross, 54 Ark. 519, 16 S. W. 575, 26 Am. St. Rep. 57, and Plunkett v. Meredith, 72 Ark. 3, 77 S. W. 600, to support his contention. These cases support the rule that oral agreements to erect a party wall are void, but they do not hold that, where one of the parties has executed the contract before a revocation thereof and the other has accepted the benefits therefrom, the party who has performed the contract cannot recover thereon. In 22 Am. & Eng. Encyc. of Law, p. 240, it is said: "An executory parol agreement for the erection of a party wall is void as being within the statute of frauds requiring all agreements relating to any interest in land to be in writing. But, when under such a contract the wall has been erected, the contract is no longer within the statute as between the parties who have already received its benefits, and one of them having promised to contribute to the cost of its erection, and having used the wall, is bound to contribute." The cases from Arkansas cited do not go further than the general rule just stated. In Walker v. Shackelford, supra, there was a parol agreement whereby the defendant was to use a brick wall on plaintiff's lot in erecting a building upon his own lot, and was to pay therefor a fixed sum to be paid on the completion of defendant's building. Defendant used the wall in the construction of his building and continued to use it until

it was destroyed by fire, but refused to pay therefor. The court in the opinion discusses the case both upon the theory of an action for use and occupation and of an action for damages for breach of contract to convey an interest in land; and upon the latter theory it is said: "On the other hand, regarding Walker as the purchaser of an interest in land, it is claimed that, the contract being void, no damages can be given for its breach. But here comes in the doctrine of performance—not partial performance, which probably has not the effect to take a case out of the operation of the statute—but complete performance. What was it that Walker bargained for? The use of the wall for the support of his timbers, so long as the wall should stand. This right he has enjoyed as fully as if Mrs. Shackelford had executed to him a formal conveyance. Having accepted the benefit of an act done at his request, he cannot refuse to make compensation on the ground that the contract was invalidated by the statute."

In the Rudisill v. Cross Case, a party fence had been constructed under an agreement that each party should pay half the cost thereof. After the construction of the fence, a parol agreement was made, whereby it was agreed that defendant should be released from any liability for his one-half of the cost of the party fence on condition that he would detach his own fence therefrom and build another. Defendant, however, refused to detach his fence, but upon suit of plaintiff to recover half of the cost of the partition fence he pleaded the oral agreement in defense thereof. The court held that the partition fence was real estate, half of which belonged to each party, for which defendant owed plaintiff half the cost of its construction; that the parol agreement of defendant to release his interest in the fence to plaintiff and to build a separate fence was an attempt to convey an interest in real estate in payment of that obligation, and, not having been executed, was void. And, because defendant did not detach his fence and continued to use the partition fence in violation of the parol agreement, the court said: "There was therefore no part performance of the parol agreement by appellee to release his interest in the fence that in a court of equity would have taken it out of the statute of frauds. If there was a contract resting in parol for the release of the appellee's interest in the fence to appellant, it might have been taken out of the statute of frauds by part performance by appellee by placing appellant in possession of his part of the fence under the contract, and this would have been a good equitable defense which appellee could have made in this action at law." Plaintiff in the instant case agreed to build a party wall and staircase, and to pay therefor, upon the agreement of defendant that he would pay to plaintiff one-half the cost expended by him. Plaintiff executed the contract. De-

fendant has at no time tried to revoke the contract, but has joined his building to the party wall and is using same. Had plaintiff in error refused to carry out this contract, it could not have been enforced; for, as a parol executory agreement, it falls within the statute of frauds, but defendant cannot receive and accept the benefits of the contract fully performed by plaintiff and escape payment therefor. *Stuht v. Sweesy*, 48 Neb. 767, 67 N. W. 748; *Rice et al. v. Roberts*, 24 Wis. 461, 1 Am. Rep. 195.

It is also contended that the contract falls within the statute of frauds because it attempts to charge defendant upon a promise to answer for the debt, default, or miscarriage of another, but this contention is not supported by the allegations of the complaint or by the evidence. Plaintiff seeks to recover solely upon a contract which he alleges was made between him and defendant, whereby plaintiff was to construct the wall and to pay therefor, and was to be reimbursed by defendant for one-half the cost thereof. Such is the contract he sought to prove by his evidence; and the court, in effect, instructed the jury that, unless they found that such contract was made and had been performed by plaintiff, he was not entitled to recover. This contention did not involve any promise of defendant to answer for the debt of another.

By the next assignment of error urged, complaint is made of the refusal of the court to give a requested instruction by which the jury was instructed that, before plaintiff could recover, he must prove by a preponderance of the evidence that the wall was erected by plaintiff at the request of defendant, and that defendant agreed to pay for his half of same. No prejudicial error was thereby committed, for this instruction is embraced in instruction No. 2, given by the court. Defendant requested the court to instruct the jury that they could not allow on any of the items sued on more than was asked for in the complaint, which was refused, but no prejudicial error was committed thereby, for plaintiff at no time attempted to recover for an amount in excess of that asked for in his complaint. By the eleventh assignment complaint is made of the refusal of a requested instruction, which is as follows: "In order for plaintiff to recover in this case, he must prove by a preponderance of the evidence that he actually paid for the portion of the wall sued for belonging to defendant, and he must also prove that by so doing he rendered defendant no longer liable to pay the parties doing the work." It was not error to refuse this instruction upon two reasons: First, it does not state the law applicable to the issues in the case; and, second, in so far as it does state the law, it was covered by another instruction given by the court. The burden is not upon defendant in error to prove that by his paying for the construction of the wall he rendered defendant not liable

to pay therefor. If plaintiff in error, without the knowledge and consent of defendant in error, entered into a contract with any one else, or did other acts that rendered him liable to pay any one else for any portion of the wall, such fact did not release him from his liability to defendant in error, if defendant in error had the wall constructed and paid therefor. By instruction No. 7, given by the court, the jury was told that if they found from a preponderance of the evidence that plaintiff and defendant entered into a verbal agreement to construct the wall, or any part thereof, as alleged in the complaint, and plaintiff in error agreed to pay one-half of the construction price of the wall and plaintiff had paid the cost thereof, he was entitled to recover from the defendant one-half the cost of the construction of the wall, less the amount that had already been paid to plaintiff by defendant. This instruction in connection with other instructions given correctly stated the law attempted to be submitted to the jury by the requested instructions refused. Other objections are made to the refusal of the court to give requested instructions and to the giving of other instructions, but, upon a careful examination of all the objections, we find that the instructions given by the court, taken as a whole, correctly state the law applicable to the pleadings and evidence in the case, and that no prejudicial error was committed either in the giving or refusal of instructions.

By one of the assignments of error, complaint is made of the admission of certain testimony. Isaac Hutton, one of the contractors who constructed the first story of the party wall, testified on behalf of defendant. His testimony tends to establish defendant's contention that the agreement between plaintiff and defendant and the contractors was that the party wall should be built, and that defendant should pay direct to the contractors his share of the cost of building same, and that he had paid them. For the purpose of impeaching this witness and destroying the effect of his testimony, plaintiff asked him if he did not, after he came back from Kansas, have his partner, D. B. Sutton, make out a statement against plaintiff for the work of constructing the party wall in which the witness claimed pay from plaintiff for all construction of the wall performed by the witness. The witness answered this question in the negative. He was also asked if at the time the statement was made the witness did not claim that defendant in error had never paid him anything for the construction of the wall, to which the witness answered he did not think that defendant was mentioned. D. B. Sutton was called by plaintiff, and, over the objection of defendant, was permitted to testify that he made out a written account against plaintiff for the witness Hutton, in which Hutton claimed pay for all the construction done by him on the wall, and not for half

of it. He was also permitted to testify that Hutton at that time made no claim that defendant ever paid him for any part of the wall. In the admission of this testimony, the court committed error, first, because no proper foundation was laid for the admission of oral statements made by the witness Hutton contrary to those testified to by him; and, second, because the written statement was the best evidence of its contents. The general rule prevailing in this country and recognized by practically all the state courts is that, before impeaching testimony of the character here complained of can be offered, the attention of the witness who is sought to be impeached must first be called to the time, place, and person involved in the supposed contradiction. 1 Greenleaf on Ev. (13th Ed.) § 462. The reference to the time of the contradictory statement made in the preliminary questions to Hutton was very indefinite; but, if the questions in that respect are sufficient, no reference whatever was made to the place of such statements, and the witness' memory in this respect was not refreshed, in order that he might recall the conversation and whether such claim or statement was made by him. The witness Sutton testified that the statement prepared by him for Hutton was in writing. The contents of this written statement could not be proved by parol evidence, without first establishing the loss, destruction of the instrument, or the inability of plaintiff to produce it. It cannot be said that the erroneous admission of this testimony was not prejudicial error, for the witness Hutton was an important witness to defendant in establishing his defense that his contract to pay for half of the wall was with the contractors and not with plaintiff, and that defendant had performed his contract. The incompetent evidence introduced had the tendency, if not to impeach the integrity of this witness, at least to establish that his memory was inaccurate, and that his testimony was therefore not reliable.

For this error, the judgment of the trial court must be reversed and the cause remanded.

DUNN, C. J., and WILLIAMS and KANE JJ., concur. TURNER, J., disqualified, and not sitting.

(27 Okl. 416)

BARTON et al. v. LACLEDE OIL & MINING CO.

(Supreme Court of Oklahoma. Nov. 16, 1910.)

(Syllabus by the Court.)

MINES AND MINERALS (§ 79*)—GAS LEASE—CONSTRUCTION.

The clause, "it is further agreed that, if gas is obtained and utilized, the consideration in full of the party of the first part shall be one-tenth portion of each gas well drilled on the

premises herein described when utilized and sold off the premises, payable monthly so long as the gas is to be so utilized," means one-tenth of the gross proceeds of each well when sold.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 79.*]

Error from Creek County Court; Josiah G. Davis, Judge.

Action by R. L. Barton and others against the Laclede Oil & Mining Company. Judgment for defendant, and plaintiffs bring error. Reversed and remanded.

McDougal, Lattimore & Lytle, for plaintiffs in error.

WILLIAMS, J. On the 22d day of September, 1908, the plaintiffs in error as plaintiffs instituted an action in the county court of Creek county against the defendant in error as defendant on a certain contract, which in part provided: "It is further agreed that, if gas is obtained and utilized, the consideration in full of the party of the first part shall be one-tenth portion of each and every gas well drilled on the premises herein described when utilized and sold off the premises, payable monthly as long as gas is to be so utilized." Said contract was executed on the 1st day of May, 1906, and thereafter gas was found on said premises, and on the 17th day of December, 1907, the Laclede Oil & Mining Company, as party of the first part, and the Bellevue Oil & Gas Company of Independence, Kan., as party of the second part, without the consent of the plaintiffs in error, entered into a contract wherein the defendant in error agreed to sell gas to the said Bellevue Gas & Oil Company that was discovered under the said lease with the plaintiffs in error, the same to be received by the said the Bellevue Gas & Oil Company at certain rates, it being provided "that for the gas used (by the Bellevue Gas & Oil Company) shall be paid the one-half portion of the proceeds of collection arising from the use and sale of gas each month for the month preceding." In other words, the defendant in error contracted with the plaintiffs in error that, "if gas is obtained and utilized" from their land, "the consideration in full of the party of the first part shall be one-tenth portion of each and every gas well drilled on the premises" described in said contract "when utilized and sold off the premises, payable so long as gas is to be so utilized."

The defendant in error having contracted with the Bellevue Oil & Gas Company of Independence, Kan., without the consent of the plaintiffs in error, to give it 50 per cent. for piping and selling said gas, if its contention be correct, it would result in the plaintiffs in error obtaining merely 5 per cent. of said gas when "utilized and sold off the premises." We think that the contract means just what it says, that the plaintiffs in error

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

were entitled to one-tenth of said gas when "utilized and sold off the premises," and that it was incumbent upon the defendant in error to sell and to pay the plaintiffs in error one-tenth of the proceeds.

The judgment of the lower court is reversed, and this cause is remanded, with instructions to enter judgment in favor of the plaintiffs in error. All the Justices concur.

(27 Okl. 530)

PLANTERS' MUT. INS. ASS'N v. ROSE
et al.

(Supreme Court of Oklahoma. Nov. 16, 1910.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 564*)—CASE-MADE—SERVICE.

A trial court or judge is without authority to make before the order or judgment appealed from is rendered an order extending the time within which to make and serve a case-made.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2501-2506, 2555-2559; Dec. Dig. § 564.*]

Error from District Court, Pittsburg County; Preslie B. Cole, Judge.

Action by W. M. Rose and others against the Planters' Mutual Insurance Association. Judgment for plaintiffs, and defendant brings error. Motion to strike case-made from the files. Granted.

A. S. McKennon, H. M. Armistead, and J. W. & M. House, for plaintiff in error. John T. Suggs and Stuart & Gordon, for defendants in error.

HAYES, J. This cause comes on at this time to be heard upon a motion to strike the case-made or certain parts thereof from the files. Every alleged error assigned in the petition in error and urged in the briefs for reversal of the cause is such as can be presented to this court only after the same has been presented by motion to the trial court as a ground for a new trial. The trial in the court below was to a jury. At the conclusion of the evidence, the court sustained a motion of plaintiffs in the court below, defendants in error here, to direct a verdict in their favor. Upon the court's instructing the jury to return a verdict in favor of plaintiffs, before any verdict had been returned or any judgment rendered thereon, defendant, plaintiff in error here, asked the court for 60 days' time in which to make and serve a case-made. The trial occurred on the 11th day of November, 1908. After the extension of time in which to make and serve the case was granted, the jury returned a verdict; and on the same day judgment was rendered in favor of plaintiffs. Thereafter, on the 13th day of the same month, a motion for a new trial was filed by defendant, which was not acted upon until the 5th day of December following, at which time it was overrul-

ed. The case-made was served on the 6th day of January, 1909.

The question presented at this time is whether an order extending the time in which to make and serve a case-made before the return of any verdict or the rendition of any judgment has the effect to extend the time for making a case in an appeal from an order overruling a motion for a new trial. Section 4741, Wilson's Rev. & Ann. St., provides that the case-made or a copy thereof shall within three days after the judgment or order is entered be served upon the opposite party or his attorney. Section 4742 authorizes the court or judge, upon good cause shown, to extend the time for making a case and the time in which the same may be served. At the time plaintiff obtained the order extending the time for making and serving his case, no appealable order or judgment had been rendered by the court, unless the peremptory instruction to the jury to return a verdict constitutes such an order. But prior to the adoption of the Code in this jurisdiction from Kansas it had been repeatedly held by the Supreme Court of that state that the sustaining of a demurrer to the evidence did not constitute such an order as might be reviewed on appeal without a motion for a new trial. *Gruble v. Ryus*, 23 Kan. 196; *Pratt v. Kelley*, 24 Kan. 111; *Norris v. Evans*, 39 Kan. 668, 18 Pac. 818. These decisions are controlling upon this court.

In *Gruble v. Ryus*, supra, the court said: "The demurrer to evidence and the ruling thereon is merely one step in the progress of the trial. Such ruling is a decision 'occurring at the trial,' made during the progress of the trial, and while the jury are still in their box; and where the decision sustains the demurrer, as in this case, it is equivalent to an instruction to the jury to find for the demurring party. And, while such a decision is based primarily upon a want of evidence, yet this very want of evidence may have been caused by a prior ruling excluding evidence." Every reason that would require a motion for a new trial in order to review a decision of the court sustaining a demurrer to the evidence would require such motion to review an instruction of the court directing a verdict. It follows at the time defendant made application for an extension of time, that not only the time for making the case had not begun, for that begins upon the entry of the judgment or order appealed from (section 4741, Wilson's Rev. & Ann. St.), but there had not at that time been any appealable order or judgment rendered by the court, and plaintiff in error was without any right of appeal. The right of appeal has its incipency, and the time for taking same begins to run upon the rendition of the appealable order or judgment. Section 4743, Wilson's Rev. & Ann. St. The order granted

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

plaintiff in error 60 days in which to make and serve his case. Twenty-five days of this time had expired before the motion for a new trial was overruled, and, of course, before entry of the order appealed from and before the statutory period for serving the case had ever begun to run. Suppose that the entire 60 days had expired before the making of the order denying a new trial. We would then have an anomalous condition. The order making and extending the time would have expired before the right of appeal had begun and before the statutory period expired for serving the case had begun; and, after the order denying the motion was entered, plaintiff in error would then still have had the right within three days from that time, without further order of the court, to serve his case-made, and, if he had done so, we would then have had a case in which the case was made and served after the purported order extending the time therefor expired; but it would be valid, because served within the statutory time. The statute contemplates that, when an appealable order has been rendered and entered against a party to an action, he shall have a reasonable time within which to make and serve his case for an appeal, and fixes the period that in contemplation of the statute is reasonable time at three days from the entry of the order or judgment; but the statute provides, when good cause therefor is made to appear to the judge or court, an extension of said time may be granted. In the very nature of things, a good cause cannot be made to appear for an extension, when the court or judge cannot know that the original time granted by the statute will ever begin to run, or that the party applying will ever have a right of appeal. If an order extending the time can be made before there is any right of appeal, as when the court gives or refuses to give some instruction requested by the complaining party, there is no reason why such an order may not be made when plaintiff files his petition or defendant files his answer or at any other stage of the proceeding; yet such a practice would lead to confusion and absurdities, and we think was never contemplated by the statute. We do not here decide that, when an appealable order or judgment has been rendered, the court or judge may not then upon application grant an extension of time. That question is not presented by this case. What we here decide is that the judge or court is without authority to make such an order before the judgment or order appealed from is rendered.

It follows that the motion should be sustained, and the case-made struck from the files.

DUNN, C. J., and KANE and TURNER, JJ., concur. WILLIAMS, J., not participating.

(27 Okl. 414)

MUTUAL TRUST CO. et al. v. FARMERS' LOAN & SECURITY CO.

(Supreme Court of Oklahoma. Nov. 16, 1910.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 564*)—CASE-MADE—SERVICE—EXTENSION OF TIME.

After the time allowed by law or granted by the court to make and serve a case-made for the Supreme Court expires, the court is without jurisdiction to allow a further extension of time for that purpose.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2503; Dec. Dig. § 564.*]

2. APPEAL AND ERROR (§ 614*)—CASE-MADE—SUFFICIENCY.

A certificate by the clerk of the district court, attached to what purports to be a case-made signed and settled by the trial judge out of time, to the effect that same is "a full, true, and correct transcript of the case-made in the above-entitled cause, as of record and on file in my office," is not sufficient to give to such case-made the standing of a transcript of the record duly authenticated.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 614.*]

Error from District Court, Carter County; S. H. Russell, Judge.

Action between the Mutual Trust Company and others and the Farmers' Loan & Security Company. From the judgment, the Mutual Trust Company and others bring error. Dismissed.

W. D. Gibbs, for plaintiffs in error. Bledsoe & Little, for defendant in error.

KANE, J. A motion to dismiss the petition in error in the above-entitled cause has heretofore been overruled by this court, upon the theory that the questions for review presented were such as could be considered on a transcript of the record; and that a certain certificate by the clerk of the district court, attached to what purported to be a case-made, was sufficient to enable the court to examine the errors complained of. On rehearing we are satisfied the court was in error in that regard. The grounds upon which the motion to dismiss is based are: First. The judgment was rendered for the defendant in error on the pleadings, June 26, 1909, and on July 13, 1909, the court made an order that said case-made should be filed in the Supreme Court on or before January 1, 1910, which time expired long before the petition in error and case-made was filed in this court, and no extension of said time was ever thereafter granted. Second. That this court has no jurisdiction, for the reason that judgment was rendered for the defendant in error against the plaintiffs in error upon motion for judgment upon the pleadings June 26, 1909, and the case-made was not served on defendant in error until September 30, 1909, and no extension of time was granted within three days from the date of judgment, and not until July 13, 1909, at which time

the said court was without jurisdiction to make said order or to extend the time in which a case-made could be served upon the defendant in error.

There is no serious contention that the second of the foregoing grounds is not sufficient to entitle the defendant in error to a dismissal of the petition in error, if the certificate heretofore mentioned is not sufficient to constitute what purports to be a case-made a transcript of the record. The certificate, omitting the formal parts, is as follows: "I, C. T. Vernon, clerk of the district court for said county, do hereby certify that the foregoing is a full, true, and correct transcript of the case-made in the above-entitled cause, as of record and on file in my office." We do not think this is a sufficient certificate. A transcript of the record is entirely different from the parts of the proceeding that may be included in a case-made. The case-made is designed to take up such parts of the proceedings below as the aggrieved party wishes to present for review, while a transcript of the record must contain everything that under the law is a part of the record proper. If the certificate was to the effect that the foregoing is a full, true, and correct transcript of the record, it would have been sufficient; but in its present form we believe it added nothing to the authenticity of the case-made signed and settled by the trial judge, and in no way change its character as a case-made.

The motion to dismiss is sustained.

DUNN, C. J., and WILLIAMS, HAYES, and TURNER, JJ., concur.

(27 Okl. 361)

GILLESPIE v. FRISBIE.

(Supreme Court of Oklahoma. Nov. 16, 1910.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 773*)—DISMISSAL—FAILURE TO FILE BRIEF.

Same as that of Leavitt v. Commercial National Bank, 109 Pac. 71.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3104, 3108-3110; Dec. Dig. § 773.*]

Error from Garfield County Court; James B. Cullison, Judge.

Action between J. W. Gillespie and James E. Frisbie. From the judgment, Gillespie brings error. Dismissed.

H. J. Sturgis, for plaintiff in error. H. Blasdel and W. T. Church, for defendant in error.

WILLIAMS, J. The petition in error with case-made attached was filed in this court on the 9th day of June, 1910. No briefs having been served or filed, the defendant in error

on September 9, 1910, moved to dismiss this appeal.

Up to this date, briefs neither having been filed, nor any response made to said motion, the appeal is dismissed. *Leavitt v. Commercial National Bank*, 109 Pac. 71. All the Justices concur.

(27 Okl. 522)

LATHIM v. SCHLACK.

(Supreme Court of Oklahoma. Nov. 16, 1910.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 564*)—RECORD—EXTENSION OF TIME FOR MAKING CASE-MADE.

A trial judge has no power to extend the time for making a case-made after the time fixed by the statute, or the time fixed by order of the court or trial judge extending the statutory time for making the case-made has elapsed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2503; Dec. Dig. § 564.*]

2. APPEAL AND ERROR (§ 564*)—PROCEEDINGS FOR TRANSFER—SERVICE OF CASE-MADE—TIME.

A party desiring to appeal has three days under the statute in which to serve a case-made after the entry of the judgment or order appealed from; and, unless the case-made is served within that time, or within the extension of time allowed by the court or judge within such time, the case-made is void, and will not be considered by this court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2501-2503; Dec. Dig. § 564.*]

Error from District Court, Pittsburg County; Preslie B. Cole, Judge.

Action between J. M. Lathim and G. D. Schlack. From the judgment, Lathim brings error. Dismissed.

Chester A. Linbach, for plaintiff in error. Arnote & Monk, for defendant in error.

HAYES, J. This appeal is from an order quashing a garnishee summons and discharging a garnishment after judgment. The order appealed from was rendered on the 22d day of March, 1910. On that date the court made an order allowing plaintiff in error 10 days in which to prepare and serve his case-made, the defendant 5 days thereafter in which to suggest amendments, and the case to be settled on 5 days' notice. No further action was taken in the case until the 18th day of April, 1910, on which date plaintiff in error applied for and obtained an order from the trial judge extending the time in which to sign and settle the case-made, so as to include the 20th day of April, 1910. It is not stated in this order that the time for serving the case-made is extended; and it is therefore doubtful whether the language of the order, if the order were not void for other reasons, would be sufficient to extend the time within which to serve the case-made. But, if the language of the order be treated as sufficient to include an extension of time for service of the case-made the order is void

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

for the reason that the extension of time granted therein was not allowed and the order was not made before the expiration of the period of time previously allowed by the court; that period having expired on the 1st day of April, 1910.

A trial judge, after the time for making and serving the case-made as allowed by the statute or as previously extended by the court has expired, has no power to extend further the time for making and serving a case-made. *Ellis v. Carr*, 108 Pac. 1101. And a case-made not served within the time allowed by the statute, or within an extension of time allowed by the judge or the court within that time, is void, and cannot be considered by this court. *Bettis v. Cargile et al.*, 23 Okl. 301, 100 Pac. 436.

It is also contended in the motion to dismiss that the manner of service of the case-made was defective, in that it was not served upon any of the persons designated by the statute; but since, for the reason already suggested, the cause must be dismissed, it is not necessary to consider this contention.

The cause is dismissed.

DUNN, C. J., and KANE and TURNER, JJ., concur; WILLIAMS, J., not participating.

(27 Okl. 418)

MADDOX v. DRAKE.

(Supreme Court of Oklahoma. Nov. 16, 1910.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 564*)—RECORD—MAKING AND SERVICE OF CASE-MADE—EXTENSION OF TIME.

Where the time granted by the trial court within which to make and serve a case-made expires before the case is made and served, the court thereafter is without power to grant a further extension for that purpose.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 2503; Dec. Dig. § 564.*]

Appeal from Washita County Court.

Action between C. W. Maddox and Annie Drake. From the judgment, Maddox appeals. Dismissed.

Burnette & Beets, for plaintiff in error. Smith & Wagner, for defendant in error.

KANE, J. The question involved in this case is raised by a motion to dismiss, filed by the defendant in error. The record shows that on the 19th day of November, 1908, the cause below was duly submitted to a jury and tried, and a verdict rendered in favor of the defendant in error, plaintiff below; that on the same day the defendant filed a motion for a new trial, which was overruled on the 2d day of December, 1908, and the defendant was given 60 days in which to make and serve a case-made for the Supreme

Court; that on the 2d day of February, 1909, the court extended the time within which to make and serve a case-made for a period of 60 days, and within this period the case was made and served.

The motion to dismiss must be sustained. The 60 days originally granted within which to make and serve a case-made expired on the 1st day of February, 1909. Thereafter the court was without jurisdiction to grant a further extension for that purpose.

The appeal is dismissed, at the cost of the plaintiff in error. All the Justices concur.

(27 Okl. 453)

HASSELL v. MORGAN et al.

(Supreme Court of Oklahoma. Nov. 16, 1910.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 1001)—REVIEW—VERDICT.

Where, on inspection of the record, it is apparent that the evidence does not reasonably sustain the verdict of the jury, the verdict will be set aside by this court.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3928-3934; Dec. Dig. § 1001.*]

Error from Greer County Court; Jarret Todd, Judge.

Action by G. W. Morgan against Sam Hassell and another. Judgment for plaintiff, and defendant Hassell brings error, making his codefendant a party defendant in error. Reversed and remanded.

C. C. Wells, C. G. Hornor, and J. D. Chappelle, for plaintiff in error.

HAYES, J. This action was originally brought in a justice of the peace court of Greer county by defendant in error, G. W. Morgan, against the firm of Douglas & Hassell, composed of the plaintiff in error, Sam Hassell, and defendant in error B. F. Douglas, to recover \$100 as damages for the negligent destruction of a moving picture film. From a judgment in favor of Morgan in that court, an appeal was taken to the county court, where the cause was retried; and from a judgment in favor of Morgan against both of the defendants, plaintiff in error has appealed, and has made his codefendant, Douglas, who does not join in the appeal, a party defendant in error.

One of the grounds urged for reversal is that the verdict of the jury was contrary to the evidence. We have been favored with no brief on behalf of defendants in error. In the absence of any brief by defendants in error, under the rule announced and followed by numerous cases heretofore decided by this court, we would be authorized, if upon examination of plaintiff in error's brief it is found that it reasonably sustains the errors assigned, to reverse the cause, without searching the record to find some theory up-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

on which the judgment below may be sustained. Nettograph Machine Co. v. Brown et al., 19 Okl. 77, 91 Pac. 849; Reeves & Co. v. Brennan, 106 Pac. 959; Buckner v. Oklahoma Nat. Bank of Shawnee et al., 106 Pac. 959; Ellis et al. v. Outler et al., 106 Pac. 937; Butler et al. v. McSpadden, 107 Pac. 170; Butler v. Stinson, 108 Pac. 1103. But we do not place the reversal of this case upon that ground alone. We have carefully examined all the evidence in the record, and fail to find any evidence which reasonably tends to establish that plaintiff in error was ever at any time a member of the alleged firm of Douglas & Hassell, or that he had any interest in the business in which Douglas was engaged at the time the picture film was destroyed, for recovery of which this action is prosecuted; and there is no evidence reasonably tending to establish that either Douglas or Hassell ever held Hassell out as a member of such alleged partnership, nor that representation to that effect was made by any one else. The only grounds upon which plaintiff in error could be held liable for the destruction of the picture film are that he either was a partner with his codefendant Douglas in the business at the time the film was destroyed, or had some interest in such business, or that he had held himself out, or suffered himself to be held out, as a partner in said business. There is entire absence of any evidence reasonably tending to establish any of these facts, and there is an abundance of positive evidence to the contrary. When the evidence upon which the verdict of the jury is returned is conflicting, the appellate courts will not set the verdict aside; but, when the evidence as a whole does not reasonably sustain the verdict, the verdict will not be permitted to stand. Ranney-Alton Mercantile Co. v. Hanes et al., 9 Okl. 471, 60 Pac. 294; Puls v. Casey, 18 Okl. 142, 92 Pac. 388.

The cause is reversed and remanded.

DUNN, C. J., and WILLIAMS, KANE, and TURNER, JJ., concur.

(27 Okl. 419)

WILLSON v. WILLSON.

(Supreme Court of Oklahoma. Nov. 16, 1910.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 564*)—DISMISSAL—FAILURE TO SERVE CASE-MADE.

A party desiring to appeal has three days by statute in which to serve the case-made after the judgment or order appealed from is entered, and unless such case-made is served within that time, or within an extension of time allowed by the judge or court within said time, the case will not be considered in this court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2501-2506, 2555-2559; Dec. Dig. § 564.*]

Error from District Court, Okmulgee County; W. L. Barnum, Judge.

Action between William H. Willson and Martha E. Willson. From the judgment, William Willson brings error. Dismissed.

Eaton & Biedleman, for plaintiff in error. G. E. Cassidy and E. N. Smith, for defendant in error.

DUNN, C. J. In this case error is sought to be shown in a judgment of the district court of Okmulgee county, Okl. The motion for new trial was overruled on the 2d day of April, 1910, and 90 days' extension of time given plaintiff in error within which to make and serve a case-made. A purported case-made was prepared by counsel, but was not served until July 8, 1910, or a period of about one week after the expiration of the time granted by the court. July 23, 1910, the said case-made, attached to a petition in error, was filed in this court; and on August 20, 1910, counsel for defendant in error moved to dismiss the same by reason of the fact that the case-made was not served within the statutory period of 3 days, nor within an extension of time allowed by the judge or the court within said time.

This motion must be sustained, the rule being that a party desiring to appeal has 3 days by statute in which to serve the case-made after the judgment or order appealed from is entered, and unless such case-made is served within that time, or within an extension of time allowed by the judge or court within said time, the case will not be considered in this court. Devault et al. v. Merchants' Exchange Co., 22 Okl. 624, 98 Pac. 342; London & Lancashire Fire Ins. Co. v. Cummins et al., 23 Okl. 126, 99 Pac. 654; Bettis v. Cargile et al., 23 Okl. 301, 100 Pac. 436; Ellis v. Carr, 110 Pac. 667.

The appeal is accordingly dismissed.

TURNER, WILLIAMS, HAYES, and KANE, JJ., concur.

(27 Okl. 528)

HARRILL v. PARKINSON.

(Supreme Court of Oklahoma. Nov. 16, 1910.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 1002*)—REVIEW—CONFLICTING EVIDENCE.

Where the evidence is conflicting, this court will not review the evidence, to ascertain where the weight of the evidence lies; and, if there is evidence reasonably tending to support the verdict, it will not be set aside.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.*]

Error from District Court, Wagoner County; John H. King, Judge.

Action by James Parkinson against Thomas C. Harrill. Judgment for plaintiff, and defendant brings error. Affirmed.

W. T. Hunt, for plaintiff in error. C. E. Castle (K. C. Crain, of counsel), for defendant in error.

HAYES, J. Defendant in error brought this action to recover from plaintiff in error the sum of \$762.20, alleged to be the balance due on a certain promissory note executed by plaintiff in error to defendant in error, and the interest thereon, and for a decree foreclosing his lien upon certain stock in an oil company, pledged to secure the payment of the note. The facts of the case that are uncontroverted are in substance, as follows: On May 18, 1905, plaintiff in error executed his promissory note to defendant in error for the sum of \$1,000, payable November 18, 1905, bearing interest from date at the rate of 8 per cent. per annum. On the same date he deposited with defendant in error 400 shares of stock in an oil company as a pledge to secure the payment of said note. On February 16, 1906, plaintiff in error paid on the note the sum of \$240, and on May 20, 1906, the further sum of \$100. Plaintiff in error contends that on February 16, 1906, when the payment of \$240 was made by him, an agreement was made between him and defendant in error whereby defendant in error purchased from him the 400 shares of stock pledged to secure the payment of the note for the agreed sum of \$500, for which amount his note was to be credited, in addition to the amount of \$240 paid by him, and that he promised to pay the balance due on the note within a reasonably short time. Defendant in error, on the other hand, contends that the agreement between him and plaintiff in error on said date was that the 400 shares of stock would be accepted by him at a valuation of \$500 to be applied and credited upon the note, upon the condition and in the event plaintiff in error, within a reasonably short time, which thereafter was fixed between them to be July 1, 1906, should pay the balance on the note; but that there was never any agreement by him to accept the stock at said valuation, unless the balance on the note was paid within the time agreed upon. Plaintiff in error contends, also, that he is entitled to an offset against the note for the sum of \$180.53, due by defendant in error to him on open account, and that, if he is allowed credit for all the amounts contended for by him, there is no balance due upon the note.

The whole controversy in the court below revolved around the contention of the parties as to whether the transaction between them on February 16, 1906, was one of absolute purchase by defendant in error of the stock from plaintiff in error, or whether it was conditioned upon the payment of the balance of the note within an agreed time. It is not contended that any payments other than those herein mentioned were ever made upon

the note. The evidence as to the character of the transaction relative to the stock is in sharp and irreconcilable conflict; that of defendant in error being that his agreement to take the stock was conditional upon the payment of the balance of the note within a reasonably short time, to be not later than July 1st following. The evidence of plaintiff in error, on the other hand, was equally as positive that the agreement was an absolute sale. The cause was submitted to a jury under instructions of which no complaint has been made in this court by plaintiff in error, and to which no objections were made in the court below; and the jury returned a verdict in favor of defendant in error, upon which the judgment appealed from was rendered. The rule repeatedly announced in this jurisdiction is that this court will not weigh conflicting evidence, to ascertain where the weight of the evidence lies; and, where the evidence reasonably tends to support the verdict of the jury, it will not be set aside. *Loeb v. Loeb et al.*, 24 Okl. 384, 103 Pac. 570; *Bird v. Webber*, 23 Okl. 583, 101 Pac. 1052.

Other assignments of error complain of the refusal of the court to admit certain evidence offered by plaintiff in error; but they are without sufficient merit to require discussion.

Finding no error in the record requiring a reversal of the cause, the judgment of the trial court is affirmed.

DUNN, C. J., and KANE and TURNER, JJ., concur. WILLIAMS J., not participating.

(27 Okl. 484)

DANIELS v. FRANKLIN.

(Supreme Court of Oklahoma. Nov. 16, 1910.)

(Syllabus by the Court.)

ANIMALS (§ 51*)—POUND—SALE OF IMPOUNDED ANIMALS.

An ordinance of an incorporated town made it unlawful for the owner of any horse to permit same to run at large within the town, and made it the duty of the town marshal to impound any horse found running at large within the corporate limits, and immediately upon impounding same to advertise the same for sale by posting notice thereof in the manner and for the time prescribed by the ordinance. The ordinance also made it the duty of the town marshal to keep in a book, suitable for the purpose, a complete record, showing the date and place of apprehending all animals taken up by him, the number of days such animals are impounded, the amount of fees, or a statement of the sale, amount received from such sale, and to turn all the money thus received over to the treasurer and make monthly reports, supported by his affidavit. *Held*, that failure of the marshal to keep the foregoing record prescribed by the ordinance did not render void the sale of a horse impounded by him and sold in accordance with the provisions of the ordinance for the sale of stock impounded.

[Ed. Note.—For other cases, see *Animals*, Cent. Dig. §§ 158-171; Dec. Dig. § 51.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Error from Pontotoc County Court; Joel Terrell, Judge.

Action by Albert Franklin against Joe Daniels. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

Stone & Maxey, for plaintiff in error.

HAYES, J. This is an action of replevin. Defendant in error was plaintiff below, and plaintiff in error was defendant. They will be referred to hereafter in this opinion, respectively, as plaintiff and defendant. There was a trial to a jury, but the court at the conclusion of the evidence peremptorily instructed the jury to return a verdict in favor of plaintiff. There is but little, if any, conflict in the evidence; and the facts are substantially as follows: Plaintiff raised the horse in controversy, and he was continuously in plaintiff's possession until a short time before the institution of this action, when the horse was running at large in the town of Roff, and was taken up by the town marshal and impounded. The marshal advertised the horse for sale, and, upon the date advertised, sold him at public auction to one Lewis Crisp, who was the highest bidder. Defendant purchased the horse from Crisp. Ordinance No. 40 of the town of Roff makes it unlawful for any person to permit any horse to run at large within the corporate limits of the town, and makes it the duty of the town marshal, when any such stock is found running at large within the corporate limits, to impound same. The marshal is required immediately upon impounding any animal to advertise the same for sale by posting in three public places the description of the animal and giving the time and place of the sale, which shall not be less than five nor more than seven days after the notices have been posted. Section 7 reads as follows: "It shall be the duty of the city marshal to keep in a well-bound book suitable for the purpose a complete record showing the date and place of apprehending any and all animals taken up under this ordinance with a full description of same, and the name of the owner of stock and his place of residence, if the owner be known or that the owner's name is unknown which record shall show the number of days such animal is impounded, the amount of fees or statement of the sale, amount received from such sale and to turn all money thus received over to the treasurer and make monthly reports supported by his affidavit showing a full and complete record of all animals impounded, penalties and fees received. * * *" The marshal did not keep any book of the character required by the foregoing section, and did not make any record of the impounding and sale of the horse in controversy, as required by said section. For this reason, the trial court was of the opinion that the sale was void; and for such reason gave the peremptory instruction. The ordinance in all other respects was complied with, and no

question of the validity of the ordinance was made. Whether the failure of the town marshal to comply with the requirements of section 7 vitiates the sale of the horse is the sole question of law presented for determination.

It is a general rule that failure to follow the procedure prescribed by the statute providing for taking up, forfeiting, or selling of animals running at large in violation of such statute or ordinance vitiates the sale. Failure to appoint appraisers when required, or to give notice of the time and place of sale, or to make the sale in accordance with the statute or ordinance, is fatal to the validity of the sale. 3 Am. & Eng. Encyc. of Plead. & Prac. p. 998. But the omissions complained of in this action do not pertain to matters required to be done before the sale or to matters in any way connected with the sale. That it was not contemplated that the duties prescribed by Ordinance No. 40 should constitute a part of the procedure for the sale is manifest by the plain language of the ordinance. Few, if any, of the things required therein, could be done before the sale takes place, and the property is transferred to the purchaser. The marshal, by reason of said ordinance, must not only give in the record required to be kept by him a description of the stock taken up, but he must give a statement (1) of the number of days the animal was impounded; (2) the amount of fees; (3) statement of the sale; (4) amount received from such sale; (5) turning all money thus received over to the treasurer; (6) make monthly reports, supported by his affidavit. The nature of all these duties required is such that they could only be performed after the sale had been consummated. The purpose of the notice of the time and place of the sale required by the ordinance is to give the owner of the property an opportunity to redeem his animal before the sale, as is permitted by the ordinance, by payment of the impounding fee, paying for feeding and caring for his stock while in the pound; but the record required by section 7 to be kept by the marshal can serve no such purpose. The purpose of this requirement was to secure a record upon which a settlement between the marshal and the city could be made; and so that information as to stock impounded and sold might be obtained by the public in order that persons who have had stock impounded and sold may make application at any time within six months after the sale as is provided by section 9 of the ordinance to have refunded to them all moneys arising from the sale, less the expense of impounding, feeding, and caring for the stock and the expenses of the sale. Said section makes it the duty of the marshal to make monthly reports of all such sales, and to turn over all moneys received therefrom to the treasurer of the city. The succeeding sections of the ordinance make it the duty of the treasurer to keep a separate

account of all moneys thus received by him from the marshal, and to keep a record of the date the stock were advertised, date of sale, and the amount received therefrom.

No reason could exist for vitiating the sale, because the marshal failed to keep the record prescribed by section 7 that would not require a vitiation of the sale, because he failed to make the monthly report or to turn over the funds received, or because the treasurer failed to keep the record required by the ordinance to be kept by him. These provisions of the ordinance are merely for the purpose of defining the duties of these officers of the municipality, so that the funds derived from the sales of such property may at all times be readily traced and accounted for; and, when application is made therefor by the owner of the stock impounded and sold, the remainder of the proceeds received from the sale may be refunded to him. They are not in the nature of a condition precedent to the sale.

As to any defect in the procedure before the sale, the purchaser is charged with notice of it; but no duty is imposed upon him as to the matters required by section 7 of the ordinance, and it would be impossible for the purchaser to know, at the time he bids upon the property and pays the purchase price, whether the duties prescribed by said section will be performed by the marshal. Failure of the marshal or of the treasurer to perform the duties prescribed relative to the keeping of the record might render him subject to an action for damages by the owner of stock who had suffered damages by reason of such omissions. But to hold that the purchaser runs the risk of having his title defeated by the failure of the officers to keep this record, or to perform some of the acts relative thereto, some of which from their nature are incapable of being performed until long periods have expired after the sale, would be to make titles so uncertain as to render the property sold at such sales valueless.

For these reasons, we think the trial court committed error, and the judgment is reversed and the cause remanded.

DUNN, C. J., and KANE and TURNER, JJ., concur. WILLIAMS, J., not participating.

(27 Okl. 584)

DILL et al. v. EBEE.

(Supreme Court of Oklahoma. Nov. 16, 1910.)

(Syllabus by the Court.)

1. BANKS AND BANKING (§ 49*)—INSOLVENCY—ACTION BY RECEIVER—UNPAID SUBSCRIPTIONS.

A complaint in a suit in equity, wherein E. as receiver of an insolvent bank joins certain subscribers to the capital stock of the bank as defendants, for the purpose of recovering un-

paid subscriptions, that further alleges, in substance, that the judge of the court wherein said receiver was appointed, upon application of creditors, supported by a showing that the bank was entirely insolvent, and without assets sufficient to distribute any part thereof to the bank or its shareholders, entered an order directing said receiver to retain counsel and institute proper proceedings against the defendants as subscribers for the capital stock of said insolvent bank to recover the respective amounts remaining unpaid on said subscription, or for the stock issued to them, for the benefit of all the creditors of said bank, and that this suit is filed in compliance with said order, states facts sufficient to warrant the trial court to treat such suit as one brought by the creditors of said insolvent bank, over which a court of equity has jurisdiction, and in which all the subscribers to the capital stock may be joined as defendants.

[Ed. Note.—For other cases, see Banks and Banking, Dec. Dig. § 49.*]

2. BANKS AND BANKING (§ 49*)—INSOLVENCY—SUIT IN EQUITY BY RECEIVER.

Under such circumstances, the right to maintain suit against the individual stockholders of an insolvent corporation to enforce their liability on unpaid stock subscriptions does not constitute such a plain, full, adequate remedy at law as to defeat a suit in equity against all stockholders for the collection and administration of the corporate assets as a trust fund for the benefit of the creditors.

[Ed. Note.—For other cases, see Banks and Banking, Dec. Dig. § 49.*]

Error from District Court, Okfuskee County; John Caruthers, Judge.

Suit by W. H. Ebey, receiver, against W. H. Dill and others. Judgment for plaintiff, and defendants bring error. Affirmed.

John H. Burford and C. T. Huddleston, for plaintiffs in error. Clinton A. Galbraith, Tom D. McKeown, and W. W. Witten, for defendant in error.

KANE, J. This suit was filed prior to statehood in the United States Court for the Western District of the Indian Territory, sitting at Okmulgee, on the equity side of the docket, by the defendant in error, W. H. Ebey, as receiver of the Citizens' Bank & Trust Company of Stonewall, as plaintiff, against the plaintiffs in error, M. W. Krouse, W. H. Dill, H. G. Malot, J. E. Guier, and Sam Ward, as defendants. The complaint, omitting the caption, is in words and figures as follows: "Comes now the said plaintiff, and represents that he is the duly appointed, qualified receiver of the Citizens' Bank & Trust Company of Stonewall, Ind. T., a corporation organized under the laws of the Indian Territory, and engaged in business at Stonewall prior to the time of the appointment of the plaintiff as its receiver, and that the defendants W. H. Dill and H. G. Malot are citizens of the Western District of the Indian Territory, and reside nearer to Okmulgee than any other place of holding court in said district, and for cause of action the plaintiff avers: (1) That heretofore, to wit, on or about the 14th day of March, 1905, the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

said defendants M. W. Krause, J. E. Guier, W. H. Dill, and Sam Ward, as corporators, organized the Citizens' Bank & Trust Company for the purpose of transacting a general banking and trust business at Stonewall, in the Indian Territory. That M. W. Krause was elected president, and W. H. Dill was elected vice-president, and J. E. Guier was elected cashier, of said corporation. That said officers, together with Sam Ward, constituted the first board of directors of said Citizens' Bank & Trust Company, and the articles of incorporation and certificate required by law were filed with the clerk of the United States Court of Appeals for the Indian Territory, at South McAlester, on the 13th day of February, 1905. That the objects and purposes of said corporation were set out in detail in the certificate filed as aforesaid, and said certificate also recites that the capital stock of said Citizens' Bank & Trust Company is and was \$25,000, divided into shares of \$25 each, and that \$10,000 of said capital stock had been actually paid in by the subscribers, and that the names of the stockholders and the number of shares subscribed for by them are as follows: M. W. Krause, president, 120 shares; W. H. Dill, 80 shares; J. E. Guier, 160 shares; and Sam Ward, 40 shares. That on the said 14th day of March, 1905, as the plaintiff is advised and believes, and on such information and belief alleges the fact to be, H. G. Malot subscribed for 80 shares of the capital stock of the Citizens' Bank & Trust Company, taking 40 shares of the 160 shares subscribed for by J. E. Guier, and 40 shares of the 120 subscribed for by M. W. Krause; that on the said 14th day of March, 1905, there was issued certificate No. 1 to M. W. Krause for 80 shares of the capital stock of the said Citizens' Bank & Trust Company. That on the same day certificate No. 3 for 80 shares of the capital stock of the said Citizens' Bank & Trust Company was issued to W. H. Dill; that on the same day certificate No. 5 for 80 shares of the capital stock of said Citizens' Bank & Trust Company was issued to H. G. Malot. That on the same day certificate No. 4 for 120 shares of the capital stock of the said Citizens' Bank & Trust Company was issued to J. E. Guier. That on the same day certificate No. 6 for 40 shares of the capital stock of the said Citizens' Bank & Trust Company was issued to Sam Ward. That each of the said defendants undertook and agreed to pay the said Citizens' Bank & Trust Company the par value of the respective shares of stock issued to them, namely; that M. W. Krause undertook and agreed to pay to the Citizens' Bank & Trust Company for the 120 shares of stock issued to him the sum of \$3,000. That H. G. Malot undertook and agreed to pay the par value of the 80 shares of stock issued to him, to wit, \$2,000. That W. H. Dill undertook and agreed to pay said Citizens' Bank & Trust Company

the par value of the 80 shares of stock issued to him, to wit, \$2,000. That Sam Ward undertook and agreed to pay said Citizens' Bank & Trust Company the par value of the 40 shares of stock issued to him, to wit, \$1,000. That J. E. Guier undertook and agreed to pay said Citizens' Bank & Trust Company the par value of the 120 shares of stock issued to him, to wit, \$3,000. That plaintiff is advised and believes, and on such information and belief alleges, the facts to be that the only one of said defendants who paid any part of the par value of said stock or anything of value for the stock subscribed for and issued to them was the defendant M. W. Krause, who paid to said Citizens' Bank & Trust Company the sum of \$2,000, and that, after said sum had been paid, the same was later returned to said defendant, and as plaintiff is informed and believes, and on such information and belief alleges the fact to be, the said defendants organized said Citizens' Bank & Trust Company without any purpose or intent to pay for its capital stock or any part thereof, except the \$2,000 paid in by the defendant Krause, and that this sum was paid in with distinct understanding that it should be returned after the corporation came to be a going concern, the sworn statement in the certificate of incorporation, that \$10,000 has been actually paid in to the contrary notwithstanding. (2) That the said Citizens' Bank & Trust Company was and is insolvent, and on the 20th day of February, 1906, on the petition of one of its creditors, the plaintiff was appointed by the United States Court for the Southern District of the Indian Territory receiver to take charge of all of its property and effects, and to administer the same under the order of said court for the benefit of all its creditors. That the liabilities of said Citizens' Bank & Trust Company at the time the plaintiff took charge of its assets as receiver as shown by its books were \$15,179.02. That a great deal of the paper of said Citizens' Bank & Trust Company is worthless, and a very small sum can be realized from the same and the rest of its assets. That after six months' efforts the plaintiff has only been able to collect on notes \$60.50, and to realize on other property the sum of \$100. That all of the capital stock of said Citizens' Bank & Trust Company represented as paid in, namely, \$10,000, and the assets in the hands of the plaintiff as receiver will not be sufficient to pay to the creditors of said Citizens' Bank & Trust Company. (3) That on a partial presentation of the foregoing facts to Judge J. T. Dickerson an order was made on the 15th day of August, 1906, directing the plaintiff, as receiver, to retain counsel and to institute proper proceedings against the defendants as subscribers for the capital stock of the said Citizens' Bank & Trust Company to recover the respective amounts remaining unpaid on said subscriptions, or for the stock issued to

them, for the benefit of all the creditors of the Citizens' Bank & Trust Company. That this suit is filed in compliance with said order. That the plaintiff has made demand on each of said defendants for the amount due on his subscription, or for the stock of said Citizens' Bank & Trust Company issued to him. That they have each failed, neglected, and refused to pay the same or any part thereof. That there is now due the plaintiff as receiver of the Citizens' Bank & Trust Company as unpaid subscription for capital stock issued to them, namely, M. W. Krause, \$3,000; W. H. Dill, \$2,000; H. G. Malot, \$2,000; Sam Ward, \$1,000; J. E. Guier, \$3,000, together with interest thereon from the 14th day of March, 1905. (4) That the plaintiff has no adequate remedy at law, and, unless this court takes jurisdiction of this suit in equity, he will be driven to a multiplicity of actions in trying to enforce the liability of said defendants at law, and the funds of said estate will be greatly depleted in paying the additional costs and expenses necessary in filing and prosecuting such actions. Wherefore, the plaintiff prays the decree of this court in his favor as receiver against M. W. Krause for \$3,000 and interest; against H. G. Malot for \$2,000 and interest; against W. H. Dill for \$2,000 and interest; against J. E. Guier for \$3,000 and interest, and for such other and further relief as to the court may seem just and proper." To this complaint defendant W. H. Dill filed a demurrer, upon the grounds (1) that said complaint does not state any sufficient facts to authorize a court of equity to assume jurisdiction; (2) that said complaint shows upon its face that complainant has a complete, adequate remedy at law; (3) that this defendant is entitled to a trial by jury under the law and constitution of the United States, of which he would be deprived should this cause be tried in equity; (4) for the reason that said court has no jurisdiction in equity to hear and determine the said cause.

This demurrer was overruled by the court, to which ruling the defendant Dill duly excepted. After statehood the cause was transferred from the district court for Okmulgee county to the district court for Okfuskee county, and the defendant Dill was given 30 days within which to file his answer. The answer of Dill amounted to an admission that he subscribed to the stock, and an avowment that he had paid for the same. Mr. Dill seems to be the only defendant to file any pleadings, although the record shows that defendant Malot appeared at the trial in person and by counsel. Upon trial the court found in favor of the defendant Malot and against the defendant Dill, and entered a decree dismissing the cause against Malot, and that the plaintiff W. H. Ebel, as receiver of the Citizens' Bank & Trust Company of Stonewall, do have and recover of and from the defendant W. H. Dill the sum of \$2,000,

together with interest thereon from the 14th day of March, 1905, and the costs incurred by him in this action. To reverse this judgment this proceeding in error was commenced.

The main contention of counsel for plaintiff in error is that the obligations arising, under the facts stated in the complaint are legal, and not equitable; that they are based upon the contract of subscription, and each subscription constitutes a separate obligation that may be dependent upon separate, independent, and distinct facts; that the action stated is equitable in form only, being but a bundle of separate actions, each of which grows out of and rests upon an independent and distinct transaction; that the relief prayed for is not of an equitable nature; that the object and purpose of the action is the recovery of money, and in all such cases, where a money judgment only is prayed for, a court of equity is without jurisdiction. Counsel base their contentions upon the rule laid down in the case of *Tompkins v. Craig et al.* (C. C.) 93 Fed. 885, from which they quote as follows: "The bill is demurred to upon the ground of multifariousness, and we think the objection must prevail. The statute does not impose a joint but a several liability upon the defendants, and they have no common interest in the decree asked for by the bill. The plaintiff seeks to support the action upon the ground that such a proceeding will prevent a multiplicity of suits, but this is a reason in form rather than in substance; for, while the bill has only one number upon the docket and calls itself a single proceeding, it is in reality a bundle of separate suits, each of which is no doubt similar in character to the others, but rests nevertheless upon the separate and distinct liability of one defendant. The liability is legal, and not equitable. It is based upon the stockholder's contract of subscription; an implied term of that contract being the declaration of the statute that a certain contingent liability should follow the subscription. Each contract is a separate obligation, and should be separately enforced. As was pointed out upon the argument by the learned counsel for the defendants, this is not a proceeding to determine how large the assessment should be. For obvious reasons, such an inquiry should be made in equity, and all the stockholders should be parties. But after the rate of assessment has been fixed, and the individual liability of each stockholder has thus been ascertained, the enforcement of such liability is the proper subject of a suit at law, in which the separate rights of the defendant stockholder are distinctively to be considered. *Flash v. Conn*, 109 U. S. 380, 3 Sup. Ct. 263 [27 L. Ed. 966]." We think the case at bar is somewhat distinguishable from the case above quoted from and from the other cases to the same effect cited by counsel. In those cases the receiver appointed by the court to wind up the affairs

of their respective corporations represented the corporations in the suits in which they appeared as parties. In the complaint herein there is an allegation to the effect that on a showing made to the judge who appointed the receiver that the corporation was entirely insolvent, and that there would be no funds arising from the sale of its assets for distribution amongst the stockholders, he directed the receiver to retain counsel and institute proper proceedings against the defendants as subscribers of the capital stock of said Citizens' Bank & Trust Company, to recover the respective amounts remaining unpaid on said subscription or for the stock issued to them, for the benefit of all the creditors of the Citizens' Bank & Trust Company, and that this suit was filed in compliance with said order. It seems to us the foregoing allegation brings the instant case within the rule laid down in *Fletcher et al. v. Bank of Lonoke et al.*, 71 Ark. 1, 69 S. W. 580. That was an action commenced by the receiver and other creditors for the use of the German National Bank and certain other creditors of the Bank of Lonoke against the latter bank, G. W. England, and other stockholders thereof, to recover so much of the stock of such shareholders as remained unpaid. Battle, J., in discussing the jurisdictional question raised, says: "The authority of the receiver to bring the action is not shown. We shall treat it as brought by creditors." And on that ground sustained the jurisdiction of the court. Counsel for plaintiff in error in distinguishing the Arkansas case from the case at bar quoted the foregoing statement by the judge who delivered the opinion for the court, and says: "Upon the theory that the suit was by the creditors of the bank, of course, equity had jurisdiction." These cases seem to be similar in principle at least. The Arkansas suit was instituted for the use of the German National Bank and certain other creditors of the Bank of Lonoke, and this, by positive direction of the court, was commenced by the receiver for the benefit of all the creditors of the Citizens' Bank & Trust Company, the insolvent corporation, after it was made to appear that the assets of the bank were entirely inadequate to pay the creditors. In *Lanigan v. North*, 69 Ark. 62, 63 S. W. 62, it was held that a liability created against the stockholders of a banking corporation may be enforced by a creditor in the courts of that state at law as well as in equity, and this notwithstanding it was held that "the statute definitely fixes the proportion of each debt or claims for which the stockholder is liable." As the laws of Arkansas were in force in the Indian Territory at the time the obligation herein was incurred and this suit commenced, the decisions of the Supreme Court of that state, although rendered after said laws were put in force in said territory, are entitled to great weight. The case of *Cook et al. v. Carpenter et al.*, 212 Pa. 165, 61 Atl. 799, 1 L.

R. A. (N. S.) 900, 108 Am. St. Rep. 854, was a suit in equity by Cook as assignee of an insolvent corporation against various stockholders to recover unpaid subscriptions to the capital stock. As in this case, the jurisdiction of a court of equity to determine such a cause was raised. Mr. Chief Justice Mitchell, who delivered the opinion of the court, in discussing this proposition, says: "The preliminary question is the jurisdiction in equity. Appellants insist that there is a plain, full, and adequate remedy at law by suits against the several stockholders defendant, where each can defend upon his own case, untrammelled by differences of fact in the others. That there is a remedy at law by separate actions against the respondents is undeniable; but is it a full and adequate remedy in the sense that it bars the jurisdiction of equity? The subject of the controversy is the collection and administration of corporate assets as a trust fund for the benefit of corporate creditors. Both the control of corporate matters and trust funds are in general the subject of equitable jurisdiction. As was said in *Lane's Appeal*, 105 Pa. 49, 65 (51 Am. Rep. 166): 'When insolvency and exhaustion of assets (of corporations) exist, the unpaid capital is not available to any one creditor in satisfaction of his debt, because to them the whole amount of the unpaid capital is a trust fund, which does not belong to the corporation, but to the whole body of its creditors. Hence, whether the proceeding originates in the name of one or of several or of all the creditors, the result is the same in each. The capital, when recovered, inures to the benefit of all, and must be distributed among all ratably.' This result as to collection, and still more forcibly as to distribution, is not necessarily practicable, except in equity. A bill may be filed, as in this case, by assignees representing the corporation for the benefit of creditors, or, as in *Lane's Appeal*, supra, by creditors, in their own names in behalf of themselves and others. In the latter case an action at law would present insuperable difficulties, and yet the substantial controversy is the same, and the mere difference in the nominal complainant should not oust in one case the jurisdiction that must be sustained in the other. It is earnestly argued by appellants that in all the cases where a bill has been sustained an accounting was part of the relief sought, and that equitable jurisdiction attached on this ground alone, while in the present case no accounting is asked, as the bill avers that the whole unpaid subscription will be insufficient to pay the debts. It is true that the necessity for an account is a large and influential element in equitable relief; but we do not find it said in any of the cases that its presence or absence is the conclusive jurisdictional fact. In the present case the bill sets up facts that avoid the necessity for an accounting and an assessment. But suppose the answer had denied the averments,

and thus made the necessity of an accounting and assessment an issue. That would at once have made the case one cognizable in equity. *Citizens' & M. Sav. Bank & T. Co. v. Gillespie*, 115 Pa. 564, 9 Atl. 73, was an action at law in which such necessity was part of the issue, and the case had to be sent to a new trial for the reception of incompetent evidence on that point. Whether all the unpaid capital is required for payment of debts, or only part, and, if so, how much, are matters of judgment on the evidence, and different juries are likely to differ in their conclusions. The result would be that in numerous suits by the assignees some stockholders defendant might have to pay their subscriptions in full while some paid only part, and others perhaps nothing at all. This would be incurring certain inconvenience and quite probable injustice, where the relief should not only be certain, but uniform. As was well said by the learned judge before: 'There are more than 40 defendants. Most of them live within the jurisdiction, some do not; and it is quite conceivable that there might be hundreds living without jurisdiction, and reachable by our process of law. The question involved in all the cases is substantially the same, namely: Ought the corporation to collect in its unpaid capital? It is a pure question of law, and may be decided once for all in one suit as well as in a thousand. If the balance should not be collected from all, then it ought not to be collected from any. If, on the other hand, it should be collected, then none should escape.' In the absence of chancery powers in our courts, equitable relief was afforded wherever practicable in common-law forms. When later the Legislature granted equitable powers, it was held that, if the subject of a bill was one within the proper and established jurisdiction of chancery, the invention of a new remedy in common-law form, or the extension of an old one, would not necessarily oust the equitable jurisdiction. *Wesley Church v. Moore*, 10 Pa. 273. The question of such cases turns on the completeness, adequacy, and convenience of the remedy at law, and our decisions have been liberal in the consideration of all these elements. *Kirkpatrick v. McDonald*, 11 Pa. 387; *Bierbower's Appeal*, 107 Pa. 14; *Brush Electric Co.'s Appeal*, 114 Pa. 374, 7 Atl. 794; *Johnston v. Price*, 172 Pa. 427, 33 Atl. 688; *Gray v. Citizens' Gas Co.*, 206 Pa. 303, 55 Atl. 988. In the last case it was said by our Brother Dean: 'The question raised in this case is not alone whether plaintiff has a remedy at law, for that remedy it clearly has; but whether, in view of the facts, it is an adequate one. It may be conceded that the time is not very remote in our judicial history when a wronged party sought the intervention of equity, and he could be truthfully met by the reply, "You have a remedy at law

in an action for damages." Such reply would have been the end of his bill. He would have been turned out of court for want of jurisdiction. But this answer is no longer conclusive as to the jurisdiction. Courts now go further, and inquire whether under the facts the remedy at law is not vexatiously inconvenient, and whether it is so proximately certain as to be adequate to right the wrong complained of.' Testing by this standard the numerous actions that would be required at law, and comparing that remedy with the superior certainty, uniformity, and convenience of the present bill, we have no hesitation in holding that it is a proper case for equitable jurisdiction." In *Hayden v. Thompson*, 71 Fed. 60, 17 C. C. A. 592, the right of a receiver of an insolvent national bank to maintain a bill in equity against the shareholders of the bank collectively to recover dividends which had been paid in violation of the national banking laws are upheld. The right to sue in equity was maintained on the ground of avoiding a multiplicity of actions; also, on the grounds that the suit was one to redress a fraud and breaches of trust; and generally because the remedy at law was inadequate. The doctrine is well settled in the federal courts that in those cases where the right of a court of equity to afford redress for wrongful acts depends upon the inadequacy of the legal remedy, courts of equity may exercise jurisdiction unless the legal remedy is as plain, practical, and efficient to the ends of justice and its prompt administration as the remedy in equity. In determining whether a suitor should be permitted to sue in equity, the federal courts have always attached much importance to the fact that the remedy in the latter forum, as compared with the remedy at law, will save time and expense and a multiplicity of suits, and settle finally the rights of all concerned in one litigation. *Cockrill v. Cooper et al.*, 86 Fed. 7, 29 C. C. A. 529; *Boyce's Ex'rs v. Grundy*, 3 Pet. 210, 7 L. Ed. 655; *Oelrichs v. Spain*, 15 Wall. 211, 21 L. Ed. 43; *Preteca v. Land Co.*, 50 Fed. 674, 1 C. C. A. 607. If the foregoing principles are applied to the case at bar, we think it may be safely asserted that the receiver is entitled to invoke the remedial powers and processes of a court of equity to redress the wrongs of which he complains.

All the other errors assigned by counsel for plaintiffs in error hinge upon the ruling of the court upon the foregoing, except the assignment that the judgment is not supported by the evidence. We have examined the record very carefully, and are of the opinion that there was sufficient competent evidence introduced at the trial to support the findings of the court below. The judgment of the court below is affirmed.

DUNN, C. J., and WILLIAMS, HAYES, and TURNER, JJ., concur.

(27 Okl. 407)

BALES v. McCONNELL et al.

(Supreme Court of Oklahoma. Nov. 16, 1910.)

(Syllabus by the Court.)

MASTER AND SERVANT (§ 247*)—INJURIES TO SERVANT—PROXIMATE CAUSE.

Where an employé while working close to a horse power corn sheller slipped from a wagon, and, upon striking the ground, threw out his hand to steady himself, and was injured by the hand coming in contact with certain moving cogs in the machine negligently left unguarded, held, that the unguarded cogs was the proximate cause of the injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 795-800; Dec. Dig. § 247.*]

Error from District Court, Grant County; W. M. Bowles, Judge.

Action by D. B. Bales against Gault McConnell and others. Judgment of dismissal, and plaintiff brings error. Reversed and remanded.

Sam P. Ridings and C. E. Elliott, for plaintiff in error. F. G. Walling and Parker & Simons, for defendants in error.

TURNER, J. On February 20, 1908, D. B. Bales, plaintiff in error, as plaintiff, sued Gault McConnell, George McConnell, and Oscar McConnell, defendants in error, in the district court of Grant county in damages for personal injuries. The amended petition substantially states that on February 26, 1908, defendants owned and operated a horse power corn sheller on the farm of Mrs. Dolan, in Grant county, then territory of Oklahoma, and were then and there shelling her corn at so much per bushel; that plaintiff was then and there employed by Mrs. Dolan, with the consent of defendants, "to work in and about said machine and handle the corn before and after the same was shelled"; that on said day while so employed "defendants carelessly and negligently took and removed from over and around certain wheels connected by cogs and operating together, the protector and shield from over and around said wheels, which was so placed when said machine was manufactured over and around them to protect persons coming in contact with the said machine from being injured by the said cogs and wheels"; that "plaintiff was familiar with said machine and other machines of the same make and style, and knew that said wheels and cogs on said machine were constructed with the shield over and around them to protect persons as above stated, and that plaintiff while so working in and around said machine, as above stated, after the said defendants had so removed said shield and protector, and without any knowledge on his part that the said shield and protector had been so removed, and without any knowledge on his part that the said defendants were operating said machine without said shield or protector, and without

any negligence on his part, slipped down and from a wagon standing by and near said machine, and by and near said cogwheels, which said wagon was being loaded with grain shelled by said machine, and upon alighting on the ground near said machine and near said cogwheels, and supposing that said shield and protector was over, upon, and around said cogwheels, said plaintiff reached out his hand to place the same upon said machine in order to steady himself. And from the fact that the said shields and protector had been removed from over and around said cogwheels, as above stated, and said machine was being carelessly and negligently operated by the said defendants without said shield and protector, the said hand of the plaintiff, which he had so placed upon said machine, as above stated, the same being his left hand, was caught in said cogwheels; and the said hand was torn, crushed, and mangled; * * * that defendants knew that divers persons were working around said machine near said cogs, and that it was necessary for the protection of plaintiff and other such persons to have said shield in use on said machine; that the injury was caused on account of the careless and negligent manner in which defendants were operating said machine without the use of said safety device, and that owing to their negligence, as stated, he was damaged in the sum of \$10,000, for which he prayed judgment.

To the amended petition defendants filed separate general demurrers, which were sustained, and, plaintiff refusing to plead further, judgment was rendered and entered dismissing his cause. He brings the case here. In support of their demurrers defendants contend that their negligence in failing to use the safety device was not the proximate cause of the injury. They say: "At the most, it can only be said that the exposed cogwheels gave rise to the condition which made the accident possible, and which was in fact caused by the slipping and falling of the plaintiff from the wagon standing by. A simple test to determine the rule of liability in this case is this: If the plaintiff had not slipped and fallen from the wagon, would the accident have occurred? The answer is necessarily, 'No.' Without his slipping from the wagon it could not have occurred, and hence that was the efficient and proximate cause of the accident." The court, in effect, so held. The court erred. That which caused plaintiff to slip from the wagon was the cause of his fall, but the negligently unguarded cogs was the proximate cause of his injury. In *Postal Tel., etc., Co. v. Zopfi*, 93 Tenn. 369, 24 S. W. 633, as to proximate cause, the court said: "A familiar illustration is the fall of a person upon an ice-covered pavement into an open cellar. In such case the ice is the cause of the fall, but the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

open cellar may cause an injury which, but for it, would not have occurred." In *Postal Tel., etc., Co. v. Zopf*, supra, plaintiff sought to recover damages for personal injuries sustained by his minor daughter at the hands of the defendant company, alleging loss of her services. The facts substantially were that defendant had negligently left a telegraph pole lying between the platform and the first stepping stone leading from his front gate to the pike; that his little daughter on her way home from school on a rainy day in stepping over the pole to pass in at the gate stepped upon the platform, slipped, lost her balance, fell upon the pole, and was injured. On the question of proximate cause the court charged the jury, concerning which the Supreme Court said: "We think there is no error in the charge thus given, and the trial judge drew a proper distinction between the cause of the fall and the proximate cause of the injury. This is well illustrated in the case of *Deming v. Cotton Compress Co.*, 90 Tenn. 353 [17 S. W. 89, 13 L. R. A. 518]." And affirmed the judgment of the trial court.

This case is cited and followed in *Anderson v. Miller*, 96 Tenn. 35, 33 S. W. 615, 31 L. R. A. 604, 54 Am. St. Rep. 812, concerning which the court said: "In *Postal Tel. Co. v. Zopf*, 93 Tenn. 374 [24 S. W. 633], the same distinction is illustrated where the fall of a young girl was caused by the slippery condition of a walkway, but the injury proximately resulted from the telegraph company negligently leaving its pole where she fell upon it, and received an injury which would not have resulted but for the presence of the pole, even though she had fallen. In that cause a hypothetical case is put to further illustrate the distinction of a person falling upon an ice-covered pavement into an open cellar. In such case the ice is the cause of the fall, but the open cellar may cause an injury which, but for it, would not have occurred." *Rosenbaum v. Shoffner*, 98 Tenn. 624, 40 S. W. 1086, was a suit in damages for the death of plaintiff's husband. The material facts were that deceased, Daniel P. Shoffner, went into the storehouse of defendant in Memphis for the purpose, among others, of buying a stove. To ascertain the quantity of pipe that would be required to set it up, he looked at the wall to estimate the distance, and, while so doing and walking backwards, he stumbled and fell into an elevator shaft negligently left unguarded by the proprietor of the store, and sustained injuries from which he died. There was an exception to the following charge: "If you find these facts, then you are instructed that the proximate cause of the injury and death of the deceased was the negligence (if such you find) of the defendant in failing to guard said elevator shaft or opening into which the deceased, Shoffner, fell, and not the fall caused by stumbling over said platform, your verdict should be for the plain-

tiff," which the court in sustaining said: "This, we think, is a correct exposition of the law. The stumbling on the platform was the cause of the fall, but it might not have been injurious but for the open elevator shaft, and if that was negligently left open, and in consequence the deceased was killed, the defendant would be liable. *Postal Telegraph Co. v. Zopf*, 93 Tenn. 372-375 [24 S. W. 633]; *Anderson v. Miller*, 96 Tenn. 45 [33 S. W. 615, 31 L. R. A. 604, 54 Am. St. Rep. 812]."

In *City of Crawfordsville v. Smith*, 79 Ind. 308, 41 Am. Rep. 612, the material facts were that one of the streets of the city ran to the brink of an excavation 25 feet deep, on each side of which was College street graded and graveled and open to travel within a yard of the steep banks of the cut; that the city had negligently suffered it to remain open and unguarded; that on the night of the accident while plaintiff was driving along College street using due care, his horse took fright, wheeled around, threw him from the buggy, ran away and into the excavation, and was killed. The contention was there, as here, that the action could not be maintained because the negligence in leaving the excavation unguarded was not the proximate cause of the injury complained of, but the court held not so, and affirmed the judgment of the lower court in favor of plaintiff.

In *Campbell v. City of Stillwater*, 32 Minn. 308, 20 N. W. 320, 50 Am. Rep. 567, the material allegations of the complaint were that the railroad company, with the consent and permission of the defendant city, had its track and operated its railroad along the side of and in places lengthwise upon one of the streets of the city; that owing to its construction it was a dangerous place for a horse with a carriage to go upon; that it was without fence or barrier between the part of the street occupied by the track and the part not so occupied to prevent horses running upon it; that as plaintiff in his buggy was driving his horse along the street near said part of the track his horse suddenly frightened by a car moving along the track, and, notwithstanding plaintiff's efforts to prevent him, ran upon the track where it was laid on and along the street, overturned the buggy, and injured plaintiff. One of the grounds of demurrer which was sustained was that the frightening of the horse by the moving car, and not the negligence of the city to properly guard the street, was the proximate cause of the injury, but the court held not so, and reversed the trial court. To the same effect, see *Hey v. Philadelphia*, 81 Pa. 44, 22 Am. Rep. 733; *Baldwin v. Greenwood Turnpike Co.*, 40 Conn. 238, 16 Am. Rep. 33; *City of Atlanta v. Wilson*, 59 Ga. 544, 27 Am. Rep. 396.

We are therefore of opinion that when plaintiff slipped from the wagon, and, upon striking the ground, threw out his hand to

steady himself, if the cogs had been covered, he would not have been injured; that, as they were negligently left uncovered, he was injured, and hence such negligence was the proximate cause of the injury.

The cause is accordingly reversed and remanded. All the Justices concur.

(27 Okl. 424)

St. LOUIS & S. F. R. CO. v. STATE et al.
Supreme Court of Oklahoma. Nov. 16, 1910.)

(Syllabus by the Court.)

RAILROADS (§ 225*)—RAILROAD COMMISSION
—POWERS—SWITCHES.

It is beyond the police power of a state to compel a railway company to put in switches at its own expense on the application of the owners of any elevator erected within a specified limit, and section 18 of article 9 of the Constitution does not attempt to confer such power upon the Corporation Commission.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 225.*]

Appeal from State Corporation Commission.

Proceedings by the St. Louis & San Francisco Railroad Company against the State of Oklahoma and Charles Cottar to review an order of the Corporation Commission. Judgment for defendants, and the railroad company appeals. Reversed.

W. F. Evans, E. T. Miller, and R. A. Kleinschmidt, for plaintiff in error. Geo. A. Henshaw, Asst. Atty. Gen., for defendants in error.

KANE, J. This proceeding was commenced to review an order of the Corporation Commission requiring the plaintiff in error to extend track privileges to the complainant elevator situated on the right of way of the railway company. The Corporation Commission based its order upon the finding that the complainant was discriminated against by the railway company in not being granted the same privileges on the right of way of the company adjoining its switch track as were granted to certain other elevators already located thereon, and the purpose of the order was to put the parties upon an equal footing. The order required the railway company to pay for extending switch facilities to the complainant's elevator, with the exception that the complainant was to pay for the cross-ties and grading.

It is claimed by counsel for the Corporation Commission that the authority to make such an order is conferred upon the commission by section 18, art. 9, of the Constitution, governing unjust or unreasonable discrimination. In C. & P. Ry. Co. v. State et al., 23 Okl. 94, 99 Pac. 901, this court had occasion to examine a question similar to the one presented by the record in the instant case. In that case the complainant

sought to require the railway company to build a side track to its place of business, after being refused a location upon its right of way in order to give it equal facilities with others engaged in said business, who were permitted by the railway company to use the right of way. It was held that "the fact that a railroad permitted the location of an elevator, maintained by a private corporation, on the industrial track on the right of way, does not render its refusal to construct, at its own expense, a side track to a competing elevator, located off the right of way, an unlawful discrimination, within Const. art. 9, § 18." The foregoing case was followed in A., T. & S. F. Ry. Co. v. State et al., 24 Okl. 618, 104 Pac. 908. Since handing down the opinions in those cases the Supreme Court of the United States, in Mo. Pac. Ry. Co. v. State of Nebraska, 217 U. S. 196, 30 Sup. Ct. 461, 54 L. Ed. 727, has passed upon the power of the state of Nebraska to compel a railroad company to put in switches at its own expense on the application of owners of elevators erected within a specified limit under a statute which by its terms required them to do so. In that case it was held: "It is beyond the police power of a state to compel a railroad company to put in switches at its own expense on the application of the owners of any elevator erected within a specified limit. It amounts to deprivation of property without due process of law; and so held as to the applications for such switches made by elevator companies in these cases under the statute of Nebraska requiring such switch connections."

The question involved in the instant case has been passed upon several times by this court, and now that its decision thereon has been followed by the Supreme Court of the United States, we trust that the Corporation Commission will no longer consider it an open one, and will follow the rule laid down in the foregoing cases in cases of that class that may hereafter come before it.

The order of the Corporation Commission is reversed.

DUNN, C. J., and WILLIAMS, HAYES, and TURNER, JJ., concur.

(27 Okl. 412)

J. I. CASE THRESHING MACH. CO. v.
OATES, Sheriff.

(Supreme Court of Oklahoma. Nov. 16, 1910.)

(Syllabus by the Court.)

1. TAXATION (§ 511*)—PERSONS LIABLE—
TRANSFER OF PERSONALTY BEFORE PAYMENT
OF TAX.

(a) Under the laws in force in the territory of Oklahoma (section 5920, Wilson's Rev. & Ann. St. 1903), if any person in said territory, after his personal property was assessed and before the tax thereon was paid, should sell

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

all of the same to any party and not retain sufficient to pay the tax thereon, the tax for that year was a lien on such property. (b) Although the party to whom such personalty was sold had a mortgage lien thereon, yet if he did not acquire title thereto by virtue of a foreclosure of said lien, but by a voluntary sale made by the mortgagor to the mortgagee in satisfaction of said mortgage indebtedness, under section 5920, supra, a tax lien was fastened on said property for the unpaid tax for such year.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 947-949; Dec. Dig. § 511.*]

(Additional Syllabus by Editorial Staff.)

2. APPEAL AND ERROR (§ 1011*)—REVIEW—FINDINGS.

Where the evidence is oral and conflicting and the court's finding of facts is general, it is a finding of every special thing necessary to sustain the general finding, and is conclusive upon the appellate court upon all doubtful and disputed questions of fact, having the same force as such a finding by a jury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.*]

Error from District Court, Woods County; John L. Pancoast, Judge.

Replevin by the J. I. Case Threshing Machine Company against D. C. Oates, Sheriff. Judgment for defendant, and plaintiff brings error. Affirmed.

Robberts & Curran, for plaintiff in error. Claud McCrory and W. M. Bickel, for defendant in error.

WILLIAMS, J. In May, 1904, and prior thereto, the plaintiff in error held a chattel mortgage on certain chattels given by the mortgagor for the purchase price of part of said chattels, said mortgage covering other property of the mortgagor. During said month the mortgagor delivered the property covered by the mortgage to plaintiff in error in settlement of the indebtedness secured by said mortgage. In June, 1904, two tax warrants were issued against mortgagor, one being for the last half of the personal tax of 1903 in the sum of \$14.18 and the other for the personal tax against mortgagor for 1904 in the sum of \$20.83. Said tax warrants were delivered to the sheriff, who in June, 1904, levied said warrants and took possession of said property, and was about to advertise and sell the same when the plaintiff in error commenced its action in replevin to recover said property. As to whether the mortgagor had other property than that in controversy at the time he delivered it to the mortgagee, that was a controverted fact on the trial, and under the general verdict such fact was found in favor of the defendant in error. Section 5920, Wilson's Rev. & Ann. St. 1903, provides: "If any person in this territory, after his personal property is assessed and before the tax thereon is paid, shall sell all of the same to any one person, and not retain sufficient to pay the taxes thereon, the tax for that year shall be a lien

thereon, or if such property is about to be sold at auction, or about to be sold at cost, then in either of such events the tax thereon shall at once become due and payable, and the county treasurer shall at once issue a tax warrant for the collection thereof, and the sheriff shall forthwith collect it as in other cases. The one owing such tax shall be civilly liable to any purchaser of such property for any tax he owes thereon, but the property so purchased shall be liable in the hands of the purchasers for such tax: Provided, however, if the property be sold in the ordinary course of retail trade, it shall not be so liable in the hands of the purchasers." The trial was had in the lower court without the intervention of a jury, resulting in a general finding in favor of the defendant in error. It has been time and again held by this court that, where the evidence was oral and conflicting and the finding by the court is general, such a finding is a finding of every special thing necessary to sustain the general finding, and that such finding is conclusive upon the appellate court upon all doubtful and disputed questions of fact, and that such finding made by a court without the intervention of a jury has the same force and effect as such finding by a jury. *McCann v. McCann et al.*, 24 Okl. 264, 103 Pac. 694; *Seward v. Casler et al.*, 24 Okl. 275, 103 Pac. 740.

Under the laws in force in said jurisdiction, the title to mortgaged personalty remained in the mortgagor; the mortgagee thereby having a lien thereon. The plaintiff in error acquired title to said property by virtue of a voluntary sale, and not by any foreclosure of said mortgage lien. The language of section 5920, supra, is that if any person after his personal property is assessed, and before the tax thereon is paid, shall sell all of the same to any person and not retain sufficient to pay the taxes thereon, the taxes for that year shall be a lien thereon. Under the general finding of the lower court, there appears to be no reversible error in the record, and the judgment of the lower court is affirmed.

(27 Okl. 405)

NIKKEK v. CONAWAY.

(Supreme Court of Oklahoma. Nov. 16, 1910.)

(Syllabus by the Court.)

VENDOR AND PURCHASER (§ 351*)—FAILURE TO PUT IN POSSESSION—MEASURE OF DAMAGES.

In a suit in damages by a vendee against his vendor for the breach of a parol contract to put him in possession of land purchased, the measure of plaintiff's damage is the value of the use of the land for the time the vendor wrongfully withheld possession.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 1047-1054; Dec. Dig. § 351.*]

Error from Custer County Court; A. H. Latimer, Judge.

Action by C. M. Conaway against C. J. Nikkel. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

Geo. T. Webster, for plaintiff in error. J. W. Lawter, for defendant in error.

TURNER, J. In March, 1908, C. W. Conaway, defendant in error, sued C. J. Nikkel, plaintiff in error, before a justice of the peace in Custer county in damages, and in his bill of particulars stated, in substance, that said Nikkel on November 13, 1907, by warranty deed, conveyed him a certain piece of land in said county, subject to the tenancy of one Jacobs, whose term expired January 1st thereafter; that at the time of the execution and delivery of said deed defendant in parol obligated himself to put plaintiff in possession of said land after said date, but neglected and refused to do so; that as part payment for said land plaintiff deeded and gave defendant possession of a certain residence in Weatherford, and temporarily secured a vacant house in the neighborhood of said land, and moved his personal property thereto, which, by reason of defendant's failure to put him in possession at the stipulated time, plaintiff was compelled to move to his farm in Custer county, to his damage \$200. After answer filed there was judgment for plaintiff, and again on trial anew in the county court, to which the cause was appealed, there was judgment for plaintiff for \$50 and costs, and defendant brings the case here.

To maintain the issues on his part, plaintiff, after proving the contract and its breach, and that he had been kept out of possession from January 1 to February 1, 1908, over objection, was permitted to prove as his damage that, owing to defendant's failure to put him in possession, he was compelled to move twice with all his household goods, and the cost incident thereto. This was error, and defendant's assignment that the judgment is contrary to law is well taken. Plaintiff's measure of damage was the value of the use of the land during the time possession thereof was wrongfully withheld from him (*Craggs v. Earls*, 8 Okl. 462, 58 Pac. 637), or, in other words, the reasonable rental value of the land for that time (29 Am. & Eng. Enc. Law, 705; *Patterson v. Hulings*, 10 Pa. 506; *Hibbard v. Smith*, 17 B. Mon. [Ky.] 53; *Brown et al. v. Grady*, 16 Wyo. 151, 92 Pac. 622; *Gilmore v. Hunt's Adm'r*, 66 Pa. 321; *Parsons v. Lunsford et al.*, 55 S. W. 885, 21 Ky. Law Rep. 1536).

As there was no testimony as to what that was, the judgment of the trial court is reversed, and the cause remanded. All the Justices concur.

(27 Okl. 427)

DUNCAN v. McALESTER-CHOCTAW COAL CO.

(Supreme Court of Oklahoma. Nov. 16, 1910.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 977*)—REVIEW—DISCRETION OF COURT—MOTION FOR NEW TRIAL.

This court will not reverse the ruling of the trial court granting a new trial, unless it can be seen beyond all reasonable doubt that the trial court has manifestly and materially erred with respect to some pure, simple, and unmixed question of law, and that except for such error the ruling of the trial court would not have been so made. The Supreme Court will very seldom and very reluctantly reverse the decision or order of the trial court which grants a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3865; Dec. Dig. § 977.*]

Error from District Court, Pittsburg County; Preslie B. Cole, Judge.

Action by H. L. Duncan against the McAlester-Choctaw Coal Company. Judgment for plaintiff was set aside, and a new trial granted, and plaintiff brings error. Affirmed and remanded.

Wallace Wilkinson, for plaintiff in error.

DUNN, C. J. This case presents error from the district court of Pittsburg county, and was begun April 5, 1907, by plaintiff in error as plaintiff filing a complaint in the office of the clerk of the United States Court for the Central District of the Indian Territory at McAlester. The action was one for damages growing out of the alleged negligence of defendant in the operation of a coal mine. The plaintiff alleges he was injured by an explosion of gas which had been allowed to accumulate in the said mine by and through the carelessness and negligence of defendant in failing to properly ventilate. The averments of the complaint are all denied in the answer of the defendant, and the case on the issues made was duly admitted to a jury, which on the evidence produced by the respective parties returned a verdict for plaintiff in the sum of \$1,000. Defendant filed a motion for a new trial, setting out that the verdict of the jury was contrary to the law and the evidence. Upon argument, the court, after considering the same, vacated and set aside the verdict, and granted the defendant a new trial, whereupon plaintiff prepared a case-made and has presented the same to this court praying a review of the order so made.

An inspection of the face of the record discloses that, while the evidence is conflicting, there was ample to require the submission of the cause to the jury and to sustain the verdict returned. The court, in setting aside the verdict, made no comment, and we are not advised what specific grounds were urged and considered by the court as sufficient to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

justify its action. In what particular it appeared to the court that the verdict was not sustained by sufficient evidence, whether on account of the credibility of the witnesses, or other matters appearing on the trial, cognizant to the trial court, but not to us, it appeared that there had not been a fair trial. We cannot say. The rule which has been adopted by this court in cases of this character is announced in the syllabus to the case of Hogan et al. v. Bailey, 110 Pac. 800, as follows: "This court will not reverse the ruling of the trial court granting a new trial, unless it can be seen beyond all reasonable doubt that the trial court has manifestly and materially erred with respect to some pure, simple, and unmixt question of law, and that except for such error the ruling of the trial court would not have been so made. The Supreme Court will very seldom and very reluctantly reverse the decision or order of the trial court which grants a new trial."

No brief is filed on the part of defendant in this court, but counsel for plaintiff state in the brief filed that the only question presented by the motion for new trial, or that could have been properly considered on the hearing of the said motion, was whether the verdict was contrary to the evidence. The sixth ground in the paragraph providing for a new trial (section 5825, Comp. Laws 1909) is: "That the verdict * * * is not sustained by sufficient evidence or is contrary to law." And it is asserted by counsel that it is possible that this court will hold that the language used in the motion filed will come within the terms of this section of the statute. It does not come within any other, and was doubtless considered by the court as coming within this one. It challenged the legal sufficiency of the evidence to sustain the conclusion to which the jury arrived.

The identical question here raised was before the Supreme Court of Kansas in the case of Atyeo v. Kelsey, 13 Kan. 212. A new trial was granted by the trial court, and appeal taken. The Supreme Court of that state, in the consideration of the case, speaking through Mr. Justice Valentine, said: "The question is discussed in the brief of counsel for plaintiff in error as though the new trial was granted solely upon the ground that the verdict was not sustained by sufficient evidence. Now the record does not show that the new trial was granted upon this ground alone; but, for the purpose of this case, we will suppose that it was, and still we do not think that we can reverse the ruling of the court below. The evidence was conflicting and contradictory, and while we think the preponderance of the evidence sustains the verdict, still we cannot reverse the ruling of the court below for that reason (Anthony v. Eddy, 5 Kan. 127; Field v. Kinnear, 5 Kan. 233, 238; Owen v. Owen, 9 Kan. 91, 96); for the preponderance is not great. Be-

fore we would reverse in such a case, the preponderance of the evidence would have to be so overwhelmingly great that it would show an abuse of judicial discretion on the part of the court below in setting aside the verdict and granting a new trial. Where a new trial has been granted, both parties have another opportunity of having a fair and impartial trial upon the merits of the action. But where a new trial has been refused, the matter is ended, unless a reversal can be had. Hence new trials should be favored, instead of being disfavored, wherever any question can arise as to the correctness of the verdict. As a rule, no verdict should be allowed to stand unless both the jury and the court trying the cause can say that they believe that the verdict is correct. While the question is before the jury, they are the sole and exclusive judges of all questions of fact; but when the matter comes before the court upon a motion for a new trial, it then becomes the duty of the court to determine for itself whether the verdict is sustained by sufficient evidence or not (Gen. St. p. 687, § 306, subd. 6), and the decision of the trial court in such a case has almost controlling force with the appellate court."

The foregoing discussion, and that contained in the case of Hogan et al. v. Bailey, supra, along with the authorities therein cited, in our judgment make it clear that where a trial court, in the exercise of a sound discretion, grants a new trial, except in cases where the question is one involving a pure, simple, and unmixt question of law, this court will not reverse such ruling, unless it can be seen beyond all reasonable doubt that the trial court has clearly committed error therein; for, as was said by this court in the case of Hogan et al. v. Bailey, supra: "Not only must the jury be satisfied of the righteousness of the conclusion to which it arrives, but unless that conclusion meets the affirmative, considerate approval of the mind and conscience of the court. It should not, where challenged, be permitted to stand."

The order of the trial court is therefore accordingly affirmed, and the case is remanded to the district court of Pittsburg county.

TURNER, KANE, and HAYES, JJ., concur. WILLIAMS, J., not participating.

(27 Okl. 461)

FRED MILLER BREWING CO. v.
KELLY.

(Supreme Court of Oklahoma. Nov. 16, 1910.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 773*)—DISMISSAL—
FAILURE TO FILE BRIEF.

Syllabus same as that in Leavitt v. Commercial National Bank, 109 Pac. 71.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 773.*]

Error from District Court, Grant County; W. M. Bowles, Judge.

Action between the Fred Miller Brewing Company and C. F. Kelly. From the judgment, the brewing company brings error. Dismissed.

A. M. Mackey, for plaintiff in error. Sam P. Ridings, for defendant in error.

WILLIAMS, J. The petition in error with case-made attached was filed in this court on the 8th day of November, 1909. No brief having been served or filed, the defendant in error on July 28, 1910, moved to dismiss this appeal. Over 40 days have expired, and no response has been made to said motion.

The appeal is therefore dismissed. *Leavitt v. Commercial National Bank*, 109 Pac. 71. All the Justices concur.

(27 Okl. 431)

BRUMMAGE v. KENWORTHY.

(Supreme Court of Oklahoma. Nov. 16, 1910.)

(*Syllabus by the Court.*)

EXEMPTIONS (§ 45*)—PROPERTY EXEMPT—"TOOLS" AND "APPARATUS" OF TRADE.

A paper cutter, weighing 685 pounds, and a card cutter, weighing from 3 to 8 pounds, both being machinery operated by hand, belonging to, used, and necessary in conducting the business of a printer, the head of a family residing in the state, are exempt under subdivision 5, § 3346, Comp. Laws 1909, providing that there "shall be reserved to every family residing in the state exempt from attachment or execution and every other species of forced sale for the payment of debts: * * * Fifth, all tools, apparatus, and books belonging to and used in any trade or profession."

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. §§ 56-61; Dec. Dig. § 45.*

For other definitions, see Words and Phrases, vol. 1, pp. 439, 440; vol. 8, pp. 7000-7005; vol. 8, p. 7817.]

Error from Logan County Court; J. C. Strang, Judge.

Action between Ben Brummage and William Kenworthy. From the judgment, Brummage brings error. Affirmed.

H. C. Olds, for plaintiff in error. Devereux & Hildreth, for defendant in error.

DUNN, C. J. This case presents error from the county court of Logan county, where it was tried on appeal from a judgment rendered on a trial before a justice of the peace. The trial was had upon an agreed statement of facts, and the primary question presented to us for our consideration is whether the following statute (section 3346, Comp. Laws 1909), which provides: "The following property shall be reserved to every family residing in the state exempt from attachment or execution, and every other species of forced sale for the payment of debts: * * * Fifth, all tools, apparatus and books belonging to and used in any

trade or profession"—exempts to the plaintiff one paper cutter, weighing 685 pounds, one card cutter, weighing from 3 to 8 pounds, both of said machines being operated by hand, under the agreed statement of facts, which shows that, at the time the property was taken and sought to be sold by forced sale for the payment of his debts, "the plaintiff was the head of a family; that he runs a printing house in Guthrie, Okl., in a room 25 by 100 feet in size on Harrison avenue in said city; that he had an equipment consisting of one cylinder press, one job press, one small electric motor, type, and paper cutter, one card cutter, stock, etc.; that the goods taken by the constable were necessary to the conducting of said printing house; that the plaintiff is a practical printer, and a member of the Typographical Union, works at his trade therein himself, and employs printers and pressmen to assist him when needed; that he derives his principal support for himself and family from the proceeds of his printing house; that he is the owner of 160 acres of land in Logan county, Okl., which has a mortgage on it of \$1,700; that he purchases raw material from wholesale houses, and manufactures the same into finished products on orders from his customers, such as briefs for lawyers, letter heads, bill heads, note heads, cards, and all work done by printing houses of like character; that the plaintiff kept in stock a few blanks and legal forms to sell to the public generally; that the tools of a journeyman printer are his stick, his rule, his pinchers, and knife."

From the foregoing agreed statement plaintiff was by the parties classed as a journeyman printer, and it was agreed that the tools of one following that trade were the stick, rule, pinchers, and knife. Under this stipulation it is manifest that the article in question did not fall within the list made, and if this stipulation were deemed by the parties to be a limitation upon our considering anything else than these exempt to the plaintiff, there not only is no controversy presented to this court, but there was none presented to the lower court, and hence it would be tantamount to an agreement that the articles in question were not exempt, but were subject to the levy and sale. Such a conclusion would be inadmissible, as absurd; and the question therefore arises, if the machinery mentioned does not fall within the scope of being properly denominated "tools," will it come within the range of the term "apparatus," as applied to one following the occupation and situated as was plaintiff?

The language of the statute of Texas (Sayles' Ann. Civ. St. 1897, art. 2335) in reference to exemptions under this class is practically identical with our own, and provides that "all tools, apparatus and books belonging to any trade or profession" are exempt from forced sale. Considering the word "ap-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

paratus," in the case of *Willis & Bro. et al. v. Morris et al.*, 66 Tex. 628, 1 S. W. 799, 59 Am. Rep. 634, the Supreme Court of that state said: "The word 'apparatus,' used in the statute, may take a wider range, and embrace such minor machinery as may be operated by hand, and such as courts of high authority have held not to be included under the term 'tools,' as used in similar enactments." And in considering the same language in the case of *Green et al. v. Raymond et al.*, 58 Tex. 80, 44 Am. Rep. 601, the Supreme Court said: "The settled policy has ever been to make liberal exemptions of property from forced sale in this state. That liberality has been extended from time to time, until to-day Texas, in this particular, surpasses all the other states of the American Union. The wonderful improvement and progress of the past few years attest the wisdom of that policy, which, if continued, will in after years be demonstrated by a commonwealth composed not only of prosperous, free, and independent, but also of solvent, citizens. It has not been the policy of the judicial department to restrict this liberalizing tendency of the lawmaking power by a strict construction of these laws; on the contrary, they have been 'liberally construed with a view to effect their objects and to promote justice.' The terms used, and especially the word 'apparatus' is strikingly apt, a generic term of the most comprehensive signification. The trade or profession of Raymond was that of editor and publisher of a weekly newspaper. What tools and apparatus belong to that trade or profession? It is the printing press, type, cases, etc., and not alone the pair of scissors, bottle of ink, and goose-quill pen of the editorial department. The apparatus belonging to the trade of a publisher must of necessity include the press, type, cases, etc., which are essential to the conducting of that business. The blacksmith could as well dispense with his anvil and hammer, the shoemaker with his awl and last, the farmer with his plow and hoe, as could the publisher dispense with his press, type, and cases; and yet all of these are exempt as belonging to these respective trades. So, in our opinion, are the press, type, cases, etc., of the publisher exempt as belonging to his trade." And in the consideration of a case very similar to the facts in the one at bar, wherein the articles involved were one Peerless printing press, one Climax paper cutter, and one Columbia printing press, the Court of Civil Appeals of Texas, in the case of *St. Louis Type Foundry v. Taylor*, 35 S. W. 691, said: "'All tools, apparatus, and books belonging to any trade or profession' are exempt by law from forced sale. Sayles' Ann. Civ. St. 1897, art. 2335. If Beard, the original owner of the property was by trade a job printer, and the articles of property in question were used as necessary or appropriate tools or apparatus for

his business, as alleged by claimant, the property is exempt from forced sale." In connection with this same subject, see, also, *Waples on Homestead and Exemption*, p. 802, c. 25, § 6; *Betz v. Maler*, 12 Tex. Civ. App. 219, 33 S. W. 710; *Smith v. Horton*, 19 Tex. Civ. App. 23, 46 S. W. 401; *Sallee v. Waters*, 17 Ala. 482; *Bliss v. Vedder*, 34 Kan. 57, 7 Pac. 599, 55 Am. Rep. 237.

The statute of Kansas on this subject exempts "the necessary tools and implements of any mechanic, miner, or other person, used and kept for the purpose of carrying on his trade or business." It will be noted that the word used in the Kansas statute is "implements," while that of our own statute is "apparatus." Webster defines "apparatus" to be "a full collection or set of implements, or utensils, for a given duty." Hence "apparatus" is a broader term than "implements," and would include within its scope more than would be implied by "implements." In the case last cited (*Bliss v. Vedder*) the Supreme Court of Kansas, under facts somewhat similar to those in the case at bar, held: "Where the owner of a printing press and printing materials resides in Kansas, is a married man and the head of a family, and uses such printing press and printing materials for the purpose of editing and publishing a newspaper, and they are necessary therefor, and the editing and publishing of such newspaper is his principal business, and the business from which he derives his principal support, and in editing and publishing such newspaper he personally arranges the matter and forms therefor, and performs such other work as is usually performed by the foreman of a weekly newspaper, but, not being a practical printer, the most of the work is done through the agency of employes, and he is a partner in two other kinds of business, and is also a justice of the peace, held, that the property is nevertheless exempt from execution, although it is not exclusively used by the owner in person, and although he may have an interest in other kinds of business."

It will be noted that the "implements" or "apparatus" involved in the case at bar were both operated by hand, and that they were necessary to the conduct of the business in which plaintiff was engaged. Under these circumstances, they were exempt to plaintiff. In thus holding we have determined the controversy on its merits. We have not, however, overlooked the questions of practice which counsel present, and have given them due consideration; but in our judgment, under the agreed statement of facts, they are without merit.

The judgment of the trial court is accordingly affirmed.

TURNER, KANE, and HAYES, JJ., concur. WILLIAMS, J., not participating.

(27 Okl. 460)

**SECOND MISSIONARY BAPTIST
CHURCH (Colored) OF
NOWATA v. KEYS.**

(Supreme Court of Oklahoma. Nov. 16, 1910.)

(Syllabus by the Court.)

**APPEAL AND ERROR (§ 780*) — DISMISSAL —
FAILURE OF PARTY TO RETURN TRANSCRIPT.**

The case-made or transcript in this court not showing a judgment of record in the lower court, which it is sought to have vacated or modified, it was moved that the appeal be dismissed on that ground. The plaintiff in error having been permitted to withdraw said case-made or transcript from the clerk's office, and having defaulted in returning same to said office, and having made no response to said motion to dismiss, the appeal will be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 780.*]

Error from District Court, Nowata County; T. L. Brown, Judge.

Action between the Second Missionary Baptist Church (Colored) of Nowata and L. A. Keys. From the judgment, the Church brings error. Dismissed.

Preston S. Davis, for plaintiff in error.
W. D. Humphrey and J. A. Tillotson, for defendant in error.

WILLIAMS, J. On December 24, 1909, defendant in error moved to dismiss this appeal, on the ground that the alleged judgment appealed from did not appear of record in the lower court, as appeared from the record in this court. On the 15th day of December, 1909, the attorney for the plaintiff in error was permitted by this court to withdraw the case-made or transcript, and the same has neither been returned to the files of this court, nor any response made to this motion.

The appeal is therefore dismissed. All the Justices concur.

(27 Okl. 560)

**ATCHISON, T. & S. F. RY. CO. v.
HENDERSON.**

(Supreme Court of Oklahoma. Nov. 16, 1910.)

(Syllabus by the Court.)

RAILROADS (§ 443*) — KILLING STOCK — EVIDENCE.

In a stock-killing case against a railway company, when the stock is injured under such circumstances as to cast upon the company the duty of ordinary care to prevent the injury, if the uncontradicted evidence shows that this duty has been fully performed, it is error to render judgment for the loss thus incurred against the defendant.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 443.*]

Error from Alfalfa County Court; F. M. Gustlin, Judge.

Action by A. J. Henderson against the Atchison, Topeka & Santa Fé Railway Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

Cottingham & Bledsoe and Geo. M. Green, for plaintiff in error. Sydney R. Roth, for defendant in error.

KANE, J. This was an action commenced by the defendant in error, plaintiff below, against the plaintiff in error, defendant below, to recover damages for certain hogs belonging to the plaintiff that strayed upon the tracks of defendant and were killed by one of its trains. It was commenced before a justice of the peace, where judgment was rendered for the plaintiff, from which judgment the defendant appealed to the county court. In the county court a jury was waived, and upon hearing the evidence the court upon request of the defendant made findings of fact and conclusions of law, wherein it found "that the engineer was negligent in not stopping his train when he saw the hogs on the tracks, and when his appliances for stopping the train were in good working order, and he could set the brakes immediately; the hogs being a distance of two telegraph poles ahead of the engine and running from it." Whereupon judgment was rendered for the plaintiff, to reverse which this proceeding in error was commenced.

We think the judgment of the court below ought to be reversed. Even treating this case as belonging to the same class as A., T. & S. F. Ry. Co. v. Davis, 109 Pac. 551, where the animals injured strayed upon the track of the defendant under such circumstances as to require the railway company to use ordinary care to prevent injury, the uncontradicted evidence shows this duty to have been fully performed.

The plaintiff offered himself as a witness, and testified in substance that the hogs were killed on the 15th day of September, 1907, upon the right of way which ran through his land; that he was not present and did not see the accident; that one of the hogs was of the value of \$8, and the other two of \$7 each; that he did not permit the hogs to run at large; that they were left in a pasture of two acres of alfalfa and corn; that a Page wire fence surrounded it; this inclosure was four feet from the railroad track, and was not part of the right of way fence; the right of way fence was a four-foot wire fence. J. T. Sanborn, the next witness for the plaintiff, testified that he lived across the road from Mr. Henderson; that on the day of the accident he heard the train whistle as it approached the place where the hogs were run over, and saw them running along the track in front of the train, and they were run over and knocked off the track. He was about 200 yards from the place of the accident, and went to the scene and found three dead hogs. On cross-examination he testified that it was an ordinary freight train and running about 20 miles an hour. He was asked: "Q. Now, the first

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

you knew of the matter is when you heard the train whistle? A. Yes, sir. Q. And you looked out and saw the hogs on the track? A. Yes, sir. Q. How long was it from the time you heard the train until you looked out and saw the hogs on the track? A. Just long enough to get out of the house. I do not know just how long it took me. Q. Well, then, how soon were the hogs run over or knocked off from the track? A. Well, they didn't run very far till they were knocked off. Q. You didn't see the hogs prior to the time that they were on the track? A. No, sir." He was asked by the court: "Q. Mr. Sanborn, when you first saw the hogs, how far were they ahead of the train? A. Why, I don't suppose they were over eight or ten rods."

At the close of the plaintiff's evidence the defendant demurred thereto, upon the ground and for the reason that the evidence was not sufficient to prove a cause of action in favor of the plaintiff and against the defendant, which demurrer was by the court overruled, and the defendant excepted. The defendant introduced Richard Barrier, who was the engineer in charge of the train. He testified in substance that he had nine cars in his train loaded; that they were supplied with air brakes and in good working order; that the train was running at the rate of 35 to 40 miles an hour; that the track at the place of accident was a little downgrade; that he was sitting on the seat box looking ahead, when he saw the hogs go on the track; that they were not over two telephone poles ahead, and that he was keeping a lookout for stock. He testified further: "Q. Now, what did you do when you first saw these hogs coming on the track? A. Why, I immediately grabbed the whistle, and threw the air in emergency, and opened my cylinder cocks. Q. Now, when you say you grabbed the whistle, what do you mean, Mr. Barrier? A. Well, we have a whistle that we make an effort to scare stock with, sounding and making all the noise that we can. Q. Then you did sound the whistle on this occasion? A. Yes, sir. Q. Now, will you explain what you mean by putting the air into the emergency? A. Well, there is two services or ways of handling the brakes; there is what we call service application, and then the emergency application; that means we throw the air on all at once. It gives us more braking power, and works quicker, and takes effect immediately. Q. Now, when you say you opened the cylinder cocks, what does this do? A. Why, that lets the steam escape from the cylinders. It would evidently scare anything that was on the track. Q. Scare it off the track? A. Yes, sir. Q. Now, I will ask you to state whether or not you did all in your power and at your command to avoid striking these hogs. A. I did. Q. I will ask you to state whether or not it was possible for this train to have been stopped and the ac-

cident avoided. A. It would have been impossible, at the rate of speed we were running and the distance we had to stop."

There was absolutely no evidence tending to contradict the positive evidence of the engineer that he did all in his power to avoid striking the hogs, and none from which the court might infer the want of ordinary care on his part. *K. C., L. & S. K. Ry. Co. v. Bolson*, 36 Kan. 534, 14 Pac. 5. The engineer saw the hogs as they approached the track, and immediately sounded the whistle, applied the emergency brakes, and did everything he could to stop his train. There is no evidence that the train did not slack in response to the engineer's efforts, or that it would have been possible to stop within the distance intervening between the hogs and the locomotive at the time they were discovered approaching the tracks. Courts cannot disregard the uncontradicted evidence of unimpeached witnesses, and it was error for the court below to do so.

The judgment must therefore be reversed, and the cause remanded, with directions to grant a new trial.

DUNN, C. J., and WILLIAMS, HAYES, and TURNER, JJ., concur.

(27 Okl. 368)

BARNETT v. BOHANNON.

(Supreme Court of Oklahoma. Nov. 16, 1910.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 82*)—APPEALABLE ORDER—"ON A SUMMARY APPLICATION IN AN ACTION AFTER JUDGMENT."

An order of the trial court quashing an execution is an order made "upon a summary application in an action after judgment," and is appealable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 479; Dec. Dig. § 82.*]

2. EXECUTION (§ 163*)—APPEAL AND ERROR (§ 983*)—QUASHING EXECUTION—ABUSE OF DISCRETION.

Every court has the inherent power to control its own process and the quashal of an execution rests largely in its discretion, and an order made quashing an execution will not be reversed in this court except where abuse of such discretion is shown.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 478; Dec. Dig. § 163.* Appeal and Error, Cent. Dig. § 3880; Dec. Dig. § 983.*]

3. NEW TRIAL (§ 12*)—STAY OF PROCEEDINGS.

After return of the verdict of a jury, and the rendition of judgment thereon, during the pendency of a motion for a new trial, the court may in its discretion reserve the case for further argument or consideration, and either stay or arrest all process until after the disposition of the motion for new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 17; Dec. Dig. § 12.*]

Error from the Haskell County Court; A. L. Beckett, Judge.

Action by T. M. Barnett against W. J. Bohannon. Judgment for defendant, and plaintiff brings error. Affirmed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Holley, Brown & Lawrence, for plaintiff in error. Fred H. Fannin, for defendant in error.

DUNN, C. J. This case presents error from the county court of Haskell county, Okl. February 4, 1908, plaintiff in error as plaintiff filed this petition in the said county court to recover of and from the above-named defendant in error as defendant the sum of \$34.40. Trial was had, and on the 5th day of August, 1908, judgment was rendered in favor of plaintiff and against the defendant. Whereupon within due time, defendant filed motion for a new trial, which motion, however, was not considered or acted upon until February 9, 1909. December 26, 1908, while the motion for new trial was still pending, the plaintiff in error had issued an execution which was levied upon property of defendant in error, and the same was advertised by the sheriff to be sold on February 9, 1909. On the day set for the sale and prior to the hour appointed therefor, the defendant filed a motion, the purport of which was to secure the quashal of the execution issued, on the ground that the motion for a new trial was still pending and undetermined. Whereupon, on a hearing had, the court sustained the motion to quash the execution, and ordered the sheriff to return the property to the defendant. From the order recalling and quashing the execution, plaintiff has by petition in error and case-made brought the case to this court for review, and two questions are presented for our consideration: First. Is the order appealable? Second. Did the court commit error in quashing the execution?

Section 6068, Comp. Laws Okl. 1909, provides that a final order which may be vacated, modified, or reversed by the Supreme Court is one made "upon a summary application in an action after judgment." In considering this identical language as it was found in the statutes of Wisconsin, the Supreme Court of that state in the case of *Ernst v. The Steamer Brooklyn*, 24 Wis. 616, speaking through Mr. Chief Justice Dixon, held that an application to set aside an execution issued in an action, or the levy made under it, or for a stay of proceedings upon it, or to direct the judgment to be satisfied of record, would fall within the meaning of this language and hence appealable. Other authorities based upon statutes of similar import in which orders of this character have been held appealable may be noted as follows: *Little v. Atchison, Topeka & S. F. R. R. Co.*, 2 Ind. T. 551, 53 S. W. 331; *Orr v. Haskell*, 2 Mont. 350; *Gilman v. County of Contra Costa*, 8 Cal. 52, 68 Am. Dec. 290; *Wright v. Rogers*, 26 Ind. 218; *McAllister v. State ex rel. Heath et al.*, 81 Ind. 256.

The question next raised is: Did the court err in quashing the execution? A motion for a new trial does not of itself operate to stay execution except the clerk of the court in

which the record of the judgment or final order shall be takes a written undertaking to be executed in accordance with the terms of section 6078, Comp. Laws 1909, or the party complies with section 6079. Except where the provisions of the statute are complied with, the party in whose favor a judgment is rendered is entitled immediately to the proper process for its enforcement. *People ex rel. Carpenter v. Loucks*, 28 Cal. 69; *Davis v. Jenkins*, 46 Kan. 19, 26 Pac. 459. However, every court has the inherent power to control its own process, and may, in the exercise of a sound discretion and to prevent injustice, stay or quash the same as may appear to be justified. *Osborne & Co. v. Hughey et al.*, 14 Okl. 29, 76 Pac. 146; *Bogle v. Bloom*, 36 Kan. 512, 13 Pac. 793; *Treat v. Wilson*, 4 Kan. App. 586, 46 Pac. 322; *Church et al. v. Goodin*, 22 Kan. 527. The case last cited, *Church v. Goodin*, is one written on statutes relating to the subject under discussion in all respects similar to our own. The court in that case had occasion to consider or pass on the question of the quashing of an execution which was issued as in the case at bar while a motion for new trial was pending and undisposed of. It was insisted that the pendency of the motion for a new trial acted as a stay of the proceedings upon the judgment rendered until it was disposed of. The court on considering this claim denied it, and in the syllabus said: "The pendency of a motion for a new trial does not necessarily stay proceedings upon a judgment rendered in a civil case. After a return of the verdict of a jury, the court has the power, however, to reserve the case for future argument or consideration, and either stay or arrest all process until the motion for a new trial is disposed of."

In the case at bar at the time the court in the exercise of its discretion quashed the writ of execution issued there was, as we have seen, pending before it for consideration a motion for new trial. If this motion were to be granted, necessarily the judgment which was the basis for the writ would be set aside and held for naught, and the court had the power in the exercise of its discretion to withhold the execution of this judgment until it could consider the motion for new trial and determine whether the judgment should stand. The action of the court being discretionary, and the presumption obtaining that it was right, it should not be disturbed except upon a showing that it has been abused. The burden is upon the plaintiff in error to overcome this presumption and to show the abuse, and, there being no showing in this court that the court committed error or abused its discretion, the order made must stand.

The judgment of the trial court is therefore accordingly affirmed.

TURNER, WILLIAMS, HAYES, and KANE, JJ., concur

(27 Okl. 513)

WELCHI v. JOHNSON.

(Supreme Court of Oklahoma. Nov. 10, 1910.)

*(Syllabus by the Court.)***1. FORCIBLE ENTRY AND DETAINER (§ 16*)—JUSTICES OF THE PEACE—JURISDICTION.**

Under the laws extended in force in the state upon its admission by section 2 of the Schedule to the Constitution, courts of justices of the peace have jurisdiction of forcible entry and detainer actions.

[Ed. Note.—For other cases, see Forcible Entry and Detainer, Cent. Dig. §§ 78-82; Dec. Dig. § 16.*]

2. LANDLORD AND TENANT (§ 63*)—LANDLORD'S TITLE—ESTOPPEL OF TENANT.

As a general rule, a tenant cannot dispute the title of his landlord nor set up a paramount title in himself or others, but he may show that the landlord's title has expired by limitation or by operation of law subsequent to the beginning of his tenancy.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 159, 176; Dec. Dig. § 63.*]

Error from Seminole County Court; T. S. Cobb, Judge.

Action by J. Coody Johnson against Henry Welch. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

J. A. Baker, for plaintiff in error. Crump, Rogers & Harris, for defendant in error.

HAYES, J. Defendant in error, who for convenience will hereafter be referred to as plaintiff, on the 3d day of January, 1908, began his action for forcible entry and detainer against plaintiff in error, who will, for convenience, be referred to as defendant, in one of the justice courts of Seminole county, to obtain possession of the S. ½ of section 22, township 9, range 8 E., I. M. He obtained judgment in that court, from which an appeal was taken to the county court. Upon a trial in that court, plaintiff again prevailed; and from a judgment in his favor this proceeding is prosecuted.

Defendant in his brief states that there are three questions involved in this case. He sets them out, and states in connection therewith that he does not abandon any question contained in the record, but that the petition in error and motion for a new trial and all the questions therein raised are still insisted upon. Of the three propositions suggested in his brief for reversal only two are supported with argument or citation of authorities. Defendant cannot by a reference in his brief to the specifications of error in his petition and a general statement that he relies upon all of them have same reviewed. By rule 25 (20 Okl. xii, 95 Pac. vii) one who desires to have errors complained of reviewed is required to set forth separately and number same in his brief and to give thereunder argument and authorities in support of each point relied upon; and, where this is not done, as to any specifica-

tions of error in the petition, the same will be considered to have been waived.

The first assignment urged for reversal is that the justice court at the time of the institution of the action therein had no jurisdiction to try cases of forcible entry and detainer. This question was directly presented to and passed upon by this court in *Bowman et al. v. Bilby*, 24 Okl. 735, 104 Pac. 1078, where the question was decided adversely to plaintiff's contention; and upon authority of that case this assignment must be held to be without merit. Defendant on the 20th day of March, 1905, under a rental contract for a period of five years from January 1, 1905, entered upon and took possession of the land in controversy, and has continued to occupy same since said date. He paid the rents thereon for a time; but at the time of the bringing of this action he had become delinquent in the payment of the rents, and there was a balance due and unpaid under the contract which he failed and refused to pay. Plaintiff gave notice to defendant terminating the contract and demanding possession of the premises.

Defendant's defense as to one quarter section of the land is that plaintiff's title to said quarter at the time defendant entered under his contract was derived from a lease contract from one Cornelia Williams, the owner of the land; that she had leased said quarter to plaintiff for a period of five years, beginning April 2, 1903; that, after this lease expired, Cornelia Williams demanded that defendant leave the premises, whereupon defendant entered into a contract with her for five years; that afterwards plaintiff bought the land from Cornelia Williams, with full knowledge of defendant's lease from her, and with an agreement on the part of plaintiff with Cornelia Williams as part of the consideration for the sale of the land to him that plaintiff would carry out her lease contract with defendant. Evidence was introduced by defendant tending to establish this defense, but the court instructed the jury, over defendant's objection, that as to this particular quarter, if the jury found from the evidence that defendant had leased the land for a period of five years from plaintiff and failed and refused to pay the rent, when the same became due under the contract, and plaintiff had notified defendant to leave the premises three days before the bringing of this action, their verdict should be for the plaintiff for possession of that quarter and also for possession of the other quarter, unless they found for defendant under another instruction given by the court, and by other instructions given and complained of the jury was instructed that defendant could not question the title of plaintiff. These instructions as given under the issues and evidence in this case were erroneous. It is a general rule that a tenant who does not sur-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

render back to his landlord possession of the demised premises will not be permitted, so long as he holds the possession which he originally derived from his landlord, to deny his landlord's title. But this rule is limited to the title that the landlord had at the inception of the tenancy. The tenant is only estopped to deny that which he has once admitted. When he takes possession under the landlord, he thereby admits the title under which the landlord then holds, and the landlord's right to execute the contract under which defendant takes possession; and the tenant is forbidden to thereafter deny such title or right as long as he retains possession of the premises and enjoys the benefit of the contract, but he may show that the right and title of the landlord existing at the creation of the tenancy has since that time been terminated, expired, or extinguished. *Indian Land & Trust Co. v. Clement*, 22 Okl. 40, 109 Pac. 1089; 24 Cyc. p. 951, and authorities there cited.

If plaintiff's title held by him at the creation of the tenancy expired as contended by defendant, no right of recovery in him exists at this time, unless he has subsequently acquired a right or title which entitles him to possession. Had plaintiff not purchased from Cornelia Williams the land in controversy, it could not be contended that defendant is estopped from denying plaintiff's title, because the only title he would have in that event would be under his lease contract from Cornelia Williams, and that has expired. He acquired no right by virtue of his purchase of the fee from Cornelia Williams which he can enforce in this action, if he took that title with the agreement to recognize the rights of defendant under his contract with Cornelia Williams, for defendant can be dispossessed only when that contract expires or some act is done by him that terminates it. As the purchaser from Cornelia Williams, plaintiff stands in her shoes. As the original landlord of defendant, plaintiff's title has expired, and with it his right of possession under the original contract.

For the errors in the instructions complained of, the judgment of the trial court is reversed and the cause remanded.

DUNN, C. J., and WILLIAMS, KANE, and TURNER, JJ., concur.

(27 Okl. 422)

FLANAGAN et al. v. DAVIS et al.
(Supreme Court of Oklahoma. Nov. 16, 1910.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 773*)—DISPOSITION OF CAUSE—FAILURE TO FILE BRIEFS.

Where counsel for plaintiff in error, in conformity with the rules of this court, has prepared, served, and filed a brief, in which, with other contentions, it is insisted that the judg-

ment and verdict appealed from are not reasonably supported by the evidence, and there is no brief filed, and no reason given for its absence, on the part of the defendant in error, this court is not required to search the record to find some theory upon which the judgment below may be sustained; but, where the brief filed appears reasonably to sustain the assignments of error, the court may reverse the judgment in accordance with the prayer of the petition of plaintiff in error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3104, 3108-3110; Dec. Dig. § 773.*]

Error from District Court, Oklahoma County; J. G. Lowe, Judge.

Action by E. G. Flanagan against Jennie Davis, J. B. Rowlett, and another. Judgment for defendant Davis and another, and plaintiff and defendant Rowlett bring error. Reversed, and new trial granted.

Fred S. Caldwell, for plaintiffs in error.

DUNN, C. J. This case presents error from the district court of Oklahoma county. September 10, 1904, E. G. Flanagan, as plaintiff, filed his petition in the district court of that county praying judgment against the defendants in error, Jennie Davis and William Davis, in the sum of \$49.50, with interest thereon as a balance due on account of labor performed; also praying foreclosure of a mechanic's lien upon certain real estate in said county. To this action J. B. Rowlett, who appears here as plaintiff in error, was also made a party defendant, for the reason that he likewise was claiming a mechanic's lien on the same real property. October 3, 1904, the said Rowlett filed an answer and cross-petition, in which he prayed judgment against his codefendants in the sum of \$59.85, and a foreclosure of the said mechanic's lien. October 13, 1904, the defendants Jennie Davis and William Davis filed their answer to the pleadings filed by the other parties. General denials were filed for replies on the part of Flanagan and Rowlett, and on the issues thus framed the case came on for trial before a jury January 15, 1908, and resulted in a verdict for the defendants Jennie Davis and William Davis. In due time the said Flanagan and Rowlett filed their motions for new trial on the ground of misconduct on the part of the prevailing parties, and that the verdict was not sustained by sufficient evidence, was contrary to law, and on the ground of newly discovered evidence. This motion was by the court denied. Whereupon the said Flanagan and Rowlett brought the case to this court for review on petition in error and case-made.

Counsel for defendants in error have filed no brief, nor offered any excuse for their failure to do so. Rule 7 of this court (20 Okla. viii, 95 Pac. vi) provides for the filing of briefs by counsel for parties interested in actions pending here on appeal, and provides: "In case of failure to comply with the re-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

quirements of this rule, the court may continue or dismiss the cause, or reverse or affirm the judgment." We have read the brief filed by counsel for plaintiff in error, and from a consideration thereof it appears to us that the propositions relied on are well taken. In the absence of a brief on the part of counsel for defendant in error, we are not given that assistance which we should have in determining the theory upon which the court denied plaintiff's motion and rendered judgment, and the pressure upon the time of this court is such that it cannot, in justice to other litigants, brief cases for parties who elect to neglect it. The leading case in this court on this proposition is *Butler et al. v. McSpadden*, 107 Pac. 170. This case has been followed in a large number of cases, among which we note the following: *Buckner v. Okla. Nat. Bank of Shawnee et al.*, 106 Pac. 959; *Reeves & Co. v. Brennan*, 106 Pac. 959; *Butler v. Stinson*, 108 Pac. 1103; *Ellis et al. v. Outler et al.*, 106 Pac. 957.

Notwithstanding this rule, however, we have read the record, along with the affidavits in support of the motion for new trial, and from a consideration of the entire case conclude that a new trial should have been awarded by the trial court.

The judgment of the trial court is accordingly reversed, and plaintiffs in error are granted a new trial.

TURNER, KANE, and HAYES, JJ., concur. WILLIAMS, J., not participating.

(27 Okl. 466)

MISSOURI, K. & T. RY. CO. v. LONG.
(Supreme Court of Oklahoma. Nov. 16, 1910.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 773*)—REVERSAL—FAILURE OF DEFENDANT IN ERROR TO FILE BRIEF.

Where counsel for plaintiff in error, in conformity with the rules of this court, has prepared, served, and filed a brief in which, with other contentions, it is insisted that the judgment and verdict appealed from are not reasonably supported by the evidence, and there is no brief filed, and no reason given for its absence, on the part of defendant in error, this court is not required to search the record to find some theory upon which the judgment below may be sustained; but, where the brief filed appears reasonably to sustain the assignments of error, the court may reverse the judgment in accordance with the prayer of the petition of plaintiff in error.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3104, 3108-3110; Dec. Dig. § 773.*]

Williams, J., dissenting.

Error from Seminole County Court; T. S. Cobb, Judge.

Action by W. C. Long against the Missouri, Kansas & Texas Railway Company. Judgment for plaintiff before a justice was af-

firmed in the county court, and defendant brings error. Reversed and remanded.

Clifford L. Jackson, W. R. Allen, and Webb & Ennis, for plaintiff in error.

DUNN, C. J. This case presents error from the county court of Seminole county, where it was tried on appeal from a judgment rendered before a justice of the peace. Plaintiff's bill of particulars charges the defendant with having so negligently run and managed its locomotives and cars that it ran one of his mules into a cattle guard and killed it, to plaintiff's damage in the sum of \$150. The evidence disclosed that no one saw the mule killed, and plaintiff relied upon circumstances to establish that the animal was killed by one of defendant's engines pulling a south-bound passenger train, and also to establish that the same was negligently done. The testimony of the engineer and fireman on this train was to the effect that they did not see the animal and did not strike it. On the coming in of the verdict, defendant filed a motion for new trial, and on its denial has brought the case here for review.

The propositions presented by counsel for plaintiff in error going to the sufficiency of the evidence to support the verdict have been elaborately treated, and from an inspection of the brief in our judgment error was committed by the court in denying a new trial. Counsel for plaintiff have not answered this brief, nor assigned any reason for the neglect. The pressure upon the time of the court is such that in justice to other litigants it cannot brief cases for parties who elect to neglect it. If one litigant may submit his cause to this court, and burden it with the duty of defending and briefing it, so may other litigants. Under rule 25 of this court (20 Okla. xii, 95 Pac. viii), the brief of plaintiff in error in civil cases is required to contain an abstract or abridgment of the transcript, setting forth the material parts of the pleadings, proceedings, and facts upon which he relies to secure a reversal, and such statement must be sufficiently full to enable the court to render its decision without an examination of the record itself. It also provides that, if the defendant in error shall claim that such abstract is incomplete, his brief shall contain a counter abstract correcting any omission or inaccuracy which may occur in the statement of plaintiff in error. Hence it must necessarily follow as a result of this rule that this court is justified in assuming, where defendant in error makes no counter statement, that he is satisfied with the statement of the case as made by counsel for plaintiff in error, and is content to have the court consider the case on such statement. Therefore the rule which we have adopted in such cases is that, where

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

counsel for defendant in error have neglected to file a brief and have offered no reason or excuse for such failure, this court is not required to search the record to find some theory upon which the judgment below may be sustained; but where the brief filed appears reasonably to sustain the assignments of error, the court may reverse the judgment in accordance with the prayer of the petition of plaintiff in error. *Butler v. McSpadden*, 107 Pac. 170; *Buckner v. Okla. Nat. Bank of Shawnee et al.*, 106 Pac. 959; *Reeves & Co. v. Brennan*, 106 Pac. 959; *Butler v. Stinson*, 108 Pac. 1103; *Ellis et al. v. Outler et al.*, 106 Pac. 957; *Flanagan et al. v. Davis et al.* (a case decided at this term of court and not yet officially reported) 112 Pac. 990.

This court has been and is very liberal where small amounts are involved, or where the parties are poor and make a showing to that effect, to permit them to file typewritten briefs, thereby relieving them of the expense of having them printed, and if, under all of these conditions, parties neglect to brief their cases, and are unnecessarily subjected to the expense and burden of second trials, they have but themselves to blame for it.

The order denying a new trial herein and the judgment are set aside, and the cause remanded to the county court of Seminole county.

TURNER, KANE, and HAYES, JJ., concur. WILLIAMS, J., dissents.

(27 Okl. 553)

WAVERLEY INV. CO. v. CITY OF ENID.
(Supreme Court of Oklahoma. Nov. 16, 1910.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 773*)—FAILURE TO FILE BRIEFS—DISMISSAL.

Syllabus same as in *Horner et al. v. Goltry & Sons*, 23 Okl. 905, 101 Pac. 111.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3108-3110; Dec. Dig. § 773.*]

Error from District Court, Garfield County; R. H. Loofborrow, Judge.

Action between the Waverley Investment Company and the City of Enid. From the judgment, the Investment Company brings error. Dismissed.

Sturgis, Moore & Manatt, for plaintiff in error. J. M. Dodson, for defendant in error.

HAYES, J. This cause is now before us upon motion of defendant in error to dismiss same for failure of plaintiff in error to file briefs. The petition in error herein was filed on the 16th day of May, 1910; but no briefs have been filed by plaintiff in error, as required by rule 7 of this court (20 Okl. viii, 95 Pac. vi).

It follows that, upon the authority of *Horner et al. v. Goltry & Sons*, 23 Okl. 905, 101 Pac. 1111, the cause must be dismissed.

DUNN, C. J., and WILLIAMS, KANE, and TURNER, JJ., concur.

(27 Okl. 522)

DES MOINES FIRE INS. CO. v. DOGGETT.
(Supreme Court of Oklahoma. Nov. 16, 1910.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 773*)—FAILURE TO FILE BRIEF—DISMISSAL.

Syllabus same as in *Horner et al. v. Goltry & Sons*, 23 Okl. 905, 101 Pac. 1111.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3104-3110; Dec. Dig. § 773.*]

Error from Payne County Court; P. D. Mitchell, Judge.

Action between the Des Moines Fire Insurance Company and H. L. Doggett. From the judgment, the Insurance Company brings error. Dismissed.

Lowry & Lowry, for plaintiff in error. Freeman E. Miller, for defendant in error.

HAYES, J. No brief was filed in this cause within the time required by rule 7 of this court (20 Okl. viii, 95 Pac. vi); and, although an extension of 90 days has been granted and expired, plaintiff in error has yet filed no brief.

It follows, upon the authority of *Horner et al. v. Goltry & Sons*, 23 Okl. 905, 101 Pac. 1111, that defendant in error's motion to dismiss should be sustained; and it is so ordered.

DUNN, C. J., and WILLIAMS, KANE, and TURNER, JJ., concur.

(27 Okl. 495)

OKLAHOMA CITY v. HASKELL, Governor.
(Supreme Court of Oklahoma. Nov. 16, 1910.)

(Syllabus by the Court.)

MANDAMUS (§ 64*)—SUBJECTS OF RELIEF—EXECUTIVE FUNCTIONS OF GOVERNOR.

The courts of the state are without jurisdiction to control the Governor by mandamus in the exercise of his executive functions.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 128, 129; Dec. Dig. § 64.*]

Mandamus by the City of Oklahoma City against Charles N. Haskell, Governor. Petition dismissed.

James S. Twyford, City Atty., for plaintiff. Chas. West, Atty. Gen., and W. C. Reeves, Asst. Atty. Gen., for defendant.

DUNN, C. J. This is an original action in the Supreme Court, brought by the city of Oklahoma City, in which a writ of mandamus is sought against the defendant, Charles

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

N. Haskell, as Governor of the state of Oklahoma, requiring him as such official to appoint a commission to appraise the value of a strip of land which the board of park commissioners of the city of Oklahoma City desire to appropriate across certain public lands owned by the state for the location of a boulevard of the city. The proceeding is being taken under the provisions of the chapter on eminent domain (chapter 37, p. 804, Comp. Laws Okl. 1909), which provides for the condemnation for certain purposes of lands set apart for the use and benefit of the state for public schools, public buildings, and educational institutions, and establishes a procedure therefor, making it the duty of the Governor to appoint three disinterested persons to appraise the value of the ground taken and the damage done the remaining part. On the Governor's refusal to appoint the board of appraisers provided for, this action was brought to secure a writ of mandamus to compel him to do so.

This court is without jurisdiction, for the reason that the courts of the state are without jurisdiction to control the Governor by mandamus in the exercise of his executive functions. This question was gone into, passed on, and determined in the case of *State of Oklahoma ex rel. Attorney General v. A. H. Huston* (an opinion of this court recently delivered, but not yet officially reported) 113 Pac. 190, and it would be of no practical value to further discuss or reiterate the reasoning of that case.

The petition is accordingly dismissed.

TURNER, WILLIAMS, KANE, and HAYES, JJ., concur.

(27 Okl. 510)

BRIGMAN v. CHENEY.

(Supreme Court of Oklahoma. Nov. 16, 1910.)

(Syllabus by the Court.)

1. GUARDIAN AND WARD (§ 13*) — APPOINTMENT OF GUARDIAN—DISCRETION OF COURT.

In the appointment of guardians, the county courts are vested with a sound legal discretion; and their judgments in such cases will not be overruled, unless it is apparent that there has been an abuse of such discretion.

[Ed. Note.—For other cases, see *Guardian and Ward*, Cent. Dig. § 50; Dec. Dig. § 13.*]

2. APPEAL AND ERROR (§ 1078*) — ASSIGNMENTS OF ERROR—WAIVER.

Where plaintiff in error fails to set forth in his brief, as required by rule 25 (20 Okl. xii, 95 Pac. viii), argument or citation of authorities in support of any assignment of error, it will be deemed as to such assignment that he has waived same.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.*]

Error from District Court, Kiowa County; James R. Tolbert, Judge.

Applications of Tula Brigman and Wesley Cheney for appointment as guardian of an

orphan minor. From an order appointing Cheney, appeal was taken by Brigman to the district court, and, on affirmance, Brigman brings error. Affirmed.

George L. Zink and Joseph H. Cline, for plaintiff in error. Morse & Standeven, for defendant in error.

HAYES, J. This proceeding presents a contest between plaintiff in error and defendant in error for appointment as guardian of an orphan minor. The minor is about four years old. His father died February 16, 1909, and his mother died on the 5th day of the following July. On the 28th day of July, 1909, defendant in error filed his petition in the county court for appointment as guardian of the person and estate of the child. Upon the 2d day of the following August, plaintiff in error filed her petition for the same appointment. The two petitions were set down for hearing, and were heard by the county judge on the 6th day of the same month. After hearing the evidence in support of both petitions and of each applicant in opposition to the appointment of the other applicant, the court appointed defendant in error. From this order of the court, an appeal was taken by plaintiff in error to the district court, where there was a trial de novo, resulting in the same order as was made by the county court.

Reversal of the judgment of the district court is here sought upon the ground that it is not supported by the evidence. Section 1793 of Wilson's Revised & Annotated Statutes of 1903 provides that an appeal may be taken to the district court from any judgment or decree or order of the probate court: "First. Granting or refusing or revoking letters testamentary or of administration or of guardianship." Appeals from the county court of the state in all cases arising under its probate jurisdiction may be taken from its judgment in the same manner as was provided by the laws of the territory of Oklahoma for appeals from probate courts to the district court. Const. art. 7, § 16. Any party aggrieved may appeal except where the decree or order of which he complains was rendered or made upon default. Section 1794, Wilson's Rev. & Ann. St. Plaintiff in error is the maternal grandmother of the minor, and defendant in error is its paternal grandfather. Whether plaintiff in error has sufficient interest in the appointment of a guardian to entitle her to a right of appeal from the order appointing defendant in error has not been questioned by defendant in error; and, assuming that she has the right to prosecute this appeal without deciding that question, we shall consider the case upon its merits. In so far as the same is properly presented by the record and briefs.

Section 1815 of Wilson's Revised and An-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

notated Statutes provides: "If the minor is under the age of fourteen years, the probate judge may nominate and appoint his guardian; if he is above the age of fourteen years, he may nominate his own guardian, who if approved by the judge must be appointed accordingly. And the probate court, in appointing a guardian is to be guided by the considerations named in the Civil Code." Section 3818 provides that in appointing a general guardian the court or judge shall be guided by the following considerations: First. By what appears to be for the best interests of the child in respect to its temporal and its mental and moral welfare; and, if the child be of sufficient age to form an intelligent preference, the court or judge may consider that preference in determining the question. Second. As between parents adversely claiming the custody or guardianship, neither parent is entitled to it as of right, but, other things being equal, if the child be of tender years, it should be given to the mother, if it be of an age to require education and preparation for labor or business then to the father. Section 3819 provides: "Of two persons equally entitled to the custody in other respects, preference is to be given as follows: First. To a parent. Second. To one who was indicated by wishes of a deceased parent. Third. To one who already stands in the position of a trustee of a fund to be applied to the child's support. Fourth. To a relative."

It follows from the facts of this case that the appointing court was governed by the first consideration mentioned in section 3818. Said provision vests in the appointing court or judge a very large discretion in the selection and appointment of a guardian. The primary consideration, which outweighs all others, even when a parent is applying for appointment as guardian, is the best interest of the child; and in protecting that best interest the court may even refuse to appoint a parent. Where other things pertaining to the best interest of the child are equal, then by section 3819 preference is to be given, first, to a parent; second, to one who was indicated by the wishes of a deceased parent; third, by one who stands in the relation of trustee; fourth, a relative. But the provisions of this last section have no application or controlling influence upon the appointing court or judge, when in the judgment of the court such an appointment would not be to the best interest of the child. The county judge must in the first instance judge of the fitness of the person proposed for appointment, his ability to discharge the duties of a guardian, and to best protect and promote the interest and development of the child. This power carries with it a discretion with which an appellate court will not interfere, unless there has been a clear abuse of that discretion. In *Lewis v. Read*, 137 Cal. 682, 70 Pac. 926, there was an application by the father of a child and its grand-

mother for appointment as guardian. Their petitions were heard together, and the grandmother's application granted. By the judge in delivering the opinion of the court it is said: "The evidence has all been brought here upon a bill of exceptions, and, after reading it, the court is prepared to say that the order appointing the grandmother guardian of the person of the minor will not be reversed upon the ground of lack of evidence to support it. The question as to which one of these two parties was the proper party to be appointed guardian over the person of this child was essentially a question of fact for the trial court, and that court having decided it, and there being substantial evidence to support that decision, this court will not interfere by setting aside the order for lack of evidence." This language is in harmony with the decisions of all the courts construing and applying similar statutes. In *re Guardianship of Johnson*, 87 Iowa, 130, 54 N. W. 69; *Ohrns v. Woodward*, 134 Mich. 596, 96 N. W. 950; *Sadler v. Rose*, 18 Ark. 600; *Nelson et al. v. Green*, 22 Ark. 368.

The child is the only son of an only son of defendant in error, who is 63 years of age, and whose family consists of himself, a wife, and one grown daughter. Defendant in error has property of approximate value of from \$30,000 to \$40,000. He has a good residence, consisting of eight rooms, and expresses a willingness and desire to care for the child at his own expense, and to administer the child's estate as its guardian without charge to its estate, which is of the value of from \$6,000 to \$8,000. He is admitted by plaintiff in error to be a competent and suitable person to act as guardian; and there is other evidence in the record showing that he and the members of his family are of high character, and that his home would afford a place of good moral and sanitary surroundings for the rearing of the child. He has reared three children and has educated all of them well, and is strongly attached to the child. On the other hand, there is nothing derogatory in the evidence to the good character and qualification of plaintiff in error to act as guardian. Her family consists of a husband and six children, who are yet at home with her. She is industrious and has been a good mother to her own children. Her residence contains three rooms, and her husband has property of approximate value of from \$3,000 to \$4,000. She likewise manifests a willingness to keep and rear the child without expense to its estate. We doubt not that the interest of each of the parties to this proceeding springs from that deep and sincere affection so often manifest in grandparents for their grandchildren, and particularly so when the grandchild has been visited with the misfortune of the loss of both parents, as the child in this case; but the appointing court cannot measure this affection of the respective parties or the pleasure that the presence of the child in their re-

spective homes would afford to them and award the appointment upon such consideration alone. The primary interest to be conserved is that of the child. These parties with their witnesses have all been before two courts, in each of which there was a trial de novo, and these trials have afforded an excellent opportunity for the weighing of the evidence and a consideration by those courts of what will be for the best interests of the child, and it cannot be said under the state of the record that any abuse of discretion has been committed in the appointment made.

Plaintiff in error demanded a trial by jury, which was refused. Her counsel in their briefs state that an exception was taken to this action of the court, and that such action is assigned as one of the errors for reversal of the cause. No citation of any statutory or constitutional provision is made granting such right, nor has any reference been made to any text or decided cases so holding, and no argument has been suggested to support this contention. Counsel have contented themselves with the mere statement that this class of cases are properly triable by jury. Rule 25 of this court (20 Okl. xii, 95 Pac. viii) requires that the briefs of plaintiff in error shall contain the specifications of error complained of separately set forth and numbered and argument and authorities in support of each point relied upon; and, where counsel fails as to any specification of error in his petition to observe this rule, such failure will be deemed a waiver of said assignment.

The judgment of the trial court is affirmed.

DUNN, C. J., and KANE and TURNER, JJ., concur. WILLIAMS, J., not participating.

(27 Okl. 524)

ARNOLD v. MOSS.

(Supreme Court of Oklahoma. Nov. 16, 1910.)

(Syllabus by the Court.)

1. PARTNERSHIP (§ 242*) — RETIREMENT OF PARTNER—ACTIONS—PARTIES.

Under the law in force in the Indian Territory before the admission of the state, one member of a partnership to whom, upon dissolution of the firm, was assigned the accounts of the partnership, could not maintain an action on any of said accounts without making the other members of the firm parties to the action.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 503; Dec. Dig. § 242*]

2. APPEAL AND ERROR (§§ 604, 695*)—ASSIGNMENTS OF ERROR—SUFFICIENCY.

Assignments of error requiring an investigation and consideration of the evidence will not be reviewed by this court, unless the case-made contains all the evidence introduced upon the trial; and, although the case-made contains a statement that it contains all the evidence, if the record upon its face shows that it does not, and that material books and accounts have been omitted therefrom, the record

is the best evidence, and will prevail over such statement.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2856-2859, 2911-2915; Dec. Dig. §§ 664, 695*.]

Error from District Court, Carter County; S. H. Russell, Judge.

Action by M. F. Moss against J. M. Arnold. Judgment for plaintiff, and defendant brings error. Reversed.

Guy H. Sigler, for plaintiff in error.

HAYES, J. This action was originally brought by defendant in error in the United States Court for the Southern District of the Indian Territory, at Ardmore, where it was pending when the state was admitted upon a demurrer to the petition of defendant in error, plaintiff in that court, and hereafter referred to as plaintiff. Plaintiff alleges in his petition, in substance, that during the cotton seasons of 1905 and 1906 he and A. L. Culwell, under the firm name of A. L. Culwell & Co., operated a gin at Springer in this state, and that plaintiff in error, defendant below, was engaged in the mercantile business at said place; that during said season A. L. Culwell & Co. sold to defendant 307 bales of cotton, as shown by a list and account attached to plaintiff's petition and made a part thereof as an exhibit, aggregating in value the sum of \$16,010.09; that defendant collected for the company in addition thereto \$408.08, thereby becoming liable to the company in the sum of \$16,508.17; that defendant has paid on said account the sum of \$16,088.50, leaving a balance due thereon to plaintiff the sum of \$419.67. He alleges that the firm of A. L. Culwell & Co. has been dissolved, and in the settlement between the members of the firm the account against defendant was assigned to and became the property of plaintiff. He further alleges that in April, 1906, defendant entered into an agreement to arbitrate the differences between them upon the account, and that under said agreement the same was submitted to one R. F. Scivally as arbitrator; that, pursuant to their agreement, Scivally made an investigation, and found that defendant was indebted to plaintiff in the sum of \$399.67, but that defendant has failed to comply with his agreement and failed and refused to pay the amount due under the award, and he thereupon prays for judgment.

Counsel for both parties and the trial court treated this action as one both upon the account and upon an alleged award. Plaintiff introduced as his first witness the said Scivally, alleged by plaintiff in his petition to have been selected to arbitrate the differences between him and defendant, and endeavored to prove by him the arbitration and award in pursuance with the agreement; but the witness testified that no award was ever made. Thereafter the action was treated as

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

one upon the account. The question of defect of parties was properly made by defendant. The trial court, however, held that there was no defect of parties. In this we think error was committed. The account sued upon was not between plaintiff and defendant, but between the firm of which plaintiff constituted only one of the members; and his right to recover judgment upon the account is based upon an alleged assignment thereof by the firm to him upon the dissolution of the partnership. But at common law an open account is not assignable so as to vest the legal interest in the assignee and enable him to sue upon it in his own name. *Anderson v. Lewis & Co.*, 10 Ark. 304. It is true that section 4933, Mansf. Dig. Ark (Ind. T. Ann. St. 1899, § 3138), in force in the Indian Territory, provides that every action must be prosecuted in the name of the real parties in interest, but the next section provides that, where the assignment of a thing in action is not authorized by statute, the assignor must be made a party as plaintiff or defendant. There was no provision of the statute in force in that jurisdiction authorizing the assignments of open accounts. Discussing these provisions of the statute in *St. Louis, Iron Mountain & Southern Ry. Co. v. Camden Bank*, 47 Ark. 541, 1 S. W. 704, it is said: "The appellees are, however, the assignees of whatever amounts are due upon these open accounts, and are entitled to collect them by suit in their own name. But the accounts are not contracts or agreements in writing for the payment of money or property, and are not therefore assignable so as to permit the assignee to bring his action upon them without the appearance of the assignor in some form in the action so that the judgment will bind him and protect the party to be charged. It is difficult to give a reason for dispensing with the presence of the assignor when suit is brought upon a nonnegotiable instrument assigned by delivery merely that does not apply with equal force to a suit upon an open account, but the statute makes a distinction, and the courts are at liberty to disregard its peremptory terms." The foregoing decision of the Arkansas court was binding upon the courts of the Indian Territory before the admission of the state; and, had the cause been tried before the admission of the state, it would have fixed the test for determining whether there was a defect of parties, and by section 1 of the schedule to the Constitution the same rule is made to apply in the trial of the cause after the admission of the state.

It is also urged that the verdict is not supported by the evidence, but this assignment cannot be reviewed; for, although the case-made contains a recital by way of averment that it contains all the evidence introduced at the trial, it is apparent from the case-made that it does not contain all the evidence,

and that such recital is untrue. Throughout the trial various books or parts of books and accounts were introduced in evidence. None of these have been embodied in the case-made. Where the record upon its face shows that it does not contain all the evidence, but that material books and accounts have been omitted therefrom, the record is the best evidence, and will prevail over statements in the case-made and recitals in the certificate of the trial judge that it does contain all the evidence. *Anderst v. Atchison, Topeka & Santa Fé Ry. Co.*, 19 Okl. 206, 91 Pac. 894; *Ragains v. Geisler Mfg. Co.*, 10 Okl. 544, 63 Pac. 687.

There are other assignments in which complaint of the admission of certain evidence is made. Some of the assignments complain of the admission of some of those books and accounts which have not been made part of the case-made. A decision upon these assignments would require a consideration of the evidence to determine whether any prejudicial error was committed in the matters complained of; but this court will not review assignments requiring a consideration of the evidence, when the record does not contain all the evidence introduced at the trial. *Pierce v. Engelkemeler*, 10 Okl. 308, 61 Pac. 1047; *Blackwell et al. v. Hatch*, 13 Okl. 169, 73 Pac. 933; *Garretson v. Witherspoon*, 15 Okl. 473, 83 Pac. 415.

For the error of the court in overruling the demurrer to plaintiff's petition upon the ground that there was a defect of parties, the judgment of the trial court is reversed.

DUNN, C. J., and WILLIAMS, KANE, and TURNER, JJ., concur.

(27 Okl. 450)

OKLAHOMA FARMERS' MUTUAL INDEMNITY ASS'N v. SUTTON.

(Supreme Court of Oklahoma. Nov. 16, 1910.)

(Syllabus by the Court.)

INSURANCE (§ 672*)—MUTUAL INSURANCE—JUDGMENT—SUFFICIENCY.

O. Co. insured S. for a term of years, beginning on the 17th of May, 1906, in consideration of a certain premium paid to it by S.; said company being a mutual insurance company existing by virtue of article 5, c. 43, *Wilson's Rev. & Ann. St. 1906*. A general verdict was returned in favor of the assured, and judgment rendered thereon against the company for the recovery of said sum. *Held*, under this record, not to be error.

[Ed. Note.—For other cases see *Insurance*, Dec. Dig. § 672.*]

Error from District Court, Washita County; J. R. Tolbert, Judge.

Action by Mrs. S. E. Sutton against the Oklahoma Farmers' Mutual Indemnity Association. Judgment for plaintiff, and defendant brings error. Affirmed.

George T. Webster, for plaintiff in error. T. A. Edwards, for defendant in error.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

WILLIAMS, J. This was an action by the defendant in error, as plaintiff, against the plaintiff in error, as defendant, to recover, on an undertaking in writing entered into by it on the 17th day of May, 1906, in consideration of a certain premium paid by plaintiff to defendant, whereby it insured plaintiff's certain house, furniture, beds, bedding, wearing apparel, jewelry, books, etc., for a term of years in the sum of \$925 against all losses by fire and lightning, cyclones, tornadoes, or windstorms, \$825 as damages, with interest thereon at the rate of 7 per cent. per annum from the 12th day of June, 1907. The insurance undertaking or policy upon which this action is based is in part as follows: "In consideration of the payment of thirty-two and $\frac{7}{100}$ dollars, payable as follows: \$——— cash and twenty-three and $\frac{12}{100}$ dollars on or before the 1st day of September, 1906, and \$——— on or before the —— day of ——, 190—, and a premium contract for nine and $\frac{25}{100}$ dollars, payable in part or whole, as the directors of said association may demand, upon an assessment to be made by them whenever they shall deem the same necessary for losses and expenses. This contract, or such part thereof as shall remain unpaid at the expiration or termination of said policy, shall be given to the maker, provided all assessments on this contract and all liabilities of the maker to said association shall have been paid. If default is made in the payment of any one assessment as above stated, then the whole of the contract shall become immediately due and payable. In no event can the assured be called on for more than the amount of this contract. The representations and declarations made by the assured in his application and contract—does insure Mrs. S. E. Sutton, Cloud Chief, Okl., against loss or damage by fire, lightning, wind, cyclones, and tornadoes, in the sum of nine hundred twenty-five dollars according to the specifications below, on the following described property for the term of five years. * * * And the Oklahoma Farmers' Mutual Indemnity Association hereby agrees to indemnify and make good said assured, his executors, administrators, or assigns, in sixty days after receipt of satisfactory proof, all such immediate loss or damage, not exceeding in amount the sum or sums as above itemized, nor the actual cash value of the property at time of loss." Defendant, in its answer, pleaded, among other things, failure to prove loss, misrepresentations as to value, etc., in procuring the application.

Section 8 of an act of Oklahoma Territory, of Feb. 27, 1899 (Laws 1899, c. 17), being section 3263, Wilson's Rev. & Ann. St. 1903, provides: "The premiums upon growing crops shall be applied to loss or damage on growing crops and the premiums upon live stock,

farm buildings, and other property insured against fire, lightning or wind storms, shall be applied to losses upon such property. The expenses of the association shall be borne ratably by all the insurance carried by the association." The only error urged here is that the judgment rendered on such verdict is contrary to said section. Nothing in the record shows that the court was requested to direct that said judgment direct that said sum be collected out of premiums upon live stock or farm buildings or other property, and not out of the premiums upon growing crops. This matter not having been called to the attention of the trial court, it is not essential to determine this question, especially in view of the fact that the presumption is that plaintiff in error has the funds with which to meet said judgment, and that it contested same because it deemed that it had an adequate defense to said policy, and not because it was unable to pay the loss.

The judgment of the lower court is affirmed. All the Justices concur.

(37 Okl. 554)

GAST v. KING et al.

(Supreme Court of Oklahoma. Nov. 16, 1910.)

(Syllabus by the Court.)

1. CORPORATIONS (§ 84*)—SUBSCRIPTION TO STOCK—RELEASE OF SUBSCRIBERS.

A secret agreement to release one set of subscribers, or one particular subscriber, to stock in a corporation, is unfair and a fraud upon other subscribers.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 307; Dec. Dig. § 84.*]

2. CORPORATIONS (§ 80*)—SUBSCRIPTION TO CORPORATE STOCK—FRAUD OF PROMOTERS—ACTIONS FOR DAMAGES—PETITION.

Petition examined, and held to state facts sufficient to state a cause of action.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 244-265; Dec. Dig. § 80.*]

Error from District Court, Oklahoma County; Geo. W. Clark, Judge.

Action by Franklin L. Gast against Alphonse L. King and others. Judgment for defendants, and plaintiff brings error. Reversed and remanded.

Fred S. Caldwell, for plaintiff in error.

KANE, J. This was an action commenced by the plaintiff in error, plaintiff below, against the defendants in error, defendants below, to recover the purchase price of certain stock in a corporation, upon the ground that the sale was procured by the fraud and deceit of the defendants. A general demurrer to the petition was sustained by the court below, and the plaintiff electing to stand on his petition, judgment was rendered against him. To reverse this judgment, this proceeding in error was commenced.

We think the petition states facts sufficient

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

to constitute a cause of action against the defendants. The petition is very long, and, as there is no brief on behalf of the defendants in error to assist the court in analyzing it, we may have overlooked the ground or grounds upon which the court below sustained the demurrer. The petition states, in substance, that on or about the 15th day of September, 1906, the defendants King and Keith called upon the defendants Turner and Anderson and proposed the organizing of a corporation under the laws of the territory of Oklahoma for the purpose of manufacturing, buying, and selling patent articles; that King stated to Turner and Anderson that he would make over and assign to said corporation his design for an advertising frame, as per letters patent, of date the 20th of July, 1897, serial number 27,404, patent office United States of America, together with all improvements thereon, as his subscription to the capital stock; that King and Keith stated to Turner and Anderson that they desired to have them connected with the corporation for the purpose of using their names as well-known and financially responsible business men to induce others to subscribe for stock in said corporation and pay therefor; that, if they Turner and Anderson would consent and agree to so lend their names to said corporation, then said King and Keith as the promoters of said corporation would cause to be issued to them, without anything being paid into the treasury of said corporation therefor, certain blocks of the capital stock of said corporation when the same was organized, and that such stock would then be valuable in the hands of the said Turner and Anderson by reason of the sums which other subscribers would pay into the treasury of said corporation and by reason of said interest in said King's patent right; that said Turner and Anderson did then and there secretly agree with said King and Keith as the promoters of said proposed corporation to lend their names to said promoters as to said corporation for the purpose of enabling said promoters to hold out and represent them as being investors in said corporation, and thereby because of the well-known reputation of the said Turner and Anderson as men of high business standing and financial responsibility, enabling said promoters to impose upon and defraud others into subscribing for stock in said corporation and paying their money therefor under the belief that said Turner and Anderson were bona fide investors therein; that it was then and there further agreed upon by and between the said King and Keith, as such promoters, and the said Turner and Anderson, as such pretended investors, that the amount of stock which the said Turner and Anderson should each receive for so lending their names to said promoters and pretending to be bona fide investors in said corporate enterprise should be one-tenth of the entire capital stock of said corporation; that immediately after the completion of said secret agreement King and Keith approached the plaintiff, and, pursuant to and in furtherance of the carrying out of the scheme and plan which they had then formulated and devised to the end that they might swindle and defraud him, and of which said plan and scheme the assistance and co-operation of the said Turner and Anderson, were a necessary and essential part, and proposed to him that he subscribe for stock in said corporation; that said corporation was to have a capital stock of 1,000 shares of the par value of \$10 each; that said Turner had subscribed for 100 shares of said company's capital stock, for which he was bound to pay into the treasury of said corporation the sum of \$1,000; that said Anderson had subscribed for 100 shares of said company's capital stock, for which he was bound to pay into the treasury of said corporation the sum of \$1,000; that Keith had subscribed for 250 shares of said company's capital stock, for which he was bound to pay into the treasury of said corporation the sum of \$2,500; that said King had subscribed for 250 shares of stock of said company, for which he had agreed to sell, transfer, and convey to said corporation all his said patent right as aforesaid; that said statements and representations so made to said plaintiff were false and untrue, and were known to be false and untrue at the time they were made, in this: Because of said secret agreement before referred to; that the said Turner, Anderson, Keith, and King were not bona fide subscribers to the capital stock of said corporation; that it was at all times understood by and among said King, Keith, Turner, and Anderson that neither of said parties should pay anything for their stock, and that said stock should be issued to them without anything of value, either in the form of money or property or services, being rendered therefor, and without the assets or resources of said corporation being benefited or enhanced in any way; that on or about the 2d day of October, 1906, while said plaintiff was ignorant of the aforesaid secret agreement, and while he was ignorant of the falsity of said statements and representations made to him, and fully believing and relying upon said statements and representations, he then and there agreed with said King and Keith to subscribe for the full number of 250 shares of the capital stock of said company, and pay therefor at the same rate at which it had been stated to him that said Turner, Anderson, Keith, and King were paying therefor, provided that King and Keith would furnish him with reasonable evidence as to the financial responsibility and business standing of said Turner and Anderson. Thereafter said King and Keith furnished plaintiff with certain letters which he accepted as reasonable evidence of the financial re-

sponsibility and business standing of said Turner and Anderson, and thereupon he definitely closed his subscription agreement, and thereafter paid for said 250 shares of said company's capital stock at the rate of \$10 per share and received said corporation's stock certificate for the number of 200 shares of said stock, the balance of said shares never being issued or received by him. After said 200 shares of stock were so issued and received by plaintiff, he surrendered the same up to defendant Anderson, without receiving anything of value therefor, on the statement and representation then and there made to him by said other defendants and said Anderson that said act was necessary and proper for the mutual interests and common welfare of all of said parties and that said other stockholders were doing the same. Plaintiff has never since received back or come into possession of any of said stock. On or about the 1st day of May, 1907, plaintiff learned and discovered the fraud complained of, and first learned of the existence of said secret agreement between said King, Keith, Turner, and Anderson. When said plaintiff discovered said fraud, all of said money, the full sum of \$2,500, which he had paid for said stock, had been expended by said corporation or appropriated by said defendants and converted to their own use. By reason of said secret agreement by and between said King, Keith, Turner, and Anderson and by reason of said false statements and representations made to him and upon which he relied and acted, and which he did not know to be false at the time, he has been defrauded by said defendants and damaged in the sum of \$2,500.

In Cook on Corporations (6th Ed.) § 152, it is said: "There are in general five different remedies which are open to a subscriber induced to subscribe by fraud. He may, upon discovering the fraud, rescind the subscription by notification to the corporate authorities, without taking legal proceedings, or he may wait until sued upon the subscription, and then set up the fraud as a defense to the action at law, or he may file a bill in equity to restrain such suits at law and to set aside the subscription, and also, if he wishes, to recover back payments already made on the subscription, or he may bring an action at law against the parties fraudulently issuing the subscription, and recover damages for the deceit." The latter of these remedies seems to be the one the plaintiff elected to pursue. It has been held in many cases that a secret agreement to release one set of subscribers, or one particular subscriber, to stock in a corporation, is unfair and a fraud upon other subscribers. Foy v. Blackstone, 31 Ill. 538, 83 Am. Dec. 246; Downie v. White, 12 Wis. 176, 78 Am. Dec. 731; Smith v. Heldecker, 39 Mo. 157; Robinson v. Railway Co., 32 Pa. 334, 72 Am. Dec. 792. In Paddock v. Fletcher et al., 42 Vt.

389, it is held: "The plaintiff having been induced to subscribe for a share of the capital stock of a company to be organized under the general statutes for certain legitimate purposes, by the false and fraudulent conspiracy, acts, and representations of the defendants, entered into and made for the purpose of deceiving and cheating the plaintiff, and by which he was deceived and cheated, having exercised such caution and prudence as the law required on his part, and so paid the price of said share to the treasurer of the company when organized, and sustained a loss thereby, is entitled to recover damages for the fraud in an action on the case against those who committed the fraud, whether they converted the money to their own use or not; and whether they carried out the fraudulent scheme after obtaining the money or not." Miller v. Barber et al., 66 N. Y. 538, was a case in a good many respects similar to the one at bar. The fourth paragraph of the syllabus reads as follows: "A corporation was organized under the general manufacturing law for the purpose, as stated in its charter, of dealing in patent rights and the manufacture and sale of patented articles. Defendant B. was president and defendant S. secretary, and both took an active part in the organization. They, with the other promoters of the company, had purchased for \$8,500 an interest in a 'patent hay loader,' giving their notes for most of the purchase money. The scheme to organize the company was set on foot to realize means to relieve themselves from liability thereon and to secure advances. The interest in said patent was conveyed to the company, and was the only property held by it to represent its nominal capital of \$35,000. To promote the sale of stock, and give credit to the enterprise, various prominent men were solicited and induced to subscribe for stock, giving their notes therefor upon a secret agreement, which was carried out, that the notes should be given up without payment. Plaintiff was induced to subscribe for \$500 for the stock, giving his note therefor, payable to defendants or bearer, upon representation of defendant B. that the invention was of great value, accompanied by a statement of the names of the stockholders; B. including in the list the names of those who had subscribed under the secret agreement. The negotiations were had in the office of defendant S., used as the office of the company. He was in another room at the time. Stock was also sold to others upon similar representations, and enough was realized from sales to pay the advances and liabilities of the original purchasers of the patent. Plaintiff's note was sold before maturity, and plaintiff paid the same. In an action to recover damages from fraud, the evidence tended to show that the patent was of no value. Held, that the evidence was sufficient to sustain the action, as the representation

of the value of the invention was accompanied with a false representation of an extrinsic fact, calculated to, and which did, put plaintiff off his guard, and induced him to give credit to the statement of value. Also, held, that the representations so made by B. were properly received in evidence as against S., the evidence showing that he knew from its inception of the scheme for securing factitious subscriptions, and that he accepted the benefits resulting from the fraud." In *Gilpin v. Netograph Mach. Co. et al.*, 108 Pac. 382, this court held that: "Where, in a suit on two promissory notes, the testimony disclosed that the same were executed in renewal of two other notes given by defendant to plaintiff in payment for his share of the purchase price of a worthless patent right, that defendant was induced to sign the original notes by the agent of plaintiff and L., one of defendant's copartners, by representing to him that L., on whose honesty, good faith, and judgment defendant relied, thought it a good investment and would join his copartners in the purchase thereof and pay for and share therein equally with them, that after the deal was closed, pursuant to a secret agreement between said agent and L., plaintiff return to L. unpaid his note and check given in payment for his share of the purchase price of said patent right, held, that the evidence was sufficient to take the case to the jury on the ground of fraud; held, also, that the execution of the renewal notes before the discovery by defendant of the fraud did not constitute a waiver thereof."

The judgment of the court below is reversed, and the cause remanded, with directions to proceed in conformity with the views herein expressed.

DUNN, C. J., and WILLIAMS, HAYES, and TURNER, JJ., concur.

(37 Okl. 630)

STATE ex rel. TAYLOR, State Examiner, v. COCKRELL, State Bank Com'r.

(Supreme Court of Oklahoma. Nov. 29, 1910.)

(Syllabus by the Court.)

BANKS AND BANKING (§ 17*)—AUTHORITY OF STATE COMMISSIONER — EXAMINATION OF RECORDS OF BANK EXAMINER.

The State Examiner and Inspector is authorized by Act April 9, 1908 (Sess. Laws, 1907-08, c. 79, art. 1, pp. 701, 705), as amended by Act Nov. 12, 1909 (Sess. Laws 1909, c. 37, art. 3, pp. 567, 569; Comp. Laws 1909, c. 108, art. 6, §§ 8674-8680, pp. 1741-1743), to examine the office and records of the Bank Commissioner, including the records, books, papers, etc., of a failed or insolvent bank in his custody or control as such officer in winding up and administering the affairs of such bank under the powers conferred upon him by said acts.

[Ed. Note.—For other cases, see Banks and Banking, Dec. Dig. § 17.*]

Kane, J., dissenting.

Action by the State, on the relation of Charles A. Taylor, State Examiner and Inspector, for a writ of mandamus to E. B. Cockrell, State Bank Commissioner. Writ awarded.

Chas. West, Atty. Gen., and Chas. L. Moore, Asst. Atty. Gen., for plaintiff. Ledbetter, Stuart & Bell, for defendant.

WILLIAMS, J. This is an original action for a writ of mandamus instituted by the state of Oklahoma, upon the relation of Chas. A. Taylor, State Examiner and Inspector, against A. M. Young, Bank Commissioner of said state. After the petition was filed, Mr. Young resigned as Bank Commissioner, and Mr. Cockrell, who was appointed to fill his place, appeared, and prayed that he might be substituted as party defendant in place of said A. M. Young. Upon being made a party, he adopted the answer filed by Mr. Young and made the same his answer.

The office of State Examiner and Inspector exists in no other state of this Union by constitutional provision. Section 1 of article 5 of the Constitution of this state provides: "The executive authority of the state shall be vested in a Governor, Lieutenant Governor, Secretary of State, State Auditor, Attorney General, State Treasurer, Superintendent of Public Instruction, State Examiner and Inspector, Chief Mine Inspector, Commissioner of Labor, Commissioner of Charities and Corrections, Commissioner of Insurance, and other officers provided by law and this Constitution, each of whom shall keep his office and public records, books, and papers at the seat of government, and shall perform such duties as may be designated in this Constitution or prescribed by law." In *State of Oklahoma ex rel. Attorney General v. A. H. Huston*, District Judge et al. (recently decided by this court but not yet officially reported) 113 Pac. 190, it was said: "Under the Constitution of Oklahoma, which provides for the election of state, county and township executive officers alike by the people, the state executive officers below the Governor, with a few exceptions, are as independent of his control in the performance of their duties as are the officers of the counties or of the townships." Obviously the duties of the State Examiner and Inspector as prescribed by the Constitution are to be discharged by him independent of the chief executive of this state. It is not within the power of the chief executive to prevent the State Examiner and Inspector from discharging any duty imposed upon him by virtue of the Constitution or the statutory law as in force in this state. The duty of the chief executive arises when the State Examiner and Inspector fails to discharge his duty; it then being the duty of the chief executive to see that the laws are faithfully executed, and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

that all executive officers discharge the duties imposed upon them by law. However, under the clause providing that other duties and powers may be added by law, it is within the power of the Legislature to prescribe certain duties to be performed by the State Examiner and Inspector when directed by the Governor. *State ex rel. Haskell, Governor, v. Huston et al.*, 21 Okl. 782, 97 Pac. 983. But where a duty is imposed not conditioned upon the direction of the Governor, but left to the discretion of the State Examiner and Inspector, it is not within the power of the chief executive to prevent the performance of such duty by him. The sole question involved in this case is as to whether the State Examiner and Inspector is authorized under the law to examine the records of the Bank Commissioner or banking department as to the collection and disbursement of the depositor's guaranty fund and the funds or assets of failed or insolvent banks received and disbursed by the Bank Commissioner or banking department in winding up the affairs of such bank, and, if so, has such officer the authority, in order to verify the records of the receipts, collection, and disbursement of such funds to examine the records, books, and papers of such bank while in the custody of the banking department? It is not contended on the part of the relator that the State Examiner and Inspector has any authority to inspect or examine any bank that is a going concern. As to the bank in question, the Columbia Bank & Trust Company, it seems that the Bank Commissioner, after due examination of its affairs, having become satisfied of its insolvency, took possession of its assets and proceeded to wind up the same. As to the funds and assets of said bank, are they under the management of the state, and within the scope of section 1, art. 3, c. 37, pp. 567-569, Sess. Laws 1909 (section 1, art. 1, c. 79, p. 701; Sess. Laws 1907-08), wherein it is provided: "The Examiner and Inspector shall examine the books and accounts of state officers whose duties it is to collect or disburse funds of the state or (under) its management at least once each year"? That the Bank Commissioner is a state officer has not been and cannot be questioned. That the depositors' guaranty fund and the funds of a failed bank in the hands of a Bank Commissioner for the purpose of reimbursing the depositors' guaranty fund is as much a fund of the state as the common school fund is also true. The depositors' guaranty fund act was sustained by this court on the theory of the reserve power of the state to alter and amend charters of state banking corporations for the public welfare of the people of the state. See *Noble State Bank v. Haskell et al.*, 22 Okl. 78, 97 Pac. 595, which is in harmony with *Ozan Lumber Co. v. Biddle*, 87 Ark. 587, 113 S. W. 796; *New York Central & H. R. R. Co. v. Williams*, 199 N. Y. 108, 92 N. E. 404; *Hammond Packing Co. v. Arkan-*

sas, 212 U. S. 322, 29 Sup. Ct. 370, 53 L. Ed. 530. This power exercised for the public welfare by the legislative act which causes to be levied the assessment "against the capital stock of each and every bank or trust company organized or existing under the laws of this state * * * equal to five per centum of its average daily deposits during its continuance in business as a banking corporation" for the purpose of protecting the depositors of such banks (section 3, art. 2, c. 5, pp. 121-123, Sess. Laws 1909) is the same as that which levies, or causes to be levied, a tax upon the property within the state for the maintenance and support of the common schools and educational institutions. The title of such depositors' guaranty fund vests in the state just as much so as the common school lands or the proceeds of the sale of the same, and the taxes levied and collected for the maintenance and support of said schools, all of which are held in trust by the state for a specific purpose. Even if it were not a state fund, it would at least be a fund under the management of the state. In that event the Bank Commissioner, being a state officer (section 1, art. 14, Const.) and a part of the executive department, would be brought within the terms of the act that imposes upon the State Examiner and Inspector the duty to examine the books and accounts of all state officers whose duties it is to collect and disburse funds under the management of the state. The qualifications of the State Examiner and Inspector are that he is to be an expert accountant with three years' experience. He is also to be elected by the people in their sovereign capacity. By section 60 of article 5 of the Constitution it was made mandatory upon the Legislature to "provide by law for the establishment and maintenance of an efficient system of checks and balances between the officers of the executive department, and all commissioners and superintendents, and boards of control of state institutions, and all other officers entrusted with the collection, receipt, custody, or disbursement of the revenue or moneys of the state whatsoever." The title of the act passed by the first Legislature under this mandate is as follows: "An act relating to the office of State Examiner and Inspector in compliance with section 152 of the Constitution of the state of Oklahoma, providing for a state Constitution of the state of Oklahoma, providing for a State Examiner and Inspector; and article 5, section 133, entitled, 'A system of checks and balances between officials'; defining duties and powers of State Examiner and Inspector; providing for appointment of an assistant, deputies and other employes, fixing salaries, providing for penalties, repealing all conflicting acts, and declaring an emergency." Sess. Laws 1907-08, p. 701. The supplemental amendatory act passed by the Legislature of 1909 pursuant to the same mandate is styled as follows: "An act amending an

act entitled, 'An act relating to the office of State Examiner and Susceptor (Inspector) and art. 5, section 133, entitled: "A system of checks and balances between officials"; defining duties and powers of State Examiner and Susceptor (Inspector); providing for appointment of an assistant, deputies, and other employes, fixing salaries, providing for expenses, providing for penalties, repealing all conflicting acts and declaring an emergency; approved April 9, 1908; and prescribing additional duties and powers; and increasing the number of deputies, and declaring an emergency." Laws 1909, c. 37, art. 3.

It is a settled rule of construction that we look to the context including the title of an act in case of doubt as to the meaning of such act. *Rakowski v. Wagoner*, County Judge, 24 Okl. 282, 103 Pac. 632. By the title of said act, it is the declared purpose of said enactment to carry into effect the mandatory provisions of said section 60 by providing for a system of checks and balances between officers of the executive department and all other officers intrusted with the receipt, custody, or disbursement of the moneys of the state whatsoever. The State Bank Commissioner or the banking department is a part of the executive department of the state, and is intrusted with the receipt, custody, and disbursement of funds of failed banks. It being the declared purpose of the Legislature by said two acts to carry into effect said section 60, did said enactments reasonably have such effect? Section 4 also provides: "All officers of the state and counties of the state * * * must make written exhibits to the Examiner and Inspector under oath in such form and in such manner as he may prescribe, and each and every person so required who shall refuse and neglect to make such written exhibit, or to make or to give such information as may be required by said Examiner and Inspector, shall be deemed guilty of a misdemeanor; and if any person in making such exhibit or giving such information or affording any statement required under this act, on his oath, shall knowingly swear falsely concerning the same, he shall be deemed guilty of perjury and punished accordingly. The State Examiner and Inspector shall have full power and authority for the various purposes named to examine books, papers, accounts, bills, vouchers and any other documents, or property of any or all of the aforesaid state institutions, all state officers and custodians of any county or state funds, also to examine under oath, county or state officers and custodians of county and state funds aforesaid. The State Examiner and Inspector is empowered to issue subpoenas and administer oaths in the performance of his duty, and any persons refusing access to said examiner to any such books, or papers, or any officer, clerk, employe, or other persons aforesaid, who shall obstruct access and refuse to search for any required informa-

tion, or who shall in any manner hinder the examination required by this act of the records and books of the officers of public institutions or pertaining to county and state officers aforesaid shall be deemed guilty of a misdemeanor. * * * The power to examine papers, accounts, bills, and vouchers or any other documents of all state officers or custodians of county or state funds aforesaid is referable to section 1, art. 1, supra, wherein the duties are imposed upon the State Examiner and Inspector to examine the books and accounts of state officers whose duties it is to collect or disburse funds of the state or (under) its management at least once each year. It seems from this language that it is the duty of the State Examiner and Inspector to examine the books, papers, accounts, bills, vouchers, and any other documents of the banking department, relative to the depositors' guaranty fund or any fund or assets of failed banks that have been handled by said department.

It is contended that the State Examiner and Inspector in making this examination is confined to the books of the banking department upon which the Bank Commissioner or other officer of said department have made entries or record relative to such fund or assets received, disbursed, or disposed of. If this be true, an examination of such department in respect to the funds and assets of a failed bank that have been or are being administered by said department could result in no practical benefit. The result would be a valueless farce, for the State Examiner and Inspector, being confined to such record as contained only entries made by the Bank Commissioner or the banking department, would have no way to determine whether they spoke the truth. Whilst all officers are presumed to be without official wrong, yet it was the evident intention of the framers of the Constitution to have such system of checks and balances as would bring about an inquisitorial examination for the protection of the people, so that there could be no hidden official wrong. These organic and statutory provisions should be given a reasonable construction to carry out the spirit and evident purpose of the lawmakers, and not by a restricted or narrow construction leave one of the most important branches of the executive department without an examination by the expert accountant or state officer elected by the people of the state for such purpose. There appearing to be no reason for such an exception, and none seeming to have been made, such exception should not be interpolated by construction into this statute. It is the mandatory duty of the Examiner and Inspector to examine at least once a year the books and accounts of state officers whose duties it is to collect and disburse funds of the state, or funds under its management; it being left to his discretion to make other examinations during such year if he thinks best. The

Governor, if he determines that other examinations than those made by the State Examiner and Inspector on his own motion are necessary, may call upon such State Examiner and Inspector to make such examinations, and it will be his duty to make the same.

The suggestion is made that, as it is his mandatory duty only to make one examination of said office each year, the records of failed banks may not remain permanently in the custody of the banking department. There being a discretion left to the State Examiner and Inspector as to whether he will make more than one examination, it is presumed that he will exercise such discretion to make at the proper and opportune time all necessary examinations. Why has he not under the broad powers conferred upon him under these statutes in order to determine whether the records of the receipts and disbursements of such funds are correct a right to examine the original books and entries of such failed bank as to cash received and disbursed and as to bills receivable and bills payable disposed of, etc., to determine whether said department as to such insolvent bank has faithfully administered its trust? If the records of such bank have been turned back to the directors and stockholders of the institution, why cannot said State Examiner and Inspector, under his inquisitorial power and the authority vested in him by virtue of said section 4, issue subpoenas for the attendance of such officers of such bank requiring them to bring with them such books and records as may be in their custody that he may examine such parties under oath and examine such records to make a thorough and complete examination of such departments. What is the sense of the requirement of such official or employees to make answer and to attach exhibits of said records covering such matters if the originals may not be examined by him? Every citizen of this commonwealth has an interest in the faithful administration of the banking department and the honest disbursement and accounting of the depositors' guaranty fund and the winding up of the affairs of all failed banks.

In *Noble State Bank v. Haskell et al.*, supra, it is said: "Banks are chartered by the state, not with the paramount view of enabling the stockholders to make investments and derive profits therefrom, but to meet a public necessity. The stockholders having made investments therein should be protected, but private interest must always be subordinated by the state, in the reasonable exercise of its police power, to the public welfare or good. With the view that the depositor as well as the stockholder, and the general public with an incidental interest therein, may be protected, banking is regulated, and limitations, restraints, and requirements are imposed. * * * In addition, to further and more completely protect the depos-

itors, the depositors' guaranty fund is created; the Legislature acting pursuant to the mandatory declaration of the Constitution." It was the purpose of the framers of the Constitution in creating the office of the State Examiner and Inspector with the mandate contained in section 60 of article 5, to provide for the examining and the checking of the accounts of all officers handling the funds of the state or funds under its management, so that the interests of the people of this state could be safeguarded by each department and office not being depended upon to check itself. In section 1 it is specifically provided that no deputy of the State Examiner and Inspector shall examine the records of the county officers of the county in which he resides. This forcibly shows the intent and purpose of the Legislature to have a disinterested and impartial inspection and examination of the account of all officers. To say—after this care in framing the Constitution to provide for such office and imposing the mandatory duty upon the Legislature to act, and in pursuance of which the Legislature has acted and examination provided to be made of the records of every state officer handling funds of the state or funds under its management, and having further provided for the issuance of subpoenas and the administering of oaths so that witnesses might be subpoenaed and papers brought before such Examiner and Inspector, and making it a misdemeanor for any person or officer to obstruct such Examiner making search in the examination of such office—that only an examination of the permanent records is authorized, is to fly in the face of the spirit and letter of the act. There is no provision in these statutes for the placing of the winding up of the affairs of a failed bank under the jurisdiction of a court. The provision is that the claims shall not be sold or compromised without being authorized by an order of court. This act contemplates that the affairs of a failed bank shall be wound up by the Bank Commissioner and these records while in the custody of the Bank Commissioner are the records of his office. There is no contention in this case that these records were not in the custody of the Bank Commissioner. If we are not correct in this conclusion, there is no adequate provision for the examination of the school land department by the State Examiner and Inspector, for the authority to examine the same can be only by virtue of section 1, heretofore referred to, imposing the duty upon the State Examiner and Inspector to "examine the books and accounts of state officers whose duties it is to collect or disburse funds of the state or (under) its management at least once each year." And how can a correct examination of said department be made without verifying the entries on the records of said department by calling upon the depositories for copies of entries and amounts of money on deposit, and, if he thinks it necessary, to

subpoena the officers of the depositories, lessees, and purchasers of land to further verify as to amounts of money received, paid, or agreed to be paid. Certainly, if he had this authority as to the Commissioners of the Land Office who are state officers, he has such authority as to the Bank Commissioner (a state officer) as to all papers in his custody relative to such trust fund. Nor would there be any adequate provision authorizing the examination of the office of the state fish and game warden, if he were to be confined exclusively to the permanent entries and records made in such office by being excluded from calling upon the various deputies over the state for exhibits or subpoenaing, swearing, and examining them as witnesses. The same would apply to the state librarian, state oil inspector, and other state officers. The fact is that section 1 is comprehensive and was intended to apply to every state officer authorized to collect or disburse funds whatsoever of the state or (under) its management at least once each year and to provide for effective not abortive examinations. Section 2 is equally as comprehensive as to the "public, educational, charitable, penal and reformatory institutions belonging to the state," or "under the control of the state," leaving no exception. To adopt such a rule of construction as is contended for by the respondent would curtail the power of a constitutional officer to examine one of the most important branches of the executive department of this state in handling trust funds, and place an exception in the statute when the more reasonable construction places none there. The writ of mandamus as prayed for is therefore awarded.

DUNN, C. J., and HAYES and TURNER, JJ., concur. KANE, J., dissents.

(27 Okl. 595)

WOOD v. STEIL et al.

(Supreme Court of Oklahoma. Nov. 16, 1910.)

(Syllabus by the Court.)

1. JUDGMENT (§ 569*)—VACATION—SECOND APPLICATION—NECESSITY FOR LEAVE TO FILE.

A second application to vacate a judgment or order founded upon facts which were known or should have been known to the party when making the first application should not be considered by the court in the absence of leave first had to file the same.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 998; Dec. Dig. § 569.*]

2. JUDGMENT (§ 344*)—APPEAL AND ERROR (§ 982*)—REVIEW—DISCRETION OF COURT—RULING ON MOTION TO VACATE JUDGMENT.

An order of court vacating or refusing to vacate an order or judgment rests much in the discretion of the court, and will not be disturbed on appeal unless plainly erroneous.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 673, 677; Dec. Dig. § 344.* Appeal and Error, Cent. Dig. §§ 3577-3879; Dec. Dig. § 982.*]

Error from District Court, Muskogee County; John H. King, Judge.

Action by M. F. Stell and others against B. F. Wood, Sr. Judgment for plaintiffs, and defendant brings error. Affirmed.

Bert G. Wood and O. T. Gilbertson, for plaintiff in error. Thomas A. Jenkins, for defendants in error.

DUNN, C. J. This case presents error from the district court of Muskogee county, and originated prior to statehood in the United States commissioner's court, sitting at Muskogee. From the judgment of that court the cause was appealed to the United States Court of the Western District of the Indian Territory, and by operation of law was transferred to the district court of Muskogee county on the incoming of statehood. It was regularly assigned for trial November 17, 1908, and on its being called for hearing counsel for defendant, who was appellant, did not appear. Counsel for plaintiff filed motion to dismiss the appeal for want of prosecution, which motion was on the same day taken up, considered by the court, and the cause was dismissed. On the next day, to wit, November 18, 1908, the defendant filed a motion to reinstate the cause, alleging therein that defendant's counsel was informed and believed that the cause was set for November 18, 1908, instead of November 17, 1908, and that there was a good defense to the action. The court on the hearing of the said motion to reinstate overruled the same, and adhered to its previous order or judgment of dismissal. Ten days thereafter, and on November 28, 1908, the defendant, to secure the same relief which had been denied on his previous motion, filed a petition under section 6004, Comp. Laws 1909, which provides that "the district court shall have power to vacate or modify its own judgments or orders, at or after the term at which such judgment or order was made. * * * Seventh, For unavoidable casualty or misfortune, preventing the party from prosecuting or defining." Counsel in his petition set up the same facts as were contained in his motion, and also an additional fact, to wit, that he had been prevented by illness from being present in court on the 17th day of November, 1908, and that, had he not been so prevented, he would have been in court at the time of the calling of the setting. In addition thereto, his petition contains a statement of defense to the action. Counsel for plaintiff filed a counter affidavit, the tendency of which was to call into question the illness alleged by counsel for defendant as the unavoidable casualty of misfortune which prevented him from appearing and prosecuting his appeal. This petition which sought to vacate the order previously made was de-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

nied, and from this defendant has brought the case to this court by petition in error and case-made.

Counsel for defendant in error in this court urge two grounds as reasons why the judgment of the trial court should be sustained: First, it is insisted that a second application to vacate a judgment founded upon facts which were known or should have been known to the party when making the first should not be considered by the court. This statement of the rule seems to be well supported by authorities, and in our judgment, in the absence of leave first obtained, a second application for the same relief on the same grounds or on grounds which were then or should have been known to counsel to exist ought not to be favorably entertained in order that the trial of actions may not be by piecemeal or become a series of experiments. Authorities supporting this conclusion may be noted as follows: 15 Ency. Plead. & Prac. pp. 300, 301, 302, where numerous authorities are cited in the notes; 23 Cyc. 974; *Smith v. Wachob et al.*, 179 Pa. 280, 36 Atl. 221; *Swanstrom v. Marvin*, 38 Minn. 359, 37 N. W. 455; *Weller v. Hammer*, 43 Minn. 195, 45 N. W. 427; *McCord v. McCord*, 24 Wash. 529, 64 Pac. 748. See, also, as pertinent to the same question the cases of *Jensen v. Barbour*, 12 Mont. 566, 31 Pac. 592, and *Bailey v. Taaffe*, 29 Cal. 423.

It is said in the syllabus to the case of *Swanstrom v. Marvin*, supra, that: "A second application for such relief, founded upon facts which were known, or should have been known, to the party when making the first, should not be considered by the court." The application to set aside an order or judgment by default rests much in the discretion of the court, and will not be disturbed by an appellate court unless plainly erroneous. As is said in the case of *Bailey v. Taaffe et al.*, supra, on the matter of this discretion: "It is not a mental discretion, to be exercised ex gratia, but a legal discretion, to be exercised in conformity with the spirit of the law, and in a manner to subserve, and not to impede or defeat, the ends of substantial justice. In a plain case this discretion has no office to perform, and its exercise is limited to doubtful cases where an impartial mind hesitates. If it be doubted whether the excuse offered is sufficient or not, or whether the defense set up is with or without merit in foro legis, when examined under those rules of law by which judges are guided to a conclusion, the judgment of the court below will not be disturbed." In this case the court had all of the parties before it and was called to pass upon the merits of the application presented. To do this it was necessary to weigh the showing made on the part of both parties, and to exercise its judgment and discretion in the premises. So from the consideration of either question presented, we

conclude that the denial of the petition to reinstate the cause was not error.

The judgment of the trial court is accordingly affirmed.

TURNER, WILLIAMS, KANE, and HAYES, JJ., concur.

(27 Okl. 400)

MEYER et al. v. WHITE.

(Supreme Court of Oklahoma. Nov. 16, 1910.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 1061*) — REVIEW — DEMURRER TO EVIDENCE.

Where the district court overrules a demurrer to plaintiff's evidence, and thereafter both parties proceed with the trial and introduce further and additional evidence, and sufficient evidence is introduced to make out a case for the plaintiff, a judgment rendered and entered in his favor on a verdict for plaintiff will not be disturbed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4137; Dec. Dig. § 1061.*]

2. LANDLORD AND TENANT (§ 291*)—TERMINATION OF TENANCY—WAIVER OF NOTICE.

In an action for forcible detainer to recover possession of a tenement, the notice to terminate the tenancy prescribed by Wilson's Rev. & Ann. St. Okl. 1903, § 3323, is waived, where the tenant disclaims the relation of landlord and tenant, refuses to pay rent to his landlord, and attorns to another.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 1226; Dec. Dig. § 291.*]

Error from Creek County Court; Josiah G. Davis, Judge.

Action by R. S. White against Max Meyer and others. Judgment for plaintiff, and defendants bring error. Affirmed.

Thompson & Smith, for plaintiffs in error. McDougal, Wood & Lattimore, for defendant in error.

TURNER, J. On July 29, 1908, R. S. White, defendant in error, as plaintiff, sued Max Meyer and Joe Abraham before a justice of the peace in Creek county in forcible detainer for the east room of the first floor of a 50x90-foot two-story building on the east 50 feet of lot 1 in block 47 in the city of Sapulpa, Creek county, Okl. He alleged that they had entered lawfully March 17, 1908, as his tenants; that their tenancy expired May 17, 1908; that he had served them with notice to quit, which he filed as an exhibit; and prayed restoration of the premises. Defendants pleaded "not guilty." There was judgment for plaintiff, and on trial anew in the county court, where the cause was appealed, there was again judgment for plaintiff, and defendants bring the case here.

To maintain the issues on his part plaintiff introduced in evidence a lease of the premises from the owner thereof to himself, dated November 28, 1906, for a term of two years from January 15, 1907; introduced

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

evidence tending to prove that, while in possession under said lease, he made an assignment of his stock of goods on sale therein; that the same was sold by his assignee on or about March 17, 1908, to defendants, together with the fixtures and balcony in the store; that they immediately took possession and continued the sale of said goods in said room with knowledge of plaintiff's lease, and with the understanding with plaintiff that they might occupy it 60 days; that, failing to pay rent, on May 20, 1908, he served defendants with notice that they were indebted to him in a certain amount for rent of the room from March 17, 1908, to May 17, 1908, with request for payment or that they surrender possession and quit; that on July 20, 1908, he again served them with notice to quit as required under the forcible entry and detainer act—and rested. Whereupon defendants demurred to the evidence, which was overruled, and exceptions saved.

To maintain the issues on their part, defendants proved that they took possession about March 14th, and paid the rent to the owner of the building, pursuant to an understanding with him that he would protect them. In rebuttal, plaintiff proved that he tendered the rent to the owner of the building when due, pursuant to the terms of his lease, which was refused, on the ground that it had already been paid by defendants.

In support of their demurrer, defendants contend that plaintiff had not made a prima facie case at the time he rested, in that a "close scrutiny" would show that he had failed to prove the dates when defendants' tenancy began and ended. We do not think so. But if this proof was not apparent at the close of plaintiff's testimony, which it was, it was made so at the close of all the testimony. Where this is the case, the error of the trial court in failing to sustain the demurrer, if any, is corrected, and it will not be disturbed here. *A. & N. Ry. Co. v. Reeher*, 24 Kan. 230.

Defendants' next contention is that the evidence fails to show that they were served with notice to terminate the tenancy, as required by Wilson's Rev. & Ann. St. Okl. 1903, § 3328, which reads: "When the time for the termination of the tenancy is specified in the contract, or where a tenant at will commits waste, or in the case of a tenant by sufferance, and in any case where the relation of landlord and tenant does not exist, no notice to quit shall be necessary"—and that therefore under all the evidence their demurrer to the evidence should have been sustained. We do not think so, for the reason that the time for the termination of the tenancy was specified in the contract—that is, at the end of two months—and for the further reason that, by refusing to attorn to plaintiff and paying rent to the owner of the building, de-

fendants disclaimed their landlord's title, and repudiated the relation of landlord and tenant existing between plaintiff and defendants. In *Polson v. Parsons*, 23 Okl. 773, 104 Pac. 336, 25 L. R. A. (N. S.) 104, this court on this point said: "Where this is done by a party in a suit against him for possession of real property, he is held to have waived a right to notice as a tenant." See cases there cited; also *Woodward v. Brown*, 13 Pet. 1, 10 L. Ed. 31. As there was no evidence reasonably tending to prove that plaintiff had abandoned his lease, the finding of the jury that he had not is supported by the evidence.

We have examined the court's instructions to the jury, and find that those complained of substantially state the law. There is nothing in the remaining assignments.

The judgment of the trial court is affirmed. All the Justices concur.

(27 Okl. 397)

LONSINGER et al. v. PONCA CITY.

(Supreme Court of Oklahoma. Nov. 16, 1910.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS (§ 280*)—CONSTITUTIONAL LAW (§ 290*)—DUE PROCESS OF LAW—NOTICE TO PROPERTY OWNERS—ASSESSMENT OF DAMAGES—MUNICIPAL SEWER SYSTEM—AUTHORITY TO ESTABLISH.

The syllabus in *City of Perry et al. v. Davis & Younger et al.*, 18 Okl. 427, 90 Pac. 865, is made a part of the syllabus in this case.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 740-743; Dec. Dig. § 280; * *Constitutional Law*, Cent. Dig. §§ 871-875; Dec. Dig. § 290.*]

2. APPEAL AND ERROR (§ 901*)—REVIEW.

Where it is not apparent that the title of an ordinance contains two subjects and the same is not pointed out, the ruling of the trial court upholding the validity of the ordinance will not be disturbed in this court.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3670; Dec. Dig. § 901.*]

Error from District Court, Kay County; W. M. Bowles, Judge.

Action by J. F. Lonsinger and others against Ponca City. Judgment for defendant, and plaintiffs bring error. Affirmed.

James Q. Louthan, for plaintiffs in error. Ed M. Catron, for defendant in error.

TURNER, J. On January 7, 1909, the city council of Ponca City, a city of the first class, passed an ordinance, No. 190, entitled: "An ordinance creating sewer districts Nos. 1 and 3 in the city of Ponca City, Oklahoma, establishing sewer districts therein; repealing sections 1 and 3 of Ordinance No. 182 and declaring an emergency." The body of the ordinance provided for the establishment of sewer districts Nos. 1 and 3, the construction of sewers therein, the character of material to be used, the submission of estimate of cost, and "that sections one (1) and three (3) of Ordinance No. 182 be repealed," declar-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

ed an emergency, and that the same be in force from and after its approval and legal publication. Thereafter the same was so published, and the city, pursuant thereto, advertised for bids for the construction of said sewers in said sewer district No. 1, and later published a "notice to contractors" that on a certain day a contract would be let by said city for the furnishing of material and construction of sewers in said district. No petition signed by a majority of the property owners, residents within said proposed sewer district, had been presented to said city council requesting or authorizing said council so to do as attempted, but a majority of said property owners protested in writing against the construction in or extension of any sewer or sewers in said proposed district. On petition filed in the district court of Kay county by J. F. Lonsinger and several other residents and property owners of said proposed sewer district No. 1, plaintiffs in error, against said city alleging said facts and that said pretended ordinance is void, because, they say, it contains more than one subject, and that said city in the absence of a petition by a majority of the property owners, resident within said proposed district requesting the city council so to do, was without jurisdiction to construct sewers therein, and praying that said city and its officers, etc., be enjoined from letting said contract, a temporary restraining order was issued as prayed, but later, on motion, was dissolved, and plaintiffs bring the case here.

They assign that the act of March 16, 1903 (article 1, c. 6, Sess. Laws Okl. 1903), is unconstitutional, in that it does not afford due process of law, and that the trial court erred in failing to so hold. In support of this contention they urge: " * * * A statute which invokes the taxing power must, if the process be due, provide that at some time and place, before the liability becomes fixed upon the individual property, the person who must pay may speak either in protest or in sanction. In vain do we search the statute under consideration for any provision for this opportunity. It is not there." This precise objection was raised to this act in *City of Perry v. Davis & Younger*, 18 Okl. 427, 90 Pac. 865, thus: "The second objection raised goes to the constitutionality of the act; that is, that the statute under which the tax was levied does not provide for any notice to owners of the property so taxed, or give them an opportunity to be heard, and that no sufficient notice was in fact given." In answer to which the court in the syllabus said: "Article 1, c. 6, p. 93, Sess. Laws 1903, under which the tax for the construction of the sewer in this case was levied, is not unconstitutional by reason of the fact that it fails to provide for notice of the construction of the sewer to property holders, other than the notice imparted by the passing of the

ordinance and other proceedings designated in the act, and to give them an opportunity to be heard before the construction of said sewer. Under the act of 1903, providing that, when a district sewer is completed, the whole cost shall be assessed as a special tax against the lots in the district, respectively, without regard to improvements, in the proportion which their respective areas bear to the areas of the whole district, is not unconstitutional as a deprivation of property without due process of law." We therefore hold adversely to plaintiffs' contention on this point, and that the same is no longer an open question in this jurisdiction.

The next assignment of error has also been held adversely to plaintiffs' contention in *City of Perry v. Davis & Younger*, supra, which is: "The court erred in holding and deciding that no petition signed by a majority of the property holders residents of said district No. 1 was necessary to authorize and empower the city of Ponca City to construct sewers in said district." There the court in the syllabus also said: "Under article 1, c. 6, p. 93, Sess. Laws 1903, entitled 'An act authorizing municipal corporations to extend or build general sewer systems and to levy special assessments of taxes to pay for same,' the mayor and city council are authorized to establish a general sewer system and proceed with the construction of district sewers when deemed necessary, without a petition by a majority of the resident property holders residing in the sewer district." To the doctrine there laid down we adhere. Since council have failed to state wherein the title to Ordinance No. 190 contains more than one subject and the same does not appear, we cannot say that the court erred in holding that said ordinance is valid.

Finding no error in the record, the judgment of the trial court is affirmed. All the Justices concur.

(27 Okl. 381)

NEWMAN v. NEWMAN.

(Supreme Court of Oklahoma. Nov. 16, 1910.)

(Syllabus by the Court.)

1. DIVORCE (§ 101*)—CROSS-PETITION—ALLEGATIONS AS TO RESIDENCE.

Where a resident of the state for the statutory time files her petition for divorce, the defendant may file a cross-petition and pray for and obtain a decree of divorce from plaintiff without alleging that he has resided continuously in the state for a year next before his application for divorce set forth in his cross-petition.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 322-327; Dec. Dig. § 101.*]

2. DIVORCE (§ 167*)—SETTING ASIDE DECREE—PETITION—SUFFICIENCY.

Where, in a suit to set aside a decree of divorce for fraud, the petition alleged that prior to the time for taking testimony before the referee defendant, with intent to cheat and defraud plaintiff and prevent her from appearing,

in consideration that she would introduce no testimony in said cause and offer no resistance to a decree in his favor on his cross-petition, agreed to and did pay her \$500 in full of alimony, and further agreed to remarry her within three years after said decree, and immediately have his life insured in her favor for \$5,000, and permit her and their children to remain in possession of a certain piece of land filed and settled on by him, which said promises he had failed and refused to perform, fails to state facts sufficient to justify equitable interference, and a demurrer thereto should have been sustained.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 533-548; Dec. Dig. § 167.*]

Error from District Court, Kay County; W. W. Boles, Judge.

Action by A. G. Newman against John A. Newman. Judgment for plaintiff, and defendant brings error. Reversed, and bill dismissed.

Moss & Turner, for plaintiff in error. John S. Burger, for defendant in error.

TURNER, J. On February 8, 1907, defendant in error, as plaintiff, filed her petition in the district court of Kay county in which she alleged herself then, and for several years next theretofore, to be a resident of said county; that on July 20, 1905, she sued in said court her husband, John A. Newman, plaintiff in error, for divorce and alimony, and attached a copy of her petition in that case as an exhibit; that there-to said Newman filed answer and cross-petition, a copy of which she also attached as an exhibit; that in said cross-petition said Newman failed to allege that he had resided continuously in the state for one year next preceding the filing thereof, and was in fact a nonresident of the state; that prior to the time for taking testimony before the referee, to whom said cause was referred, said Newman, with intent to cheat and defraud her and prevent her from appearing and presenting her cause before a referee, in consideration that she would introduce no testimony in said cause and offer no resistance to a decree in his favor on said cross-petition, agreed to pay her, in case said decree was granted, \$500 in full of alimony, which he did, and further agreed that within three years after said decree he would remarry her; that he would immediately have his life insured in her favor for \$5,000, and permit her and their three children to remain in possession of a certain piece of land in said county, filed and settled upon by said Newman; that she, relying upon said promises and believing them to be true, offered no resistance to the taking of said decree which was later granted by the court, but that said Newman had failed and refused to perform said promises and had sued to put her and her children off said land and for possession thereof, and, after restating her grounds for divorce, prayed that said New-

man be restrained from prosecuting his said suit; that said decree of divorce be set aside, that her deed quitclaiming said land to said Newman be canceled, that she be decreed divorced from him, and for general relief. To this a general demurrer was filed and overruled, and defendant brings the case here.

In overruling the demurrer, the court, in effect, held that, as defendant in his cross-petition failed to allege that he had resided continuously in the state for a year next before his application for divorce set forth therein, his decree of divorce was void for want of jurisdiction. The question then before us to determine is: Was said allegation necessary to confer jurisdiction on the trial court to grant relief on the cross-petition? In support of plaintiff's contention that it was, is urged an act of Congress approved May 25, 1896 (chapter 241, 29 Stat. 136), which reads: "That no divorce shall be granted in any territory for any cause unless the party applying for the divorce shall have resided continuously in the territory for one year next preceding the application: Provided," etc. The allegation was unnecessary. The court, having jurisdiction of the subject-matter of divorce, and, under the pleadings, having acquired jurisdiction of the parties, had a right to determine all the equities between them, and do complete justice in the premises.

In *Sterl v. Sterl*, 2 Ill. App. 223, an almost identical statute was under construction. In that case the facts were that to a bill for divorce, attached to which was his affidavit of nonresidence, defendant appeared and filed her answer and cross-bill. To the latter plaintiff demurred, upon the ground that the same disclosed that complainant therein had not resided in the state for more than one whole year next before the filing thereof. The court sustained the demurrer, and dismissed the cross-bill. On appeal this was assigned for error. It appeared from the bill that complainant in the cross-bill had resided for two years in New York City. The governing statute provided: Section 2, c. 40, Rev. St. 1877: "No person shall be entitled to a divorce in pursuance of the provisions of this act who has not resided in the state one whole year, next before filing his or her bill or petition, unless the offense or injury complained of was committed within this state, or whilst one or both of the parties resided in this state." In support of the demurrer it was contended that under the provisions of said section appellant had no right to file her cross-bill praying for a divorce, for the reason that she was not a resident of the state, and, that fact appearing on the face of her cross-bill, appellee could avail himself of such fact of nonresidence by way of demurrer. The court, in effect, held the allegation to be unnecessary as not jurisdic-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

tional, and that without it appellant was entitled to relief under a cross-bill, and in reversing the decree said: "It is a familiar principle of law that a court of equity having acquired jurisdiction of the parties and of the subject-matter of the suit will retain and exercise such jurisdiction until the equities of all the parties are meted out to them. In this case the jurisdiction of the court is invoked by the appellee, he having, as he had a legal right to do, filed his bill against appellant praying relief and summoning the appellant into the court. When she is thus brought in, and, having responded to the claims of the appellee by answering his bill of complaint, being, as it were, then forced into the court, submits herself to its jurisdiction, and asks the court to grant to her certain equitable rights, to which she claims to be entitled, then it is that the appellee challenges the jurisdiction of the court to grant to her any equitable rights, but continues to clamor for his. This position is unconscionable and indefensible upon the principles of equity. But we are told, and it is urged by the appellee, that by reason of the arbitrary provisions of the statute there is no escape from this dilemma, and that as a consequence, the appellant is in the court for the purpose of receiving its mandate, and yielding obedience to its orders, but without any equitable rights which the appellee is bound to respect, for the reason, as he claims, that she resided in New York, and not in Illinois, and notwithstanding she is dragged into the court, at the suit of appellee, and, as may be presumed, against her will. We think that by the plainest principles of equity the appellee is, under such circumstances, precluded from questioning the jurisdiction of a court which he has himself invoked; and, that the court having acquired jurisdiction of the subject-matter and the parties to the suit at the instance and by the prayer of the appellee, he cannot be heard to question the jurisdiction of the court to hear, consider, and determine all the equities of the parties, to the end that complete justice may be done to all in the same case. There is another ground on which we think the appellant had the undoubted right to file her cross-bill under all the circumstances of this case, and that is as one of the means or methods of defense to the original bill. 'A cross-bill being generally considered as a defense to the original bill or as a proceeding necessary to a complete determination of a matter already in litigation, the complainant is not, at least as against the complainant in the original bill, obliged to show any ground of equity to support the jurisdiction of the court. It is treated, in short, as a mere auxiliary suit, or as a dependency upon the original suit.' 2 Barbour, Chancery Practice, 131, and authorities there cited. To the same effect is the holding of the court in *Field v. Schiefelin*, 7 Johns. Ch. [N. Y.] 250. This view

seems well sustained by other elementary writers, as well as adjudged English cases. If, then, the right to file a cross-bill be included in the right to make a full and complete defense to the allegation contained in the original bill, we think no one will be found who will deny her that right; so that, in either view of the case, we think appellant had the clear right to file her cross-bill notwithstanding she was at the time a resident of New York, and not of Illinois." And, in effect, held that the nonresident wife, upon her showing in her cross-bill, was entitled to relief. This case was cited and followed in *Clutton v. Clutton*, 108 Mich. 267, 66 N. W. 52, 31 L. R. A. 160. In that case *Jonithan L. Clutton*, a resident of the state for the statutory time, brought suit for divorce against the defendant, *Anna J. Clutton*, a resident of Ontario, alleging their marriage in Ontario. She appeared, filed her answer admitting the marriage, but denied all the causes for divorce stated in the complaint. She filed her answer as a cross-complaint, making countercharges, and prayed for a divorce from complainant. The trial court sustained a general demurrer to the cross-bill, dismissed the same, and defendant appealed. One question decided by the court was: "Can a decree of divorce be granted a nonresident of the state, who is brought in by the complainant, who is and has been a resident of the state for the statutory period required to give the court jurisdiction?" The governing statute read: "No divorce shall be granted unless the party exhibiting the petition or bill of complaint therefor shall have resided in this state one year immediately preceding the time of exhibiting such petition or bill. * * * " In answering the question in the affirmative the court quoted approvingly from *Jenness v. Jenness*, 24 Ind. 350, 87 Am. Dec. 335, where a decree was granted a nonresident defendant under similar circumstances, and said: "That to give the statute any other construction would be to say that in two cases precisely alike in their facts, the defendant in one being a resident, and in the other a nonresident, the former might result in a decree for divorce on cross-petition, with such allmony as ought to be given where the plaintiff is in fault; while in the latter that vindication of character which can often be secured only by a decree could not be had by the defendant, nor could the allmony be adjusted upon the basis of the fact that the defendant was the party aggrieved. Such a discrimination against nonresident defendants finds no place within the letter of the statute, still less in its spirit, and a construction which would allow it would invite, in the class of cases in which they could be most successfully perpetrated, the very worst abuses." * * * "While our statute is intended to prevent nonresidents from making use of our courts to perpetrate frauds upon their unsuspecting wives or husbands, by

coming here to petition for divorces, it, at the same time, arms them with every weapon of defense which is afforded to our own people, when brought into court at the suit of those whose bona fide residence here gives us jurisdiction."

There is nothing in the petition which would justify this court in setting aside the decree of divorce on the ground of fraud. The petition so to do discloses the same to have been obtained as a result of collusion between the parties, and this court will leave them where it finds them. The parties thereto are bound by it. *Nichols v. Nichols*, 25 N. J. Eq. 60, and cases cited. *Karren v. Karren*, 25 Utah, 87, 69 Pac. 405, 60 L. R. A. 294, 95 Am. St. Rep. 815, was a suit to set aside a decree of divorce for fraud on the wife. The facts were that her husband as plaintiff, in the suit resulting in the decree sought to be set aside, represented to her that his father would deed him certain land if he would divorce her; that, in order to aid him in securing said land, she made no defense to the suit, it being understood that he would remarry her. On appeal the Supreme Court, after quoting approvingly 2 Bishop on Mar. Div. & Sep. § 1548: "Mutual fraud, of which the common instance is collusion and which is available to third persons in interest, as we shall see in the next subtitle, cannot be brought forward by either of the parties against the other as ground for reversing any step in the cause, or vacating the sentence. This doctrine is an inevitable result from the universal rule of our law that one in a court of justice cannot complain of his own wrong, or of another's wrong whereof he was a partaker. It would be a special novelty for a plaintiff to address the tribunal with, 'The defendant and I have been playing a trick on this court, but I discover he has got the better of me, so please turn the tables on him'"—reversed the judgment of the trial court and dismissed the bill. And such we will do here.

The cause is accordingly reversed and dismissed. All the Justices concur.

(27 Okl. 565)

ATCHISON, T. & S. F. RY. CO. v. STATE
et al.

(Supreme Court of Oklahoma. Nov. 16, 1910.)

(Syllabus by the Court.)

1. RAILROADS (§ 58*)—POWER OF CORPORATION COMMISSION—ESTABLISHMENT OF STATIONS.

The corporation commission is without authority to arbitrarily require a railway company to establish stations and switching facilities at places not required by public convenience or necessity.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 130-136; Dec. Dig. § 58.*]

2. RAILROADS (§ 58*)—POWERS OF CORPORATION COMMISSION—ESTABLISHMENT OF STATIONS.

That a railway crosses the state line at a certain point may be taken into consideration

in determining whether station and other facilities are required at that point, but that fact alone is not sufficient to sustain an order of the corporation commission requiring the railway company to supply such facilities.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 130-136; Dec. Dig. § 58.*]

Appeal from the Corporation Commission. Proceedings by the Atchison, Topeka & Santa Fé Railway Company against the State of Oklahoma and L. W. Wolfolk to review an order of the Corporation Commission. Reversed.

Cottingham & Bledsoe, for plaintiff in error. Chas. West, Atty. Gen., and Geo. A. Henshaw, Asst. Atty. Gen., for defendants in error.

KANE, J. This proceeding was commenced by a communication with 10 signatures attached addressed to the corporation commission, which stated, in substance, that: "We, the undersigned, earnestly request that you do all in your power to place a depot on the state line between Texas and Ellis county, Okl., on the Atchison, Topeka & Santa Fé Railway. This is a question that is of vital interest to the farmers of Western Oklahoma, and they are waiting and watching with interest to see what you will do with it." Thereafter certain citizens of Goodwin, Okl., requested and were given permission to intervene in said hearing and submit evidence asking the commission to locate the depot at or near the post office of Goodwin, instead of on the state line. Thereafter the railway company filed its objections to the prayer of the complaint, wherein, among other allegations, it alleged, in substance: That the railway company has located on its line of railway in the state of Texas a depot and yard, side tracks, and station facilities at the town of Higgins, in the state of Texas, only 1 $\frac{1}{10}$ miles west from the state line between the states of Texas and Oklahoma, and within 1 $\frac{1}{10}$ miles of the proposed location as asked by the complainants herein. That said town of Higgins, with facilities as above set out, is a city of approximately 2,000 people, in which city all lines of trade and traffic are represented and where all facilities are established and maintained by the railway company for handling all classes of traffic which may be offered for shipment over said line of railway. That the public roads between the town of Higgins and said state line are in splendid condition, well maintained, and are ample for the use of the citizens of said community. That said station facilities so conceded as above, with depots and yards and side tracks, were installed by said railway company at an expense of several thousands of dollars and are adequate and ample and complete for all present demands or future needs and have been and are and will be in the future maintained and kept by said railway com-

pany in proper condition to serve the public. On which account there is no necessity for an order requiring said railway company to build or construct additional depot facilities or yards, or side tracks in such close proximity to the town of Higgins, and on which account an order requiring said railway company to install station facilities on the state line in such close proximity to the station of Higgins would be unreasonable, unjust, and beyond the power and jurisdiction of this commission. That, in addition to said station at Higgins, said railway company has a station approximately seven miles east from said town of Higgins already established and with ample depot facilities, side tracks, and yards, and all facilities for serving the public, so that in said community the passengers on said railway have ample depot and railway facilities within four miles in either direction, which the railway company submits is ample and sufficient. That to order additional facilities to those already established and tendered to the public on the part of the commission would be unreasonable and unjust and beyond the power of the commission. Thereafter the railway company filed objections to the intervening petition of the citizens of Goodwin, wherein, among other things, it was alleged: That said railway company is a corporation organized and existing under and by virtue of the laws of the state of Kansas, and doing business in the state of Oklahoma, and extending through Ellis county, in said state. That said railway company is building and causing to be built a line of railway from Belen, N. M., to and through Ellis county, Okl., to connect with other lines of its railway to Kansas City, thereby making a low-grade main line from Chicago to the Pacific Coast, which said railway passes through Ellis county and near Goodwin post office in said county. That said line of railway consists largely of new construction and relocating and rebuilding of a line of railway already in existence, the maximum grade on which said reconstructed line will not exceed six-tenths of 1 per cent. That in rebuilding such line said railway company has expended many millions of dollars and has in many instances been compelled to abandon the old line as established and in building has expended in many places twice the cost of the abandoned line per mile. That between the stations at Higgins, Tex., and Shattuck, Okl., a distance of 14.2 miles, the costs of rebuilding the line, exclusive of the value of the old line abandoned, exceeds the sum of \$275,000. That the post office of Goodwin is located on the old line so abandoned by said railway company, 4.7 miles northeast of Higgins, Tex., and 9.5 miles south and west from Shattuck, Okl. That the relocated and reconstructed line where it passes Goodwin post office is approximately 1,500 feet from the old and abandoned line; the old line being on a 1 per cent. grade from Shattuck to

Goodwin, and the new line being on six-tenths of 1 per cent. as a maximum. Then follow allegations setting up the impracticability of establishing facilities at or near Goodwin post office, after which it is further alleged, in substance, that the first station on the west of Goodwin post office is Higgins, Tex., and the first station on the east is Shattuck, Okl.; the distance between those stations being 14.2 miles. That the railway company has never established a station at Goodwin post office or encouraged the location of a town site at said point for the reason that for many years it has been the intention to relocate and rebuild said line of railway and relocate and build a station at some consistent place as nearly as possible midway between the stations of Shattuck on the east and Higgins on the west. That, in seeking a location for such depot and station between said points on said relocated line, the only place where a station could be suitably located was three miles east of the present Goodwin post office at which point grading has been done for side tracks and depot grounds at a cost and expense of about \$6,000, which site was the best place that could be selected from an engineering and operating standpoint where a station could be safely installed and side tracks built and operated, and even then where said station is so constructed it is on a grade of four-tenths of 1 per cent., which is the limit of grade on which a station and side tracks may be safely constructed and operated. Said proposed station being $6\frac{1}{2}$ miles west of Shattuck and $7\frac{7}{10}$ miles from Higgins, which is practically equidistant between stations already existing on said line. That said reconstructed line was built at such great expense with a view of handling large amounts of interstate traffic and heavy freight business in addition to serving all the localities through which it passes and will be constantly used for heavily loaded cars and large locomotives and motive power, which cannot be stopped and started on maximum grades, and to locate and build a depot and station with side tracks at or near Goodwin post office would render it impossible to operate the railroad in a practical way either for through business or local business, and would greatly endanger and hinder the interstate traffic of said railway and place such a burden on said interstate traffic as greatly to interfere with the proper handling and transaction of such traffic and practically destroy a portion of the business for which said railway company is organized and is proposing to transact. It is hoped the commission will take into consideration the character of business, both local and interstate, which it is destined to transact on said railway, and not make an order locating a depot and side tracks at a point which would so largely deprecate the value and usefulness of the property for the purposes for which it was intended. That said proposed order of the commission involves

the right of the railway company to carry on interstate commerce in the state of Oklahoma without becoming subject to such unreasonable orders and directions of the corporation commission, which so directly burden interstate commerce as to amount to a regulation thereof, which burdens and regulations of said railway company's business amount to a great deal more than \$2,000 to said railway company.

On the 22d day of October, 1908, upon the issues thus joined, said proceeding came on for hearing before the commission, and the commission, after hearing the evidence, entered order No. 154, which order, omitting the caption, is in words and figures as follows: "L. W. Wolfolk and other citizens of Grand, Okl., filed a complaint, praying that the defendant be required to build and maintain a depot and depot facilities at a suitable point near the state line on what is known as Panhandle branch of the defendant's railroad, between Oklahoma and Texas. Also the citizens in the vicinity of Goodwin, Okl., about five miles northeast of the state line, had formerly filed a complaint, asking that a depot be established at Goodwin. That in the consideration of this complaint the commission heard evidence as to the most practicable and available place for depot at Goodwin or at a point between Goodwin and the state line, and finally ordered a depot to be established at a point near the state line. The citizens of Goodwin made an informal motion for a rehearing, and the commission suspended the order by informally notifying defendant that it need not comply with the order until further investigation. The rehearing or reconsideration of the two cases, establishing a depot at Goodwin and at the state line, was heard by the commission on the complaint first above mentioned; it being apparent that, if a depot was established at Goodwin, there would be no necessity for a depot at the state line, and vice versa. Therefore all parties interested at either place were heard. It appears from the evidence that the defendant, during the last year, has reconstructed and relocated its line of road that passes Goodwin, and that the distance between the state line and Shattuck, Okl., is 14 miles; that the post office at Goodwin is located on the old line abandoned by said railway company, 4 miles northeast of the state line, and 9.5 miles southwest from Shattuck, Okl.; that the reconstructed line passes Goodwin about 1,500 feet from the abandoned line; that at or near Goodwin the new line, as now built, runs through a cut 15 feet deep, and 1,500 feet long, and at each end of the cut is a draw or fill connecting with another cut; that to establish a depot and switching facilities at this place would be of considerable expense to the defendant, and, inasmuch as a depot has been established 2½ or 3 miles north of Goodwin, the commission is still of the opinion that a depot at Goodwin

would not serve the people and be as great a convenience to the general public, as it would have been had there been no depot established between Goodwin and Shattuck. There was considerable evidence with reference to the public roads leading to Goodwin, and the town north of Goodwin, and to a point near the state line. However, so far as the public road question is concerned, there seems to be no great difference between any of these points, and good roads could be established without unreasonable expense to either of them. The evidence clearly shows that a majority of the wheat from that entire section of the country is hauled to Higgins, Tex. The commission finds that a depot established at a point near the state line would be about the average distance that the defendant places depots within the state of Oklahoma, same being about six or seven miles from the depot established between Goodwin and Shattuck; that the same is necessary and a great convenience for the citizens in the vicinity of the location where a depot is desired near the state line. The commission is of the opinion that the defendant should be required to establish depot and switching facilities at a suitable point near the state line, to be hereafter designated by the commission. It is therefore ordered that the defendant, the Atchison, Topeka & Santa Fé Railway Company, build a depot and establish necessary switching facilities at a point near the state line between Texas and Oklahoma, in Ellis county; said point to be hereafter designated by the commission. That this order shall be complied with by the 1st day of March, 1909." To reverse the foregoing order this proceeding in error was commenced.

The order of the corporation commission must be reversed, for the reason that there was not sufficient evidence adduced at the trial upon which to base it. The complaint requesting that a depot be placed at the state line does not set up any facts showing the necessity for such a facility, and on the trial of the case none of the parties who signed the complaint appeared, and there was no attempt to show by evidence that the establishment of a state line depot was a necessary and reasonable exaction to require of the railway company on behalf of its patrons. All of the witnesses for the complainants who appeared, viz., Messrs. Clark, Edmondson, Bowles, Vermillion, Oates, and Cupp, seem to have been adherents of Goodwin, and all testified to the effect that conditions were such that the railway company should furnish station and shipping facilities at or near that place. And the examination of these witnesses by the Assistant Attorney General was directed toward establishing the necessity and reasonableness of an order to that effect. It is true the chairman of the commission also examined the same witnesses for the purpose, presumably, in view of the order entered, of showing the neces-

sity and reasonableness of a state line depot. The following questions and answers indicate the nature of the evidence thus elicited: Mr. Clark was on the stand being examined by the chairman: "Q. Do you know the price they paid for wheat at Holestein this year? A. No, sir. Q. Do you know what they paid at Higgins? A. Yes, sir. Q. Don't you know that they paid a higher price at Higgins this year than they did at Holestein or Shattuck either? A. Yes, sir. Q. Do you know the reason of that? A. The rate given, I suppose. Q. Do you know the rate on wheat from Holestein to Galveston? A. No, sir. Q. Do you know the rate from Higgins to Galveston? A. No, sir. Q. Do you know the difference in prices of wheat from Holestein and Higgins? A. I don't. Q. Do you know the price they would charge you to haul wheat from Higgins and Holestein? A. No, sir. Q. Do you know how far it is from Holestein to Higgins? A. By rail? Q. Yes, sir. A. No, sir. Q. How far is it by wagon? A. About 10 miles, I would say. Q. This is a proposition we are getting at for the interest of farmers irrespective of town sites. Haven't you understood in that country, hasn't it been generally talked, that you get from 8 to 10 cents more for wheat in Higgins than you do at Shattuck or Holestein? A. There has been a difference in the price; but what it has been I don't know. Q. The fact of it is from Holestein to Galveston the freight is 21½ cents and from Higgins to Galveston it is 20 cents, making a difference of 1½ cents, yet you get from 8 to 10 cents more for wheat billed from Higgins or any Texas point than you do from any place billed—that is, billed from Holestein or any Oklahoma point. Now, then, isn't it a fact that the people of Texas are hauling their broom corn to Shattuck and selling it, and Holestein? A. I don't know. Q. Haven't you seen anything of that kind being done? A. The only produce that goes past my way goes to Higgins. I don't see anything that goes to Shattuck or Holestein. Q. Have you seen any broom corn going to Higgins? A. Yes, sir. Q. This year? A. Yes, sir. Q. Here is the proposition: If it is a fact that you get 10 cents a hundred more for your wheat in Higgins than you do in Holestein or at Goodwin if there were shipping facilities there, then the proposition is, if a state line depot was put there on the state line and switching facilities, for the benefit of the working class of people, irrespective of town-site speculations, wouldn't you favor a state line depot there? A. If the buyers would pay in proportion to the rate, I wouldn't haul my grain there for that amount. Q. What do you mean by the buyers? A. You stated the difference in the rate would be 1½ cents a hundred, and still the buyers are making a 10 cent difference. I can haul grain for 10 cents a bushel, but I wouldn't haul it for a cent a bushel." The following is taken from the examination of Bowies, by the

chairman: "Do you know what the rate is from Higgins to Galveston? A. No, sir. Q. I will tell you for your information the rate from Holestein to Galveston is 21½ cents; the rate from Higgins to Galveston is 20 cents. If you could get as much in Oklahoma for your wheat as you could get in Higgins, Tex., in proportion to the freight rates, it would only be 1½ cents a hundred less, but on account of billing from Texas you get from 3 to 5 cents a bushel more? A. Yes, sir. Q. Now, then, for the benefit of the farmers in that country, if a state line depot could be placed on the line between Texas and Ellis county and a switch put in on the Texas side so you could bill your wheat out of Texas and do your trading in Oklahoma, wouldn't it be a better proposition for the people to have a state line depot than it would to have one at Holestein or Old Goodwin? A. It would if the farmers got enough out of their grain to pay them to haul it there. Q. You get enough more out of your grain to haul it to Higgins, Tex., don't you? A. We have been, but, if the rates are that close, I don't see any necessity for it." Mr. Oates, who was probably the most favorable witness for a state line depot, was examined, as follows: "State whether or not in your judgment a considerable number of people would be accommodated by having a railroad station on the Santa Fé Railroad at or near the state line between Oklahoma and Texas. A. Yes, sir; I think so. Q. Give your reasons for thinking that these results would accrue. A. I mean if we had the same rates as Texas had it would give Oklahoma a chance to market their own stuff." On cross-examination he testified: "Your idea for locating a station at the state line nearly a mile and a half from Higgins would be simply to control what is known as interstate rates? A. Yes, sir; and I live in Oklahoma, and I would like to build up our own state. It might have a tendency to give us a small town, taxable property, and such like."

There was no evidence introduced or offered tending to show that there is any town, village, settlement, or gathering of people of any kind on the line of railway at or near the state line; nor how many people reside in the adjacent country within such a distance from the point where the railway crosses the state line that they would do their railway business there if facilities were furnished. On the other hand, there was evidence, which was uncontradicted, to the effect: That Higgins is the nearest station on the west, and Shattuck is the nearest on the east, to the present station of Goodwin, and that Shattuck and Higgins, each, has a population of about 1,500 and are located about 15 miles apart. That the present station of Goodwin is a little over 6 miles from Shattuck and a little over 7 miles from Higgins, and 3 miles east of the old station of Goodwin. The new station of Goodwin is more accessible than many stations, and will

be accessible from every direction with very little work. At the present time it may be reached from all directions, delivering a full load. That the grade at (Old) Goodwin was six-tenths, including the compensation for curvature, which was the maximum on the road. That the actual grade at (Old) Goodwin is between four and five-tenths, which, with the curvature, made it as difficult to pull as six-tenths on a straight track. That it required 3,000 feet of switch for passing track, and that it was good railroading to have the passing track at stations. That the present station of Goodwin, some time referred to in the evidence as "Holestein" or "New Goodwin," is six miles from the Texas state line. With reference to a location for a depot at the state line, the following questions were propounded by Mr. Henshaw, and the following answers given by Mr. Turner: "Q. There are plenty of good locations in that territory near the state line that there could be no physical objections to a depot, isn't there? A. A station could be put there by spending the money to grade down and fill the holes. Q. There are locations there that stations could be built without much work? A. A good deal of work. It would take a good deal of work. Q. Are there any locations near the state line where a depot could be located? A. No, sir; no level. Q. Within a reasonable distance from the state line? A. There is no level there according to my memory exceeding 600 or 700 feet." Mr. C. A. Morse, chief engineer for the railway company, testified to the same condition with reference to grades, and that the entire line of the Santa Fé through the northwest corner of the state has been reconstructed, practically rebuilt from Wellington, Kan., to Texico, N. M., and that maximum grade of the line, including curvatures, was six-tenths of 1 per cent., and that it was built for the purpose of a heavy through freight line from California to the East; that the company was unable to find a grade at the old station of Goodwin that would permit the building of a station there; that, as the stations were now located, the present station of Goodwin is about equally distant between Shattuck and Higgins, and there were stations at these places with all necessary facilities; that just north of the state line beginning about 700 feet there is 1,000 or 1,500 feet of seven-tenths grade, a little above the maximum, what we term in railroad parlance, "velocity grade," and then north and east of this there is a strip of 2,000 or 3,000 feet that is nearly level. On the subject of building stations on grades of this character, Mr. Morse testified with reference to the construction of a station at Goodwin, where the grade is much less, that you cannot stop a full train load and start it on a place like that. It is not practicable to do so. That from his experience of 28 years as a railroad engineer it was impracticable to construct a station with the amount of grade that ex-

isted at Old Goodwin and should not be done, and that is the reason why it was changed.

For a disposition of the questions involved in this case it is not necessary to examine the statutes which empower the corporation commission to require the railways of the state to provide and maintain adequate depot buildings and shipping facilities for the reasonable needs of the people tributary to their lines, for, conceding that such power exists, it does not follow that it may be arbitrarily exercised when there is no public necessity therefor. *N. P. Ry. Co. v. Washington Territory*, 142 U. S. 492, 12 Sup. Ct. 283, 35 L. Ed. 1092.

In 1905 the General Assembly of the state of Arkansas passed an act requiring the building and construction of a depot and the maintenance thereof at Snow Crossing, in Columbia county, Ark., by the Louisiana & Arkansas Railway Company, and requiring passenger and local freight trains to stop there and receive passengers and freight, and prescribing penalties and damages for violations of the act. Acts 1905 Ark. p. 265. The company failed to construct a station or depot as required by the act in question, and the grand jury returned an indictment against it. The railway company filed a general plea of not guilty and a special plea containing the following statements: "It states that the country around Snow Crossing is principally wild and uncultivated and sparsely inhabited; that the cleared land is devoted principally to the raising of cotton, which cotton is hauled to the neighboring towns of Magnolia and Lewisville, where the farmers purchase their supplies; that the station of Experiment is situate about 2½ miles north of Snow Crossing; that passengers and freight are received and discharged at such station; that the station of Taylor is situate 4½ miles south of Snow Crossing on the line of said railway company; that there is a depot building and telegraph operator with passenger and freight agent employed at said station; that the two stations of Experiment and Taylor furnish to the inhabitants contiguous to Snow Crossing ample facilities to board the trains as passengers or to ship their freight; that to force the railroad to maintain a regular station at Snow Crossing would require three stations maintained by said railway company within seven miles in a sparsely settled region; that to erect a station at Snow Crossing would cost approximately \$1,000; that to maintain same would cost \$75 to \$100 per month; that the receipts from freight and passengers at such station would meet only a small proportion of the cost of maintenance; that such station would have to be operated at a monthly loss to the railway company; * * * that Snow Crossing is located at the foot of a very heavy grade on the line of said Louisiana & Arkansas Railway Company, the heaviest grade at any point on said line;

that because of the topography of the country it would be impracticable, with very great expense, to provide side tracks and passing tracks at said point, as required by said Act No. 105; and that to attempt to comply with said act by stopping all freight and passenger trains would, by reason of said hill and steep grade, add greatly to the danger of accidents to passengers and employes upon said railway." The case was tried before the court without a jury, and the state introduced proof establishing the fact that the appellant had not complied with the requirements of the statute. The railway company offered to introduce evidence to sustain the allegations of its special plea; but the court refused to hear the evidence. The court then made a finding that the railway company was guilty as charged in the indictment, and assessed a fine of \$25 against it, and the defendant appealed.

Mr. Justice McCulloch, who delivered the opinion of the Supreme Court (L. & A. Ry. Co. v. State, 85 Ark. 12, 106 S. W. 960), after discussing the question whether a special act of the Legislature requiring a railway company to construct and maintain a station at a given point on its line is subject to review by the courts, said: "This brings us to a consideration of the questions whether or not the appellant in this case offered to bring to the attention of the court facts sufficient to show that there is no public necessity for a station at Snow Crossing, and that the requirements of the Legislature in that respect are so arbitrary and unreasonable as to demand a judicial review so as to relieve the railroad company from compliance therewith. The rejected evidence tended in substance to show that there was no public necessity at all for the maintenance of a station at Snow Crossing; that the land around that place, which is not a point of intersection of two railroads, but is only the crossing of a country road over the railroad, is principally wild, uncultivated, and sparsely settled; that there is such a heavy natural grade at that point on the road as would render it not only very expensive to build side tracks, but would add greatly to the danger of accidents in stopping trains; that there is now a flag station on appellant's line $2\frac{1}{2}$ miles north of Snow Crossing, and also a regular station $4\frac{1}{2}$ miles south of Snow Crossing, where there is a depot building, and where a telegraph operator and passenger and freight agent is kept; that these two stations provide suitable, convenient, and ample transportation facilities to the people near Snow Crossing; and that the cost of erecting and maintaining a station at that place would be greatly in excess and out of proportion to the revenues which could possibly accrue from the business at that place, and the station would have to be operated at a monthly loss to the company. Now, this evidence tended to show that there

is no public necessity for a station at the place named, and the court should have heard and considered it for the purpose of determining whether or not the statute was a valid exercise of power by the Legislature. As we have already stated, the authority of the Legislature to regulate railroad companies, and to compel them to establish stations and build depots whenever the public necessity and convenience requires, is not disputed; and, as the Legislature has that right and power, the presumption is that it exercised it in a proper case, and that the public convenience required the station at that place. But that presumption was not conclusive. The burden to show that there was no necessity for a station at that place was on the company, and it had the right to be heard on the question whether the act of the Legislature was an arbitrary and unreasonable exercise of the legislative power, which would result in putting the company to useless expense. As the Legislature had no power to confiscate or deprive the company of its property, where no public necessity requires it, it is plain both from reason and from authority that it had no right to arbitrarily require a railway company to establish stations at places not required by public convenience or necessity. So if, after considering all the facts and circumstances, giving due consideration to the determination of the Legislature, and resolving every doubt in its favor, the court should be convinced that there was no public necessity for a station there, and that the result of enforcing the act would be to put the defendant to large expense without any corresponding benefit either to it or the public, then the Legislature had no right to make such requirement, and the court should so declare as a matter of law."

Whilst it is probably true that the fact that a railway crosses a state line at a certain point may be taken into consideration in determining whether station and other facilities are required at that point, we do not believe that that fact alone is sufficient to justify the corporation commission in requiring the erection of a state line depot and other expensive facilities. *State ex rel. R. R. & Warehouse Com. v. M. & St. L. R. Co.*, 76 Minn. 469, 79 N. W. 510. Particularly is this true when the uncontradicted evidence shows that there are natural impediments on the line of railway at the state line that render that place impracticable or inconvenient for the railway company to provide such facilities, and which would probably hamper the handling of its interstate business. It is true that our statutes providing for the regulation of the railways of the state in their relations to the public impose duties to be performed in Oklahoma, but it would be an unreasonable exercise of the power granted to require railroads at a large expense to erect facilities where their roadway crosses

the state line for no other reason than that it is the state line. In *Railroad Commission of Texas v. C. R. I. & G. Ry. Co.*, 102 Tex. 393, 117 S. W. 794, Mr. Justice Williams, speaking for the Supreme Court of Texas, in construing the words "place of starting," in a statute that required every railway corporation to start and run their cars for the transportation of passengers and property at regular times, to be fixed by public notice, and furnish sufficient accommodation for the transportation of all such passengers and property as shall within a reasonable time previous thereto be offered for transportation at the place of starting, etc., said: "We do not mean to be understood as holding that the mere fact that the rails stopped at the state line makes the point of contact one at which a station must be maintained. The words used in article 4494 must be understood to mean what they meant when first adopted into our legislation. They were so employed at a time when the chartering of railroad companies by private acts of the Legislature was just beginning in this state and in other parts of the country. The charter usually authorized the construction of the roads between points named as their termini, and these were referred to as places of starting. The thought was not in the legislative mind that a 'place of starting' would be in an unbroken forest, a wild and unsettled prairie, a river swamp, or the middle of a stream forming a boundary line of the state. The roads were to run from town to town, and these were their termini, their 'places of starting.' The state line is in law and in fact one terminus of the line of a railroad intersecting it constructed by a Texas corporation because its powers cease at that line; but, if there is no 'place' there, such as is meant by the language of article 4494, the mere ending of the track does not bring into existence the duty defined in these statutes. To hold that it does would wrench the law from its obvious meaning and purpose and carry it to absurd extremes. To avoid this, and at the same time accomplish the good aimed at, will not be found very difficult in practice if the true intent of the statute is kept in mind."

It is true that in that case the railway was required to establish a state line station; but the decision is based upon the ground that the facts established at the trial showed that the state line was a "place of starting" within the meaning of the statute. In *State ex rel. R. R. & Warehouse Com. v. M. & St. L. R. Co.*, supra, the railroad and warehouse commissioners of Minnesota, upon the petition of numerous citizens, and after a hearing at which the railway company appeared and opposed the granting of the petition, made an order requiring the Minneapolis & St. Louis Railway Company to build and maintain at Emmons, a small unincorporated village on the line of its

road, a station house for the convenience of the public. The facts found by the commission were, in substance, as follows: Emmons is on the line of the Minneapolis & St. Louis Railway Company, and has a population of about 100. It has 3 stocks of general merchandise, 2 hardware stores, 3 blacksmith shops, 2 restaurants, 1 furniture store, 1 drug store, 1 lumber and coal yard, 1 grain elevator, 1 feed mill, 1 creamery, 1 butcher shop, 1 livery stable, and 14 or more dwelling houses; and tributary thereto is a rich and populous agricultural country, which extends to a distance of 15 or 16 miles in a westerly direction, and 5 or 6 miles in other directions. That it is 5.7 miles from Emmons to the first railroad station on the line of said railroad north of it, and there is no station on the line of said railroad south of Emmons within the state of Minnesota. That there is a station called Norman, in the state of Iowa, seven-tenths of a mile by rail, and one mile by wagon road, from Emmons; but said Norman, being within the state of Iowa, is not subject to the jurisdiction or control of this commission. The second paragraph of the syllabus of that case reads as follows: "The facts considered, and held not to justify an order of the railroad and warehouse commissioners, requiring the defendant to build and maintain a passenger station at an unincorporated village of 100 inhabitants, situated in a strictly rural and agricultural part of the state, and within seven-tenths of a mile of an existing passenger and freight station. The fact that the existing station is situated across the state line in another state is in and of itself no reason for requiring the defendant to build and maintain another station." Mr. Justice Mitchell, who delivered the opinion for the court, after construing a statute of the state of Minnesota, which provided, in substance, that all railroad companies shall provide at all villages and boroughs on their respective roads depots with suitable waiting rooms for the protection and accommodation of all passengers patronizing such roads and a freight room for the storage and protection of freight, and holding that the word "village," as therein used, must be construed as referring only to incorporated villages, said: "But there is no doubt of the power of the commissioners, under the general railroad and warehouse commission act, to require a railroad company to provide a suitable depot and passenger waiting room at any place, incorporated or unincorporated, where public necessity or convenience reasonably requires it to be done. But this power is neither absolute nor arbitrary. The facts must be such, having regard to the interests, not only of the particular locality, but also of the public at large and of the railroad company itself, as to justify the commissioners, in the exercise of a reasonable discretion and judgment, in ordering the railway company to provide a depot and passenger station at the

place in question." We think this quotation from the opinion states the law applicable to the case at bar correctly. This same case, after another trial, was again before the Supreme Court of Minnesota (State ex rel. Railroad & Warehouse Commission v. Minneapolis & St. L. R. Co., 87 Minn. 195, 91 N. W. 465), where an order commanding the railroad company to build and maintain a station house or depot at Emmons was sustained by a divided court. In the last opinion it was said: "We do not question the correctness of the conclusion reached when considering the former appeal. But two members of the court, Mr. Chief Justice Start and Associate Justice Brown, are of the opinion that from the evidence it appears that there has since been a substantial growth in the village—a growth which makes an altogether different showing—and that the company did not overcome the prima facie case arising by virtue of the statute, and therefore that the judgment appealed should be affirmed." It will be seen that the last opinion in no way disturbs the rule formerly laid down.

The Attorney General in his brief recognizes the soundness of the rule laid down in those cases, and its applicability to the facts in the instant case, and does not urge any advantages that may flow to the public on account of any difference a state line depot may make in interstate rates, as a proper ground upon which to require the railway to provide facilities at the state line. He says: "Counsel for appellant addressed the principal parts of their argument in this case to the question that the object of this order was an indirect interference of interstate commerce. This assumption is so erroneous that we do not deem it necessary to reply to this line of argument. It cannot be insisted for a moment that the state of Oklahoma has any jurisdiction or could make any order that would directly or indirectly cast a burden on interstate commerce; that it could not make an order even in aid of interstate commerce where Congress, either by direct act or through Interstate Commerce Commission, has prescribed regulations in reference thereto. The question in this case is whether or not there is a reasonable necessity for a depot on the defendant's line within the state of Oklahoma for the accommodation of the citizens of Oklahoma, that they may avail themselves of rates prescribed by the Oklahoma commission without driving an unreasonable distance to ship their commodities." We believe that the evidence clearly shows that no reasonable necessity exists for a state line depot; in the face of this evidence, it was unreasonable to require the railway to place a depot there. We are not unmindful that, on appeal from orders of the corporation commission, the presumption obtains that the order appealed

from is reasonable, just, and correct, and that he who complains on appeal from such order has upon him the burden of establishing the unreasonableness, unjustness, or incorrectness thereof. K. C., M. & O. Ry. Co. v. State, 107 Pac. (Okla.) 912. But in the case at bar it appears from the facts as certified by the commission, and the uncontradicted evidence upon which findings are not made, that the order of the commission is erroneous.

The order of the commission is, accordingly, reversed.

DUNN, C. J., and WILLIAMS, HAYES, and TURNER, JJ., concur.

(27 Okla. 455)

MISSOURI, O. & G. RY. CO. v. WORTMAN.
(Supreme Court of Oklahoma. Nov. 16, 1910.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 773*)—DISMISSAL—FAILURE TO FILE BRIEFS.

Rule 7 of the rules of practice of this court (20 Okla. viii, 95 Pac. vi) requires the plaintiff in error in all civil cases, unless otherwise ordered by the court, to serve his brief on counsel for defendant in error within 40 days after filing his petition in error, and where this rule is not complied with, and a timely motion is duly made, served, and filed, to dismiss by reason thereof, which motion is ignored and no excuse offered therefor, the petition in error will be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3104-3110; Dec. Dig. § 773.*]

Error from Hughes County Court; P. W. Gardner, Judge.

Action between the Missouri, Oklahoma & Gulf Railway Company and J. A. Wortman. From the judgment, the Railway Company brings error. Dismissed.

Willmott & Wilhoit and E. R. Jones, for plaintiff in error. Geo. C. Crump and J. Ross Bailey, for defendant in error.

DUNN, C. J. This case presents error from the county court of Hughes county, and was filed in this court on July 1, 1910. A motion showing service on counsel for plaintiff in error praying an order of dismissal for the failure of plaintiff in error to file briefs was filed on September 16, 1910. Practically two months have elapsed since the service of this motion, and counsel for plaintiff have neither filed briefs nor made any showing in excuse for their failure.

Rule 7 of this court (20 Okla. viii, 95 Pac. vi) provides that: "In each civil cause filed in this court, counsel for plaintiff in error shall, unless otherwise ordered by the court serve his brief on counsel for defendant in error within forty days after filing his petition in error, and shall at the same time file fifteen copies of said brief with the clerk of the Supreme Court. * * * In case of failure to comply with the requirements of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

this rule, the court may continue or dismiss the cause, or reverse or affirm the judgment." The same rule in effect was promulgated and put into force by the Supreme Court of the territory of Oklahoma, and the case of *Le Breton v. Swartzel*, 14 Okl. 521, 78 Pac. 323, is an instance of its enforcement. The same procedure has been adopted by this court in a number of cases. *Horner et al. v. Goltry & Sons*, 23 Okl. 905, 101 Pac. 1111; *Walker et al. v. Hannewinckle*, 24 Okl. 152, 103 Pac. 585.

Wherefore the motion to dismiss is sustained.

TURNER, WILLIAMS, KANE, and HAYES, JJ., concur.

(27 Okl. 598)

ARNOLD v. McLELLAN.

(Supreme Court of Oklahoma. Nov. 16, 1910.)

(Syllabus by the Court.)

1. GARNISHMENT (§ 92*)—ISSUE OF WRIT BEFORE JUDGMENT.

Under the laws in force in the Indian Territory at the time of the erection of the state, it was only in suits by attachment that writs of garnishment were authorized to be issued against a defendant before judgment.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. § 173; Dec. Dig. § 92.*]

2. GARNISHMENT (§ 193*)—ISSUE OF WRIT BEFORE JUDGMENT—NECESSITY FOR AFFIDAVIT AND BOND.

In such cases, not only an affidavit, but also a bond, was required, and the failure to make and file either would operate on timely motion to cause the writ of garnishment to be quashed, and the garnishee to be discharged.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. §§ 381, 382; Dec. Dig. § 193.*]

3. APPEAL AND ERROR (§ 901*)—REVIEW—SUFFICIENCY OF RECORD.

An action in equity pending on the equity side of the docket at the time of the erection of the state was required to be transferred to the district court of the state where both law and equity were administered from the same docket. The answer of the defendant having raised an issue of fact which, if decided in her favor, would conclude the plaintiff as to all the equitable relief sought, though there had previously been error committed, in denying such preliminary relief, the plaintiff having refused to introduce evidence to meet the issue raised on the part of the defendant, and not having brought up as a part of the record the evidence introduced on the part of the defendant, it does not affirmatively appear that any prejudicial error was committed against plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3670; Dec. Dig. § 901.*]

Error from District Court, Pittsburg County; Preslie B. Cole, Judge.

Action by Jones N. Arnold against Ada McLellan. Judgment for defendant, and plaintiff brings error. Affirmed.

W. H. Jones, for plaintiff in error.

WILLIAMS, J. Under section 330 (section 317, Mansf. Dig. Ark. 1884) Ind. T. Ann. St.

1899, it is settled that only in suits by attachment may a writ of garnishment be issued before judgment against the defendant. *Leingardt v. Deitz*, 30 Ark. 224; *Littlejohn v. Lewis*, 32 Ark. 423. Consequently, not only the affidavit, but also the bond, was essential. Section 340 (section 318, Mansf. Dig. Ark. 1884) Ind. T. Ann. St. 1899; section 332 (section 310, Mansf. Dig. Ark. 1884) Ind. T. Ann. St. 1899; section 334 (section 312, Mansf. Dig. Ark. 1884) Ind. T. Ann. St. 1899. The failure to make such affidavit and bond and file the same is fatal on timely objection. *Fletcher v. Menken*, 37 Ark. 206.

On the erection of the state, said cause was transferred to the state district court, where both equity and law were administered from the same docket. Plaintiff having refused to introduce evidence to support or meet the issues, and the evidence on the part of the defendant not being brought up as a part of the record, we cannot say that any error was committed to the prejudice of plaintiff in error; for, if fraud was committed by plaintiff in error in procuring the execution of the contract, no relief in equity could have been afforded him.

Neither has any appearance been made in this court on the part of the defendant in error nor any briefs filed. Whilst we have carefully searched the record, yet if the judgment here were adverse to defendant in error, having made such default, she would be entitled to no consideration on a petition for rehearing if the contention therein was as to what questions were presented by the record.

The judgment of the lower court is affirmed. All the Justices concur.

(27 Okl. 356)

SIMMONS et al. v. WHITTINGTON.

(Supreme Court of Oklahoma. Nov. 16, 1910.)

(Syllabus by the Court.)

1. INDIANS (§ 15*)—LANDS—ALIENATION—VALIDITY.

A deed conveying or a contract for the sale of a portion of a surplus allotment made by a Choctaw Indian by blood before the removal of restrictions upon her power to alienate same, in violation of Act Cong. June 25, 1898, c. 517, § 29, 30 Stat. 507, and of Act Cong. July 1, 1902, c. 1362, §§ 15, 16, 32 Stat. 642, 643, is void.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 37-44; Dec. Dig. § 15.*]

2. INDIANS (§ 15*)—LANDS—ALIENATION—VALIDITY.

The act of Congress, approved April 21, 1904 (Act April 21, 1904, c. 1402, 33 Stat. 204), authorizing the removal of all restrictions upon the alienation of allotted lands of members of the Five Civilized Tribes by blood, except minors and except as to homesteads, upon approval of the Secretary of the Interior under such rules and regulations as he may prescribe, authorizes the Secretary of the Interior to provide by general rule that no order removing the restrictions of any such allottee shall become effective until 30 days after its date; and a deed executed by an allottee after the date of the approval of the order removing restrictions upon

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the power of the allottee to alienate, but before the expiration of 30 days from the date of such order and approval, is void.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. §§ 37-44; Dec. Dig. § 15.*]

3. INDIANS (§ 15*)—LANDS—CONVEYANCES.

A grantee of an allottee after the order removing the allottee's restrictions upon alienation became effective may attack the validity of deeds executed by the allottee before the removal of her restrictions conveying the same lands, although the grantee had notice of such deeds before his purchase from the allottee.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. §§ 37-44; Dec. Dig. § 15.*]

4. INDIANS (§ 15*)—LANDS—ALIENATION—VALIDITY OF DEEDS.

The deed of one who purchases from an Indian allottee after the allottee's restrictions upon alienation have been removed is not rendered void because the purchaser before the removal of restrictions told the allottee if, when she obtained a removal of her restrictions upon alienation, she could not find another buyer, he would buy her land, if they could agree upon a price.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. §§ 37-44; Dec. Dig. § 15.*]

Error from District Court, Carter County; S. H. Russell, Judge.

Action by O. A. Simmons and others against W. F. Whittington. Judgment for defendant, and plaintiffs bring error. Reversed and remanded.

Cottingham & Bledsoe, for plaintiffs in error. W. F. Bowman, for defendant in error.

HAYES, J. The land in controversy in this action was, in the month of March, 1906, allotted to Virginia Jones, a Choctaw Indian by blood, as a part of her surplus allotment. Thereafter, by warranty deed, she conveyed the land to defendant in error, who will hereafter for convenience be referred to as "defendant." At the time she executed the deed, she executed a contract to defendant, whereby she agreed that, as soon as the restrictions upon her power to alienate her surplus allotment should be duly removed, she would execute to him another warranty deed conveying the same land. Defendant, at the time, paid her as a consideration for the land and for the execution of said instruments the sum of \$385. On the 23d day of April, 1907, an order was made by the Secretary of the Interior removing the restrictions upon the alienation of the surplus land of said Virginia Jones; but, under the terms of said order and the rules and regulations prescribed by the Secretary of the Interior, the order was not to become effective until 30 days from the date thereof. On the 23d day of May, 1907, before the expiration of the 30 days after the date of the order removing the restrictions had expired, Virginia Jones and her husband executed a second warranty deed to defendant in pursuance with her contract so to do after the removal of the restrictions, and were paid by defendant an additional sum of \$25. On

the 21st day of June, 1907, Virginia Jones executed and delivered to plaintiff, for a consideration of \$350, her warranty deed for said land, conveying the same to plaintiffs. Since the execution of the first deed by the allottee to defendant, defendant has been and is now in possession of the land.

Plaintiffs brought this action in the court below to recover possession of the land, and alleged in their petition the source of their title and right to possession to be said deed from the allottee to them. Defendant by his answer sets up the two deeds executed to him and alleges that by them he acquired the fee-simple title to the land; that plaintiffs acquired no right or title by the deed executed to them, for the reason at the time of the execution thereof the grantor had no title to convey; that defendant is in possession; and that the deed of plaintiffs is a cloud upon his title; and, by way of cross-petition, prays for judgment of the court quieting his title and canceling the deed of plaintiffs. The judgment of the trial court was for defendant and grants to him all the relief prayed for in his answer and cross-petition.

Section 15 of the supplemental treaty with the Chickasaw and Choctaw Tribes of Indians (Act July 1, 1902, c. 1362, 32 Stat. 641) provides: "Lands allotted to members and freedmen shall not be affected or incumbered by any deed, debt, or obligation of any character contracted prior to the time at which said land may be alienated under this act, nor shall said lands be sold except as herein provided." Other sections of the treaty make the homestead allotment inalienable during the lifetime of the allottee, not exceeding 21 years, and authorize and prescribe that a certain part of the surplus allotment shall be alienable after issuance of patent; one-fourth in acreage in one year, one-fourth in acreage in three years, and the balance in five years. It was not contended in the court below that the restrictions upon the power of Virginia Jones to alienate her surplus allotment were removed either at the time she executed the first deed to defendant or at the time she executed the second deed to him, unless the Secretary of the Interior was without power in making the order removing her restrictions to provide that it should not become effective until 30 days after its date. The language of section 15, *supra*, is not ambiguous, and no amount of discussion could make its meaning clearer than the plain language used. By its terms it is declared that the lands of an allottee shall not be affected or incumbered by deed, debt, or obligation of any character contracted prior to the time he is authorized to alienate his allotment under the act, and prohibits the sale of any part of his allotment, except as provided in the act. There also existed in force at the time of the execution of said deeds paragraph 29 of the

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act of Congress, approved June 28, 1898 (Act June 28, 1898, c. 517, 30 Stat. 507), which provides that all contracts looking to the sale or incumbrance in any way of the lands of an allottee, except the sale thereafter provided, shall be null and void. Any effort by an allottee to incumber or affect his land before the restrictions upon alienation have been removed or expired under the provisions of the act is void, not only because such act is in direct violation of the mandates of the statute, but because declared so by the statute. Construction and application of these sections of the statutes were made by this court in *Lewis et al. v. Clements*, 21 Okl. 167, 95 Pac. 769, wherein it was held that a contract to sell, made before the removal of restrictions, was void and could not be enforced in an action for specific performance after the removal of restrictions. See, also, *Sayer v. Brown*, 7 Ind. T. 675, 104 S. W. 877.

By an act of Congress, approved April 21, 1904 (Act April 21, 1904, c. 1402, 33 Stat. 204), it is provided: "And all the restrictions upon the alienation of lands of all allottees of either of the Five Civilized Tribes of Indians who are not of Indian blood, except minors, are, except as to homesteads, hereby removed, and all restrictions upon the alienation of all other allottees of said tribes, except minors, and except as to homesteads, may, with the approval of the Secretary of the Interior, be removed under such rules and regulations as the Secretary of the Interior may prescribe, upon application to the United States Indian agent at the Union Agency in charge of the Five Civilized Tribes, if said agent is satisfied upon a full investigation of each individual case that such removal of restrictions is for the best interest of said allottee." Under the provisions of this statute, Virginia Jones made application for the removal of restrictions upon her alienation of the land in controversy, and said application was granted. But the order granting same had not become effective at the time of the execution of the second deed by her to defendant, if the Secretary of the Interior had power to provide by rule and regulation that an order removing restrictions should not become effective for 30 days after its date. It is not contended by able counsel for defendant that such power could not be granted by Congress to the Secretary of the Interior; but that the language of the act does not confer such authority; that his power under the act relative to the removal of restrictions is limited to an investigation in each individual case to ascertain whether the removal would be for the best interest of the allottee, and if he determines that it will be, to make an unconditional order of removal of the restrictions upon his power of alienation. We cannot concur in this contention, and we have been able to find no decided case construing statutes, treaties, or patents with similar provisions that support

the interpretation of this statute contended for by defendant. In September, 1854, a treaty was concluded between the United States and the Chippewa Tribe of Indians, whereby the President of the United States was authorized from time to time to survey and to allot to certain members of the Chippewa Tribe of Indians 80 acres of land each and to issue patents therefor, with such restrictions upon the power of alienation as the President saw fit to impose. Acting under the provisions of this treaty, the President of the United States caused to be allotted to certain of the Indians named in the treaty tracts of land, and issued therefor to the allottees a patent containing a restriction upon the power of the allottee to alienate his allotment to the effect that he should not sell or lease in any manner the land conveyed by the patent "without the consent of the President of the United States." In *Starr v. Campbell*, 208 U. S. 527, 28 Sup. Ct. 365, 52 L. Ed. 602, it was held that these provisions of the treaty and of the patent authorized the President to prescribe rules and regulations to govern contracts for the sale of timber by the Indians to whom allotments had been made and patents issued, by which certain conditions and procedure were prescribed, and required such contracts to be approved by the Commissioner of Indian Affairs, which approval should operate as the specific consent of the President to the sale of the timber. In that case it was contended that the power granted to the President extended no further than to authorize him to consent to the sale or refuse to consent; that he could put no conditions upon his consent. But the court declared such contention unsound. The language of the statute involved in the case at bar is equally as comprehensive as the language of the patent involved in that case. All restrictions upon the alienation of all the allottees of the classes named in the statute, except as to homesteads, may, with the approval of the Secretary of the Interior, be removed under such rules and regulations as the Secretary of the Interior may prescribe.

It is not mandatory upon the Secretary of the Interior to remove restrictions of any allottee; it is within his discretion. The application may be made to the agent of the Union Agency as prescribed by the statute, and said agent may be satisfied that it will be to the best interest of the allottee to remove his restrictions; yet such fact does not require a removal thereof. It still remains within the discretion of the Secretary of the Interior to approve or disapprove the removal of the allottee's restrictions, and, if he removes them, to do so under the rules and regulations as he may prescribe. The rule complained of falls within this grant of power, and the Secretary of the Interior in this case had power to prescribe by general rule that no order of removal should be effective until 30 days from the date of its ap-

proval by him. It was so provided in the case at bar both by general rule and by specific provision in the order of removal.

In *United States v. Thurston County, Neb.*, et al., 143 Fed. 287, 74 C. C. A. 425, there was involved lands allotted to a member of the Winnebago Tribe of Indians under an act of Congress that made the lands inalienable for a certain period of time, during which they were held in trust by the United States for the benefit of the allottees and their heirs. The act of Congress of May 27, 1902 (Act May 27, 1902, c. 888, § 7, 32 Stat. 275), provides that any heir of any Indian allottee to whom a trust or other patent containing restrictions on alienation had been issued may sell and convey the lands inherited from such allottee; "but all such conveyances shall be subject to the approval of the Secretary of the Interior and when so approved shall convey a full title to the purchaser, the same as if a final patent without restrictions upon alienation had been issued to the allottee." The Secretary of the Interior acted under the authority conferred by the language quoted, promulgated rules and regulations by which he permitted the owners of inherited Indian lands to sell on condition that they agreed that the proceeds of such lands should be placed in one or more banks which should furnish satisfactory bond to guarantee the safety of the deposit to the credit of each heir or his proportion, subject to the checks of said heirs only when approved by the agent or officer, for amounts not exceeding \$10 in any one month, and subject to their checks for larger amounts only when approved by the agent specifically authorized by the Commissioner of Indian Affairs.

It was contended in that case that these rules and regulations were unauthorized, and that the only power of the Secretary of the Interior was to approve or disapprove the sale of any of such lands. But Mr. Circuit Judge Sanborn, delivering the opinion of the court, in discussing this question, said: "Nor is the complainant without lawful authority to hold these proceeds and to control their disposition in the same way that it held and controlled the lands in trust for the benefit of these Indian heirs. The act of 1902 authorized these heirs to sell and convey their inherited lands only when the proposed sales were approved by the Secretary of the Interior. It thereby vested in the Secretary plenary power to permit or to forbid the sales proposed. The whole is greater than any of its parts, and includes them all, and the authority to allow or to prohibit proposed sales necessarily included the power to consider and determine the terms and conditions on which such sales should be approved." So we think in the case at bar that the plenary power conferred upon the Secretary of the Interior to approve or disapprove the application and removal of restrictions of any member of the Choctaw or Chickasaw Tribes of Indians as provided in

the act of April 21, 1904, coupled with the specific requirement that, when such removal is made, it shall be under the rules and regulations prescribed by the Secretary of the Interior, includes the power not only to approve or disapprove the removal of restrictions of the appellant, but to say when such order of removal, if it is made, shall take effect. It follows from this conclusion that, at the time Virginia Jones executed her second deed to defendant, the restrictions upon her alienation had not been removed, and that deed, like the first one, was void and in no manner affected the land it attempted to convey.

It is next contended by defendant that, if the deeds of the allottee to him for any reason be illegal, the right to challenge the illegality is personal to the allottee and cannot be availed of by plaintiff, who by the evidence is shown to have had knowledge of the execution and delivery of such deeds to defendant before they purchased the land from the allottee. But this contention is without merit. If the deeds made before the removal of restrictions were only voidable, there might be some support for this contention; but they are absolutely void, because prohibited by the law. They bind no one. In legal effect, they are nothing; and knowledge of their existence conveyed no notice of the rights of any one, because no one can claim any rights under them. A very similar question was decided by this court in *Bragdon v. McShea* (not yet officially reported) 107 Pac. 916. In that case a minor Creek freedman had, during her minority, conveyed to Bragdon her surplus allotment. McShea, who had knowledge of this transaction as a stockholder and officer in a land and investment company, received part of the purchase price paid by Bragdon to the allottee in payment of an indebtedness due the company by the allottee. After the allottee attained her majority, acting as the agent of Bell, McShea purchased from her her surplus allotment and received her warranty deed to Bell therefor. Bell afterwards conveyed the land to McShea, and McShea brought his action to have canceled as a cloud upon his title the deeds executed by the allottee to Bragdon. By section 16 of the supplemental agreement with the Creek Indians, approved June 30, 1902 (chapter 1323, 32 Stat. 500), it is provided that lands allotted to citizens shall not in any manner whatever or at any time be incumbered, taken, or sold to secure or satisfy any debt or obligation nor be alienated by the allottee or his heirs before the expiration of five years from the date of approval of the agreement; and that any agreement or conveyance of any kind or character made in violation of said statute shall be absolutely void and not susceptible of ratification in any manner. In the opinion it was held that the deed executed by the said Indian minor during her minority to Bragdon was absolutely void by reason of the forego-

ing section of the supplemental agreement and incapable of ratification by her when she became of age; and that on attaining majority she had the right to convey her land to whomsoever she chose; and that Bell had the right to purchase; and that his grantee, McShea, obtained a good title.

In *Muskogee Land Co. v. Mullins*, 165 Fed. 179, 91 C. C. A. 213, a similar question was involved. In that case the land company had brought an action against the defendant to recover rents for certain premises reserved to it by the terms of a written lease. The defense was that the lease was void because in violation of section 17 of the act of Congress of June 30, 1902 (Act June 30, 1902, c. 1323, 32 Stat. 504), which provides that Creek citizens may rent their property for strictly grazing purposes only and for a period not to exceed five years for agricultural purposes, and any agreement violative of said provision shall be absolutely void. Defendant in that case attempted to show that the lease under which plaintiff was attempting to hold, while upon its face purported to be for agricultural purposes, was for grazing purposes, and in violation of the law. The land company contended that the Creek citizens under whom they held alone could avoid the lease for such illegality, but the court said: "We are unable to agree with the interpretation placed on the act of Congress by the land company, to the effect that its lessors, the Creek citizens, alone could avoid the lease for illegality. The act of Congress inaugurated a public policy specially applicable to wards of the nation, as the Indians, even after allotment, are held to be; and it is our duty to so apply the law as to subserve that policy so far as we may lawfully do so. The act in question is couched in emphatic and comprehensive language. It declares 'any agreement or lease of any kind or character violative * * * shall be absolutely void.'" And it was held that the lease as between the land company and defendant was void and the land company could not recover thereon.

By act of Congress, approved April 26, 1906, it is provided that: "Conveyances heretofore made by members of any of the Five Civilized Tribes subsequent to the selection of allotment and subsequent to removal of restriction, where patents thereafter issue, shall not be deemed or held invalid solely because said conveyances were made prior to issuance and recording or delivery of patent or deed; but this shall not be held or construed as affecting the validity or invalidity of any such conveyance, except as hereinabove provided; and every deed executed before, or for the making of which a contract or agreement was entered into before the removal of restrictions, be and the same is hereby, declared void. * * * Act April 26, 1906, c. 1876, § 19, 34 Stat. 144.

It is lastly contended by defendant that the deed of Virginia Jones to plaintiffs is

void, because made in pursuance of an agreement made with her before the removal of her restrictions, in violation of the foregoing statute; but this contention is not supported by the evidence. It appears from the evidence that Bronaugh is the cashier of a bank to which Virginia Jones was, prior to the removal of her restrictions, indebted in the sum of \$150 for which the bank held a note executed by her and by her brother as surety. To secure the payment of the note, the bank held a mortgage on certain property of her brother. The evidence tends to show that the bank was asking for payment of the note; that she offered to sell her land; that she was told by plaintiff Bronaugh that if she would have her restrictions removed, and they could agree on a price, he would buy it. He said, "I will buy it if you can't sell it to somebody else and pay off the notes." The bank also made her a further loan of an amount sufficient to pay her expenses to Muskogee to make application to have the restrictions removed. When plaintiffs bought the land from her, with her consent, plaintiffs paid to the bank the amount of her indebtedness to it and paid to her the balance of the purchase price in cash. This, in substance, constitutes the evidence relative to any agreement between them whereby she agreed to sell plaintiffs the land after the removal of restrictions. We do not think these facts sufficient to strike down the deed executed by her to plaintiffs. There is entirely wanting any evidence tending to show that she agreed that she would sell the land to plaintiffs or any of them. There was never discussed between them any price for the land, nor was anything said or done toward an agreement other than that one of the plaintiffs stated that, if the allottee could not find a buyer and they could agree upon the price, he would buy the land. This falls short of being a contract to purchase, if not short of an offer to buy. There was never any meeting of the minds of the parties. Such an alleged agreement, if there had been no prohibition of the statute against the alienation of the allottee's land, would not support an action for specific performance or to recover damages for violation thereof.

Prior to the enactment of April 26, 1906, contracts and agreements for the sale and purchase of allotments made before the removal of restrictions were void; but there existed no statute which specifically made deeds, procured after the removal of restrictions in pursuance of contracts made before, void. Congress no doubt recognized that, while such contracts to purchase and sell, made before the removal of restrictions, were void and could not be made the basis of an action for specific performance, designing persons by procuring such contracts could use them as a moral force to induce the In-

dian allottee, after the removal of his restrictions, to execute a deed, which, when obtained, would be valid, and by such practice defeat the policy of Congress to protect the allottee from liability under any contract made before Congress deemed such allottee competent to transact his business and handle his property as other persons. Such contracts, although void, would constitute such a cloud upon an allottee's title as to render it, after the restrictions had been removed, unmarketable, without first obtaining a decree of court canceling such instruments. An opportunity was therefore afforded designing persons to obtain such contracts, thereby clouding the title of the allottee and forcing him to sell his land, when it became alienable, to the owner of such illegal contracts or be to the expense of litigation to clear his title. But when any deed, procured in pursuance of such a contract, is struck down by the statute, all fruits of such contracts are destroyed, and there can be no inducement to obtain them. It was to accomplish this that this act was passed. It was not, intended by the statute to disqualify any person who has expressed a wish or desire to purchase an allotment or any part thereof, before the removal of restrictions, from purchasing it after removal of restrictions. The statements of plaintiffs in this case to the allottee and her statements to them constituted neither a moral nor a legal obligation upon any of them to perform any act after the removal of restrictions. To hold that plaintiffs in this case were disqualified under the statute from purchasing the land from Virginia Jones, and that any deed they might procure from her after the removal of her restrictions would be void, because of their expression to her before the removal of restrictions of their willingness to buy afterwards, if a price could be agreed upon, would establish a rule that would render all titles from Indian allottees uncertain and dangerous, and would greatly impair, if not destroy, the value of their lands. Such a construction of the statute, instead of rendering it a source of protection to the Indians, would become an instrument of oppression. Such was not the intent of Congress.

It follows from the foregoing conclusions that the judgment of the trial court must be reversed, and the cause remanded.

DUNN, C. J., and WILLIAMS, KANE, and TURNER, JJ., concur.

(27 Okl. 667)

HOLCOMB v. CHICAGO, R. I. & P. RY. CO.
(Supreme Court of Oklahoma. Nov. 16, 1910.)

(Syllabus by the Court.)

1. JUSTICES OF THE PEACE (§ 141*)—APPEAL—JURISDICTION.

Under the provisions of sections 14 and 18 of article 7 of the Constitution of Oklahoma,

there was conferred upon the county courts of the state exclusive appellate jurisdiction of all appeals from judgments of justices of the peace in civil and criminal cases.

[Ed. Note.—For other cases, see *Justices of the Peace*, Dec. Dig. § 141.*]

2. STATUTES (§ 124*)—TITLE OF ACT.

That portion of section 3, art. 1, c. 27, Sess. Laws Okl. 1907-08, providing that the county court shall have "concurrent with the district court," appellate jurisdiction of judgments of justices of the peace not being correlated to the subject expressed in the title to the act, nor appearing to follow as a natural and legitimate complement, is in violation of section 57, art. 5, Const. Okl., providing that every act of the Legislature shall embrace but one subject, which shall be clearly expressed in the title, and is therefore unconstitutional, inoperative, and void, and it is error for a district court to deny a motion to dismiss an appeal taken from a court of justice of the peace.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 184-186; Dec. Dig. § 124.*]

(Additional Syllabus by Editorial Staff.)

3. WORDS AND PHRASES—"UNTIL."

The word "until," as used in the expression, "until otherwise provided by law," means "up to that time," "till the point or degree that," and as so used means until the law provides some other disposition of the matter in question.

[Ed. Note.—For other definitions, see *Words and Phrases*, vol. 8, pp. 7217-7219; vol. 8, p. 7825.]

Error from District Court, Comanche County; J. T. Johnson, Judge.

Action by J. H. J. Holcomb against the Chicago, Rock Island & Pacific Railway Company. Judgment for plaintiff before a justice was reversed on appeal, and judgment rendered for defendant, and plaintiff brings error. Reversed and remanded, with instructions to dismiss appeal from justice.

E. L. Antony, for plaintiff in error. C. O. Blake, H. B. Low, and Stevens & Myers, for defendant in error.

DJNN, C. J. This case presents error from the district court of Comanche county, and was begun originally before a justice of the peace on June 9, 1908. Plaintiff in error filed his bill of particulars to recover \$114, the value of two bales of cotton delivered to the defendant in error for shipment, and which were lost as alleged by the negligence of the defendant. The case was tried June 18, 1908, and judgment rendered for plaintiff for the amount sued for and costs. Whereupon the defendant filed its bond, and appealed the case to the district court of that county July 1, 1908. September 8, 1908, plaintiff filed a motion to dismiss defendant's appeal for want of jurisdiction in the district court on the ground that such court had no jurisdiction of appeals from judgments of justices of the peace. This motion was denied, to which exception was saved, and on trial in the district court judgment was rendered for the defendant. Motion for new trial was filed and denied, and the case has

been regularly brought to this court for review.

The sole question presented for our consideration is the one raised by the denial of plaintiff's motion to dismiss the appeal on the ground that the district court possessed no appellate jurisdiction of cases tried before justices of the peace. Prior to the incoming of statehood all appeals from justices of the peace were under the statutes as they then existed taken to the district court. Section 534, art. 22, c. 66, par. 4732, and section 117, c. 67, par. 5044, Wilson's Rev. & Ann. St. Okl. 1903. Section 12, art. 7, Const. Okl., provides: "The county court, coextensive with the county, shall have original jurisdiction in all probate matters, and until otherwise provided by law, shall have concurrent jurisdiction with the district court in civil cases in any amount not exceeding one thousand dollars, exclusive of interest. * * * It shall have such appellate jurisdiction of the judgments of justices of the peace in civil and criminal cases as may be provided by law, or in this constitution." Section 14, art. 7, Const., provides: "Until otherwise provided by law, the county court shall have jurisdiction of all cases on appeals from judgments of justices of the peace in civil and criminal cases; and in all cases, civil and criminal, appealed from justices of the peace to such county court, there shall be a trial de novo on questions of both law and fact." Section 18, art. 7, Const., provides, in part, that: "Until otherwise provided by law, appeals shall be allowed from judgments of the court of justices of the peace in all civil and criminal cases to the county court in the manner now provided by the laws of the territory of Oklahoma governing appeals from the courts of justices of the peace to the district court."

It is contended on the part of defendant that these sections of the Constitution have not deprived the district court of the jurisdiction which it had under the territory in this class of cases, but that the effect was simply to provide another tribunal, it being contended that it was rather the purpose to preserve and hold in force the procedure allowing appeals to the district court and provide the additional right of appeal to the county court where appeals might perhaps be more expeditiously tried, and that under section 2 of the Schedule to the Constitution the right of appeal to the district court as it had previously existed was not repugnant to these sections of the Constitution, and, not being locally inapplicable, was extended in force. We have given careful consideration to the claims made by counsel, but in our judgment the sections of the Constitution which we have noted are not susceptible to the construction that there still remained on their adoption any jurisdiction to entertain appeals from the courts of justices of the peace in the district courts of the state. The phrase contained in section 18, art. 7,

supra, "until otherwise provided by law, appeals shall be allowed from judgments of the court of justices of the peace in all civil," etc., vests, until some further legislation, the exclusive jurisdiction of these cases in the county courts. The word "until," as used in this sense, means, "Up to the time that; till the point or degree that." Cent. Dict. & Ency. p. 6851. "Until I know this sure uncertainty, I'll entertain the offered fallacy." Comedy of Errors, II, 2. So that, the phrase, "until otherwise provided by law," would mean, as here used, until the law provides some other disposition of appeals from justices of the peace courts, the county court shall have jurisdiction of appeals of such cases. It is difficult to see how the meaning here placed upon that phrase could have been better stated than in the language used. The legal phraseology uniformly adopted to express the meaning contended for by the defendant is that until otherwise provided by law the county courts shall have of such appeals concurrent jurisdiction with the district courts, but the word "concurrent" is not used, and from the terms which are we can find no substantial argument justifying us in yielding to the construction for which counsel for defendant so earnestly contend.

But it is contended that, if the Constitution vested sole jurisdiction in the county court, section 3, art. 1, ch. 27, p. 284, Sess. Laws Okl. 1907-08, provided the condition contemplated by the language of section 18 of the Constitution, and was a legal provision vesting in the district court jurisdiction of these appeals. The portion of the section relied on reads as follows: "The county court shall have, concurrent with the district court, appellate jurisdiction of judgments of justices of the peace, and of judgments of police judges in all civil and criminal causes. * * *" To this contention counsel for plaintiff replies that, if the recitation relating to the concurrent jurisdiction of the district courts was sufficient in terms to effect the object and purpose contended for, still it is void for the reason that it is contained in an act, the title to which does not embrace it, and hence that it falls within the inhibition of section 57, art. 5, Const., which provides that "every act of the Legislature shall embrace but one subject, which shall be clearly expressed in its title." The title to the act within which this provision is contained reads as follows: "An act to define the jurisdiction and duties of the county court, and to fix compensation for the judges thereof, and to provide for a clerk of the county court in certain counties, and to provide for a county stenographer, who shall be ex-officio clerk of the county court, fixing the compensation and fees therefor; and declaring an emergency." It is manifest, and is conceded, that this title contains no reference to the district court, and is not an act for the purpose of defining appellate jurisdiction of causes tried in courts of justices of

the peace. This constitutional provision or one of similar import is contained in the Constitutions of practically all the states of the union, and its purpose and scope has received consideration at the hands of the appellate courts of practically every jurisdiction. Judge Cooley in his work on Constitutional Limitations (7th Ed.) p. 205, says: "The intent of this provision of the Constitution was to prevent the union in the same act of incongruous matters, and of objects having no connection, nor relation. And with this it was designed to prevent surprise in legislation, by having matter of one nature embraced in a bill whose title expressed another. And similar expressions will be found in many other reported cases. It may therefore be assumed as settled that the purpose of these provisions was: First, to prevent hodge-podge or 'log-rolling' legislation; second, to prevent surprise or fraud upon the Legislature by means of provisions in bills of which the titles gave no intimation, and which might therefore be overlooked and carelessly and unintentionally adopted; and, third, to fairly apprise the people, through such publication of legislative proceedings as is usually made, of the objects of legislation that are being considered, in order that they may have opportunity of being heard thereon, by petition or otherwise, if they shall so desire." One of the best considered cases on this subject and which is frequently cited is *Ballentyne v. Wickersham*, 75 Ala. 533. The rule therein laid down was subsequently adopted by this court in the case of *City of Pond Creek v. Haskell et al.*, 21 Okl. 711, 97 Pac. 338, as follows: "Under this clause of the Constitution, the title of a bill may be very general, and need not specify every clause in the statute, it being sufficient if they are all referable and cognate to the subject expressed; and, when the subject is expressed in general terms, everything which is necessary to make a complete enactment in regard to it, or which results as a complement of the thought contained in the general expression, is included in, and authorized by, it. But if clauses are contained in the act which are not so correlated to the subject expressed in the title as to appear to follow as a natural and legitimate complement, they cannot stand." See, also, *Ex parte Mayor and Aldermen of Birmingham*, 116 Ala. 186, 22 South. 454.

The identical question here presented was mooted by this court in the case of *St. Louis & San Francisco Ry. Co. v. Bray et al.*, 24 Okl. 476, 103 Pac. 573, wherein Mr. Justice Williams, who prepared the opinion for the

112 P.—65

court said: "As to whether or not section 3, art. 1, c. 27, p. 285, Sess. Laws Okl. 1907-08, which provides that 'the county court shall have, concurrent with the district court, appellate jurisdiction of judgments of justices of the peace, and of judgments of police judges in all civil and criminal causes,' has the effect to confer a like appellate jurisdiction upon the district courts, we express no opinion in this case. However, the question would necessarily arise as to whether or not the provisions of said section 3 would be within the purview of the title of said act, and, if not, such provisions would fall."

The question is now squarely presented, and after a full consideration of the same the only conclusion which we deem at all justifiable under the authorities is that, even if sufficient in terms, the subject of the concurrent appellate jurisdiction of the district court not being embraced nor expressed in, nor referable to the title of the act, that reference thereto in section 3 was in violation of the section of the Constitution above noted, and is therefore inoperative and void. It is clear that an act, the title to which simply defined the jurisdiction of the county court, could not embrace within it within the terms of this constitutional provision a section fixing the jurisdiction of the district court. It would not be correlative to the subject expressed in the title, nor would it appear to follow as a natural and legitimate complement, and hence it cannot stand. Other authorities where this question has been dealt with by this court may be referred to as follows: *In re Menefee*, 22 Okl. 365, 97 Pac. 1014; *In re County Com'rs of Counties Comprising Seventh Judicial Dist.*, 22 Okl. 435, 98 Pac. 557. Under the authority of the foregoing conclusion we therefore hold that that portion of section 3, art. 1, c. 27, Sess. Laws Okl. 1907-08, reciting that "the county court shall have concurrent, with the district court, appellate jurisdiction of judgments of justices of the peace and of judgments of police judges in all civil and criminal causes," so far as the same relates to the district court, is inoperative and void, being in conflict with section 57, art. 5, Const., providing that every act of the Legislature shall embrace but one subject, which shall be clearly expressed in the title, and the judgment of the district court is accordingly reversed and the case remanded, with instructions to dismiss the same.

TURNER, KANE, and HAYES, JJ., concur; WILLIAMS, J., not participating.

(27 Okl. 564)

SINGLETON v. KENAMER.

(Supreme Court of Oklahoma. Nov. 16, 1910.)

*(Syllabus by the Court.)***APPEAL AND ERROR (§ 532*)—REVIEW—SUFFICIENCY OF RECORD.**

A motion to dismiss an appeal from a judgment of a justice of the peace filed in the district court is not a part of the record proper, and error based on the action of the district court in sustaining such motion cannot be presented to this court upon a transcript of the record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2399; Dec. Dig. § 532.*]

Error from District Court, Tulsa County; L. M. Poe, Judge.

Action between C. W. Singleton and W. L. Kennamer. From a judgment before a justice, Singleton appeals, and from an order dismissing the appeal he brings error. Dismissed.

Aby & Tucker, for plaintiff in error.
Charles N. Sifton, for defendant in error.

KANE, J. This proceeding in error was commenced for the purpose of reviewing an order of the district court of Tulsa county dismissing an appeal from a justice of the peace court of said county. The only error complained of is that the court erred in dismissing the appeal of the plaintiff in error, and remanding said action to the justice of the peace by whom the judgment appealed from was rendered. It is sought to present this alleged error by a transcript of the record. This cannot be done. *McMechan v. Christy*, 3 Okl. 301, 41 Pac. 382. In that case it was held that, "under the Code of 1893, a motion to dismiss an appeal from the probate court to the district court, and a motion for a new trial, and the evidence taken on the trial in the district court and the exceptions made to the various rulings of the district court upon these matters, are not a part of the record without a case-made or bill of exceptions, and a transcript of the record of the district court presents no question in this court for a review of the actions of the district court in its rulings upon such motions." One on all fours with the case at bar may be mentioned: *Black v. Kuhn*, 6 Okl. 87, 50 Pac. 80. In that case it was held: "The statutes of 1893 do not include a motion as part of the pleadings in the cause, and make no provision for bringing here for review, an order made upon a motion to dismiss an appeal in the district court by a transcript of the record." The foregoing authorities have been followed by the Supreme Court of the territory and this court in a great many cases, and the rules therein laid down have long since become the settled law of this jurisdiction. Moreover, it has been held by this court in an opinion handed down this term (*Holcomb v. C., R. I. & P. Ry. Co.*, 112 Pac. 1023) that since statehood appeals do not lie

from justice of the peace courts to the district courts of the state.

The appeal must be dismissed. All the Justices concur.

(27 Okl. 496)

PACIFIC MUT. LIFE INS. CO. v. ADAMS et al.

(Supreme Court of Oklahoma. Nov. 16, 1910.)

*(Syllabus by the Court.)***1. JURY (§ 32*)—RIGHT TO TRIAL BY JURY—ACTIONS BEGUN IN TERRITORIAL COURT.**

Prior to the admission of the state into the Union, defendant, in a civil suit pending in the district court of Oklahoma Territory, was entitled, under the seventh amendment to the federal Constitution, to a common-law jury of 12 and to a unanimous verdict. This was a right in procedure and, as to all such suits so pending, was preserved under section 1 of the Schedule to the Constitution, providing, "No existing rights, actions, suits, proceedings, contracts or claims shall be affected by the change in the form of government, but all shall continue as if no change in the form of government had taken place," and remained unaffected by the change of procedure prescribed by Const. art. 2, § 19, providing: "The right of trial by jury shall be and remain inviolate, and a jury for the trial of civil * * * cases in courts of record, other than county courts, shall consist of twelve men. * * * In civil cases, * * * three-fourths of the whole number of jurors concurring shall have power to render a verdict. * * * In case a verdict is rendered by less than the whole number of jurors, the verdict shall be in writing and signed by each juror concurring therein." And an instruction in the trial of such causes after statehood, in effect, that the jury might return a verdict on concurrence of nine of their number, is error.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 221-225; Dec. Dig. § 32.*]

2. JURY (§ 32*)—TRIAL BY JURY—INFRINGEMENT OF RIGHT—NUMBER OF JURORS—ACTIONS BEGUN IN TERRITORIAL COURT.

Where, in the trial of a cause after statehood which was pending in the district court of Oklahoma Territory prior to that time, and in which defendant was entitled to a common-law jury of 12 and to a unanimous verdict, a verdict is returned against him signed by 11 of the jurors, such verdict is null.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 221-225; Dec. Dig. § 32.*]

3. INSURANCE (§ 539*)—ACCIDENT INSURANCE—NOTICE OF INJURY—CONDITION SUBSEQUENT.

Provisions in an accident insurance policy requiring that immediate written notice must be given the insurer of any accident and injury for which a claim is to be made, and affirmative proof of death furnished insurer within two months from the date of insured's death, are conditions subsequent and are fulfilled by notice and proof of death within a reasonable time after insured's death under all the circumstances of the case.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1328-1336; Dec. Dig. § 539.*]

4. INSURANCE (§ 539*)—ACCIDENT INSURANCE—NOTICE AND PROOF OF DEATH—SUFFICIENCY.

Insured died August 5, 1903, leaving, him surviving, plaintiff, as beneficiary in an accident insurance policy on deceased's life. Plaintiff, who lived several hundred miles away from where deceased was killed, first learned of said policy on January 8, 1904, but not of its terms

or the name of the company by which it was issued, and did not obtain said policy until January 23, 1904, on which date he sent written notice to the insurer of the accident and demanded payment, and on February 5, 1904, furnished proof of death. *Held*, that such notice and proof of death were furnished within a reasonable time under all the circumstances, and that plaintiff's failure so to do within two months after the death of insured, as required by the policy, was no defense to a suit thereon.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1328-1336; Dec. Dig. § 539.*]

5. INSURANCE (§ 622*)—ACCIDENT INSURANCE—ACTIONS—LIMITATION—CONSTRUCTION OF POLICY.

Though an accident policy provide that written notice must be given to the insurer at its home office of any accident and injury for which a claim is to be made thereunder, and affirmative proof of death furnished the insurer within two months from the time of death, and that suit thereon may not be brought before the expiry of three months from the date of filing proofs at its home office, nor brought at all unless begun within six months from the time of the death, *held*, that such six months' limitation applies only where, after furnishing said notice and proof of death within a reasonable time thereafter and after the expiry of said three months, sufficient time remains in which to bring suit within six months from said death.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1544-1550; Dec. Dig. § 622.*]

6. INSURANCE (§ 461*)—ACCIDENT INSURANCE—CONSTRUCTION OF POLICY—"UNNECESSARY EXPOSURE TO DANGER."

The expression "unnecessary exposure to danger" includes exposure attributable to negligence on the part of the assured. It is intended to hold the insured to the exercise of ordinary care and exempt the insurer from liability in all cases of injury occurring in whole or in part through a failure on the part of the insured to exercise such care.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1180, 1181; Dec. Dig. § 461.*]

7. INSURANCE (§ 668*)—ACCIDENT INSURANCE—ACTION ON POLICY—QUESTIONS FOR JURY—CAUSE OF DEATH.

Where a given state of facts are such that reasonable men may fairly differ upon the question as to whether the insured died of injuries resulting from "unnecessary exposure to danger," the determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them that such a question is ever considered one of law for the court.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1556, 1732-1770; Dec. Dig. § 668.*]

Error from District Court, Oklahoma County; George W. Clark, Judge.

Action by William F. Adams and others against the Pacific Mutual Life Insurance Company. Judgment for plaintiffs, and defendant brings error. Reversed and remanded. Upon the death of plaintiff pending the action, it was revived in the name of Wallace Estell, Jr., his special administrator.

Cottingham & Bledsoe, for plaintiff in error. Paul F. Cooper, for defendants in error.

TURNER, J. On June 28, 1904, William F. Adams, defendant in error, as plaintiff, sued the Pacific Mutual Life Insurance Com-

pany, plaintiff in error, in the district court of Oklahoma county, to recover \$2,000 on an accident insurance policy issued by said company on the life of James Adams, and in favor of plaintiff as beneficiary. After issue joined, there was trial to a jury on March 28, 1908, which resulted in judgment for plaintiff. The insurance company brings the case here. In this court the death of William F. Adams has been suggested, and the cause by consent revived in the name of Wallace Estell, Jr., as special administrator.

The only question necessary for us to determine is: Did the court err in instructing the jury, over objection, in effect, that they could render a verdict on 9 o. their number concurring and in rendering judgment on the verdict concurred in and signed by 11 of said jurors? The charge was based on article 2, § 19, which on this point reads: "The right of trial by jury shall be and remain inviolate, and a jury for the trial of civil cases in courts of record, other than county courts, shall consist of twelve men. * * *

In civil cases, three-fourths of the whole number of jurors concurring shall have power to render a verdict. * * * In case a verdict is rendered by less than the whole number of jurors, the verdict shall be in writing and signed by each juror concurring therein." In support of its contention that this was error, defendant contends that, as this suit was brought prior to statehood, it had, when brought, a right to a common-law jury of 12 under the seventh amendment to the federal Constitution, and to a unanimous verdict, and that said right was unaffected by said change in the form of government and by said section of the state Constitution. The point is well taken. The right claimed was one of procedure existing in an action pending at the time of the admission of the state and continued unaffected by virtue of section 1 of the Schedule to the Constitution, which reads: "No existing rights, actions, suits, proceedings, contracts or claims shall be affected by the change in the form of government, but all shall continue as if no change in the form of government had taken place." This was held, in effect, by the United States Circuit Court of Appeals in *St. L. & S. F. Ry. Co. v. Cundiff*, 171 Fed. 319, 96 C. C. A. 211. See, also, *Blanchard & Co. v. Ezell*, 106 Pac. 960; *Loeb v. Loeb*, 24 Okl. 384, 103 Pac. 570. In the *Cundiff* Case the court said: "Construing all of these provisions together, we are of opinion that they do not change, and were not intended to change, the method of procedure in cases pending in the courts of Indian Territory and of the territory of Oklahoma, but that the civil cases pending in the Indian Territory should, after statehood, continue under the law in force in the Indian Territory." We are therefore of opinion that defendant's right to a common-law jury and to unani-

mous verdict was wrongfully impinged on by said instruction; that it was a right preserved to him by the Schedule to the Constitution; that the change prescribed by the Constitution for the concurrence of a less number of jurors than 12, being a change in procedure, was not applicable to this case, pending as it was on the advent of statehood; that the verdict returned under the instruction was in fact no verdict at all (*Girdner v. Bryan*, 94 Mo. App. 27, 67 S. W. 699); and that the judgment of the court thereon must be reversed.

But in view of the probability of another trial we will determine whether the court erred in refusing to instruct the jury, peremptorily, to return a verdict for defendant. Defendant insists that it did: "First. Because the notice required by the terms of the policy was not given. Second. Because the proof of death was not furnished as required by the terms of the policy. Third. Because the suit was not instituted as required by the terms of the policy, and was not instituted until more than six months after the policy was in the possession of the plaintiff. Fourth. Because it appears from the uncontradicted evidence that the death of the insured was brought about by an unnecessary exposure to danger."

There is no conflict in the testimony. The evidence discloses that the policy sued on was delivered and thereupon took effect at Moxa, Wyo., May 3, 1903; that on August 5, 1903, the insured received injuries within the terms of the policy, from which he died the same day; that plaintiff named therein as beneficiary was his son and is a minor 18 years old, a common laborer, and lived with his mother and six younger children in Shawnee, Okl.; that immediately on the death of insured the mother received a telegram that he had been killed, and some two or three months later a letter, telling her that he had his life insured; that, owing to his poverty, plaintiff did not go to the scene of the killing, but thereafter for about a month made diligent efforts to learn the name of the company issuing the policy and to get possession of it; that, failing so to do, he turned the matter over to his attorney, who, after diligent effort, on January 8, 1904, received information of its number and the name of the company issuing it, but not its terms, and later, on January 23, 1904, the policy itself; that on said day he gave said company notice in writing of the death of insured, and the claim, and on February 5, 1904 furnished it proof of death, and, on payment being refused, brought this suit. The policy provides: "Immediate written notice must be given the company at San Francisco, California, of any accident and injury for which a claim is to be made with full particulars thereof and full name and address of the insured. Affirmative proof of death, * * * must also be furnished to the company within two months from the time of

death. * * * Legal proceedings for the recovery hereunder may not be brought before the expiry of three months from date of filing proofs at the company's home office, nor brought at all unless begun within six months from the time of the death. * * *

We think the notice of injury and proof of death furnished the company by plaintiff was sufficient under the terms of the policy, and that the first two grounds of assignment, *supra*, are not well taken. A literal compliance with these terms of the contract cannot be exacted. As conditions subsequent they must receive a liberal construction in favor of the plaintiff as beneficiary in the policy, under all the circumstances in the case. To hold that plaintiff cannot recover because of his failure to give notice and furnish proof of death within two months thereafter, he not knowing of such requirement until five months thereafter, would be to require of him an impossibility, and such, of course, we cannot do. Speaking of similar conditions, the court, in *Brown v. Accident Association*, 18 Utah, 265, 55 Pac. 63, said: "Doubtless the purpose of such conditions in a policy is to afford the insurer an opportunity within a reasonable time after the occurrence to inquire into the cause of the accident, and ascertain the surrounding facts and circumstances while fresh in the memory of witnesses, so as to determine whether or not liability under the contract exists. The condition in the policy, requiring notice to be given within a specified time, with full particulars of the accident, operates upon the contract of insurance only after the fact of the accident. It is a condition subsequent, and must therefore receive a reasonable and liberal construction in favor of the beneficiary under the contract."

Munz v. Standard Life, etc., Co., 26 Utah, 69, 72 Pac. 182, 62 L. R. A. 485, 99 Am. St. Rep. 830, was a suit to recover an amount claimed to be due on an accident insurance policy issued to the insured for the benefit of his estate, of which plaintiff was appointed administratrix. The facts were: The policy was issued about May 16, 1899. The insured was accidentally killed June 29, 1900. Plaintiff, as next of kin, resided in Salt Lake City, 234 miles away, and learned of the death of insured for the first time October 1, 1900. Owing to her poor circumstances, she was unable to have his body or effects removed to Salt Lake City, but about February 15, 1901, procured said effects, including the policy of insurance sued on, the existence of which prior to that time was unknown to her. On February 23, 1901, she gave notice to defendant company of his death, and made demand for payment of the policy, which was refused because notice had not been sent to defendant and no proof of death had been made within two months thereafter. As soon as she was able to secure legal assistance, to wit, May 1, 1901, she sent to defendants due proof, whereupon payment was

again refused, because the same were not made within the specified time. She then brought suit. A general demurrer was sustained to the complaint reciting these facts, in support of which it was urged that said complaint disclosed that neither notice of the fatal accident was given nor proof of death furnished to the company within the time limit of the policy. The policy was identical in terms to the one here. The Supreme Court reversed the ruling of the lower court and, in effect, held that the terms of the policy had been substantially complied with in the particulars complained of; that the same had been furnished within a reasonable time after the death of insured, under the circumstances; and that plaintiff's failure to submit proof of death within two months after the death was no defense to the suit on the policy. In passing the court said: "In the case at bar, the beneficiary was not aware of the death of the insured until about three months after it occurred, was distant 234 miles from the place of the accident and death, and was not aware of the existence of the policy until over seven months after the fatal occurrence. Being thus ignorant of these things, how could she comply literally with the terms of the policy as to notice and proof? How could she give 'full particulars' of an accident the occurrence of which was not within her knowledge, or the 'full name and address of the insured' when she knew nothing of the insurance? We cannot assume that the parties to the insurance contract intended such absurdities. The contracting parties doubtless intended that notice and proof should be furnished at the earliest practicable time after the happening of an accident and injury for which liability would be claimed, so that the real facts of the case could be ascertained by the insurer before time had effaced them from the memory of witnesses. The word 'immediate,' under such circumstances as are disclosed in this record, cannot be construed as excluding all intervening time between the occurrence of the death and the giving of notice. It does not, by any fair construction of the policy, mean instantly, but 'immediate notice' means notice within a reasonable time, under all the circumstances of each particular case, and no doubt, ordinarily, unless there are circumstances excusing delay, the notice should be given at once. It would, however, be both an unreasonable and unfair interpretation to hold that, as used in the policy, the word 'immediate' required the doing of a thing impossible for the beneficiary to do. Such provisions must receive reasonable construction in favor of the beneficiary"—and, after citing abundant authority in support of the holding, reversed and remanded the case. We are therefore of opinion that notice and proof of death was furnished within a reasonable time after the requirements of the policy were brought home

to plaintiff as beneficiary, which is sufficient under all the evidence.

But was the suit brought in time? Defendant urges that it was not and is barred, and bases its contention upon the six months' clause in the policy, *supra*, providing, in effect, that suit thereon shall not be brought "at all unless begun within six months from the time of the death. * * *" In support of this contention is cited *McFarland v. Ry. Officials*, 5 Wyo. 126, 38 Pac. 347, 677, 27 L. R. A. 48, 63 Am. St. Rep. 29, which, in substance, holds that "from the time of the death" means from the time of the death, on which event the statute of limitations began to run. It is claimed that, inasmuch as this policy is a Wyoming contract, proof of the law as laid down in said opinion should have been admitted in evidence as part of the common law of that state, and, as such, binding on the court. Whether binding or not or improperly rejected as evidence or not, we take it as conclusive of the law so far as it goes, being supported by reason and authority, and sufficient to bar this suit unless other terms in the policy, not in the one there construed, modify or control the clause in question and thereby render it not an authority in point. With reference to the clauses requiring notice and proof of death within two months thereafter, we have just held, in effect, that this means notice within a reasonable time under all the circumstances after notice to the beneficiary of the death of the insured and the terms of the policy. Now, if such information is not received by the beneficiary a sufficient length of time to enable him to comply with those conditions, and have remaining a sufficient length of time within the six months in which to bring suit, it is clear that to require him so to do would be unreasonable, and hence not within the intent or contemplation of the parties to the policy. As this contingency might frequently occur, as it did in this case, it may fairly be presumed to have been within the contemplation of the parties at the time this policy was issued that this six months' limitation was intended to refer only to those cases in which the information came to the beneficiary within sufficient time to give notice and make proof of loss and have a reasonable time remaining after three months have passed within which to bring suit within six months. In other words, it is fair to presume that said six months' limitation was not intended to apply in cases where that time is necessarily consumed by the beneficiary in performing the conditions prescribed in the policy, or where, after complying with the terms of the policy, a reasonable portion of the six months is not left remaining in which to bring the suit.

In *Dennison v. Mason's Fraternal Accident Ass'n*, 59 App. Div. 294, 69 N. Y. Supp. 292, the contention was, as here, that the bar had

fallen on the suit. The certificate provided that no suit shall be brought unless brought within one year from the date of the alleged accident. The accident occurred on October 25, 1897. The suit was brought on January 7, 1899. The court held the point well taken, unless the certificate disclosed some provision modifying or controlling that clause. The claim was for \$25 a week for 52 weeks, pursuant to the terms of the certificate. It was provided in the certificate that legal proceedings to enforce payment thereunder should not be brought until three months had expired after receipt by the association of acceptable and satisfactory proofs of loss. The court held that, as such proofs could not be furnished until the disability had ceased and 52 weeks had passed, suit could not be brought within 15 months after the accident, and, in effect, that the bar of one year could be held to apply only to those cases in which the disability had ceased within sufficient time to furnish proof of loss and have remaining a reasonable time after the three months within which to bring suit before the end of the year, and in passing said: "As this contingency is contemplated by the contract of insurance, the year limitation within which the action can be commenced must refer only to those cases in which the disability has ceased within sufficient time so that the proofs of loss may be furnished, and a reasonable time remain after the three months have passed before the expiration of the year. If, however, the disability shall continue so long that the proofs of loss cannot be furnished, and the three months expire before the expiration of the year, the law will still give to the plaintiff a reasonable time after the expiration of the three months from the furnishing of the proofs of loss within which to commence the action. The three months in the case at bar expired upon the 19th day of December, and upon the 5th of January the summons was issued, and upon the 7th served. We think, under the circumstances of this case, that the delay in the commencement of the action was not unreasonable, and that the plaintiff complied with the fair intentment of the contract."

For the reason that the question here decided was expressly left open in the Wyoming case, *supra*, that case is not in point. There the court said: "It is admitted by the defendant that if the time allowed for, or necessarily occupied by the claimant under contract of insurance, in performing such conditions precedent, should include all the time specified within which suit must be brought or should not leave a reasonable time for that purpose, the right of action would not be lost by the lapse of the time specified. * * * So, cases cited to these propositions will be eliminated from this discussion."

We are therefore of opinion that as the

death occurred August 5, 1903, and as it was only possible to comply with the terms of the policy on January 23, 1904, on which day notice of the fatal accident and of the claim was given, and as it was impossible to make proof of death and bring suit within the twelve days yet remaining before the expiration of six months and at the same time observe the clause requiring legal proceedings to be stayed until the expiry of three months after proof of death, that this six months' clause was not intended to operate nor the penalty thereof to fall, but that the insured was intended to have thereafter a reasonable time in which to bring suit, which was done.

But should the demurrer have been sustained on the fourth ground? The policy did not cover injuries resulting from "unnecessary exposure to danger or perilous venture (unless in the humane effort to save life)." Defendant contends the proof shows that insured died as the result of injuries resulting from such unnecessary exposure. On this point there is no conflict in the testimony. It shows that deceased was a railroad man, 42 years old, a car repairer, and was insured, "in consideration of an order to the paymaster." At the time of his death he had been out of the employ of the Oregon Short Line for a day or two and had ridden that day, by implied permission, on one of its freight trains into Moyer Junction, where he was killed. On arriving at the junction the train on which he rode was coupled on to some cars on a siding. That immediately thereafter deceased climbed on top of the cars, 25 in number, and was last seen, by the man in charge, walking towards the head end of the train, which was at that time going downgrade on the side track around a sharp curve, pushed by a switch engine. His object in so doing does not appear. In about five minutes thereafter his body was found cut to pieces lying across a frog, having been run over by said train. Before we can hold that the court erred in refusing to instruct the jury peremptorily to find for the defendant, we must be able to say as a matter of law that insured brought about his own death by an "unnecessary exposure to danger." These were the exact words used in the policy to preclude recovery in *Sargent v. Cent. Acc. Ins. Co.*, 112 Wis. 29, 87 N. W. 796, 88 Am. St. Rep. 946. Of them the court said: "The force and effect of the clause in the policy excepting the defendant from liability for injuries due to unnecessary exposure to danger has received authoritative construction in this court in *Shelvin v. Association*, 94 Wis. 180, 68 N. W. 866, 36 L. R. A. 52, where it is held to be satisfied by the same acts that would constitute contributory negligence. * * *" Turning to that case, as we find the words there construed were "exposure to unnecessary danger," we take it that the court held the two expressions to mean practically the same thing. Of

the latter the court said: "It plainly includes all cases of exposure to unnecessary danger where such exposure is attributable to negligence on the part of the assured; that is, the exception was intended to hold the insured responsible for the exercise of ordinary care, and to except from the provisions of the policy all cases of injury occurring in whole or in part through a failure to exercise such care." So that, to hold the company not liable under the terms of the policy, we must say that the death of the insured was the result of his own negligence as a matter of law. This we cannot do and are of opinion that the same was a question for the jury upon proper instructions, for the reason that, although the facts are undisputed, reasonable men might very well differ as to whether a railroad man, a car repairer, 42 years old, was in the exercise of ordinary care for his personal safety, under all the circumstances attending his death, in walking, without apparent motive, on top of a moving freight train on a side track, in daylight, while said train was being pushed by a switch engine. *M., K. & T. Ry. Co. v. Shepherd*, 20 Okl. 626, 95 Pac. 243.

Travelers' Ins. Co. v. Randolph, 78 Fed. 754, 24 C. C. A. 305, was a suit on an accident policy excepting "voluntary exposure to unnecessary danger." The defense was that plaintiff had intentionally and of a purpose sprang or jumped from a passenger train. The facts, in substance, were that plaintiff was a passenger on a passenger train returning home to Memphis from St. Louis in November, 1894. The train was composed of a sleeping car, two passenger cars, and a baggage car. He occupied a seat in the sleeper. He arose quite early in the morning and was seen several times standing on the platform of the cars while the train was going at 15 or 20 miles an hour. At one time he stood on the platform with his back against the door of the car; at another he was seen holding on to the railing with one foot on the platform, the other on the top step of the platform; at another he was seen holding with one hand to the railing attached to the body of the car and with the other to the platform railing "one foot up like a man going to jump off, and the other foot on the lower step—standing like a railroad man who was going to jump off." At the close of the evidence defendant moved for a peremptory instruction in its behalf on the ground that the insured "voluntarily exposed himself to unnecessary danger and that his injury and consequent death resulted therefrom." This motion was overruled, and defendant appealed, assigning this as error. The Circuit Court of Appeals in passing said that under the facts the jury might well have concluded, from the examination of the witness who swore that deceased was standing like a railroad man who was going to jump off, that he was mistaken and that there was nothing

in the conduct of the insured indicating a purpose to put his life in peril by jumping from the train. But that there was no room to doubt that he was riding on the platform while the train was running at from 15 to 30 miles an hour. Said the court: "But the defendant's motion for a peremptory instruction distinctly presented the question whether riding upon the platform of a car running 15 to 25 or 30 miles an hour, even if the passenger, while so riding, holds to a railing, and thereby diminishes the danger of being thrown from the car, was, within the meaning of the policy and as a matter of law, a voluntary exposure of himself to unnecessary danger. The principal contention of the defendant is that the jury should have been so instructed." And, after defining what was meant by a "voluntary exposure to unnecessary danger," the court said: "Whether, in the present case, the exposure was unnecessary, and whether the assured was aware of and appreciated the danger, and intentionally or purposely risked it, were questions of fact that were properly left for the determination of the jury under appropriate instructions by the court as to the law of the case, * * *" and affirmed the judgment of the lower court.

Smith v. Aetna, etc., Life Ins. Co., 115 Iowa, 217, 88 N. W. 368, 56 L. R. A. 271, 91 Am. St. Rep. 153, was a suit on an accident insurance policy. The facts were that the insured lost his life by stepping, or falling, from a rapidly running train while returning to his home from Independence to Waterloo. The accident occurred shortly after midnight in September, 1899. On boarding the train at Independence insured took a seat in the smoking car and rode therein until reaching Waterloo. As the train entered that city he left his seat and went out on the platform. He told a fellow passenger that he intended to alight when the train stopped at a certain crossing, as that would save him some distance walking home. He left the train over a thousand feet before reaching the crossing and while the train was running about 10 miles an hour. Two witnesses swore that he descended the steps and stood upon the lower one for just an appreciable length of time facing inward towards the center of the car, and in this position he left the train. It was quite dark. After so leaving he clung to the railing with his left hand and was dragged a short distance; one witness saying: "He seemed to me like a man who was going to step down on another step—as if he thought there was another step there, and that in his opinion insured fell from the train." In passing the court said: "We cannot say, as matter of law, that his standing upon the car steps, holding to the rail with both hands, was a 'voluntary exposure to danger,' within the meaning of those words as we have defined them, * * *" and cited in support of its holding, *Travelers' Ins. Co. v.*

Randolph, *supra*, and *Collins v. Insurance Co.*, 96 Iowa, 216, 64 N. W. 778, 59 Am. St. Rep. 367, adding, "Indeed, it cannot be said, as matter of law, that deceased was even negligent in standing upon the platform of the car, holding to the railings as he did," citing *Sutherland v. Ins. Co.*, 87 Iowa, 505, 54 N. W. 453, and cases there cited, and affirmed the judgment of the lower court.

We are therefore of opinion that the court did not err in refusing to instruct peremptorily for defendant; but, for the error indicated, the cause is reversed and remanded for a new trial. All the Justices concur.

(37 Okl. 469)

HOLLAND v. COFIELD.

(Supreme Court of Oklahoma. Nov. 16, 1910.)

(*Syllabus by the Court.*)

1. LIS PENDENS (§ 3*)—EFFECT OF NOTICE—"TITLE."

The word "title," in section 4285, Wilson's Rev. & Ann. St. 1903 (section 5621, Comp. Laws 1909), is to be construed in its broadest meaning and most comprehensive signification.

(a) An action or claim to enforce a vendor's lien comes within its meaning.

[Ed. Note.—For other cases, see *Lis Pendens*, Cent. Dig. §§ 3-8; Dec. Dig. § 3.*]

For other definitions, see *Words and Phrases*, vol. 8, pp. 6978-6982; vol. 8, p. 7816.]

2. LIS PENDENS (§ 22*)—VENDOR'S LIEN—CLAIM—UNRECORDED DEED—PRIORITIES.

Under section 13, art. 1, c. 21, St. Okl. 1893, a *lis pendens* vendor's lien claim is superior, with certain exceptions, to the claim of a grantee in a deed which was unrecorded at the time of the filing of the *lis pendens* petition, but which was filed for record prior to the time of the reducing said vendor's lien claim to final judgment; said subsequent recording not having such retroactive effect as to overcome the superior lien theretofore obtained by the filing of the *lis pendens* vendor's lien claim.

[Ed. Note.—For other cases, see *Lis Pendens*, Cent. Dig. §§ 31, 34, 37; Dec. Dig. § 22.*]

Error from District Court, Logan County; A. H. Huston, Judge.

Action by Carrie Cofield against Mamie E. Holland. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

H. M. Adams, for plaintiff in error. Devereux & Hildreth and Charles A. Blair, for defendant in error.

WILLIAMS, J. Section 4285, Wilson's Rev. & Ann. St. 1903 (section 5621, Comp. Laws 1909), provides: "When the petition has been filed, the action is pending, so as to charge third persons with notice of its pendency, and while pending no interest can be acquired by third persons in the subject matter thereof as against the plaintiff's title; but such notice shall be of no avail unless the summons be served or the first publication made within sixty days after the filing of the petition." This section was borrowed from Kansas. Comp. Laws Kan. 1879, § 3608 (Code Civ. Proc. § 81). In *Smith v.*

Kimball, 86 Kan. 474, 13 Pac. 801, said section was construed by the Supreme Court of that state, wherein it was said: " * * * We give the word 'title' in the section its broadest meaning and most comprehensive signification. Judge Story's definition is: 'A purchase made of property actually in litigation pendente lite for a valuable consideration, and without any express or implied notice in point of fact, affects the purchaser in the same manner as if he had such notice; and he will accordingly be bound by the judgment or decree in the suit.' 1 Eq. Jur. § 405. Among the actions to which this doctrine will apply are suits for the foreclosure of unrecorded mortgages (*Chapman v. West*, 17 N. Y. 125; *Center v. Bank*, 22 Ala. 743; *McCutchen v. Miller*, 31 Miss. 65); to foreclose vendor's liens; to set aside a decree of partition; to enforce the specific performance of a contract for the sale of real estate; to enforce a charge against real property whatever be the form of the action (*Seabrook v. Brady*, 47 Ga. 650). Actions in the nature of creditors' bills have been considered as giving notice to subsequent purchasers of the particular property involved in the controversy. *Jackson v. Stone*, 13 Johns. [N. Y.] 447; *Bradley v. McDaniel*, 48 N. C. 128; *Fogarty v. Sparks*, 22 Cal. 143; *Bolin v. Connelly*, 73 Pa. 336; *Hill v. Oliphant*, 41 Pa. 364. And see generally on this subject *Wade on the Law of Notice*, § 342, and authorities cited." Under this decision, which seems to be binding upon this court (*Farmers' State Bank v. Stephenson et al.*, 23 Okl. 695, 102 Pac. 992), the plaintiff's vendor's lien claim comes within the terms of said section. But the question further arises as to whether the defendant, having acquired the interest in the land by virtue of the deed, which was unrecorded at the time of the filing of the *lis pendens* petition, by recording same prior to the time that the vendor's lien claim was reduced to judgment, acquired a superior interest in the subject-matter of said land against the plaintiff. This question seems to have been settled by the Supreme Court of Kansas in favor of the contention of plaintiff in error in *Smith v. Worster et al.*, 59 Kan. 640, 54 Pac. 676, 63 Am. St. Rep. 385, wherein the following excerpt is quoted from 13 Am. & Eng. Ency. of Law (1st Ed.) 907, with approval: "The holder of an unrecorded deed at the time a suit is commenced and *lis pendens* comes in force must be placed in the category of a pendente lite purchaser. This is specially true where the recording laws declare that the instrument shall be effective as against purchasers and creditors from and after the filing for record or recording. As between the parties to the instrument, it is valid without reference to its record; but under such statutes the instrument does not become effective as against purchasers and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

creditors until it is recorded. So, if prior to such record a suit is commenced involving the property, the *lis pendens* would take precedence to the rights of a grantee under an unrecorded deed or mortgage, and such grantee or mortgagee could have no better right than if the instrument had actually been made after the *lis pendens* had come in force, for the recording, as in favor of such persons, is one of the essentials to its validity. This is not an exception to the rule of *lis pendens*, but an application of the rule itself." Had the holder of the unrecorded deed gone into and remained in the actual possession of said lot up to the time of the filing of the *lis pendens* notice, that would have caused a different conclusion herein to be reached. In *Edwards et al. v. Montgomery et al.* (recently decided by this court, but not yet officially reported) 110 Pac. 779, it is held: "In the absence of any record title where a grantee to a tract of land enters into the open, actual, and exclusive possession thereof, the same is sufficient to put a subsequent mortgagee of the grantor on inquiry as to his rights therein, and he takes his mortgage subject thereto."

Further, had the plaintiff at the time she filed her *lis pendens* notice had actual notice of the unrecorded deed of the defendant, likewise a different conclusion would be herein reached, for it could not then be said that plaintiff was a subsequent bona fide incumbrancer by mortgage, judgment, or otherwise. The courts of California, Minnesota, South Dakota, and other states have given similar provisions a strict construction, but we are bound by the construction of the Kansas Court. True, *Smith v. Worster et al.*, supra, was decided since the adoption of this section from that state, and is therefore only persuasive; but considering the binding force of *Smith v. Kimball*, supra, as to the construction of section 4285, supra, when you apply the same to said section 13, art. 1, c. 21, Okl. St. 1893, which reads as follows: "All deeds, conveyances or agreements in writing affecting the title to real estate, interests therein, and powers of attorney, for the conveyance of real estate or interest therein, only (duly) acknowledged or proven, may be recorded in the office of the county clerk, or the recorder of deeds, if the office of the recorder of deeds is separate from that of the county clerk, wherein such real estate is situated, and from and after the filing thereof, for record in such office, and not before, such deeds, conveyances and agreements shall take effect as to subsequent bona fide purchasers and incumbrancers by mortgages, judgment or otherwise"—the same conclusion as was by Judge Doster in *Smith v. Worster* will be reached. See, also, *Lewis v. Atherton et al.*, 5 Okl. 90, 47 Pac. 1070; *McCormick v. Bonfils*, 9 Okl. 605, 60 Pac. 296; *Eldridge v. Stenger et al.*, 19 Wash.

697, 54 Pac. 541; *Hoyt v. Jones*, 81 Wis. 389; *Ehle v. Brown*, 81 Wis. 405; *Collingwood v. Brown*, 106 N. C. 382, 10 S. E. 869; *Jackson & Sharp Co. v. Pearson (C. C.)* 60 Fed. 113; 21 Am. & Eng. Ency. of Law (2d Ed.) pp. 650, 651. A *lis pendens* vendor's lien claim is an incumbrance under the term "or otherwise." As to whether it was bona fide depends upon whether the grantee in the unrecorded deed was in the actual possession thereunder of said lot or the plaintiff had actual knowledge of said unrecorded deed at the time of the filing of said *lis pendens* notice. Said section 13, art. 1, c. 21, Okl. St. 1893, was specifically repealed by act of the Legislature of Oklahoma Territory on March 12, 1897, the title being, "An act regulating the conveyance of real property and mortgages thereon and contracts relating thereto, and repealing article 1, chapter 21, entitled 'Conveyances,' and chapter 82, entitled 'Transfers,' of the Oklahoma Statutes of 1893, and other acts and parts of acts." Sess. Laws Okl. T. 1897, c. 8, pp. 92-102. Said section 13 being in force at the time of the executing and filing of said unrecorded deed, and the filing of the *lis pendens* notice, the rights of the parties are to be determined as to the laws then existing, and not as the laws now in force in this state.

The judgment of the lower court is reversed and remanded, with instructions to grant a new trial and proceed in accordance with this opinion. All the Justices concur.

(37 Okl. 515)

SEAY v. BOARD OF COM'RS OF ELLIS COUNTY et al.

(Supreme Court of Oklahoma. Nov. 16, 1910.)

(Syllabus by the Court.)

COURTS (§ 206*)—SUPREME COURT—ORIGINAL JURISDICTION.

Section 38 of the Schedule to the Constitution does not confer upon the Supreme Court original jurisdiction of an action by an individual, holding a judgment bond against one of the old counties of the territory of Oklahoma, to obtain upon the bond judgment against the new counties created in whole or in part out of such old county, or to obtain an order decreeing what portion of the liability each county shall pay.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 206.*]

Action by A. J. Seay against the Board of County Commissioners of Ellis County and the Board of County Commissioners of Roger Mills County. Dismissed.

M. W. Hinch, for plaintiff. C. B. Leedy, Co. Atty. of Ellis County, and W. H. Mouser, Co. Atty. of Roger Mills County, for defendant.

HAYES, J. This is an original action in this court in which plaintiff seeks to recover

judgment on a certain judgment funding bond against the counties of Ellis and Roger Mills. He sets out in his petition a certain judgment funding bond issued by the county of Day in the territory of Oklahoma, and alleges that upon the adoption of the Constitution of the state Day county became dissolved, and that the territory formerly composing said county is now embraced partly within the county of Roger Mills and partly within the county of Ellis, that said counties became and are now liable to the petitioner for the amount of said bond, and prays for judgment of this court equitably dividing said indebtedness between said counties, and for a judgment against said counties for the respective amounts held by the court to be the equitable parts of the indebtedness they should pay.

Section 2, art. 7, of the Constitution (Snyder's Const. p. 210), provides that: "The original jurisdiction of the Supreme Court shall extend to a general superintending control over all inferior courts and all commissions and boards created by law. The Supreme Court shall have power to issue writs of habeas corpus, mandamus, quo warranto, certiorari, prohibition, and such other remedial writs as may be provided by law, and to hear and determine the same. * * *" It is apparent that this cause is not embraced within any of the matters over which this court is given original jurisdiction by the foregoing provision of the Constitution. Section 20 of the Schedule to the Constitution (Snyder's Const. p. 386) provides that the Legislature shall provide by general, special, or local law for the equitable division of the property, assets, and liabilities of any county existing in the territory of Oklahoma between such county and any new county or counties created in whole or in part out of the territory of such county. Section 21 provides that all property, real and personal, and credits, claims, and choses in action, belonging to the county of Day at the time of the admission of the state into the Union, shall be vested in and become the property of the county of Ellis, and then provides that the Legislature shall, in the same manner as provided by section 20, as to the other counties, make provision for the division of the assets and liabilities of Day county between the counties of Roger Mills and Ellis. Section 38 of the Schedule provides that: "Should the first session of the Legislature, provided by this Constitution, fail to provide for the division of the property, assets and liabilities of any county existing in the territory of Oklahoma between such county and any county or counties created in whole or in part out of such county, original jurisdiction is hereby conferred upon the Supreme Court to make equitable division of such property, assets and liabilities. * * *"

It is probable that counsel construed this

section as conferring original jurisdiction of this cause upon the Supreme Court; but such we do not regard to be the effect of this provision. It was intended by section 38 of the Schedule to provide a means for the division and apportionment of the assets and liabilities between the new counties created by the Constitution and the parent counties out of which the new counties were created, if the Legislature should fail to act, as provided in sections 20 and 21 of the Schedule. Sections 20 and 21 clearly contemplate an adjustment and division of the liabilities and assets between the counties, and not between the counties, or any of them, and persons having claims against such counties; and it was not intended by section 38 to confer upon this court jurisdiction, upon application of an individual claimant against any county, to divide up such claims and substitute another obligor for the original one. All that was contemplated by this provision was that, if the Legislature failed to act, this court should, as between the counties, ascertain what would be an equitable division of the assets, and what proportion each county should contribute toward the discharge of the liabilities, of the old county, and to make an order accordingly.

Our attention has been called to no statute conferring jurisdiction of this matter upon the court, and we know of none. The cause must therefore be dismissed for want of jurisdiction.

DUNN, C. J., and KANE and TURNER, JJ., concur. WILLIAMS, J., not participating.

(27 Okl. 436)

BAKER v. NEWTON.

(Supreme Court of Oklahoma. Nov. 22, 1910.)

(Syllabus by the Court.)

1. COURTS (§ 183*)—JURISDICTION—COUNTY COURT.

The county court of the state, as to all causes jurisdiction of which is conferred upon it by the Constitution and which theretofore had been in the probate court of the territory, is a successor of said probate court; and the statutes, prescribing the procedure in the trial and disposition of such causes in the probate court, govern the trial and disposition of said causes in the county court, in so far as said statutes are not in conflict with the Constitution or inapplicable.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 183.*]

2. CLERKS OF COURTS (§ 2*)—CLERKS OF THE COUNTY COURT—CREATION OF OFFICE—CONSTITUTIONAL PROVISION.

By reason of section 18 of the schedule to the Constitution, among the duties and powers devolving upon the judge of the county court, upon the admission of the state, was to act as clerk of his court.

[Ed. Note.—For other cases, see Clerks of Courts, Dec. Dig. § 2.*]

3. COURTS (§ 66*)—ADJOURNMENT—EFFECT.

Adjournment of the regular term of a county court, without fixing in the order of adjournment any time at which the court shall reconvene, precludes the court from again convening until the time fixed by law for the next regular session of the court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 236; Dec. Dig. § 66.*]

4. JURY (§ 10*)—RIGHT TO "TRIAL BY JURY"—SCOPE.

The trial by jury secured to the people of the state by section 19, art. 2, of the Constitution, is a trial according to the course of the common law as it existed, and the same in substance as that which was in use when the Constitution was adopted, except as specifically modified by the provisions of the Constitution.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 15, 16; Dec. Dig. § 10.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7103-7107; vol. 8, p. 7821.]

5. JURY (§ 10*)—RIGHT TO "TRIAL BY JURY"—SCOPE.

One of the elements of the trial by jury as it existed in this jurisdiction before the admission of the state was the power of the trial judge to instruct the jury upon the law.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 15, 16; Dec. Dig. § 10.*]

6. JURY (§ 31*)—ADMISSION—LAWS IN FORCE.

Sections 1872, 1873, and 5028, Wilson's Rev. & Ann. St. 1903, providing that, in all civil cases commenced in probate courts wherein the amount is within the jurisdiction of the justice of the peace courts, the procedure shall be the same as in proceedings before the justice of the peace, and that the judge shall not have power to instruct the jury, is repugnant to section 19, art. 2, of the Constitution, and was not extended in force in the state so as to be made applicable to the trial of causes in the county courts.

[Ed. Note.—For other cases, see Jury, Dec. Dig. § 31.*]

7. COURTS (§ 183*)—ADMISSION—LAWS IN FORCE.

Section 1880, Wilson's Rev. & Ann. St. 1903, providing that probate courts shall be open at all times for the trial of cases under the justice procedure, is inapplicable to the trial of civil cases in the county courts of the state, and to that extent was not extended in force in the state.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 183.*]

Kane, J., dissenting.

Error from Ottawa County Court; D. W. Talbot, Judge.

Action by Charles Baker against K. R. Newton. Judgment for defendant, and plaintiff brings error. Reversed and remanded, with instructions.

W. H. Kornegay, for plaintiff in error.

HAYES, J. This proceeding in error is brought to have reviewed a judgment of the county court of Ottawa county. The proceedings in that court were presented to this court upon the application of plaintiff in error for a writ of certiorari in *Baker v. Newton et al.*, 22 Okl. 658, 98 Pac. 931. The proceedings of the trial court contain a great many irregularities, most of which are set out in the statement of facts in the foregoing

case. The procedure attempted to be followed was that applicable to courts of justices of the peace. Plaintiff in error now contends, as he did in the former case, that no trial was ever had or judgment rendered in the county court, but that the cause was instituted, prosecuted, and tried before the judge of the county court, sitting as a justice of the peace. The facts relative to this contention were stated by this court in *Baker v. Newton et al.*, and we there stated our conclusion to be that the case was tried in the county court under the procedure controlling the courts of justices of the peace, and we are still of the same opinion. For a full statement of the facts relative to the proceedings in the trial court, reference is made to the opinion of the court in that case.

Plaintiff in error makes 28 assignments of error for reversal of the cause, but no bill of exceptions was asked for by him or allowed by the trial court, and this proceeding is upon a petition in error and transcript of the record and not upon a case-made. Several of the assignments made present questions that could be reviewed only upon a bill of exceptions or a case-made. Those assignments will not be considered. Plaintiff in error contends that the judgment of the trial court is void upon the following grounds: First, that sections 11 and 12 of article 7 of the Constitution, creating county courts and defining their jurisdiction, are not self-executing; and, at the time of the trial in the court below, no county court was or could be organized in the state. Second, that the judgment was rendered out of term time. Third, because the cause was tried under procedure applicable to the trial of causes in courts of justices of the peace, instead of under the procedure applicable to county courts. We shall consider these contentions in the order here named, except we shall consider the last two together.

1. This case was instituted in the lower court on the 14th day of March, 1908, and the trial had and judgment rendered on the 18th day of the same month. At that time no legislation had been enacted by the state Legislature relative to county courts, their jurisdiction, or procedure therein. The law in force at that time pertaining to these questions consists in the provisions of the Constitution and of the statutory provisions extended in force in the state applicable thereto. Sections 11, 12, 13, and 14 of article 7 of the Constitution (Snyder's Const. p. 219) establish a county court in each county of the state; declare that the same shall be a court of record; provide for the election of a county judge; prescribe his qualifications; fix his term of office; confer upon the county court coextensive with the county original jurisdiction in probate matters and, until otherwise provided by law, concurrent jurisdiction in civil cases in the amount not ex-

ceeding \$1,000, exclusive of interest. Prior to the admission of the state, there existed in that portion of the state constituting the Indian Territory no court that corresponded to the county court as it now exists in this state or to the probate court as it existed in the territory of Oklahoma before the admission of the state. There were no probate courts in the Indian Territory. The United States courts for the several districts of the Indian Territory possessed probate jurisdiction, but they were not probate courts. In Oklahoma Territory the judicial system consisted of the territorial district courts, probate courts, and courts of justices of the peace. The statute in force in that jurisdiction prescribed procedure applicable to the trial and disposition of civil cases in those respective classes of courts, and these statutes were, by the terms of the enabling act and the schedule to the Constitution, put in force in the states in so far as they are applicable and not inconsistent with the provisions of the Constitution. Act Cong. June 16, 1906, c. 3335, § 21, 34 Stat. 277; Snyder's Const. Okl. p. 309; section 2, Schedule, p. 380, Snyder's Const.

In the judicial system established in the state by the Constitution, there is no court which is by name called a "probate court," just as there was no court in the judicial system of the territory of Oklahoma that was by name called a "county court"; but the powers and jurisdiction of the probate courts of the territory and of the county courts of the state are, in many respects, the same. It is contended, however, that the county court is in no sense the successor of the probate court with respect to cases not pending at the time of the admission of the state, because it is not specifically so declared in the Constitution. If this contention is correct, there was no statute in force in the state upon its admission, or at the time of the trial in the court below, fixing the term of the county court or prescribing the procedure for the trial and the disposition of causes instituted in county courts after the admission of the state. The relation of a county court of the state to the probate court under the territorial system was considered by this court to some extent in *Crump et al. v. Pitchford*, 24 Okl. 808, 104 Pac. 911. In the first paragraph of the syllabus to that case it is said: "The county court (section 12, art. 7, Const.) is the successor of the probate court as it existed under the territory of Oklahoma, only as to matters or proceedings pending at the time of the admission of the state, and administrations and guardianships as provided in section 12, art. 7, of the Constitution." Reading this syllabus alone, it would appear to have been held in that case that the county courts of the state are not the successors of the probate courts of the territory as to the jurisdiction conferred upon said courts by the Constitution in civil causes; and, since there is no stat-

ute or provision of the Constitution specifically declaring that the civil procedure applicable to probate courts shall apply to causes in the county courts, and since they are in name different courts, if the latter be not in any respect the successor of the former, no procedure existed until same was prescribed by act of the Legislature. But the syllabus by the court must be read in connection with the opinion in order to determine the exact question decided in that case. In the opinion, which was delivered by Mr. Justice Williams, it is said: "The county court, under the Constitution, has specifically defined powers and jurisdiction; and, had it been intended for it to have succeeded fully to the jurisdiction of the probate court, as it existed under the territory, it would have been so indicated. On the contrary, it having been made by virtue of section 23 of the schedule the successor only as to pending matters, it appears to be its successor only to that extent, *except as it may be affected by section 12, art. 7, of the Constitution.*" (Italics are ours.)

The exact question before the court in that case was whether a county court has jurisdiction of a forcible entry and detainer action. The Constitution does not, in defining the powers and jurisdiction of the county court, name forcible entry and detainer actions as a class of cases of which it shall have jurisdiction. Section 1872, Wilson's Rev. & Ann. St. 1903, conferred upon the probate courts in their respective counties all the ordinary power and jurisdiction of justices of the peace, one of which powers and jurisdiction was jurisdiction of forcible entry and detainer actions; but the court held in the *Crump* Case that the powers and jurisdiction of a county court are only those defined by the Constitution, and that the county court did not succeed to any other jurisdiction theretofore existing in the probate courts than that named in the Constitution, and, since the jurisdiction of forcible entry and detainer actions was not specified in the Constitution, the county court had no jurisdiction of such actions. But it was not held that, as to those powers and jurisdictions conferred by the Constitution upon the county court which had theretofore existed in the probate court of the territory, the county court is not the successor of the probate court. On the other hand, this question was left open and undecided in the opinion by the statement therein that the county court is the successor of the probate court only as to the extent made so by section 23 of the schedule: "Except as it may be affected by section 12, art. 7, of the Constitution." Section 12, art. 7, of the Constitution confers upon the county court jurisdiction of probate matters and jurisdiction of civil cases in any amount not to exceed \$1,000, exclusive of interest; the jurisdiction of the latter class of cases being concurrent with the district court, and denies to the county court

jurisdiction in certain classes of cases. The jurisdiction conferred by this section was, before the admission of the state, in the probate court of the territory. In the territorial judicial system, the probate court was the court of the county; the district court the court of the territory; and the justice of the peace court the local court. In the judicial system of the state, the district court is a state court; the county court the court of the county; and the justice court the local court. It is true the Constitution nowhere declares that the county court as to causes not pending shall be the successor of the probate court under the judicial system of the territory of Oklahoma; but the same may be said as to the district courts of the state and as to the courts of justices of the peace; but it has never been questioned by the bench or bar in this court or so far as we know in the trial courts of the state that the district courts and the courts of justices of the peace are the successors of the corresponding courts under the territorial system to the extent that the procedure for the trial of causes under the statutes in force in the territory of Oklahoma before the admission of the state is applicable to the trial and disposition of causes in said courts, since the admission of the state. Yet the jurisdiction of none of these classes of courts is exactly the same as the jurisdiction of the corresponding class under the territorial government. It was the intention of Congress, evidenced by the provisions of the enabling act extending in force all laws in the territory of Oklahoma at the time of the admission of the state into the Union and of the framers of the Constitution by making a similar provision in the schedule of the Constitution, that there should be no greater lapse in the administration of government of the state in all of its departments on account of the change in the form of government than was unavoidable, and the provisions of the enabling act and the schedule to the Constitution extending said laws in force in the state should receive a liberal construction to effectuate that purpose; and we think that it was intended and should be held that the county court of the state, as to all causes jurisdiction of which is conferred upon it by the Constitution which theretofore has been in the probate court of the territory, is a successor of said probate court; and the statute prescribing a procedure for the trial and disposition of such causes in the probate courts govern the trial and disposition of said causes in the county courts in so far as said statutes are not in conflict with the Constitution or inapplicable.

Section 11, art. 7, of the Constitution makes the county court a court of record; and it is insisted by counsel for plaintiff in error that upon the admission of the state there was no law providing a clerk for the county court, and that for this reason, also,

the provisions of the Constitution creating county courts were not self-executing; but we do not think this contention well founded. Section 1892, Wilson's Rev. & Ann. St., provides that the judge of the probate court shall also be clerk of said court. Section 18 of the schedule to the Constitution provides that, until otherwise provided by law, the terms, duties, powers, qualifications, and salary and compensation of all county and township officers not otherwise provided by the Constitution shall be as provided by the laws of the territory of Oklahoma for like named officers; and that the duties and compensation of the probate judge shall devolve upon and belong to the judge of the county court. One of the duties of the judge of the probate court was to act as clerk of his own court. This duty devolved upon the judge of the county court upon the admission of the state. It is true that the Constitution in defining the duties and powers of county officers does not use the word "power" with respect to the judges of the county courts, as it does in connection with the other county officers; but it provides that the duties of the judge of the county court shall be the same as the duties of the probate judge under the laws extended in force in the state. For every duty, there is a corresponding power; and it would be inconsistent to hold that it was intended to impose upon the judge of the county court the duties of the probate judge, and at the same time deny to him the power to discharge those duties. With every duty imposed, a corresponding grant of power to discharge that duty is implied, although not conferred in specific terms. To have provided that the duties "and powers" of a probate judge shall devolve upon and belong to the judge of the county court would have added nothing to the force and comprehensiveness of the language used.

2 and 3. Section 1895, Wilson's Rev. & Ann. St., provides that the probate courts shall hold terms beginning on the first Mondays in January, March, May, July, September, and November of each year. This section fixes the beginning of the terms at which the trial and disposition of civil causes, prosecuted in the probate courts of the territory not governed by the procedure of courts of justices of the peace, might be had. *American Fire Insurance Co. v. Pappe*, 4 Okl. 110, 43 Pac. 1085; *Irwin v. Irwin*, 2 Okl. 180, 37 Pac. 548. The county court of Ottawa county convened in regular term on March 2, 1903. On the same date it adjourned, subject to call. The order of adjournment fixes no time at which the court shall be reconvened. The trial of the case at bar occurred on the 18th day of March of the same year. No call of any term on that date was made by the judge or by any order of court, and there is no statute authorizing terms of court to be called or held at any other time than

those fixed by the statute. Upon adjourning the regular term, without fixing in the order of adjournment any time at which the court shall reconvene, the term elapsed, and the court was precluded from thereafter again convening the court, until the time fixed by law for the next session of the court. *Irwin v. Irwin*, supra. The judgment, therefore, rendered in this cause was rendered at a time when the court was not legally in session, and is therefore void, unless the procedure of justice of the peace courts applies.

Sections 1872 and 1873 of Willson's Revised and Annotated Statutes provide that, in all civil cases commenced in the probate courts wherein the amount exceeds the jurisdiction of justices of the peace courts, the civil procedure governing pleadings and practice and proceedings in the district courts shall apply; but, in all cases which are within the jurisdiction of the justice courts, the practice, proceedings, and pleadings brought before and after judgment provided for justice procedure shall be applicable. And section 1880 provides that said courts shall be deemed to be always open for the trial of all actions commenced therein that are triable under the justice procedure.

It follows that if the justice procedure is applicable since the amount involved in this cause is within the jurisdiction of the justice court, the trial court had authority to proceed at any time to try the cause. But is the justice procedure applicable? As previously stated, the enabling act and the schedule only extend in force in the state the statutes theretofore in force in the territory of Oklahoma in so far as the same are not in conflict with the Constitution, or inapplicable. No appeal lies in civil cases from the county court to the district court; but all appeals in such cases shall be to the Supreme Court in the same manner and by like proceedings as appeals are taken from the judgment of the district court to the Supreme Court. Section 15, art. 7, Const.

Section 19, art. 2, of the Constitution provides that: "The right of trial by jury shall be and remain inviolate, and a jury for the trial of civil and criminal cases in courts of record, other than county courts, shall consist of twelve men; but in county courts and courts not of record, a jury shall consist of six men." If the justice procedure in force in the territory does not afford a trial by jury, which this section of the Constitution preserved inviolate to the citizens of the state, it is in conflict with the Constitution, and was not extended in force. The question therefore arises: What constitutes a trial by jury as guaranteed by the Constitution? This question has been under investigation by many courts of the nation, both state and federal, and there is unanimity in the opinions that the right of trial by jury secured by the Constitutions of the various states is simply the right to a trial by jury

constituted substantially and with the same elements and incidents as existed when the Constitution was adopted. *Carroll v. Byers et al.*, 4 Ariz. 158, 36 Pac. 499; *State ex rel. v. Withrow*, 133 Mo. 500, 34 S. W. 245, 36 S. W. 43; *Byers v. Commonwealth*, 42 Pa. 89; *Plimpton v. Somerset*, 33 Vt. 283. "The trial by jury secured to the subject by the Constitution is a trial according to the course of common law, and the same in substance as that which was in use when the Constitution was formed." *East Kingston v. Towle*, 49 N. H. 64, 97 Am. Dec. 575, 2 Am. Rep. 174. See, also, *Copp v. Henniker*, 55 N. H. 179, 20 Am. Rep. 194; *Hagany v. Cohnen et al.*, 29 Ohio St. 82.

Judge Cooley, discussing these provisions, said: "All the state Constitutions preserve the right of trial by jury, for civil as well as for criminal cases, with such exceptions as are specified, and which for the most part consist in such cases as are of small consequence, and are triable in inferior courts. The constitutional provisions do not extend the right; they only secure it in the cases in which it was a matter of right before. But, in doing this, they preserve the historical jury of 12 men, with all its incidents, unless a contrary purpose clearly appears." *Cooley's Constitutional Limitations*, 580.

The territory now embraced within the territorial limits of the state was, before the admission of the state, by virtue of section 3, art. 4, of the federal Constitution, under the jurisdiction of Congress, with power to make all needful rules and regulations with respect thereto. By section 31 of Act Cong. May 2, 1890, c. 182, 26 Stat. 88, the Constitution of the United States was specifically put in force in the Indian Territory. The same act authorized the establishment of an organized territorial government in Oklahoma Territory. Section 6 confers upon the territorial Legislature power over all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States. See *Bradford v. Territory*, 1 Okl. 366, 34 Pac. 66. By these statutory provisions, the federal Constitution, if it did not operate *ex proprio vigore* in this jurisdiction before the admission of the state, was put in force, and the people were guaranteed by the seventh amendment thereto the right of trial by jury. *American Pub. Co. v. Fisher*, 166 U. S. 464, 17 Sup. Ct. 618, 41 L. Ed. 1079. That amendment provides: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. * * *" As to what constitutes the "trial by jury" here preserved has been decided by the Supreme Court of the United States. The jury must consist of 12 men, who shall be unanimous in their verdict. The trial must be under the superintendence of a judge empowered to instruct them in the law and to set aside their verdict, if in his opinion it is against

the evidence or the law. *American Pub. Co. v. Fisher*, supra; *Capital Traction Co. v. Hof*, 174 U. S. 1, 19 Sup. Ct. 580, 43 L. Ed. 873. Power of the trial judge to instruct the jury upon the law and to set the verdict aside, if it is against the law or evidence, is as much an essential element of a trial by jury as 12 men and unanimity in their verdict. *Luce v. Garrett*, 4 Ind. T. 54, 64 S. W. 613. Trial by jury in the Indian Territory and Oklahoma Territory at the time of the adoption of the Constitution was attended by all these incidents. It is true that, in trials in probate and justice courts of Oklahoma Territory, the jury consisted of 6 men, and the justice of the peace was without power to instruct the jury; and in commissioners' courts of the Indian Territory, while the jury might consist of 12 men, it generally consisted of 6, and the United States commissioner was without power to instruct the jury or to hear or grant a motion for new trial. But, from all these courts, an appeal was allowed by the statute to a court where a trial with all the foregoing elements and incidents could be had, and the mandate of the seventh amendment thereby observed. *American Pub. Co. v. Fisher*, supra; *Luce v. Garrett*, supra; *Dennee v. McCoy*, 4 Ind. T. 233, 69 S. W. 858. As before stated, under the Code of Civil Procedure governing the trial of causes before the justices of the peace in Oklahoma Territory, the jury was composed of 6 men, and the justice is prohibited from instructing the jury either upon the law or the facts. Sections 5019 and 5028, *Wilson's Rev. & Ann. St.*

It would follow that, if trial by a jury is preserved by the state Constitution, as it existed at the time of the adoption of the Constitution, the jury trial, under the justice procedure, would fail to contain all the essential elements of such trial. The seventh amendment to the United States Constitution is, however, a limitation only upon the powers of the federal government, and does not affect the powers of the state; and the states may provide for a different trial than that preserved by the amendment to the citizens of the United States. The constitutional provision preserving trial by jury in this state specifically eliminates some of the features thereof as it existed before the admission of the state. Section 19, art. 2, after providing that the right of trial by jury shall be and remain inviolate, specifically provides that in county courts and courts not of record a jury shall consist of six men; and in all civil cases and in criminal cases less than felonies, three-fourths of the whole number of jurors shall have power to render a verdict. By these provisions unanimity in the verdict is no longer required in any civil case, and the number constituting the jury as to county courts is reduced from twelve to six; but, except as to these two important changes in the features of the

jury trial as it existed at common law, the preceding clause of the section provides that the trial by jury shall be and remain inviolate. It was evidently intended by such declaration of right that those essential features of the jury trial as existed before the admission of the state not specifically modified by the Constitution should be preserved. Since there can be no appeal from the county court to any court where a new trial may be had under the supervision of a judge who can instruct a jury, and since, under the justice of the peace procedure made applicable to probate courts of the territory, the judge is denied the power to instruct a jury, the justice of the peace procedure for the trial of cases in the county courts would be repugnant to said section 19, art. 2, of the Constitution, and was not extended in force, so as to be applicable to county courts. If said procedure was not extended in force in the state for the trial of causes within the justice court's jurisdiction, the statute authorizing probate courts to hold terms at any and all times for the purpose of trying cases under the justice court procedure is inapplicable; and the case at bar was tried and judgment rendered at a time not authorized by law, and for this reason is void.

It follows that the judgment of the trial court should be set aside and vacated, and the cause is reversed and remanded, with instructions to proceed in accordance with this opinion.

DUNN, C. J., and WILLIAMS and TURNER, JJ., concur.

KANE, J. (dissenting). I concur in that part of the opinion of the court covered by the first, second, third, and fourth paragraphs of the syllabus. But, granting that one of the elements of trial by jury as it existed prior to statehood was the power of the trial judge to instruct the jury upon the law, still the conclusion reached by the court does not necessarily follow. Prior to statehood the class of cases to which the one at bar belongs were triable in the probate or justices of the peace courts of the territory before a jury of six, and such courts were not allowed to instruct as to the law. Such trials were upheld upon the theory that, as the laws of the territory provided for an appeal to the district court where the cause could be tried by a jury of twelve men, a trial before six men in the justices' court was not unconstitutional. Section 18, art. 7, of the Constitution, however, provides that justices of the peace shall have jurisdiction concurrent with the county court, in civil cases where the amount involved does not exceed \$200, and that, until otherwise provided by law, appeals shall be allowed from judgments of the courts of justices of the peace to the county court in the manner provided by the laws of the territory governing appeals from the courts of justices of the

peace to the district court, and section 15 of the same article provides that appeals shall be taken from the judgments of county courts direct to the Supreme Court in the same manner as appeals are taken to the Supreme Court from judgments of the district court. One of the effects of these constitutional provisions is to modify trial by jury in this class of cases as it existed prior to statehood by taking away the right to have such cases tried on appeal in a court empowered to instruct upon the law.

This seems to me to be the only logical conclusion that can be reached, considering the text of the Constitution alone, or in connection with the laws of the territory extended over and put in force in the state by the schedule. If this construction was adopted, the procedure of the territory of Oklahoma adopted by the constitutional convention for the purpose of vitalizing the Constitution, in order that no inconvenience may arise by reason of the change in the government, would not be repugnant to the jury system adopted by the state for the trial of this class of cases, and no hitches in the administration of justice will occur. It was the intention of the members of the constitutional convention and Congress, evidenced by the provisions of the enabling act and their acceptance by the convention, that there should be no greater lapse in the administration of government of the state in all its departments on account of the change in the form of government than was unavoidable, and said provisions should receive a liberal construction to effectuate that purpose.

(27 Okl. 371)

McCOY v. McCOY et al.

(Supreme Court of Oklahoma. Nov. 16, 1910.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 564*)—PROCEDURE—SERVING CASE-MADE.

A party desiring to appeal has three days by statute in which to serve the case-made after the judgment or order appealed from is entered; and unless such case-made is served within that time, or within an extension of time allowed by the judge or court within said time, the case will not be considered in this court.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 564.*]

2. APPEAL AND ERROR (§ 520*)—MOTIONS—REVIEW OF MOTIONS—NECESSITY OF BILL OF EXCEPTIONS—CASE-MADE.

Motions presented in the trial court, the rulings thereon, and exceptions are not properly part of the record, and can only be preserved and presented for review on appeal by incorporating the same into a bill of exceptions or case-made.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2359-2366; Dec. Dig. § 520.*]

Error from District Court, Caddo County; Frank M. Bailey, Judge.

Action between Elizabeth McCoy and James McCoy and Lizzie McCoy. From a judgment, Elizabeth McCoy brings error. Dismissed.

Carlisle & Edwards, for plaintiff in error. Morris & Starkweather, for defendants in error.

DUNN, C. J. This case presents error from the district court of Caddo county. May 18, 1910, a motion for a new trial was overruled, and judgment entered, and plaintiff in error given 60 days within which to make and serve a case-made for appeal to this court. Plaintiff in error prepared case-made; but did not secure service thereof until July 29, 1910, a date subsequent to the time extended by the trial judge. The time originally given was not enlarged, and a motion has been filed by counsel for defendant in error to dismiss the petition in error, for the reason that the case-made was not served within the time allowed and that all the errors complained of in the petition in error are those which could be presented only by exceptions contained either in a transcript of the record or by case-made.

Counsel for plaintiff in error contend in response to this motion that they were misled by counsel for defendant in error, in that it is asserted counsel for defendant in error agreed not to take advantage of the delay of service of the case-made. This question has frequently been before this court and the Supreme Court of the territory of Oklahoma, and it has been uniformly held that unless the case-made is served within three days after the judgment or order, or within an extension of time allowed by the judge or court within said time, the case will not be considered in this court. Carr v. Thompson et al., 110 Pac. 667; Ellis v. Carr, 108 Pac. 1101. Nor is the defense made to the motion available to plaintiff in error; for parties cannot, by stipulation even, extend the time for the making of a case-made unless the same is approved by the court or judge within the time fixed by statute. Horner v. Christy, 4 Okl. 553, 46 Pac. 561; Bettis v. Cargile et al., 23 Okl. 301, 100 Pac. 436.

The record presented contains a certificate by the clerk of the district court certifying the same as a transcript. The specifications of error contained in the petition in error are that the court erred in not permitting plaintiff in error to file an amended petition during the progress of the trial, and in overruling plaintiff's motion praying an order that the judgment obtained be made a lien upon the land involved. Neither of these orders of the court were brought into the record by a bill of exceptions, and hence are not a part thereof. The Supreme Court of the territory of Oklahoma, citing numerous

authorities, in the case of *Menton v. Shuttee et al.*, 11 Okl. 381, 67 Pac. 478, held that "motions presented in the trial court, the rulings thereon, and exceptions are not properly part of the record, and can only be preserved and presented for review on appeal by incorporating the same into a bill of exceptions or case-made."

It therefore follows that the motion of counsel for defendant in error to dismiss the petition in error must be sustained.

TURNER, WILLIAMS, HAYES, and KANE, JJ., concur.

(27 OKL. 459)

SCHOOL DIST. NO. 89, STEPHENS COUNTY, v. COX.

(Supreme Court of Oklahoma. Nov. 16, 1910.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 504*)—PROCEEDINGS FOR TRANSFER OF CAUSE—TIME FOR TAKING.

A party desiring to appeal has three days by statute in which to serve the case-made after the judgment or order appealed from is entered; and unless such case-made is served within that time, or within an extension of time allowed by the judge or court within said time, the case will not be considered in this court.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 504.*]

Error from Stephens County Court; W. H. Admire, Judge.

Action between School District No. 89, Stephens County, Okl., and J. D. Cox. From the judgment, the School District brings error. Dismissed.

Amil H. Japp, for plaintiff in error. H. W. Sitton, for defendant in error.

DUNN, C. J. This case presents error from the county court of Stephens county. August 20, 1909, there was made and entered an order denying motion of plaintiff in error for new trial, and an order made, which was subsequently extended, providing for making and serving a case-made within 45 days. The case-made was not served until October 11, 1909, which was a time subsequent to the expiration of the time allowed. Counsel for defendant in error have filed a motion to dismiss the petition in error for this reason, which under the uniform holdings of this court must be sustained. See cases of *Carr v. Thompson*, 110 Pac. 687, and *Ellis v. Carr*, 108 Pac. 1101, and authorities therein cited, and case of *McCoy v. McCoy et al.* (delivered at this term of court, but not yet officially reported) 112 Pac. 1040.

The cause is accordingly dismissed.

WILLIAMS, KANE, HAYES, and TURNER, JJ., concur.

(19 Idaho, 107)

ROWLEY v. STACK-GIBBS LUMBER CO.

(Supreme Court of Idaho. Dec. 28, 1910.)

(Syllabus by the Court.)

1. CORPORATIONS (§ 426*)—CONTRACT BY AGENT—RATIFICATION.

Where a contract for the purchase of saw-logs was made with the bookkeeper of a corporation and the corporation had the logs scaled or measured, and received them, the corporation thereby ratified the contract made by its bookkeeper and is liable to the seller for the contract price of the logs.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1702-1716; Dec. Dig. § 426.*]

2. CORPORATIONS (§ 426*)—CONTRACT BY AGENT—RATIFICATION.

A corporation, like a natural person, may ratify any act which it can perform.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1702-1716; Dec. Dig. § 426.*]

3. APPEAL AND ERROR (§ 1170*)—REVIEW—ERRORS NOT AFFECTING SUBSTANTIAL RIGHT.

Under the provisions of section 4231, Rev. Codes, where technical errors or defects in the proceedings of trial occur which do not affect the substantial rights of the parties, the judgment must not be reversed by reason of such errors or defects.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4540-4545; Dec. Dig. § 1170.*]

4. REVIEW ON APPEAL.

Held, that no substantial rights of the appellant have been affected by the technical errors that appear in the record.

5. CONTRACT BY AGENT—RATIFICATION.

Held, that the corporation having ratified the contract and received the benefits of it, it must perform its part thereof.

6. INSTRUCTIONS SUFFICIENT.

The instructions contain a clear and concise statement of the law of the case and taken as a whole are sufficient.

Appeal from District Court, Kootenai County; Robert N. Dunn, Judge.

Action by E. A. Rowley against the Stack-Gibbs Lumber Company. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Affirmed.

McBee & La Veine and R. H. Voorhees, for appellant. Elder & Elder, for respondent.

SULLIVAN, C. J. This action was brought to recover the sum of \$579.20 and interest thereon for logs alleged to have been sold and delivered to the appellant corporation. It is alleged that the logs were sold in the month of November, 1907, and were delivered during the months of March, April, and May, 1908; that there were 60,968 feet of logs delivered, for which the appellant agreed to pay \$9.50 per thousand. The defendant by answer denied the purchase and the receipt of the logs and denied any indebtedness in any amount. During the trial it was admitted that the logs in question were delivered to the defendant corporation and were received by it, but they seek to avoid payment on the ground that the plaintiff had no

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes 112 P.—66

title to the logs, and for the further reason that the agent dealing with the plaintiff had no right or authority to purchase said logs. The case was tried with a jury, and verdict and judgment found and entered for the amount above stated. A new trial was denied, and this appeal is from the judgment and said order. Thirty-nine errors are assigned, most of which are in regard to the rejection and admission of testimony.

It appears from the record that the contract for the sale of the logs was made with one Cleland, the bookkeeper of the appellant company, and it is contended that he was not authorized to enter into such contract; but it appears from the evidence that after the contract was entered into, the corporation sent a man to scale or measure the logs and received them, and under a well-established rule when a corporation accepts or ratifies a contract made by an unauthorized person, it becomes the contract of the corporation. The evidence clearly shows that by having the logs measured and receiving them under the contract made by its bookkeeper, it ratified the transaction. It appears that the appellant, after learning of the transaction through its bookkeeper, Mr. Cleland, sent its scaler into the timber and scaled the logs so purchased, and at numerous times afterward, through its secretary, promised to pay for said logs, and through its president agreed to settle with the respondent for the logs on such terms as the attorneys acting for the corporation and respondent should agree upon. A corporation, like a natural person, may ratify any act which it can perform. *Oregon Ry. Co. v. Ore. Ry. & Nav. Co.* (C. C.) 28 Fed. 505.

It is contended, however, that the corporation was not advised of all of the facts in regard to the transaction and could not ratify it for that reason. There is nothing in that contention.

It is contended that the appellant purchased the same logs from the son of the respondent and advanced him \$50 on the logs. The son appeared and testified for the father to the effect that he had sold the logs to his father, and the appellant admits that it agreed to pay the son the same price for the logs that is here sued for.

We are fully satisfied that the jury arrived at a correct verdict in this case, although we concede there were some technical errors made by the court in the trial of the case. We are admonished by the provisions of section 4231, Rev. Codes, that the court must in every stage of an action disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the parties, and no judgment shall be reversed or affected by reason of such error or defect. No substantial rights of the appellant have been affected by the technical errors that we find in the record. The

corporation having received the benefits of the contract, it must perform its part thereof.

The giving of certain instructions is assigned as error. We think the instructions as a whole fairly covered the case and were a clear and concise statement of the law of the case. The record shows that in the trial, justice has been done between the parties.

The judgment will therefore be affirmed, and costs are awarded to the respondent.

AILSHE, J., concurs.

(19 Idaho, 229)

STREETER v. MacLANE.

(Supreme Court of Idaho. Jan. 27, 1911.)

(Syllabus by the Court.)

1. JUDGES (§ 2*)—APPOINTMENT—CONSTITUTIONALITY OF STATUTE.

The power of the Legislature to provide for more than one district judge in a judicial district is not limited by the Constitution of this state, section 11, art. 5.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 2, 3; Dec. Dig. § 2.*]

2. JUDGES (§ 2*)—APPOINTMENT—CONSTITUTIONALITY OF STATUTE.

Under the provisions of said section 11, art. 5 of the Constitution, it is within the power of the Legislature to provide for the appointment or the election of more than one district judge for a judicial district when the business of such district requires.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 2, 3; Dec. Dig. § 2.*]

Prohibition by H. L. Streeter, receiver of the Victory Mining Company, against John F. MacLane. Writ quashed.

Richards & Haga, for plaintiff. D. C. McDougall, R. H. Johnson, A. A. Fraser, and Cavanah & Blake, for defendant.

STEWART, C. J. An act of the Legislature known as House Bill No. 47 was passed by the Legislature, and approved by the Governor, January 19, 1911, authorizing the Governor to appoint an additional judge in the third judicial district of this state. Under the provisions of this act the Governor appointed John F. MacLane as such judge, who has qualified and entered upon the duties of said office. This proceeding is brought for the purpose of testing the constitutionality of the act authorizing the appointment of such additional judge.

The determination of this question depends upon the construction to be given to section 11, art. 5, of the Constitution. This section reads as follows: "The state shall be divided into five judicial districts, for each of which a judge shall be chosen by the qualified electors thereof, whose term of office shall be four years. And there shall be held a district court in each county, at least twice in each year to continue for such time in each county as may be prescribed by law; but the Legislature may reduce or increase

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the number of districts, district judges, and district attorneys."

Under this provision of the Constitution the question arises whether the Legislature has the power to provide for more than one judge in each judicial district. It will be conceded at the inception of this investigation that the Constitution of this state is a limitation upon the powers of the Legislature with reference to all matters embraced within its provisions, and that the Legislature cannot go beyond the limitations fixed by the Constitution. If, however, there is no limitation upon the power of the Legislature with reference to the increasing or reducing of judicial districts and the number of judges, then it is entirely within the legislative power to act as in its judgment the exigency requires, and the act under consideration should be upheld.

When the Constitution was framed the makers provided for five judicial districts, for each of which a judge should be chosen by the qualified electors thereof, which no doubt was intended to meet the requirements and conditions existing at that time with reference to the district courts. In anticipation of the growth of the state and the probable increase in the business to come before the courts, the framers of the Constitution placed in this same section a specific provision, which in terms amounts to an express grant of power to the Legislature, to "increase or reduce the number of districts and district judges."

The Constitution of the state was framed for years to come, and the framers purposely omitted to place any limitation upon the Legislature in creating judicial districts, or in providing for the number of judges to preside in the several districts, and the Legislature was made the sole judge of the necessities for the administration of justice, which might be changed, decreased, or increased by the increase of the population and the increase of litigation. If this provision in the Constitution should be held a limitation upon the power of the Legislature, any judicial district might be without judicial officers sufficient to administer its affairs, and the due administration of justice would be greatly delayed. But we are satisfied that at the time this section of the Constitution was written, the framers had in mind the possibilities of the future, and after making such provisions for judicial districts and judges as appeared to be necessary, in anticipation of the future growth of the state, placed entirely in the hands of the Legislature the power to increase and diminish judicial districts and provide judges therefor, to meet all the requirements and necessities that would arise because of such growth and increase; and that the framers of the Constitution placed no restriction upon the Legislature, and expressly authorized the Legislature to reduce or increase the number of districts and district judges; that it was not

intended that the words, "the state shall be divided into five judicial districts, for each of which a judge shall be chosen," should be a limitation upon the power of the Legislature as to increasing the number of judges in each judicial district as the necessities required in the future; but rather a limitation as to the number of judges at the time of the adoption of the Constitution.

Questions of a similar character have arisen in different states under constitutional provisions similar to those under consideration in this case. In the case of *State ex rel. Kingsworthy v. Martin*, 60 Ark. 343, 30 S. W. 421, 28 L. R. A. 153, the Supreme Court of the state of Arkansas delivered a very exhaustive discussion of many of the questions involved in this case, and held: "The power of the Legislature to provide for more than one judge in a judicial district is not limited by the provision of the Constitution (article 7, § 13): For each circuit a judge shall be elected." This court, however, is not confined to the construction placed upon the Constitution of the state of Arkansas in the above-cited case, for the reason that the Constitution of this state expressly authorizes the "Legislature to reduce or increase the number of districts and district judges," which language is not found in the Constitution of Arkansas. In the case of *State of Nevada v. Kinkad*, 14 Nev. 117, the Supreme Court of Nevada had under consideration a constitutional provision very similar to that of this state, and in that case the court says: "In the first place, there can be no doubt as to the fact that it was the intention of the framers of the Constitution to empower the Legislature to reduce the number of judges in the First district. This is sufficiently proved by the debates in the constitutional convention (650, 651, 713, *passim*). If further proof were necessary, it is afforded by the circumstances in view of which the convention acted. The condition of the country at that time was such as to forbid any other than a provisional arrangement as to the number of judges to be assigned to the respective districts."

* * * In view of these facts there is no reason for taking the following language in any other than a literal sense. "The Legislature may, however, provide by law for an alteration in the boundaries or divisions of the districts herein prescribed and also for increasing or diminishing the judicial districts and judges therein." This means the Legislature may increase or diminish the number of judges in the respective districts, and not, as petitioner contends, that the number of judges in the state may be incidentally increased or diminished by increasing or diminishing the number of districts."

In the case of *State v. Stevenson*, 18 Neb. 417, 25 N. W. 586, the Supreme Court of Nebraska construed a similar constitutional provision and held: "But the language of the section empowers the Legislature to di-

rectly 'increase the number of judges of the district court,' and surely when a power is granted to do a thing directly, we need not justify the doing of it under another indirect and constructive grant of power. There being then one judge provided for each of the six district courts, the Legislature may, in or after 1880, increase this number. May they increase it in one district, or in any or all of them? Obviously, not only from the language used, but from the very nature of the subject-matter, in any or all the districts."

So we think that it clearly appears that the framers of the Constitution in the first instance provided a provisional system of district courts and a judge to preside in each district, and expressly granted to the Legislature the power to change and alter the boundaries of such districts and the number of district judges, not only in accordance with the number of districts, but also the number of district judges in each district, so that the business of each district would be properly administered.

For these reasons we think the statute now under consideration was clearly within the power of the Legislature to enact, and authorized the appointment of an additional district judge in and for the Third judicial district.

AILSHIE and SULLIVAN, JJ., concur.

(19 Idaho, 101)

PENNSYLVANIA-COEUR D'ALENE MINING CO. v. GALLAGHER et al.

(Supreme Court of Idaho. Dec. 28, 1910.)

(Syllabus by the Court.)

1. REVIEW ON APPEAL.

Held, that the court did not err in the admission or rejection of certain evidence.

2. CORPORATIONS (§ 657*)—FOREIGN CORPORATIONS—STATUTORY PROVISIONS.

Under the provisions of section 2658, Rev. St. 1887, as amended by Laws 1906 (Sess. Laws, p. 49), which section is 2792, Rev. Codes, requiring foreign corporations to file their articles of incorporation and designate an agent upon whom process may be served, where a foreign corporation received conveyances to certain mining claims dated April 21, 1906, and filed its articles of incorporation with the county recorder of the county in which such real estate is situated, and also with the Secretary of State on said date, and on June 10, 1906, filed its designation of a statutory agent in said county and filed said deeds for record, and on the 18th of said month filed a copy of such designation of agent with the Secretary of State, held, a sufficient compliance with the provisions of said section and that said conveyances are not void under the provisions thereof.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2552; Dec. Dig. § 657.*]

3. PLEADING (§ 236*)—AMENDMENT—DISCRETION OF COURT.

Under the provisions of section 4225 et seq., Rev. Codes, a trial court has large discretion in permitting amendments to pleadings

and may permit such amendments at any stage of the proceedings almost as of course, to make the pleadings correspond with the proof.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 601; Dec. Dig. § 236.*]

4. SUFFICIENCY OF EVIDENCE.

Held, that the evidence is sufficient to sustain the finding of facts.

Appeal from District Court, Shoshone County; W. W. Woods, Judge.

Action by the Pennsylvania-Coeur D'Alene Mining Company against William Gallagher and others. From a judgment for plaintiff and an order denying a new trial, defendants appeal. Affirmed.

A. G. Kerns and James E. Gyde, for appellants. Gray & Knight and John H. Wourms, for respondent.

SULLIVAN, O. J. This is an action by the respondent, a corporation organized and existing under the laws of the state of Maine, to quiet title to certain mining claims and to have it established by a decree of the court that the defendants hold said claims in trust for the respondent. The appellant claims ownership to said property by virtue of certain deeds conveying said claims to it in the month of April, 1906. Said mining claims are called Golden Eagle No. 1, Golden Eagle No. 2, Columbus, Good Hope, Murray, Wampum, Dinero, Plumbum, Argentum, Good Luck, Gallagher, and Col. Bradford. It is alleged in the complaint that said mining claims were wrongfully and fraudulently relocated by the appellants Dunlap and Smith on the 1st day of January, 1909, under the following names: Reliance, Reliance No. 1, Reliance No. 2, Reliance No. 3, Reliance No. 4, Reliance No. 5, Reliance No. 6, Reliance No. 7, Reliance No. 8, Reliance No. 9, and Reliance No. 11; and it is alleged that said claims were so located in furtherance of a conspiracy entered into between the appellants to defraud plaintiff out of said claims.

Certain demurrers were filed to the complaint and to the amended complaint, on the ground generally that the plaintiff had no capacity to sue and had failed to designate an agent upon whom process could be served, and that the amended complaint does not state facts sufficient to constitute a cause of action. All of the demurrers were overruled. Separate answers were filed by the various defendants, all practically in the same form, which admitted that the defendants Dunlap and Smith relocated said claims but denied that it was through any conspiracy entered into by the defendants to defraud plaintiff of its property. It was alleged in the amended complaint that the ground in controversy was subject to relocation at the time said relocations were made, and alleged in substance that said relocations were in trust for the plaintiff by reason of an unlawful conspiracy, whereby it is alleged that the two appellants Gallagher failed purpose-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ly to do the annual labor for 1908. The answers admitted that the annual labor was not done for 1908, also alleged that the annual labor was not done for 1907, but denied that the failure of the Gallaghers to do such annual labor was by reason of any conspiracy. The contention of the defendants is that the annual labor was not performed for the years 1907 and 1908, and that such failure was not due to any failure of duty on the part of the appellants or any of them, and that said mining ground was subject to relocation by any person having the statutory qualifications. It appeared from the evidence on the part of the appellants that the claims were not legally relocated by Dunlap and Smith, that they put up notices, staked the claims, and pretended to locate them in the month of December, 1908, but afterwards, on the 2d day of January, 1909, went on the ground, re-marked the stakes, dated the notices January 1, 1909, and filed the notice for record without doing anything further or any other work, and on that showing at the close of the trial the respondent offered an amendment conforming to such testimony, which amendment was allowed by the court. The court made its finding of facts, conclusions of law, and entered judgment in favor of the respondent, and this appeal is from the judgment and from the order denying a new trial.

Counsel for appellants assign 60 errors, going to the admission and rejection of certain evidence and to denying motions to strike out certain evidence and to the action of the court in other matters, and that certain findings of fact were not supported by the evidence and that the court erred in entering the judgment and decree.

As to the alleged errors in regard to the admission and rejection of testimony, the court has carefully examined the errors assigned and finds no prejudicial error in the ruling of the court in that regard.

It is next contended that the plaintiff is a foreign corporation and that the deeds conveying said mining claims to said corporation were absolutely void under the provisions of section 2792, Rev. Codes, which section was 2653, Rev. St. 1887, and was amended by an act of the Legislature in 1903. See Sess. Laws 1903, p. 49. It appears that the respondent corporation was organized under the laws of Maine on January 27, 1906; that the deeds conveying said mining claims to said corporation are dated April 21, 1906; that said articles of incorporation were filed in the office of the county recorder of Shoshone county on April 21, 1906, and on the same date with the Secretary of State. On June 16, 1906, the respondent filed with the clerk of the district court of said Shoshone county a copy of designation of agent and on the same day filed said deed for record, and two days later filed a copy of its designation of agent with the Secretary of State. It thus appears that the deeds bore date of

April 21st and were not filed for record until June 16, 1906, the date of filing its designation of agent. Said section 2792 provides, among other things, that every foreign corporation, before doing business in this state, shall file with the county recorder of the county in this state, in which is designated its principal place of business, a copy of the articles of incorporation of said corporation and with the Secretary of State, and must also, within three months from the time of commencement to do business in this state, designate some person in the county in which the principal place of business is conducted upon whom process may be served, and within that time must file such designation in the office of the Secretary of State and the office of the clerk of the district court of such county. It is also provided as follows: "No contract or agreement made in the name of, or for the use or benefit of, such corporation prior to the making of such filings as first herein provided, can be sued upon or enforced in any court of this state by such corporation. Such corporation cannot take or hold title to any realty within this state prior to making such filings, and any pretended deed or conveyance of real estate to such corporation prior to such filings shall be absolutely null and void."

This court has had under consideration the question of the right of foreign corporations to do business in this state and several features have been determined in the following cases: *Katz v. Herrick*, 12 Idaho, 83, 86 Pac. 873; *War Eagle Consolidated Mining Co. v. Dickey*, 14 Idaho, 534, 94 Pac. 1034; *Tarr v. Western Loan & Savings Co.*, 15 Idaho, 741, 99 Pac. 1049; *Foore v. Simon Piano Co.*, 108 Pac. 1038; *Keating v. Keating Min. Co.*, 112 Pac. 206. We think the rules laid down in those cases effectually dispose of the contention on the point under consideration against appellants, and under the facts of this case appellants cannot profit in this action, on the ground that said deed was executed on April 21, 1906, and that the designation of agent and the deeds were filed on the same date with the clerk of the district court of Shoshone county, ex officio recorder, and said designation of agent was filed within the three months provided for by said section.

The assignment of error involving the action of the court in permitting the amendment of the complaint at the close of the evidence is not well taken. Under the provisions of our statute, Rev. Codes, §§. 4225 to 4229, inclusive, amendments should be liberally allowed. Under Statutes similar to our own, the Supreme Court of Washington, in *Miner v. Paulson*, 110 Pac. 994, said: "A party may amend at any stage of the proceedings almost as of course, to make his pleadings correspond with his proof." Said amendment did not result in an abandonment of the original theory of the respondent as to the fact that a conspiracy existed. The

amendment simply set forth the actual facts with reference to the location of said mining claim, in order that the decree might properly follow the evidence. It simply made the pleading conform to the proof introduced by appellants themselves and they certainly were not taken by surprise in regard thereto.

The court in its findings of fact found all of the material issues in favor of the respondent, and the evidence is amply sufficient to sustain them.

Upon a careful examination of the record, we conclude that it contains no reversible error and the judgment must therefore be affirmed, and it is so ordered, with costs of this appeal in favor of the respondent.

AILSHIE, J., concurs.

(19 Idaho, 208)

VADNEY v. STATE BOARD OF MEDICAL EXAMINERS.

(Supreme Court of Idaho. Jan. 23, 1911.)

(Syllabus by the Court.)

1. PHYSICIANS AND SURGEONS (§ 5*)—RIGHT TO LICENSE—QUALIFICATIONS—STATUTORY PROVISIONS.

Under the provisions of section 1298, Rev. St. 1887, no person was permitted to practice medicine or surgery in this territory (now state) who had not received a medical education and a diploma from some regularly chartered medical school having a bona fide existence at the time the diploma was granted, and when it appears from the complaint that the applicant for a license to practice medicine and surgery in the state was engaged in the practice of his profession under the provisions of the Laws of 1887, and had complied with all of the provisions of section 5 of the act of 1899 (Sess. Laws, p. 346), it was the duty of the State Board of Medical Examiners to issue to him a license to practice medicine and surgery in this state.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. § 5; Dec. Dig. § 5.*]

2. CERTIORARI (§ 22*)—RIGHT TO REMEDY.

Under the provisions of section 9 of the medical law of 1899 (Sess. Laws 1899, p. 348), there is no provision for an appeal from an order of the State Board of Medical Examiners refusing to grant a license to an applicant; but said section contains a provision whereby the proper court may review by certiorari certain proceedings of said board.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. § 35; Dec. Dig. § 22.*]

3. MANDAMUS (§ 4*)—RIGHT TO REMEDY—EXISTENCE OF ADEQUATE REMEDY BY APPEAL.

Held, under the provisions of said act, that a plaintiff has no plain, speedy, and adequate remedy at law by appeal.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 9-34; Dec. Dig. § 4.*]

4. PHYSICIANS AND SURGEONS (§ 5*)—RIGHT TO LICENSE—QUALIFICATIONS—STATUTORY PROVISIONS.

A diploma from a regularly chartered medical school, which had a bona fide existence at the time the diploma was granted, and a compliance with the provisions of said sections 1298a and 1298b, Rev. St. 1887, was all of the proof that the statute required at that time of the applicant's having a medical edu-

cation, and under the act of 1899 (Sess. Laws 1899, p. 345), the medical board had no authority to require any other or further evidence of that fact.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. § 5; Dec. Dig. § 5.*]

5. PLEADING (§ 122*)—ISSUES—DENIAL OF MATTERS OF RECORD ACCESSIBLE TO DEFENDANT.

A denial of matters which are of record and accessible to the defendant is insufficient and is no denial, and does not raise an issue.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 249-252; Dec. Dig. § 122.*]

6. PHYSICIANS AND SURGEONS (§ 5*)—RIGHT TO LICENSE—QUALIFICATIONS.

The State Board of Medical Examiners, under the law of 1899 (Sess. Laws 1899, p. 345), has no authority to refuse a license to an applicant who was engaged in the practice of medicine and surgery under the Laws of 1887 (Rev. St. 1887, § 1298), on the ground that the college issuing the medical diploma under which he was practicing was not a "reputable college of medicine in good standing," as the law of 1887 provides that the diploma referred to must be from some "regularly chartered medical school" having a bona fide existence at the time when said diploma was granted.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. § 5; Dec. Dig. § 5.*]

7. PHYSICIANS AND SURGEONS (§ 5*)—RIGHT TO LICENSE—QUALIFICATIONS—STATUTORY PROVISIONS.

Held, that the reason for refusing to grant the plaintiff's application was based on the ground that the Independent Medical College of Chicago was not a "reputable college of medicine in good standing," and not on the ground that said application was not in proper form.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. § 5; Dec. Dig. § 5.*]

8. REVIEW ON APPEAL.

Held, that the answer fails to raise any material issue of fact.

9. PHYSICIANS AND SURGEONS (§ 5*)—RIGHT TO LICENSE—QUALIFICATIONS—STATUTORY PROVISIONS.

Held, that facts sufficient are alleged in the complaint to entitle the plaintiff to a license from the State Board of Medical Examiners to practice medicine and surgery in this state.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. § 5; Dec. Dig. § 5.*]

Mandamus by Emanuel Vadney against the State Board of Medical Examiners to compel the issuance of a license to practice medicine. Writ granted.

Ben F. Tweedy and G. Orr McMinlmy, for plaintiff. D. C. McDougall, Atty. Gen., and O. M. Van Duyn and J. H. Peterson, Asst. Atty. Gens., for defendant.

SULLIVAN, J. This is an original application to this court for a writ of mandate directed to the State Board of Medical Examiners, requiring them to issue to the applicant a license to practice medicine and surgery in this state.

It appears from the petition of the plaintiff that he was and now is a duly licensed graduate of the Western University of Chicago and Independent Medical College of Chicago;

that on the 4th of October, 1897, he established an office and residence in Morrow, Nez Perce county, and has ever since continued to practice medicine and surgery in said town and county; that before he began the practice of medicine and surgery, he duly filed his affidavit of identity and filed and recorded his said medical diploma with the county recorder of Ada county, Idaho; that said medical college had a bona fide existence and was duly chartered under the laws of the state of Illinois at the time said diploma was granted to applicant; that he is the rightful possessor of said diploma and the identical person named therein; that at the time of the passage of the act commonly known as the "Medical Act of 1899" (Sess. Laws 1899, p. 345), plaintiff was legally engaged in the actual practice of medicine and surgery within the state of Idaho under the provisions of the medical act of 1887 (Rev. St. 1887, §§ 1298-1298e); that in the month of June, 1899, and within six months after the medical act of 1899 went into effect, applicant made application for a license to practice medicine and surgery to the State Board of Medical Examiners on the blanks furnished by said board, and transmitted with the said application a certificate from the county recorder of Nez Perce county that the plaintiff was a bona fide resident of that county and had recorded his diploma under the medical act of 1887, giving the date of such record, and that plaintiff transmitted with said application the fee of five dollars with the proof of plaintiff's good moral character requested by said board; that thereafter and on or about the — day of —, 1899, the plaintiff received notice from the secretary of said board that the application properly executed and the fee of five dollars had been received by said board and that said board wished to inspect the plaintiff's medical diploma; that on the — day of —, 1899, the plaintiff sent his said diploma to said medical board and was thereafter informed by said board that they did not and would not recognize the said Independent College of Chicago as one having authority to issue a diploma to a doctor of medicine; that said board thereafter and ever since has refused to issue to the plaintiff a license to practice medicine and surgery, although requested so to do; that the plaintiff is entitled to a license to practice medicine and surgery in this state and that he is the real party in interest in these proceedings, and prays for the issuance of a writ of mandate to compel said board to issue the necessary license. Upon that application this court issued the alternative writ, and upon the return day the said board appeared by its attorney and moved to quash the alternative writ on the ground that the court has no jurisdiction to issue a writ of mandate in this matter, for the reason that the plaintiff has a plain, speedy, and adequate remedy at law, and that the petition

presents no facts entitling the plaintiff to the relief asked for, or to any relief whatever. The matter came on for hearing on said motion.

The first contention made by counsel for the board is that under the Laws of 1887 (Rev. St. 1887, § 1298), no person was entitled to practice medicine in the state of Idaho who had not received a medical education and who had not received a diploma from a regularly chartered medical school, the said school to have a bona fide existence at the time the diploma was granted. Said section is as follows: "No person shall practice medicine or surgery in this territory who has not received a medical education and a diploma from some regularly chartered medical school, said school to have a bona fide existence at the time when said diploma was granted." We think it sufficiently appears from the petition that the plaintiff was lawfully engaged in the practice of medicine and surgery under the Laws of 1887, when the medical act of 1899 was passed.

In the case of *State v. Cooper*, 11 Idaho, 219, 81 Pac. 374, this court said: "Where it is shown that an applicant for a license to practice medicine and surgery was a resident of the state, engaged in the practice of his profession under the provisions of the law of 1887, and had complied with all the provisions of the law of 1899, held, that in case the Board of Medical Examiners refused to issue his license, it was not criminal in him to pursue his profession."

If the plaintiff was lawfully engaged in the practice of medicine and surgery at the time of the enactment of the medical law, of 1899, the question is presented whether he made a sufficient showing to the board under that law to require it to issue a license to him.

Section 5 of that act is as follows: "All persons, except as hereinafter provided, who were legally engaged in the actual practice of medicine and surgery or either of them within the state, at the time of the passage of this act, under the provisions of the medical act of 1887, shall be licensed without examination to continue such practice under this act, by making application to the State Medical Examining Board upon suitably prepared blanks to be furnished by said board, within six months from the taking effect of this act. The applicant shall be required to transmit with said application, a certificate from the county recorder from the county in which he or she may reside, that said applicant is a bona fide resident of the state and has recorded his or her diploma under the provisions of the medical act of 1887, giving date of such record. Persons who received a license under the now defunct medical law of 1897 will simply be required to transmit such license. The fee for license under this section shall be five dollars (\$5) and shall in each case accompany the application. Upon fulfillment of the requirements herein

stated, the board shall issue to said applicant a license to practice medicine and surgery within this state. Persons for whom the provisions of this section are intended, failing or refusing to avail themselves of the same, shall be and are hereby subject to the requirements of section six of this act."

It appears from the petition that the plaintiff was legally engaged in the actual practice of medicine and surgery under the medical act of 1887, and that he made a proper application to the State Medical Examining Board, as provided by section 5 of said act, and if the facts presented in his affidavit be true, the board had no option whatever in said matter. It was its duty to issue to him a license to practice medicine and surgery.

It is next contended that the plaintiff, after the refusal of said board to grant him a license, had a plain, speedy, and adequate remedy by appeal under the provisions of said law of 1899. It is provided in section 9 of said act of 1899 that, in case the board refuses to grant a license to practice under that act, the applicant shall have the right to have the action of the board reviewed by the district court in and for the county in which the meeting at which the license was refused was held, or such other county as may be agreed upon, provided proceeding for such review is instituted within 10 days after notice of such refusal upon the applicant.

This court, in the case of *Raaf v. State Board of Medical Examiners*, 11 Idaho, 707, 84 Pac. 33, held, under the provisions of said section 9, that the district court could review on certiorari the action of the medical board, provided proceedings therefor were instituted within 10 days after notice of the refusal to grant the license, and that such review and inquiry could not go beyond the scope of investigation and inquiry usually and ordinarily pursued and exercised by courts in the consideration of writs of review. The second paragraph of the syllabus of said case is as follows: "The state medical law contains no provision granting the right of appeal from the action of the Board of Examiners in refusing a license to an applicant, but by the terms of section 9 of the act it is provided that the action of the board in refusing to grant a license under the provisions thereof may be reviewed by the district court on certiorari, provided proceedings therefor be instituted within 10 days after notice of such refusal." And it is held in that case that the courts will not review and re-examine matters in which the board is called upon to exercise judgment and discretion and perform quasi judicial functions in relation thereto; but the courts will compel the board to act when they fail or refuse to do so, and will review their proceedings where they have assumed to exercise powers not conferred. Under the rule laid down in that decision, the petitioner has no plain, speedy, and adequate remedy at law by appeal.

Counsel for defendant board contend that under the Laws of 1887, § 1298, the applicant must have a "medical education" and that if he had possessed diplomas from all the medical colleges in the United States and did not have a medical education, he would not be entitled to practice under the Laws of 1887, and contend that the complaint is insufficient, because it does not directly allege that the defendant had a "medical education." Section 1298a, Rev. St., provided that every physician or surgeon when about to take up his residence in this territory, or who now resides here, shall file for record with the county recorder of the county in which he is about to practice his profession, or where he now practices it, a copy of his diploma, at the same time exhibiting the original or a certificate from the dean of the medical school of which he is a graduate, certifying to his graduation. Section 1298b provides that every physician or surgeon who files a copy of his diploma or certificate of graduation, as required by section 1298a, shall be identified as the person named in the papers about to be filed, either by the affidavit of two citizens of the county or by his affidavit taken before a notary public or commissioner of deeds of this territory, which affidavit shall be filed in the office of the county recorder. Under the provisions of said law of 1887, a diploma from some regularly chartered medical school which had a bona fide existence at the time said diploma was granted, and a compliance with the provisions of the sections above referred to, was proof of the applicant's having received a medical education and all of the evidence that the statute required at that time of that fact. That being true, the complaint states a cause of action, and, if said facts are true, they entitle the plaintiff to the relief prayed for.

The plaintiff alleges in his complaint all of the facts necessary to entitle him to a license from the State Board of Medical Examiners to practice medicine in this state, and the board by refusing to issue a certificate to him refused to perform a duty imposed on it by the medical act of 1899. For that reason the motion to quash must be denied.

The answer denies matters of record on information and belief. A denial on information and belief of matters of record is no denial at all, where such records are accessible to the defendant; therefore said denials do not make an issue in the case. *Simpson v. Remington*, 6 Idaho, 681, 59 Pac. 360; *Work Bros. v. Kinney*, 7 Idaho, 460, 63 Pac. 596; *Bennett Co. v. Twin Falls L. & W. Co.*, 14 Idaho, 38, 93 Pac. 789.

The answer denies that the Independent Medical College of Chicago, from which plaintiff held a diploma, was a "reputable college of medicine in good standing." The board had a right to determine that question under the act of 1899, where the applicant had

not been practicing medicine and surgery under the act of 1887; but when the applicant had been practicing under the Laws of 1887, and made application under the fifth section of the act of 1899 for a license, the board had no authority whatever to determine whether or not the diploma under which the applicant had been practicing was issued by "a reputable college of medicine in good standing." If the plaintiff had a diploma from a regularly chartered medical school that had a bona fide existence at the time the diploma was granted, that was all that was necessary, so far as the diploma was concerned. The answer admits that said Independent Medical College was a regularly chartered medical school and had a bona fide existence, and avers that its charter was revoked in the year 1899 on account of fraud. Under the admitted facts and law, the board had no authority whatever to refuse the applicant a license, on the ground that the medical college from which he graduated was not a "reputable college of medicine in good standing." Said board avers in its answer that it did not and would not recognize said Independent Medical School of Chicago as one having authority to issue a diploma to a doctor of medicine, and avers "that said refusal was made upon the ground that said alleged college of medicine was not a reputable college in good standing." Under the law of 1887, said board had no authority to refuse to grant the plaintiff a license upon that ground.

Said board sets up as a further defense that the plaintiff's application was not in proper form. That was evidently an afterthought and cannot be considered. If said application was not properly verified, it was the duty of the secretary of the board to return it to the applicant for verification, and if the persons who certified to the good moral character of said plaintiff were not satisfactory, plaintiff ought to have been notified of that fact and given an opportunity to furnish the names of other persons who would certify to his good moral character, if he could.

It appears from the record before us that the real reason for refusing the application of the plaintiff was that said board did not recognize said Independent Medical College as "a reputable college of medicine in good standing." That was not a sufficient reason for refusing to grant said application. As the answer fails to raise any issue of fact that would justify the board in refusing to grant said license, it will not be necessary to refer the case to a referee to take any evidence.

It is therefore ordered that the peremptory writ of mandate issue to defendant, the said State Board of Medical Examiners, directing them to issue to the plaintiff a license to practice medicine and surgery in the state of

Idaho, and that the costs of this proceeding be awarded to the plaintiff

AILSHIE, J., concurs.

(19 Idaho, 192)

STATE v. JORDAN.

(Supreme Court of Idaho. Jan. 18, 1911.)

(Syllabus by the Court.)

1. INTOXICATING LIQUORS (§ 40*)—LOCAL OPTION—SALES BY HOLDERS OF LICENSES.

The fact that other persons hold licenses, issued prior to the passage of the local option statute, which permit them to sell and dispose of intoxicating liquors, does not prevent the local option statute from operating after its adoption, as provided therein, and prohibiting the sale and disposition of intoxicating liquors by all other persons.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 34; Dec. Dig. § 40.*]

2. INTOXICATING LIQUORS (§ 40*)—LOCAL OPTION—EFFECT ON LICENSES.

The provision in the local option statute "that no license issued prior to the passage of this act should be terminated or in any manner affected by this act, or by any election held hereunder" (Laws 1909, p. 12, § 8) does not prevent the creation of a county into a prohibition district upon the holding of an election, and the declaring of the result, as provided in said act.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 34; Dec. Dig. § 40.*]

3. JURY (§ 116*)—CHALLENGES—BIAS OF SUMMONING OFFICER.

Under the provisions of section 7824, Rev. Codes, when a panel is formed, or in part formed, from persons whose names are not drawn as jurors, a challenge may be taken to the panel on account of any bias of the officer who summoned them, which would be good ground for challenge to a juror.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 543; Dec. Dig. § 116.*]

4. JURY (§ 97*)—CHALLENGES—IMPLIED BIAS.

Under the provisions of section 7834, Rev. Codes, a challenge for implied bias may be taken upon the ground of being a witness for the prosecution, or subpoenaed as such.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 431; Dec. Dig. § 97.*]

5. JURY (§ 116*)—CHALLENGE—IMPLIED BIAS OF SUMMONING OFFICER.

Under the provisions of these sections, a challenge to the special panel may be taken for the implied bias of the officer summoning the same, when it appears that he is a witness for the prosecution.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 543; Dec. Dig. § 116.*]

6. INTOXICATING LIQUORS (§ 239*)—LOCAL OPTION LAW—OPERATION—INSTRUCTIONS TO JURY.

It is for the court to determine when the local option law becomes operative in any prohibition district created under its provisions, and the court is authorized to instruct the jury as to the date when such law becomes operative in such prohibition district.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 331; Dec. Dig. § 239.*]

Appeal from District Court, Lincoln County; E. A. Walters, Judge.

Fred W. Jordan was convicted of violation

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

of the prohibition law, and appeals. Reversed.

James R. Bothwell, for appellant. D. C. McDougall, Atty. Gen., J. H. Peterson and O. M. Van Duyn, Assts. Atty. Gen., Frank T. Disney, Pros. Atty., and E. M. Wolfe, for the State.

STEWART, C. J. A complaint was sworn to before the probate judge of Lincoln county by L. M. Zug, charging the appellant with the crime of selling and disposing of intoxicating liquors to one O. E. Blair within a prohibition district of the state of Idaho, contrary to the provisions of Senate Bill No. 62 (Sess. Laws Idaho 1909, p. 9). Upon this complaint a warrant was issued, and appellant was brought before the probate judge, and demanded a trial by jury, on the ground that Lincoln county was not a prohibition district. This was denied by the probate judge and a preliminary examination was held, and the appellant was held to answer to the district court. In the district court the prosecuting attorney filed an information against the defendant, charging him with the crime of selling and disposing of intoxicating liquors to one O. E. Blair, and within a prohibition district of the state of Idaho, contrary to Senate Bill No. 62 (Sess. Laws Idaho 1909). When he was arraigned upon the information filed in the district court, and before plea, he filed a motion to set aside the information upon the ground, in substance, that the offense charged in such information was triable, in the first instance, in the probate court, and that the probate court of said county had no authority to hold a preliminary examination therefor, or to hold the defendant for trial to the district court. This motion was overruled, and the trial proceeded, and the appellant was convicted and sentenced to imprisonment in the county jail for a term of three months, and to pay a fine of \$500 and costs of prosecution. A motion for a new trial was made and overruled. This appeal is from the judgment, and from the order overruling the motion for a new trial.

The first question for consideration on this appeal is: Did the trial court err in refusing to quash and set aside the information? In support of this motion, the appellant offered in evidence the proceedings before the probate judge, among which was an admission made by the prosecuting attorney to the effect that on or about March 4, 1910, the day the crime is alleged to have been committed by the appellant, intoxicating liquors were being sold in Lincoln county, state of Idaho, as a beverage, under license granted by the board of county commissioners of said county and state, as provided by section 1508 of the Revised Codes of Idaho, and that saloons were in operation in said county on said day. The charge made in the information is that the appellant on or about the 4th day of March, 1910, "did willfully

and unlawfully, directly and by device and subterfuge, sell, furnish, and give away and dispose of intoxicating liquors, namely, whisky, to one O. E. Blair, and not upon the prescription of a duly licensed physician, within a prohibition district of the state of Idaho, and contrary to Senate Bill No. 62 (Sess. Laws Idaho 1909), all of which is contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the state of Idaho."

To support the appellant's motion, therefore, it was necessary for him to show that Lincoln county was not a prohibition district at the time the crime is charged to have been committed, as alleged in the information. Section 7 of the local option statute (Laws 1909, p. 12), provides that, if a majority vote has been obtained in favor of the proposition submitted, it shall thereafter be unlawful for the board of county commissioners of the county to grant any license to sell or dispose of any intoxicating liquors, and section 8 of said act provides: "No license issued prior to the passage of this act shall be terminated or in any manner affected by this act, or by any election held hereunder." Section 28 of said act defines a prohibition district as follows: "A prohibition district within the meaning of this act is any district or territory in the state of Idaho in which the sale of intoxicating liquors is prohibited by law." These provisions must all be construed together, and while a county becomes a prohibition district upon an election being held therein for the purpose of voting upon said proposition, and the canvass of the returns and the declaring of the result by the board of county commissioners, yet intoxicating liquors may be sold in said prohibition district under licenses issued in accordance with law prior to the passage of said local option statute. The fact that liquor was being sold in said county under licenses was not sufficient to prove that said county was not a prohibition district as provided by said local option statute. It was incumbent upon the appellant, in support of his motion to dismiss, to show that he was not subject to the provisions of the statute regulating the prohibition of sales within a prohibition district, and the fact that others held licenses issued prior to the passage of the local option statute, which permitted them to sell intoxicating liquors, as provided in said act, did not protect the appellant, or render such county a nonprohibition district.

In the case of Gillesby v. Board of Commissioners, 17 Idaho, 586, 107 Pac. 71, this court held: "It is entirely within the province of the Legislature to enact a statute, the provisions of which will not become operative until a future date, and to specify upon what conditions or event such statute will become operative." The Legislature, having provided, as was clearly within its authority, that licenses granted before the

passage of the act should not in any way be affected by the provisions of said act, did not prevent the creation of a county into a prohibition district upon the holding of an election and the declaring of the result, as provided in said act. The court therefore did not err in overruling the motion to quash and set aside the information.

The next question presented on this appeal is the ruling of the trial court on appellant's challenge to the special venire. When the cause was called for trial on April 4, 1910, and before any juror was sworn, the appellant interposed a challenge in writing to the special venire returned on the 28th day of March, 1910, and as grounds for said challenge alleged implied bias on the part of L. M. Zug, the officer who summoned the said special venire, in that said L. M. Zug is a witness for the prosecution, and that the information shows that it was upon the depositions of L. M. Zug and O. E. Blair that the defendant was held to answer in the district court. The prosecuting attorney admitted the facts stated in the challenge, but denied that such facts were sufficient to sustain the challenge. Upon the hearing of said challenge the defendant introduced in evidence the special venire, together with the return made by L. M. Zug, deputy sheriff, showing his selection and summons to appear of 14 jurors for the March term, 1910, of said court. It was also stipulated between counsel for appellant and the prosecuting attorney that the facts alleged in the defendant's written challenge to said panel were true and correct, and that L. M. Zug, selecting officer of said special panel, is a witness for the prosecution. It also appears from the record that on the 5th day of March, A. D. 1910, the trial judge made an order directing that a jury consisting of 32 jurors be drawn by a proper officer according to law, and summoned to appear to serve as such on the 24th day of March, 1910. It further appears from the minutes of the court that during the trial of one Henry Berger, and on the 26th day of March, the regular jury so drawn was exhausted, and the court thereupon issued an order commanding the sheriff of said county to summon from the body of the county 15 jurors to be and appear in the district court on the 28th day of March to act as trial jurors during the March term, A. D. 1910. These jurors, it appears, were selected and summoned by L. M. Zug, and became regular trial jurors for that term. At the conclusion of the testimony the trial court overruled the challenge, and this is assigned as error. The Attorney General admits that a witness for the prosecution would be incompetent to serve as a juror in a criminal case, and he also admits that the same grounds for challenging a juror exists under the statute for challenging an officer who summons a jury, but argues that inasmuch as it did not appear at the time the challenge was heard that Zug was a material

witness for the prosecution, and it was not shown that his testimony was as to material facts in the case, the mere fact that he was a witness was not alone sufficient to show implied bias. Rev. Codes, § 7824, provides: "When the panel is formed, or in part formed, from persons whose names are not drawn as jurors, a challenge may be taken to the panel on account of any bias of the officer who summoned them, which would be good ground of challenge to a juror. Such challenge must be made in the same form, and determined in the same manner, as if made to a juror." Rev. Codes, § 7818, provides: "A challenge to the panel is an objection made to all the jurors returned, and may be taken by either party." Section 7820 provides: "A challenge to the panel must be taken before a juror is sworn, and must be in writing, and must plainly and distinctly state the facts constituting the ground of challenge." Rev. Codes, § 7834, provides: "A challenge for implied bias may be taken for all or any of the following causes, and for no other * * * (6) * * * being a witness for the prosecution, or subpoenaed as such." Under the provisions of this latter section, had L. M. Zug been called as a juror, he would have been subject to challenge for implied bias, because of the fact that he was a witness for the prosecution, and section 7824, supra, authorizes a challenge to the panel on account of the bias of the officer who summons a jury upon the same ground that a challenge could be made to a juror. If, then, a challenge would have been entertained against Zug if called as a juror because he was a witness for the prosecution, a challenge would also lie upon the same ground to the jury panel summoned by him. If he would not be qualified as a juror because of implied bias, he would also be disqualified, for the same reason, to summon a jury formed, or in part formed, from persons whose names are not drawn as jurors. The provisions of the statute do not leave the question of bias open to investigation. It is expressly declared that a witness for the prosecution is disqualified from sitting as a juror because of implied bias, and the statute also declares positively that for the same reason a panel formed, or in part formed, from persons whose names are not drawn as jurors, and selected by an officer, may be challenged upon the ground of such implied bias.

This precise question has been considered by the Supreme Court of California under a statute almost identical with that of this state, and the court says, in the case of *People v. Coyodo*, 40 Cal. 586: "At the trial from the regular panel 10 jurors were selected and sworn—the regular panel being then exhausted. By this time the defendant had exhausted all his peremptory challenges. A special venire for six additional jurors having been issued was served by the sheriff, and the jurors summoned appeared in court.

The defendant then interposed a challenge to the panel returned on the special venire, on the ground that the sheriff had formed and expressed an unqualified opinion that the defendant was guilty. The challenge was denied, and on the trial of it the sheriff was sworn, and from his evidence it appears plainly enough that he had formed and expressed such an opinion as would have disqualified him from serving as a juror in the case. Section 337 of the criminal practice act provides that a challenge may be made to the panel on account of any bias of the officer summoning them, which would be good ground of challenge to a juror." *State v. Kent*, 4 N. D. 601, 62 N. W. 631, 27 L. R. A. 686. There is a very strong reason for the rule announced by the statute. The officer having the order for the special venire in serving the same would have power to exercise his judgment partially, and to summon jurors whom he might think would favor the prosecution, and thus return a jury wholly favorable to the prosecution, and it is because such power might be executed partially that the statute makes the fact that the officer is a witness for the prosecution a cause for challenge to the panel thus selected by him on the ground of implied bias. For this reason, we think the court erred in denying the challenge to the jury panel.

It is also contended that the court erred in giving the following instruction to the jury: "The state further instructs you, gentlemen, that the territory embraced within the county of Lincoln was a prohibition district on the 4th day of March, 1909, and at said date it was a violation of the laws of this state for any person, either directly or by device or subterfuge, to sell, furnish, give away, or otherwise dispose of intoxicating liquors of any kind in said Lincoln county at said date." The objection to this instruction presents a serious and interesting question, and one that is not entirely easy of solution. It will be observed by the language of the instruction that the trial court told the jury that Lincoln county was a prohibition district. Under the local option statute the creation of a prohibition district depends upon a vote of the people of the county, and the declaration of the board of county commissioners declaring the result of such election, and the action thus taken must necessarily be brought to the attention of the trial court in some manner. The Attorney General contends, first, that the court will take judicial notice of the holding of an election and the result, and, if such is not the law, then the question is one to be determined by the court, and not by the jury, and that the instruction is a correct statement of the law, whether the court takes ju-

dicial knowledge of the holding of an election and the declaration of the result, or determines such matter upon proof. Section 12 (page 13) of the local option statute provides: "In any complaint, information or indictment for selling or disposing of intoxicating liquors without license in a prohibition district, it shall not be necessary to set forth, neither shall it be necessary to prove upon the hearing or trial the facts showing that the required number of voters petitioned for the election, that the election was held, or that a majority voted in favor of prohibiting the sale as herein provided." And section 7 of said act provides: "The board of county commissioners shall meet within ten days after such special election, and canvass the returns and declare the result of the election; if a majority of the votes cast at such election shall be in favor of the proposition submitted, it shall thereafter be unlawful for the board of county commissioners of the county to grant any person, firm, association, corporation or club a license to sell and * * *." From this latter section the local option statute becomes operative in a county from the holding of an election and the declaring of the result of such election by the board of county commissioners, and it no doubt was the intention of the Legislature to dispense with proof of the facts referred to in section 12 upon the trial of the cause, and to leave to the court the determination of the time at which the local option statute becomes operative in any given county. The court should determine this matter upon proof. No doubt in the first instance the introduction of the order of the board of county commissioners showing the canvass and declaration of the result is sufficient to authorize the court to instruct the jury that the territory embraced within a given county becomes a prohibition district on the date such result was so declared, and, if the creation of the district is contested, the defendant should be given an opportunity to go into the creation of such district from its inception. In this instance the court seems to have been satisfied with the proof made that Lincoln county was created into a prohibition district, and we see no reason to interfere with the court's conclusion upon this proof, and therefore find no error in the instruction. *Joyce on Intoxicating Liquors*, § 418; *State v. O'Brien*, 35 Mont. 482, 90 Pac. 514; *People v. Bennett*, 107 Mich. 430, 65 N. W. 290.

There are other questions discussed which may not arise upon a retrial of this case, and which will not be considered. The judgment is reversed, and a new trial ordered.

AILSHIE, J., and SULLIVAN, J., concur.

(19 Idaho, 185)

STATE v. BESLIN.

(Supreme Court of Idaho. Jan. 18, 1911.)

(Syllabus by the Court.)

1. KIDNAPPING (§ 1*)—PERSONS LIABLE—CONSTRUCTION OF STATUTE.

Under the provisions of section 6800, Rev. Codes, a person who "maliciously, forcibly, or fraudulently" takes or entices away a child under the age of 12 years, with intent to detain and conceal such child from its parents, guardian, or other person having the lawful charge of it, is punishable by imprisonment in the state prison or in the county jail, and by fine not exceeding \$500.

[Ed. Note.—For other cases, see Kidnapping, Cent. Dig. §§ 1-7; Dec. Dig. § 1.*]

2. PARENT AND CHILD (§ 18*)—PERSONS LIABLE—CONSTRUCTION OF STATUTE.

Where the mother has possession of an infant between 2 and 3 years of age and leaves her husband and takes with her such child, and is assisted by the defendant in leaving the state with said child, and after such separation the child continues in the possession of the mother until her death, or until the legal authorities take the child from her, *held*, that the defendant is not guilty of enticing said child away from its father, under the provisions of said section 6800, Rev. Codes.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 182-188; Dec. Dig. § 18.* Kidnapping, Cent. Dig. § 13.]

3. KIDNAPPING (§ 5*)—PERSONS LIABLE—CONSTRUCTION OF STATUTE.

The evidence *held* insufficient to support the verdict of guilty.

[Ed. Note.—For other cases, see Kidnapping, Cent. Dig. § 11; Dec. Dig. § 5.*]

4. HUSBAND AND WIFE (§ 3*)—RIGHTS OF PARTIES.

Under the provisions of section 2675, Rev. Codes, the husband is the head of the family and may choose any reasonable place or mode of living, and a wife must conform to it while she lives with him.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 5-8; Dec. Dig. § 3.*]

5. KIDNAPPING (§ 5*)—CUSTODY OF CHILD—RIGHT OF WIFE.

Held, under the facts of this case, that the mother had the lawful custody of said child at the time she removed it from this state to the state of Washington.

[Ed. Note.—For other cases, see Kidnapping, Cent. Dig. § 11; Dec. Dig. § 5.*]

6. PARENT AND CHILD (§ 2*)—CUSTODY OF CHILD—RIGHT OF WIFE.

Under the provisions of section 5774, Rev. Codes, either the father or mother of a minor, being respectively competent to transact his or her own business, and not otherwise unsuitable, is entitled to the guardianship of the minor child.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. § 4; Dec. Dig. § 2.*]

7. PARENT AND CHILD (§ 3*)—SUPPORT OF MINOR.

Under the provisions of section 2696, Rev. Codes, the mother as well as the father is liable for the support of their minor child, and if they neglect to provide articles necessary for its support, according to their circumstances, they, or either of them, may be compelled to do so.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 33-62; Dec. Dig. § 3.*]

8. PARENT AND CHILD (§ 2*)—CUSTODY OF CHILD—JURISDICTION.

Under the provisions of section 2698, Rev. Codes, "when a husband and wife live in a state of separation, without being divorced," any court of competent jurisdiction may inquire into the custody of their minor child and may award its custody to either, for such time and under such regulations as the case may require, and the decision of the court in that matter must be guided by the welfare of the child.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 4-32; Dec. Dig. § 2.*]

9. PARENT AND CHILD (§ 2*)—CUSTODY OF CHILD—RIGHT OF MOTHER.

Under the laws of this state, the father has no absolute right to deprive the mother of the care and custody of an infant child simply because he is the father.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 4-32; Dec. Dig. § 2.*]

Appeal from District Court, Kootenai County; Robt. N. Dunn, Judge.

Harvey L. Beslin was convicted of child stealing, and he appeals from the judgment and an order denying a new trial. Reversed and remanded, with directions to dismiss.

McFarland & McFarland, for appellant. C. H. Potts and D. C. McDougall, for the State.

SULLIVAN, J. The defendant was found guilty of the crime of child stealing on the 29th day of September, 1910, and was sentenced by the court to a term in the state prison for a period of not less than two and not more than ten years.

It appears that the appellant was held by the probate court of Kootenai county on the 3d day of September, 1910, for said crime, and on the 12th day of that month an information was filed against him by the prosecuting attorney charging him with the crime of child stealing, under the provisions of section 6800, Rev. Codes. On the 14th day of that month he filed a motion in the district court to quash, vacate, and set aside the information on several grounds, one of which was that the testimony taken at the preliminary examination does not show probable cause for believing the defendant guilty of the offense charged, or of any other offense. The motion was overruled and the cause was tried by the court with a jury, which returned a verdict of guilty, and the above-mentioned sentence was imposed on the defendant. A motion for a new trial was overruled, and this appeal is from the judgment and order denying a new trial.

A number of errors are assigned in regard to the admission and rejection of certain testimony; also in the overruling of defendant's motion at the close of the testimony of the state to advise the jury to acquit the defendant, and in regard to the giving and refusing to give certain instructions. The view that the court takes of the case makes it unnecessary for us to pass upon the several errors assigned *seriatim*.

The main question presented in the case

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

is whether, under the facts disclosed by the evidence, the statutory crime of child stealing, as defined by section 6800, Rev. Codes, was committed by the defendant. Said section is as follows: "Every person who maliciously, forcibly or fraudulently takes or entices away a child under the age of twelve years, with intent to detain and conceal such child from its parent, guardian or other person having the lawful charge of such child, is punishable by imprisonment in the state prison not exceeding ten years, or by imprisonment in a county jail not exceeding one year, and a fine not exceeding five hundred dollars."

In the decision of that question, the question is also presented as to whether the crime of child stealing can be committed where the mother has the lawful custody of the child and accompanies it, and whether the wife was entitled to the custody of the child under the facts of this case. It is conceded by counsel for the state that if under our statute the husband and wife are entitled equally to the custody of the minor child, the prosecution must fail; but if, on the other hand, the husband is entitled primarily to the custody of the child, the fact that at the time it was stolen it was accompanied by its mother would not be material in the case. In other words, the fact that the mother accompanied the child at the time of the alleged stealing would be immaterial.

The facts are substantially as follows: On the 1st day of September, 1909, the date when the crime is alleged to have been committed the appellant resided at La Crosse, Idaho, and the mother and child resided in Coeur d'Alene City, Idaho. On the 16th day of August, 1909, the father left the state of Idaho and went to Malden, state of Washington, and did not return until about the 5th of September, 1909. On or about the 31st of August, 1909, the mother left Coeur d'Alene and went to La Crosse where she and the child stayed one night and the defendant paid for their lodging and meals. On the 1st day of September, 1909, the mother, child, and defendant left La Crosse, Idaho, for Washington, in which state the father then was. It appears that the mother, child, and defendant, some time after leaving La Crosse, went to Raymond, in the state of Washington, and lived there for some time and the child was finally taken from them by the legal authorities there and turned over to the Overmeyer Hospital, and it was kept there from the 28th of February to the 24th of March, 1910. It was then delivered to a man by the name of Clark, who kept it from March 24th until May 12th following. It appears that after the child was taken from the custody of the mother, she committed suicide. Appellant took the child from Clark and on the 1st of July employed a Mrs. McCracken at Chehalis (which is a short distance from Raymond) to take charge of the child, for which he agreed to and did pay

her \$15 a month, for two months, and while the child was so in the possession of Mrs. McCracken, the father appeared and took possession of it.

The record shows that the mother had concluded to leave her husband, the father, and go with the appellant, and she took the child with her, and after her death it appears that the appellant did attempt to care for the child, but that occurred in the state of Washington. So far as the evidence shows, the mother voluntarily took the child with her from Coeur d'Alene City to La Crosse and there met the defendant, and from there they went into the state of Washington, and it appears that she kept the child until it was taken from her by the authorities at the town of Raymond, in the state of Washington, and if the defendant took charge of the child in the state of Washington after the death of the mother, with the intention of then stealing the child, he could not be prosecuted under the provisions of said section 6800 for child stealing, as the act was not committed in this state. In order to be guilty under the provisions of said section, he must have "maliciously, forcibly, or fraudulently" taken or enticed the child away, with the intention of detaining and concealing it from its parent, which the evidence fails to show that he did. The child was in the care of the mother until after it left the state of Idaho, so far as appears from the evidence. It also appears that she had the lawful care and custody of the child at the time she left Coeur d'Alene City with it. The father had left his home and wife and child and gone to the state of Washington to procure employment or attend to business matters. During his absence the wife evidently concluded to leave him and take the child with her, which she did. The defendant went with her and the child into the state of Washington.

But it is contended under our statutes that the husband is the head of the family and may choose any reasonable place or mode of living, and the wife must conform thereto (section 2675, Rev. Codes), and that said statute is the re-enactment of the common-law doctrine on that subject. Conceding that to be true, under the facts of this case the mother had the lawful custody of the child, and she might take it with her anywhere she desired to go and would not be guilty of child stealing. Under the provisions of section 5774, Rev. Codes, either the father or the mother of a minor, being respectively competent to transact his or her own business, and not otherwise unsuitable, is entitled to the guardianship of the minor children. The mother as well as the father is liable for the support of the child, and if they neglect to provide the articles necessary for its support, according to their circumstances, they, or either of them, may be compelled to do so. Section 2696, Rev. Codes. Under the provisions of section 2698

Rev. Codes, "when a husband and wife live in a state of separation, without being divorced," any court of competent jurisdiction may inquire into the custody of their minor child, and may award its custody to either, for such time and under such regulations as the case may require. The decision of the court in that matter must be guided by the welfare of the child.

In the case of *State v. Angel*, 42 Kan. 216, 21 Pac. 1075, the court had under consideration a case in which the defendant was convicted by the trial court for child stealing, under a statute containing similar provisions to those contained in said section 6800. The facts of that case were very much like the facts in the case at bar, and in the decision the court said: "As Mrs. Willis, the mother of the child, had the equal right with her husband, the father, to the actual care and control of the child, it is clear that she could not be punished under the provisions of said section 47 for taking and carrying the child away from the father. If it be true that James Angel, the defendant, assisted her to leave her husband, and in so doing assisted her in taking her child, he cannot be convicted under said section 47, because he only assisted the mother of the child, who had the same right to the care and control of the child as the father. The mother had the lawful charge of the child all of the time, and neither the mother nor Angel is guilty of any criminal violation of said section 47. The judgment of the district court must be reversed, and, as the facts are undisputed, the defendant will be discharged."

It is, however, contended by counsel for respondent that that case is not applicable, for the reason that the Constitution and statute of Kansas are different from those of this state. Section 6, art. 15, of the Kansas Constitution provides, among other things, that the Legislature shall provide for the equal rights of the parents in the possession of their children. The Legislature in carrying out the provision of that section of the Constitution enacted section 1, c. 46, Gen. St. Kan. 1868 (section 3217, Gen. St. Kan. 1889), which is as follows: "The father and mother are the natural guardians of the persons of their minor children. If either dies or is incapable of acting, the natural guardianship devolves upon the other." While we have no such provisions in our Constitution or statutes, still we think under a fair construction of all of our statutes in relation to parent and child and guardianship of minors, the mother has equal rights to the custody of the child with the father. They are, in fact, full partners in that regard. In case they do not live together and cannot agree who shall have the custody of the minor child or children, a court of competent jurisdiction has a right to determine that question upon a proper

showing. Section 2698, Rev. Codes. The father has no absolute right to deprive the mother of the care and custody of an infant simply because he is the father.

At the time the mother left Cœur d'Alene City with the child for La Crosse, and from thence went to the state of Washington, under the law, she had a right to the custody of the child equally with the husband, and as she had equal right with the father to the actual care and custody of the child, it is clear that she could not have been punished under the provisions of said section 6800 for taking the child, especially when the father was absent from the state and the child was in her possession and under her care. If it be true that the defendant assisted her to leave her husband and in doing so assisted her in taking the child, he cannot be convicted under the provisions of said section 6800, because he only assisted the mother of the child, who had the same right to the care and control of it that the father had. The evidence fails to show that the defendant "maliciously, forcibly, or fraudulently" took or enticed said child away, with intent to detain and conceal it from its father. It is true, after the mother died he took charge of the child and to a certain extent cared for it, but until her death the mother had charge of the child, and if there was any crime committed in taking the child as he did after her death, the crime was committed in the state of Washington and not in the state of Idaho.

The record shows that the conduct of the defendant was most reprehensible, at least so far as the mother was concerned, but such reprehensible conduct did not make him guilty of child stealing, since the mother voluntarily took the child to the state of Washington.

Under the views above expressed, it will not be necessary for us to pass upon any of the other errors assigned. The judgment must be reversed, and the cause remanded, with instruction to dismiss the case and discharge the defendant from custody.

STEWART, C. J., and AILSHIE, J., concur.

(19 Idaho, 136)

BACON v. FEDERAL MINING & SMELTING CO.

(Supreme Court of Idaho. Dec. 31, 1910.)

(Syllabus by the Court.)

1. MINES AND MINERALS (§ 38*)—RIGHT TO INSPECTION.

Rev. Codes, § 4542 is merely a legislative declaration of what has been recognized as the general equity powers of the court, and is intended to enable any person who claims possession, title to, or interest in any real property or mining claim to make examination and inspection of the property, for the purpose of pro-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

tecting and preserving such possession, title, or interest in such property.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. § 92; Dec. Dig. § 38.*]

2. MINES AND MINERALS (§ 38*)—RIGHT TO INSPECTION—APPLICATION.

Under the provision of this section of the statute, it is necessary for the plaintiff to allege and show a bona fide claim to possession, title to, or interest in the property sought to be examined and inspected, in order to give the court jurisdiction and power to make the order.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. § 92; Dec. Dig. § 38.*]

3. MINES AND MINERALS (§ 38*)—RIGHT TO INSPECTION.

A complaint alleging that the plaintiff is a judgment creditor of the defendant, and has caused an execution to issue upon such judgment, and to be levied upon an interest of the defendant in a mining claim, does not show a state of facts sufficient to entitle the plaintiff to an order permitting plaintiff to examine and inspect such property prior to the execution sale.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. § 92; Dec. Dig. § 38.*]

4. MINES AND MINERALS (§ 38*)—RIGHT TO INSPECTION.

A complaint alleging that the plaintiff is a judgment creditor, and has caused an execution to issue against the judgment debtor, and to be levied upon property of the judgment debtor, does not allege facts showing any necessity for the granting of an order permitting the plaintiff to examine and inspect the property levied upon, prior to the execution sale.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. § 92; Dec. Dig. § 38.*]

Sullivan, C. J., dissenting.

Appeal from District Court, Shoshone County; W. W. Woods, Judge.

Action by M. W. Bacon against the Federal Mining & Smelting Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Featherstone & Fox and Cullen & Dudley, for appellant. Gray & Knight, for respondent.

STEWART, J. This action is brought for the purpose of securing an order of the district court of Shoshone county permitting the plaintiff, appellant here, to inspect, examine, and survey the Skookum Lode mining claim. A general demurrer was filed to the complaint, and sustained by the trial court, and, the plaintiff declining to amend, judgment was rendered in favor of the defendant. From this judgment this appeal is taken.

It is alleged in the complaint that Kennedy J. Hanley is the owner of a one-eighth interest in the Skookum Lode mining claim, and that the Federal Mining & Smelting Company is the owner of the remaining seven-eighths interest; that on the 8th day of June, 1909, the plaintiff obtained a judgment against the said Hanley for the sum of \$51,856.51, and thereafter caused execution to issue upon said judgment, and that levy was thereafter made upon the said interest

of said Hanley in said claim, and notices of sale given; that in order to protect the rights of the plaintiff in and to said property it will be necessary for the plaintiff to become a bidder at said sale; that the Federal Mining Company has lately and during the year 1909 uncovered a large and valuable body of ore in said Skookum mining claim, the location and situation of which is unknown to the plaintiff, and that it is necessary for the plaintiff to make an examination and inspection of said ore body, in order to determine the amount which he can properly bid at said execution sale. It is further alleged that the plaintiff will probably be the only bidder at said sale, and that it will be necessary for him to buy the said interest of Hanley, and apply the same on said judgment, and that he has an interest in and to said mining claim; that he has made a demand in writing upon defendant Federal Mining Company, setting forth his said interest in said mining claim, and the necessity for an inspection and survey of same, and demanding permission to make such inspection and survey, and that the defendant has refused to permit said examination and inspection.

These are the material allegations of the complaint. It is contended on the part of the respondent that the complaint is insufficient for the reason that it fails to show a sufficient interest in the plaintiff to authorize or empower the court to make an order requiring the defendant to permit inspection and survey. The appellant, however, contends that the allegation that the plaintiff is a judgment creditor of Hanley, and that it will be necessary for him to bid at execution sale in order to protect his judgment, is a sufficient allegation of interest to authorize and empower the court to make an order permitting inspection and survey. The contention of appellant is based upon the general equity powers of the court, and also upon the provisions of section 4542 of the Revised Codes. This section reads as follows: "Any person having a bona fide claim to the possession, title of, or interest in, any real property or mining claim, including any ledges thereof, which is, or which he has a good reason to believe is, in the possession of another, either by surface or under-ground holdings or workings, and it is necessary for the ascertainment, enforcement or protection of such rights or interests, that an examination or survey of such property be had, and the person so in the possession thereof, falls or refuses for three days after demand on him made in writing, to permit such examination or survey to be made, the party desiring the same may apply to the court or the judge thereof, whether he have an action concerning such property pending in such court or not, for an order for such examination and survey."

This section of the statute is merely a legislative declaration of what has been recognized as the general equity powers of the court, and is intended to enable a person who claims possession, title to, or interest in any real property or mining claim, to make examination and inspection of the property, for the purpose of protecting and preserving such possession, title, or interest in such property. *St. Louis Mining & Milling Co. v. Montana Co.*, 9 Mont. 288, 23 Pac. 510; *Id.*, 152 U. S. 160, 14 Sup. Ct. 506, 38 L. Ed. 398; 2 *Lindley on Mines*, § 873; *Costigan on Mining Law*, § 148; *Barringer & Adams on the Law of Mines and Mining*, p. 730.

Our attention has not been called to any case, and we have been unable to find any, in which a court has held that either in the exercise of the court's equitable jurisdiction, or by virtue of the powers conferred under similar statutes, relief should be granted to an applicant in the absence of a showing that the applicant had a bona fide claim to the possession, or title to, or interest in, the property sought to be protected. On the contrary, the authorities all hold that the claim to possession, or title to, or interest in real property or a mining claim must be an actual right—a real interest. *State ex rel. Geyman v. District Court*, 26 Mont. 433, 68 Pac. 797; *Montana Co. v. St. Louis Mining & Milling Co.*, 152 U. S. 160, 14 Sup. Ct. 506, 38 L. Ed. 398; *People v. De France*, 29 Colo. 309, 68 Pac. 267.

The allegation that the plaintiff is a judgment creditor, and has caused execution to issue upon said judgment, and to be levied upon said property, does not show that the plaintiff is entitled to the possession of said property, or has any title to or interest in the same. By the statute of this state the judgment obtained by the plaintiff became a lien on all real property of the judgment debtor, and the issuance of an execution upon said judgment, and the levying of such execution upon any specific property, or any particular interest in property, simply gave to the plaintiff a right to have such property, or such particular interest in property, sold to satisfy such judgment. Property sold under execution is required to be sold to the highest bidder, and if the plaintiff is given permission, by an order of court, to enter upon said premises and inspect the same, there would thereby be granted to plaintiff an advantage which would not be given to any other bidder at such sale. In other words, the plaintiff by the information thus obtained might be able to prevent any competitive bidding, and make it possible for the plaintiff to secure the property at much less than it would otherwise be sold for, had all bidders been placed upon an equality.

Referring again to the statute, we find that it is also provided therein that the order for inspection and examination may be made when it is necessary for the as-

certainment and enforcement or protection of the right or interest of the applicant. In other words, the complaint must not only allege a state of facts which shows that the plaintiff has a bona fide claim to the possession, title to, or interest in the property, but the plaintiff must also allege a state of facts showing a necessity for the inspection and examination of the property.

In the complaint under consideration, there are no facts alleged which show any necessity for the inspection and examination in order to enforce or protect any rights of the plaintiff. There is no allegation of injury or threatened injury to the property or depreciation of its value. The mere fact that the plaintiff will probably be the only bidder at the execution sale, and in order to exercise proper judgment as to the amount he would bid, it is necessary that he inspect and examine said property, is not an allegation of a state of facts showing a necessity for such examination in order to protect any right or interest he may have in or to said property. So far as it appears from the complaint, the judgment debtor may have sufficient other property upon which the judgment is a lien, and which may be levied upon to satisfy the same, even though the property previously levied upon does not invite any bidders whatever, and the plaintiff may be able to enforce his claim against the judgment debtor by the sale of such other property, and be fully protected in his claim. We think the complaint fails to state a cause of action, and that the trial court did not err in sustaining the demurrer.

There is another matter that it seems proper to refer to, inasmuch as there is printed in the record an affidavit made by counsel for plaintiff alleging certain facts, purporting to show a necessity for granting the prayer of the complaint, and such affidavit is referred to by counsel for appellant in his brief. This affidavit, however, has no place in the record, and could not have been considered by the trial court in determining the sufficiency of the complaint. The sufficiency of the complaint is to be determined upon the demurrer, and the affidavit in support of the complaint was no part of the same, and could not have been considered in determining its sufficiency.

The judgment is affirmed. Costs are awarded to respondent.

AILSHIE, J., concurs.

SULLIVAN, C. J. (dissenting). I am unable to concur in the conclusion reached by my Associates. The appellant is the judgment creditor of an owner of one-eighth interest in the Skookum mining claim, the respondent, the Federal Mining Company, owns the other seven-eighths interest. To enforce said judgment, which is for more than \$50,000, execution has been levied upon the one-eighth interest in said mining claim belong-

ing to the judgment debtor. That one-eighth interest is in the custody of the law by reason of levying such execution. So far as the record shows, the judgment debtor raises no objection to the appellant, who is judgment creditor, inspecting said mine in order that he may intelligently bid for said property at the execution sale. In the opinion of my Associates it is held that section 4542, Rev. Codes, contains the only authority and power of a court of equity to grant an inspection of real property; that the provisions of that section are only a declaration of what has been recognized as the general equity powers of a court, and that a person to be entitled to an inspection must have a "bona fide claim to the possession, title of or interest in any real property or mining claim including any ledges thereof," etc., and since the appellant is only an execution creditor he has no "bona fide claim to * * * or interest in" said mining claim, therefore a court of equity has no power to order an inspection. In support of the rule there laid down, my Associates cite the following authorities: *St. Louis Mining & Milling Co. v. Montana Co.*, 9 Mont. 288, 23 Pac. 510; *Id.*, 152 U. S. 160, 14 Sup. Ct. 506, 38 L. Ed. 398; 2 Lindley on Mines, § 873; Costigan on Mining Law, § 148; Barringer & Adams on the Law of Mines and Mining, p. 739—all of which refer to mining claims, and none of which involve the question presented in the case at bar.

In *St. Louis Mining & Milling Co. v. Montana Co.*, above cited, it appears that the *St. Louis Company* and the *Montana Company* owned adjoining claims; that the *Montana Company* had constructed shafts, tunnels, stopes, and drifts on its own property, and it was the contention of the *St. Louis Company* that from those shafts, tunnels and drifts the *Montana Company* had crossed the line of their own property and gone into the mining claims of the *St. Louis Company* and had extracted large quantities of ore therefrom, and it was alleged that it was necessary for the *St. Louis Company* to make an inspection and survey of the underground workings alleged to have been made on the *St. Louis Company's* claims, and it was necessary in order to make that inspection and survey for the *St. Louis Company* to enter upon the mining claims, in which they claimed no interest, and go down the shafts into the tunnels and drifts that the *Montana Company* had constructed on its own ground in order to get into the workings alleged to have been made on the *St. Louis Company's* grounds. The *St. Louis Company* claimed no bona fide right to the possession of or title to or interest in the mining claim on which such shafts and tunnels were made, and the court granted the right to enter into said shafts and tunnels and to inspect and make surveys for the purpose of ascertaining the extent of the work, if any, that the *Montana Company* had done upon the *St.*

Louis Company's ground. That action of the court was sustained both by the Supreme Court of Montana and the Supreme Court of the United States. That proceeding was brought under section 376 of the Code of Civil Procedure of Montana, which section is in part as follows: "Whenever any person shall have any right to or interest in any lead, lode, or mining claim which is in the possession of another person, and it shall be necessary for the ascertainment, enforcement, or protection of such right or interest that an inspection, examination, or survey of such mine, lode, or mining claim should be had or made; or, whenever any inspection, examination, or survey of such lode or mining claim shall be necessary to protect, ascertain, or enforce the right or interest of any person in another mine, lead, lode, or mining claim," etc.

That section is not identical with said section 4542 of our Revised Codes, and that decision is not in point in the case at bar. That section of the Montana statute was attacked as unconstitutional, as being unjust and oppressive, as authorizing a trespass upon private property. The petitioner claimed no right to the possession of or title to or interest in the mining claims on which said shaft was constructed. Both the Supreme Court of Montana and the Supreme Court of the United States held that statute constitutional. The decision by the Supreme Court of Montana is well considered, and many authorities are cited, both English and American. In the course of the decision the court said: "It will be seen that the order of the court below followed an unbroken line of precedents. The rule of equity which has been enforced by the courts of England and America is not of statutory growth. In this state the legislative department has indorsed the chancery practice involved in this hearing with the form of law. We are not called on to decide that the district courts of the state may make the order complained of, in the absence of any requirement of the Code of Civil Procedure. We can vindicate with absolute certainty the existence of the right to make an order for the inspection and survey of a lode mining claim, where the appropriate steps have been taken by interested parties. The authorities treat the proceedings as the proper mode of securing 'the best evidence of which the case in its nature is susceptible.' There is not an assertion or suggestion by any jurist that rights of property are impaired or transgressed by the making of the orders for an inspection and survey. * * * We have stated that the power of the courts of England over this matter was exercised as a branch of their chancery jurisdiction. In 1854 the common-law procedure act was created, and the fifty-eighth section provides that 'either party shall be at liberty to apply to the court or a judge for a rule or order for the inspection by the jury or by himself,

or by his witnesses, of any real or personal property, the inspection of which may be material to the proper determination of the question in dispute; and it shall be lawful for the court or a judge, if they or he think fit, to make such rule or order."

The application in that case was made before any suit was brought to determine the rights of the parties. It is stated in the opinion as follows: "The bare fact that the St. Louis Mining & Milling Company of Montana petitions for an inspection and survey of the mining property referred to before its complaint has been filed is immaterial."

In *Winslow v. Gifford*, 6 Cush. (Mass.) 327, it is held that an act of the Legislature is not unconstitutional which authorized certain parties to go upon private lands and make surveys and establish boundaries. It is there said: "In effecting such an object, there may be, and often is, a brief, and, as it were, momentary, interference with the absolute right of the owner of real estate. This exercise of power, in its various forms, is one of everyday occurrence; indeed, so common as to be acquiesced in without remonstrance, or even a question as to the right so to do." *St. L. Mining & Milling Co. v. Montana M. Co.*

In that case the only question presented to the United States Supreme Court was whether the right to inspect was in violation of any of the provisions of the Constitution, and that court held that it was not. 152 U. S. 160, 14 Sup. Ct. 506, 38 L. Ed. 398. Justice Brewer, in delivering the opinion in that case, said: "Inspection orders like this have been frequently made, sometimes under the authority of special statutes and sometimes by virtue only of the general powers of a court of equity;" and cites numerous cases in support of that proposition, and quotes from *Thornburgh v. Savage M. Co.*, Fed. Cas. No. 13,986, as follows: "The very great powers with which a court of chancery is clothed were given it to enable it to carry out the administration of nicer and more perfect justice than is attainable in a court of law." The court further said: "It was conceded that such entry and occupancy created a slight trespass upon the absolute right of the owner to an undisturbed and exclusive use of his real estate, but it was held that if the occupancy was reasonably necessary for some public purpose, was temporary, and with no unnecessary damage, it carried no right to compensation. All these cases involve some invasion of the rights of the owner to the possession and use of his property, yet the necessities of justice seem to compel it. * * * But by an inspection neither the title nor the general use is taken, and all that can be said is that there is a temporary and limited interruption of the exclusive use. And it is in that light that the question of the validity of this statute is to be determined."

And again: "It is objected that the statute

does not define the quality of 'right to or interest in' the mining claim which entitles to an inspection. But does the amount of a party's interest determine the question of the constitutionality of a statute passed to enable an accurate determination thereof? Suppose it be true that a petitioner has but a limited interest in a mine, has not that petitioner a legal right to the protection of that interest equal to that of the other owners? Has he not the same constitutional right to any means of ascertaining and enforcing that interest that belongs to any other party interested in the mine? Indeed, it may be said to be generally true that the weaker a party and the smaller his interest the greater the need of the strong hand of the court to ascertain and protect his rights. It is true, the quality of the right or interest is not defined, but it must, in order to come within the statute, be a 'right to or interest in' the mining claim. The language is general and comprehensive, because the intent is to include within its purview every actual right, every real interest."

The appellant has a real interest in said one-eighth interest in said mining claim, in that as his execution is levied in said interest he has the actual right to have his judgment satisfied out of said interest, and it is not for the respondent, who is the judgment creditor's cotenant, to say that appellant shall not have the fruit of his judgment. So, under the provisions of said section 4542, any person having a "bona fide" interest, no difference how small, in any real property, has the right, upon a proper showing, to an inspection thereof, and I maintain that a judgment creditor who has levied his execution upon real property has a substantial interest in such property, and, when it is necessary to protect his interests at the execution sale, he has a right upon proper showing to an order for the inspection of such property. It is a remarkable proposition to me that a court of equity has not the general power without any statute authorizing it to order an inspection of property that has to be sold at execution, where the owner is not objecting and the cotenant who has no right to object to the sale of the property on execution, may defeat such inspection by refusing to grant it. If this be true, it might well be said that the arm of equity is too weak to secure to a litigant justice.

In *U. S. v. Nourse*, 9 Pet. 8, 9 L. Ed. 31, the Supreme Court of the United States defined the word "execution" as "that which gives the successful party the fruit of his judgment." It is also defined as the "end of the law; the act of carrying into effect the judgment or decree." 17 Cyc. 921. The sole aim and object of an execution is to secure the judgment creditor the fruit of the litigation. According to my Associates' theory, the court had jurisdiction to render the judgment but has no jurisdiction to see that the execution sale is so conducted as to give the

creditor the fruit of his litigation. The question arises, would the sale under execution without the inspection asked by appellant secure him the fruit of his suit? The facts are the plaintiff has a judgment exceeding \$50,000 against Hanley, who owns an undivided one-eighth interest in the Skookum mining claim. Appellant filed his affidavit stating that he was advised and believed that he will be the only bidder at the sale. The value of the Skookum claim is problematical. The one-eighth interest of Hanley therein may be worth \$1,000,000 or it may not be worth 30 cents. The appellant could not bid intelligently at the sale without an inspection of the mine. How could he therefore obtain the fruit of his suit at the end of said execution? As before stated, at least Hanley's interest in said property is in custodia legis. Under the provisions of section 4477, Rev. Codes, real property or interest in real property "may be attached on execution in like manner as upon writs of attachment" and after the execution is levied, the real property upon which it is levied is in the custody of the law. While inadequacy of price alone is not sufficient grounds for setting aside an execution sale, if the price is grossly inadequate the presumption of fraud arises, and the sale will be set aside. 2 Freeman on Executions (2d Ed.) § 309. Where a purchaser has, by mistake, given an unreasonable price for an estate, the court will, in a proper case, wholly rescind the contract. *Id.* § 304. Nothing but an inspection can determine the value of the property so that the judgment creditor can make an intelligent bid.

It is clear to me that a fair and just sale can be had of said interest under execution only after an examination of the claim. The law contemplates a fair and just sale under execution, and no such sale can be had without knowing something about the property to be sold and its market value. It is not the intention of the law under execution sales to require the property to be sold as was the proverbial pig which was put in a poke so that no one could examine it before the sale. The trial court that rendered said judgment still has the inherent power upon a proper showing to compel a fair and just sale of property under execution issued to enforce said judgment. In *Lindley on Mines*, § 873, the author after referring to numerous statutes authorizing an inspection of mines in certain cases, states: "Independent of any state legislation as an aid to discovery in pending actions, the power to order an inspection of real property has long existed in the courts of equity," and quotes with approval from *Thornburgh v. Savage M. Co.*, Fed. Cas. No. 13,986. Is not the importance of an inspection in the present case as great as the inspection of a mine in order to ascertain whether certain rights are being violated?

While I have no doubt that a court of equity has ample power under the facts of this case to order an inspection, I believe with a fair construction of section 4542, Rev. Codes, the court has ample authority under its provisions to make such an order as prayed for by the appellant, and if its provisions are not broad enough, a court of equity has ample power on proper showing to order an inspection of any real property about to be sold under execution. It is held by numerous authorities that such power is not derived from the statute alone. In *Platt v. Bright*, 31 N. J. Eq. 87, referring to said right, the court stated: "It arises independent of it (the statute) from the necessities of the administration of justice and is inherent in this court."

It must not be overlooked in this case that this proceeding is against a cotenant who has no interest in the judgment against Hanley and it should not be permitted to defeat the appellant from securing the results of his judgment against Hanley, thus preventing Hanley from realizing all that his one-eighth interest in said mining claim is fairly worth, to be applied on his debt due to appellant. The action of the court ought to be reversed and an order to inspect said mine granted.

(42 Mont. 315)

DEER LODGE COUNTY v. UNITED STATES FIDELITY & GUARANTY CO. OF BALTIMORE, MD.

(Supreme Court of Montana. Dec. 6, 1910.)

1. PRINCIPAL AND SURETY (§ 20*)—SIGNATURES—UNDERTAKINGS.

The principal to a statutory bond must be a party thereto, while the person in whose behalf a statutory undertaking is executed need not be party to it.

[Ed. Note.—For other cases, see *Principal and Surety*, Dec. Dig. § 20.*]

2. OFFICERS (§ 126*)—BONDS—NECESSITY FOR OFFICER'S SIGNATURE.

Rev. Codes, § 384, provides that official bonds must be executed by the principal and two or more sureties, or by the principal and one or more surety companies. Section 388 provides that such bonds must be joint and several. Section 389 provides that a statutory bond executed by an officer is in force as to the principal and sureties therein for all breaches of the conditions thereof committed during the time such officer continues to hold the office. *Held* that, where such a bond is joint and several so that had the principal signed it, action might have been brought thereon against the surety without joining the principal under Rev. Codes, § 6492, and the failure of the principal to sign such instrument did not change the liability of the surety, and he is not released by failure of the principal to sign the bond.

[Ed. Note.—For other cases, see *Officers*, Dec. Dig. § 126.*]

3. STATUTES (§ 226*)—CONSTRUCTION—STATUTES ADOPTED FROM OTHER STATES—PRESUMPTION.

Where a statute is adopted from another state, it will be presumed that the Legislature

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

intended that the construction theretofore placed upon it by the highest court of the state from which it was adopted should be the rule for its construction, unless it appears that the decision of the foreign court was based on unsound reasoning or the application of the doctrine would lead to a denial of a substantial right.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 256, 307; Dec. Dig. § 226.*]

4. OFFICERS (§ 126*) — BONDS — EFFECT OF FAILURE TO APPROVE.

Rev. Codes, § 393, providing that any defect in the approval of an official bond will not render it void so as to discharge such officer and sureties, was adopted from Pol. Code Cal. § 963. Held that, in construing such provision, the court will adopt the construction of the California Supreme Court, that the provision for approval of the bond is to give greater security to the public, and that any defect in such approval cannot avail the surety so that the failure of the proper officer to approve such a bond will not work a release of the surety.

[Ed. Note.—For other cases, see Officers, Dec. Dig. § 126.*]

Appeal from District Court, Deer Lodge County; Geo. B. Winston, Judge.

Action by Deer Lodge County against the United States Fidelity & Guaranty Company of Baltimore, Md. Judgment for plaintiff, and defendant appeals. Affirmed.

M. S. Gunn and E. M. Hall, for appellant. Albert J. Galen, Atty. Gen., and J. A. Poore, Asst. Atty. Gen., for respondent.

HOLLOWAY, J. At the general election held in 1904 E. J. Nadeau was elected county treasurer of Deer Lodge county, and at the election held in November, 1906, he was re-elected to the same office. In each instance he qualified by taking and filing the official oath and giving bond. The bond in each instance was furnished by the defendant company as surety. Each bond in terms followed the requirements of the statute. However, the bond given in 1904 was not signed by Nadeau, but was approved by the district judge, filed and recorded as required by law; while the bond given in 1906, though properly executed, was not approved by the district judge but was duly filed and recorded. Nadeau appointed George M. Johnston his deputy for each term. This action was brought by Deer Lodge county against Nadeau and the defendant surety company to recover certain sums of money alleged to have been collected by Johnston and converted to his own use. The first cause of action is upon the bond given in 1904, and is for the recovery of \$6,325. The second cause of action is upon the bond given in 1906, and is for the recovery of \$3,300. A trial of the cause resulted in a judgment in favor of the plaintiff for \$2,200 on the first cause of action, and \$3,300 on the second cause of action. From that judgment the defendant surety company appealed. The contention is made by appellant that the complaint does not state facts sufficient to constitute either cause of action.

1. The complaint sets forth the facts fully, including the fact that the bond given in 1904 was not signed by Nadeau, the principal. It alleges, in substance, that the bond was approved, filed, recorded, and acted upon by all the parties interested as the official bond of Nadeau, that Nadeau entered upon the discharge of his duties as such treasurer, and thereafter paid to the defendant company the premium for furnishing said bond. It is now insisted by appellant that, since it appears affirmatively from the first cause of action that the bond was not signed by Nadeau, the defendant surety company cannot be held liable in this action for the defalcation of his deputy. The provisions of the Revised Codes involved by both parties to this appeal are section 384, which reads: "All official bonds must be signed and executed by the principal and two or more sureties, or by the principal and one or more surety companies." Section 388, as follows: "All official bonds must be in form joint and several. * * * And section 389: "Every official bond executed by any officer pursuant to law is in force and obligatory upon the principal and sureties therein for any and all breaches of the conditions thereof committed during the time such officer continues to discharge any of the duties of or hold the office, and whether such breaches are committed or suffered by the principal officer, his deputy or clerk." As we understand counsel for appellant, their contention is that the statute makes the signature of the principal necessary to the validity of an official bond. They cite *Ney v. Orr*, 2 Mont. 559, and *Pierse v. Miles*, 5 Mont. 549, 6 Pac. 347. In *Ney v. Orr* there was involved the validity of an appeal bond not signed by Kay, appellant. The report does not set forth the condition of the bond, but the court in speaking of it said: "They [the sureties] promised to pay whatever should be recovered upon the bond against Kay if he did not pay." We assume that this is a correct statement of the principal term of the bond, and upon this assumption the correctness of the court's conclusion is beyond question; for, if the sureties were bound to pay only in the event that recovery was had against Kay on the bond, it follows as a matter of course that, if Kay was not a party to the bond, recovery against him on the bond could not be had, and the contingent liability of the sureties never could attach. The correctness of the court's conclusion was so apparent upon the face of the opinion that a citation of authorities was needless; but the court, in a vain effort to justify a self-evident conclusion, cites *Sacramento v. Dunlap*, 14 Cal. 421, but fails to distinguish between a joint, and a joint and several, bond. Other cases are cited, but they are not in point to the question which was before the court. It is true that the bond in *Ney v. Orr*

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

was in terms joint and several, but the liability of the sureties was conditioned upon a recovery by Ney against Kay upon a bond to which Kay was not a party—a contingency which never could arise. Much that is said in the opinion is obiter dictum, and while we may concur in the result reached, upon the assumption stated above, we do not deem the decision authority in this instance.

Pierse v. Miles does not involve any question analogous to the one before us, though there are expressions found in the opinion which might indicate the contrary. The undertaking considered in that case was given to secure an attachment, and was not conditioned as required by law. However, this court did not treat it as void, but only defective, for it reversed the cause and remanded it in order that the plaintiff might have an opportunity to give a new undertaking. In many cases this court has referred to the distinction between a statutory undertaking and a statutory bond. Typical of these cases is *King v. Elling*, 24 Mont. 470, 62 Pac. 783, in which it is said: "There is, it is true, a distinction in some respects between a statutory bond and a statutory undertaking, as was decided in *Pierse v. Miles*, 5 Mont. 549, 6 Pac. 347, and in *Ney v. Orr*, 2 Mont. 559, consisting chiefly in the requirement that the principal must be a party to the former, while the person in whose behalf the latter is executed need not be a party to it." As a general statement of the distinguishing characteristic between the two classes of instruments, the foregoing is clearly correct.

Upon the question of the liability of sureties upon an official bond not signed by the principal, the authorities are in conflict. The leading cases which it is said hold the sureties are not bound are: *Hall v. Parker*, 37 Mich. 590, 28 Am. Rep. 540; *Bunn v. Jetmore*, 70 Mo. 228, 35 Am. Rep. 425; *Mayo v. Renfro*, 66 Ga. 408; *Board of Education v. Sweeney*, 1 S. D. 642, 48 N. W. 302, 36 Am. St. Rep. 767; *Martin v. Hornsby*, 55 Minn. 187, 56 N. W. 751, 43 Am. St. Rep. 487; and *Weir v. Mead*, 101 Cal. 125, 35 Pac. 567, 40 Am. St. Rep. 46. *Hall v. Parker* was decided upon the evidence, which showed that the sureties signed the bond upon the express condition that it should be signed by the principal before it was delivered. The court did not go further than to say that the sureties could properly interpose as a defense the breach of the condition upon which they became sureties. To the same effect is *Johnston v. Kimball Township*, 39 Mich. 187, 33 Am. Rep. 372. In *Bunn v. Jetmore*, above, the Supreme Court of Missouri did decide the question, but gives no further reason for its conclusion than the following: "The received doctrine is that securities who execute a writing as such only can show in discharge of their liability that their principal never was bound, and we can perceive no reason why that principle cannot be invoked

in this case." The decision in *Mayor v. Renfro* is that, since the bond in question was not drawn, executed, or approved as required by statute, there was not any execution or delivery of it, and consequently it never became effective even against the sureties. In *Board of Education v. Sweeney* the question was squarely before the Supreme Court of South Dakota, and the court said: "After a careful review of the authorities, and the reasoning upon which they are based, we think the better rule is that an official bond in which the officer is named as principal, but which is not executed by him, is prima facie invalid, and not binding upon the sureties." In *Martin v. Hornsby* the court said: "Prima facie the instrument now being considered was incomplete and invalid, and was not binding upon those who signed it as sureties." Reference is made to a prior decision of the same court to *Curtis v. Moss*, 2 Rob. (La.) 367, and to *Board v. Sweeney* above. In *Weir v. Mead* the bond sued upon was joint, and was held invalid upon the authority of *Sacramento v. Dunlap*, above, and *People v. Hartley*, 21 Cal. 585, 82 Am. Dec. 758, but the court makes clear the distinction between a bond joint in terms, and one joint and several, holding that a bond of the first class is invalid without the signature of the principal, whereas a bond of the second class under like circumstances is valid and binding upon the sureties. *Kurtz v. Forquer*, 94 Cal. 91, 29 Pac. 413. And the reason for this distinction is so apparent that further comment seems unnecessary; and this is true even though the Minnesota court in *Martin v. Hornsby* was unable to perceive the reason. See *Murfree on Official Bonds*, § 9. In *St. Louis Brewing Ass'n v. Hayes*, 97 Fed. 859, 38 C. C. A. 449, the court states the ground upon which the foregoing decisions are based, as follows: "The reason underlying the discharge of sureties from liability in cases like this is the increased liability of the surety, caused by the failure of the principal to sign the obligation executed by the surety. It would be manifestly unjust to hold the surety bound, when the principal fails to sign the instrument, if by its terms it was to be signed by him and his signature fixed a liability on him not otherwise placed on him by the transaction, for in such case his signature would lessen the liability of the surety. The same principle would govern where the signature of the principal would give the sureties some right or power tending to protect them which was not conferred on them otherwise by the transaction or by law." But the court holds that such reason has no application to a case unless the surety is prejudicially affected by the failure of the principal to sign.

The reason which prompted the Legislature to require that a public officer shall sign his official bond is not apparent. The provisions of the statute with reference to such bonds generally are for the protection of the

public interests (29 Cyc. 1452), and, unless it appears that the interests of the sureties are prejudiced by the failure of the principal to sign the bond, the plainest dictates of reason would suggest at once that the public should not suffer by such technical oversight. As said before, the bond in question is joint and several, and, had Nadeau signed it, an action might have been maintained against this surety without joining the principal. Rev. Codes, § 6492. The failure of the principal, then, to sign the bond, did not in the least increase the burden upon the surety or rob it of any right or defense it otherwise might have had. Nadeau was bound by law to do everything required in the bond, and his signature to that instrument would not have increased or otherwise changed his liability. Under such circumstances, we think the decided weight of authority and the better reasoning favor the conclusion that the surety is not released by the failure of the principal to sign the bond. The decision of this court in *Cockrill v. Davie*, 14 Mont. 131, 35 Pac. 958, while not directly in point upon the facts, very forcefully announces the view of the law just stated. This court said: "Appellant insists that the bond in question is wholly void because Davie, named therein as principal, did not sign it along with the sureties; but, after much consideration of this subject and the authorities, we cannot sustain that view. The same obligation was fixed upon Davie by another contract, and Renner and Cornelius [the sureties] undertook and promised, in writing, to answer for the default of Davie in respect to his engagements by virtue of that contract, which the sureties described in their bond. This bond was a collateral ingraftment upon the building contract, whereby these sureties took upon themselves the burden of answering for any default which Davie might make in respect to his obligation thereunder. As to such obligations, where the liability of the principal is fixed by contract or by operation of law, the sureties who guaranty the fulfillment of that obligation cannot avoid their obligation because the principal did not sign the bond with them. There is no reason or principle of law, or substantial right involved, which should lead to such a ruling; and the same, we think, without doubt, would be against the contemplation, understanding, and purpose of the contracting parties, because the sureties in such a case neither gain nor lose any substantial right by reason of the principal signing, or omitting to sign, such undertaking, which he procured on his behalf." *St. Louis Brewing Ass'n v. Hayes*, above. Citing the *Cockrill* Case, the Supreme Court of Arizona, in *Pima County v. Snyder*, 5 Ariz. 45, 44 Pac. 297, in a case in all respects similar in its facts to the one before us and under statutory provisions the same as our own, held that the surety is not released by reason of the failure of the principal to sign the bond. To the same effect

is *Kurtz v. Forquer*, above; *State v. McDonald*, 4 Idaho, 468, 40 Pac. 312, 95 Am. St. Rep. 137; *McKissack v. McClendon*, 133 Ala. 558, 32 South. 486.

In the following cases the statutes in question did not in express terms require the officer to sign his official bond, but the courts proceeded upon the theory that it was his duty to do so, and that such duty was clearly implied by law, but nevertheless held that the surety was bound in the absence of the principal's signature. *State v. Bowman*, 10 Ohio, 445; *Douglas County v. Bardon*, 79 Wis. 641, 48 N. W. 909; *Miller v. Tunis*, 10 Upper Canada C. P. 423. See, also, *Loew v. Stocker*, 68 Pa. 226; *Tillson v. State*, 29 Kan. 452; 1 *Brandt on Suretyship*, § 170. In *Trustees v. Sheik*, 119 Ill. 579, 8 N. E. 189, the Illinois court, after reviewing the conflicting decisions at length, concluded its determination of a case the facts of which are similar to the one before us, as follows: "We have given the authorities bearing on the question due consideration, and we are not inclined to adopt the view held by the courts that a bond signed by the sureties without the signature of the principal may not be binding upon those who execute it, as was held in the case cited from Missouri and other like cases. If the sureties saw proper to bind themselves without the principal executing the bond and becoming bound, we think they might do so, and their undertaking is one that may be enforced in the courts by an appropriate action. The fact that the principal obligor in this case failed to sign the bond was a mere technicality, which ought not to affect the rights of any of the parties concerned. In what way are the sureties injured by the omission of the principal obligor to sign the bond? If they are compelled to pay the trustees any sum of money on account of the default of the treasurer, they can recover the amount back from him whether he signed the bond or not. So far, then, as they are concerned, they are in as good a position as if Reitz, the treasurer, had properly executed the bond. If Reitz is insolvent, a judgment in favor of the trustees against him could be of no benefit to the sureties. If, on the other hand, he is solvent, the sureties can collect from him whatever sum they may be required to pay in consequence of executing the bond." With that conclusion we agree.

2. Did the failure of the district judge to approve the second bond operate to discharge the surety? Some of the earlier cases would have answered this query in the affirmative. *Postmaster General v. Norvell*, 19 Fed. Cas. 1103; *Fletcher v. Leight*, 4 Bush (Ky.) 303. But it may be fairly said that the unanimous opinion of the courts of late has been to the contrary. In *Commission v. McCormick*, 4 Mont. 115, 5 Pac. 287, this court, without giving any reason for its conclusion and without reference to the authorities upon the subject, held that the date of the approval

of an official bond fixes the date at which the liability of the sureties begins. But, whatever may be said of that decision in view of the statute then in force, it does not have any application to the present case in view of our curative statute.

In 1850 the state of California adopted a statute referring to official bonds, as follows: "Whenever any such official bond shall not contain the substantial matter, or condition or conditions required by law, or there shall be any defects in the approval or filing thereof, such bond shall not be void so as to discharge such officer and his sureties, but they shall be equitably bound to the state or party interested, and the state or such party may, by action instituted as other suits on official bonds, in any court of competent jurisdiction, suggest the defect of such bond, or such approval or filing, and recover his proper and equitable demand or damages from such officer, and the person or persons who intended to become and were included as sureties in such bond." This statute was carried forward with slight changes which did not affect the substance, and is now section 963, Pol. Code Cal. 1897. In *People v. Edwards*, 9 Cal. 280, the court was considering an action against the sureties on an official bond, and said: "The defect in the approval of the bond, if any existed, could not avail the defendants. The object of requiring the approval is to insure greater security to the public, and it does not lie in the defendants to object that their bond was accepted without proper examination into its sufficiency by the officers of the law." After quoting the section of the statute above, it further observed: "It is evident from the language of this section that the defects which are cured upon their suggestion in the complaint are omissions which, but for the statute, would operate to discharge the obligors." Citing the same statute, the court, in *People v. Evans*, 29 Cal. 430, held that the sureties on an official bond were not released even though the bond was approved by the wrong officer, which, in effect, amounted to no approval at all. This was followed in *Mendocino County v. Morris*, 32 Cal. 145. In *People v. Huson*, 78 Cal. 154, 20 Pac. 369, the court, relying on the statute above and the three cases just mentioned, said: "The settled rule is that the failure of the proper officers to approve an official bond will not invalidate it nor release the sureties from their liability upon it." All of these California cases were decided prior to the adoption of our Code of 1895. In 1895 our Legislature passed section 1066, Pol. Code 1895 (Rev. Codes, § 393), borrowing the language in terms from section 963 of the California Political Code above, and, upon the familiar principle repeatedly announced by this court, we will assume that in so adopting the section our Legislature intended that the construction theretofore giv-

en it by the highest court of California, should be the rule for the guidance of the courts of this state in applying the statute (*McQueeney v. Toomey*, 36 Mont. 282, 92 Pac. 561, 122 Am. St. Rep. 358; *State Savings Bank v. Albertson*, 39 Mont. 414, 102 Pac. 692), unless it appears that the decision of the foreign court was based on unsound reasoning or the application of the decision would lead to a denial of a substantial right (*State v. Mott*, 29 Mont. 292, 74 Pac. 728). In the present instance we think the California court correctly expressed the legislative will in its interpretation of the statute, and that our Legislature intended that the statute should cover just such a case as the present one. Invoking here the rule announced by the California court above, it follows that the failure of the district judge to approve the bond did not work a release of the surety.

We think sufficient facts are stated in each cause of action to sustain the judgment.

The judgment is affirmed.

Affirmed.

BRANTLY, C. J., and SMITH, J., concur.

(42 Mont. 302)

JENKINS v. CARROLL

(Supreme Court of Montana. Dec. 6, 1910.)

1. APPEAL AND ERROR (§ 414*)—NOTICE OF APPEAL—"ADVERSE PARTY."

After a judgment against D. and property sold on execution, D. and her husband mortgaged the property to plaintiff, who brought suit to foreclose the mortgage and have equitable relief in aid thereof, making the persons claiming under the execution sale parties. D. defaulted in the action and judgment was taken against her, and subsequently judgment was rendered for plaintiff on the merits against the other defendants. After the commencement of the action, a defendant claiming under the execution sale conveyed the property to F., who was not made a party defendant to the action. Held, that there was a complete severance of the action as between D. and such defendant, and on appeal by defendant, F. and D. were not adverse parties, within the meaning of Rev. Codes, § 7100, which requires that a notice of appeal shall be served on the adverse party, as an "adverse party," within the meaning of that statute, is one who has an interest in opposing the object sought to be accomplished by the appeal.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 414.*]

For other definitions, see Words and Phrases, vol. 1, pp. 224-227; vol. 8, pp. 7567-7568.]

2. JUDGMENT (§§ 461, 518*)—COLLATERAL ATTACK—ADMISSIBILITY OF EVIDENCE.

In an action to foreclose a mortgage, and for equitable relief against a judgment against the mortgagor and parties claiming through an execution sale thereunder, the complaint alleged that the judgment was void for want of jurisdiction by the court, both of the subject-matter and the parties, and specified the particular defects which deprived the court of jurisdiction. Held, that the action was not a collateral attack on the judgment, and that all proceedings by which jurisdiction of the action

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

resulting in the judgment was sought to be conferred were properly admitted in evidence, as the burden of showing that the judgment was void, which was assumed by plaintiff, could not be sustained, except by exhibiting those proceedings to the court.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 892-895, 961, 962; Dec. Dig. §§ 461, 518.*]

3. JUSTICES OF THE PEACE (§ 154*)—APPEAL—JURISDICTION OF APPELLATE COURT.

Under Rev. Codes, § 7121, an appeal is taken from a justice's court by filing with the justice a notice of appeal and serving a copy upon the adverse party or his attorney, and under section 7124, if the adverse party excepts to the sufficiency of the sureties to the appeal bond within five days, the appellant must, upon notice, and within five days, have the sureties, or others in their stead, justify before the justice or the judge of the district court, and if he fails to do this, the appeal is regarded as if no undertaking had been given. Const. art. 8, § 23, provides that appeals from justice's court are subject to statutory regulation, and that the mode prescribed for taking them is exclusive. *Held*, that until the notice is filed and served as prescribed and the undertaking given and, if required, the sureties thereon, or others in their stead, have justified after notice and within five days, the district court does not acquire jurisdiction of the subject-matter or of the parties.

[Ed. Note.—For other cases, see Justices of the Peace, Dec. Dig. § 154.*]

4. JUSTICES OF THE PEACE (§ 59*)—JURISDICTION—PRESUMPTIONS—JUDGMENT.

Under Const. art. 8, § 20, a justice's court is a court of inferior and limited jurisdiction, having only such power as is expressly conferred by statute, and therefore no presumptions in favor of a judgment pronounced by it attach, until it affirmatively appears from the proceedings that it had jurisdiction over the subject-matter and the parties.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 216; Dec. Dig. § 59.*]

5. JUDGMENT (§ 461*)—PRESUMPTIONS—JUDGMENT OF COURT OF GENERAL JURISDICTION.

Upon a direct attack upon the judgment of a court of general jurisdiction, except by appeal, the presumption attaches that it had jurisdiction both of the parties and the subject-matter, and the want of jurisdiction must appear affirmatively from the record, and when the validity of a judgment of a district court rendered on appeal from a justice's court is attacked, the proceedings must show that jurisdiction was acquired in the manner prescribed by the statute.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 892-895; Dec. Dig. § 461.*]

6. JUSTICES OF THE PEACE (§ 141*)—APPEAL—JURISDICTION OF DISTRICT COURT.

Although, under Rev. Codes, § 7122, on appeal from a justice's court, the trial is *de novo*, and under section 7127, the district court proceeds with the trial as in other cases, jurisdiction is acquired by the district court by appeal; and hence its jurisdiction must affirmatively appear.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 467-476; Dec. Dig. § 141.*]

7. JUSTICES OF THE PEACE (§§ 141, 160*)—APPELLATE JURISDICTION OF DISTRICT COURT—WAIVER.

The notice of appeal from a justice's judgment serves the purpose of a summons, and service of it may be waived by a general appearance of the adverse party and submission to a trial and judgment; but there can be no

waiver as to jurisdiction of the subject-matter, which jurisdiction can only be conferred by proceeding in accordance with the statutory requirements.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 475, 591; Dec. Dig. §§ 141, 160.*]

8. JUSTICES OF THE PEACE (§ 160*)—APPELLATE JURISDICTION—WAIVER OF NOTICE OF APPEAL.

Where the owner of property takes part in the trial of an action in the district court on appeal from a justice's court, and submits to its judgment, she waived service of notice and could not thereafter complain of jurisdiction of the court as to her person.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 591; Dec. Dig. § 160.*]

Smith, J., dissenting in part.

Appeal from District Court, Silver Bow County; Jeremiah J. Lynch, Judge.

Action by Mary Jenkins against Carrie May Carroll. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

W. E. Carroll and Chas. O'Donnell, for appellant. Breen & Hogevoil, A. B. Melzner, and L. P. Donovan, for respondent.

BRANTLY, C. J. Action by the respondent for foreclosure of a mortgage and to obtain equitable relief in aid thereof. On May 28, 1900, the defendant Cella Davison and her husband, Allen Davison, executed and delivered to the respondent their promissory note for the sum of \$1,500, due one year after date and stipulating for the payment of interest monthly at the rate of 1 per cent. per month. To secure the payment of the note and interest and also such taxes, insurance, etc., as the respondent might be compelled to pay in order to preserve and protect the property, the Davisons executed and delivered to the respondent a mortgage upon lot 6 in block 6 of the Leggat & Foster addition to the city of Butte. The property was owned by Cella Davison. Allen Davison is now dead. Prior to this transaction, and on January 19, 1899, Cella Davison commenced an action in a justice's court in Silver Bow county, against one James Dougherty to recover judgment for the sum of \$65 alleged to be due on account for board, together with interest. As a defense, Dougherty interposed a counterclaim for money due on account of labor performed at the instance and request of plaintiff. The result was a judgment in favor of plaintiff for \$76.30. Dougherty thereupon took his appeal to the district court. Before any proceedings were had in the cause in the district court, the plaintiff, upon notice to Dougherty's counsel, made special appearance and moved for a dismissal of the appeal. The motion was denied. A trial upon the merits, had on December 19, 1899, the plaintiff appearing by counsel, resulted in a judgment in defendant's favor for \$46.80. On January 27, 1900, the sheriff

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

of Silver Bow county, having levied upon the property described in the mortgage under an execution issued upon this judgment, sold it at public auction to W. E. Carroll for the sum of \$63.80 and issued to him the usual certificate of sale, which was duly filed with the clerk of Silver Bow county. On January 29, 1901, no redemption having been made, the sheriff executed to Carroll a deed. Thereafter the appellant, Carrie May Carroll, by mesne conveyances became the owner of such interest as W. E. Carroll acquired under the execution sale and his sheriff's deed. The complaint contains allegations sufficient to warrant a decree in foreclosure as against Cella Davison. As ground for relief against the appellant, the complaint, after setting out in detail the proceedings in the justice's and district courts resulting in the judgment in the case of Davison v. Dougherty, alleges that the judgment of the district court in favor of Dougherty and all of the proceedings thereunder were void, because that court was without jurisdiction to entertain the appeal, and to render judgment on the merits. The specific allegations upon which this conclusion is based are the following:

"(7) That at the time the said (copy of) notice of appeal was served upon the attorney of Cella Davison, to wit, the 24th day of January, 1899, the said notice of appeal was not filed with said justice of the peace above named. That the said notice of appeal was not filed with said justice of the peace until the 25th day of January, 1899, and that no (copy of) notice of appeal was ever served upon the said Cella Davison, or her attorney, on the said 25th day of January or subsequent thereto; and that the said failure to serve said notice of appeal in the manner provided by law appeared at all times from the records and papers in said cause.

"(8) That on the 25th day of January, 1899, the said James Dougherty filed in the said justice court his undertaking on appeal in the said action, entitled Cella Davison, Plaintiff, v. James Dougherty, Defendant, which said undertaking was executed by Phil. J. Murphy and John J. Quinn, as sureties, and conditioned as by law required, and that on the 28th day of January, 1899, the said Cella Davison, plaintiff in the said cause, duly excepted to the sufficiency of the said sureties upon the said undertaking, filed in the said action, and did duly serve upon the said William E. Carroll and file with the said justice of the peace his [her?] exceptions to the sufficiency of said sureties.

"(9) That on the 18th day of February, 1899, the said James Dougherty, defendant in said action, filed in the said justice court in the said action another undertaking on appeal, executed by Charles Schatzlein and William Harrison, as sureties, and conditioned as by law required.

"(10) That the plaintiff is informed and believes that none of the said parties named

as sureties in said undertakings ever justified and that no notice was ever given that they or any of them would justify, and that Cella Davison never waived justification of the sureties upon said undertakings on appeal or either of them."

The defendant Cella Davison suffered default to be entered against her; and on December 8, 1908, the court, after hearing the respondent's evidence, rendered and caused to be entered a decree in foreclosure against her directing the sale of her interest in the property, whatever it might be. The court allowed the action to proceed as to the appellant. In her answer, the appellant, besides relying upon various provisions of the statute of limitations as a bar to the action against her, alleges that the respondent had full knowledge of the condition of the title of Cella Davison at the time she accepted her mortgage and put in upon record, and that at that time she knew that W. E. Carroll had a prior lien thereon by virtue of his purchase at the sheriff's sale and the certificate issued to him in pursuance thereof. She then deraigns her title by various mesne conveyances to herself, and alleges that she paid full consideration for the property, without knowledge of any claim of respondent thereto. She denies that there was any error or irregularity in the proceedings in the case of Davison v. Dougherty, by reason of which the district court was without jurisdiction to render the final judgment therein. At the trial had on June 9, 1909, it was tacitly assumed that all proceedings had under the execution issued upon the judgment resulting in the deed to W. E. Carroll were regular. The contention was that the district court was without jurisdiction to try the case of Davison v. Dougherty and to render judgment therein, because it appeared that Dougherty, in taking his appeal to the district court, had served a copy of his notice of appeal upon the plaintiff before filing the original with the justice, instead of filing before serving, and because the sureties on the undertaking had failed to justify upon notice as required by the statute. On December 9, 1909, the court, having had the case under advisement until that time, made and filed its findings of fact that the allegations contained in paragraph 7 of the complaint were true, but that those contained in paragraphs 8, 9, and 10 were not true, and rendered and caused to be entered a decree declaring appellant without title or interest in the property. No finding was made disposing of the plea of the statute of limitations. The appeals are from this decree and from an order denying appellant's motion for a new trial. When the record was filed in this court, the respondent filed her motion to dismiss the appeals upon the ground that two of the adverse parties, Tobias Frederickson and Cella Davison, had not been served with notice of the appeals, and because it appeared from the record that the appellant

is not an aggrieved party. Disposition of the motion was reserved until the hearing on the merits.

1. On the motion to dismiss the appeals. Neither Frederickson nor Celia Davison was served with the notice of intention or of the appeals. It appears that subsequent to the commencement of the action the appellant, by bargain and sale deed, conveyed her interest in the property to Frederickson; Frederickson, however, was not made a party defendant by substitution or otherwise. An "adverse party," within the meaning of the statute (Rev. Codes, § 7100), is one "who has an interest in opposing the object sought to be accomplished by the appeal." *Power & Bro. v. Murphy*, 26 Mont. 387, 68 Pac. 411; *Merk v. Bowery Min. Co.*, 31 Mont. 298, 78 Pac. 519; *Anderson v. Red Metal Min. Co.*, 36 Mont. 312, 93 Pac. 44; *Cummings v. Reins Copper Co.*, 40 Mont. 599, 107 Pac. 904. In *Harper v. Hildreth*, 99 Cal. 265, 33 Pac. 1103, it was said: "Whether a party to the action is 'adverse' to the appellant must be determined by their relative position on the record and the averments in their pleadings, rather than from the manner in which they may manifest their wishes at the trial, or from any presumption to be drawn from their relation to each other, or to the subject-matter of the action in matters outside of the action. * * * If his [the party's] position on the record makes him nominally adverse, he must be so considered for the purpose of an appeal from the judgment thereon." Frederickson not being a party to the record is not an adverse party. It was therefore not necessary to serve him with either notice.

Is Celia Davison, upon this record, an adverse party? If the whole case had been heard at one time and a single decree had been entered adjudging the rights of all the parties, we should say that she is. The case of *Power & Bro. v. Murphy*, supra, cited in support of the motion, would be directly in point. That case, like this, was an action to foreclose a mortgage. The defendant mortgagors, Patterson and wife, defaulted. A trial upon the issues presented by the other defendants, Murphy and Chipman, resulted in a decree adjudging that the lien claimed by them was inferior to that of plaintiff upon a part of the mortgaged land, but that they had a superior lien upon the remainder. Appeals by Murphy and Chipman to this court, by which they sought to have their lien declared superior to that of plaintiff, were dismissed on the ground that notice thereof had not been served upon the Pattersons. Patterson, the husband, was held to be an adverse party, because the effect of a reversal or modification of the decree would be to release a part of Patterson's property from the prior lien of the plaintiff as declared by the decree, "thereby diminishing the fund to arise from the decretal sale and tending to increase the amount of any deficiency judgment that might be rendered

against Patterson." Here, however, we find two separate decrees, one entered on default against Celia Davison, to which the appellant was not a party, and another, about a year afterwards, to which, though it incidentally affects her rights, Celia Davison was not a party. In their treatment of the case, the court and counsel for respondent proceeded upon the theory that a separate decree against Celia Davison was proper under the statute (Rev. Codes, § 6712). In our opinion, this course resulted in a complete severance of the action as against Celia Davison and appellant as codefendants, and put the latter in the same position in which she would have been had a separate action been brought against her to set aside her claim under the sheriff's deed, and thus to remove an obstruction in the way of the satisfaction of a foreclosure decree obtained theretofore in an independent action. If this be the correct view, and we think it is, upon the entry of the foreclosure decree against her, Celia Davison passed out of the action as a codefendant with appellant and was not a party to the record made thereafter, within the rule of the cases cited, supra; so that upon proceedings upon motion for a new trial and appeal she should be regarded as an adverse party. She could not move for a new trial to have the second decree vacated, nor could she appeal from it. Whether she should have been regarded as a necessary or proper party to the action as against the appellant, we do not decide. The last ground of the motion that appellant is not aggrieved by the decree against her, deserves no further notice than the statement that if this is so, then no defendant in any case who is adjudged to be without right is an aggrieved party.

2. On the merits. At the trial, the court admitted in evidence, over objection of appellant, the files in the cause of *Davison v. Dougherty*, transmitted by the justice to the clerk, and also the proceedings had in the case in the district court. The copy of the justice's docket recites that the trial was had and judgment rendered by him on January 18, 1899; that the notice of appeal was filed with the justice on January 25th; that an undertaking on appeal was filed January 25th; that on January 28th the plaintiff filed with the justice her exceptions to the sufficiency of the sureties, and that on February 18th the defendant filed another undertaking with different sureties. Why the filing of this undertaking was deferred to this date, and whether the sureties thereon justified before the justice after notice of the plaintiff, does not appear. On February 24th the justice transmitted the files in the case to the clerk, consisting of a transcript of his docket, an undertaking, and 12 other papers. What the date of this undertaking was, or when it was filed with the justice, does not appear. The notice of appeal shows an admission of service by plaintiff's counsel on January 24th. From the proceedings in

the district court, it appears that on June 12th the plaintiff appeared specially and moved to dismiss the appeal, on the ground that it had not been taken as provided by the statute; that after several postponements the motion was denied on July 1, 1899, and that a trial had on December 19, 1899, both plaintiff and defendant appearing and taking part, resulted in the judgment in favor of Dougherty, as already stated. No question is made by appellant as to the sufficiency of the evidence to sustain the findings.

In their brief, counsel, after asserting that the attack upon the judgment in the case of *Davison v. Dougherty* is collateral, argue that the court erred in admitting the evidence referred to above. They make the contention, also, that the conclusion reached by the court that the judgment in question was void is erroneous. There is no merit in the first contention. The complaint assails the judgment directly, alleging that it was void ab initio for want of jurisdiction by the district court, both of the subject-matter and the parties, to entertain the appeal and to render the judgment, on the grounds (1) that the plaintiff was not served with a copy of the notice after the original had been filed with the justice, and (2) that the defendant failed to have the sureties on his undertaking justify after notice of plaintiff's exceptions to their sufficiency, or to have other sureties justify before the justice or the judge of the district court, upon notice to plaintiff within five days, as provided by the statute (Rev. Codes, § 7124).

The very purpose of the action was to have set aside a judgment which operated as an obstruction to the sale of the mortgaged property under the foreclosure decree. To this character of case, the rule declared in *Haupt v. Simington*, 27 Mont. 480, 71 Pac. 672, 94 Am. St. Rep. 839, and in *Burke v. Interstate S. & L. Ass'n*, 25 Mont. 315, 64 Pac. 879, 87 Am. St. Rep. 416, cited by counsel, has no application. In the former case the judgment was not assailed by the pleadings in any way. It was sought merely by way of defense, to show that the defendant had not been served with summons; and hence, that the judgment was void because the court was without jurisdiction. In the latter case, it was sought in the same way to impeach a judgment upon which defendant rested his claim of title to the property in controversy. In each case this court held that the attack was collateral, and that the validity of the judgment must be determined by an inspection of the judgment roll alone. In this latter case, the expression "collateral attack" is defined as including "every proceeding in which the integrity of a judgment is challenged, except those made in the action wherein the judgment is rendered, or by appeal, and except suits brought to obtain decrees declaring judgments to be void ab initio." The same distinction is pointed out more elaborately in the text in 23 Cyc., at

page 1065, as follows: "The term 'collateral' as used in this connection is opposed to 'direct.' If an action or proceeding is brought for the very purpose of impeaching or overturning the judgment, it is a direct attack upon it. Such is a motion or other proceeding to vacate, annul, cancel, or set aside the judgment, or any proceeding to review it in an appellate court, whether by appeal, error, or certiorari, or a bill of review, or, under some circumstances, an action to quiet title. On the other hand, if the action or proceeding has an independent purpose and contemplates some other relief or result, although the overturning of the judgment may be important or even necessary to its success, then the attack upon the judgment is collateral. This is the case where the proceeding is founded directly upon the judgment in question, or upon any of its incidents or consequences as a judgment, or where the judgment forms a part of plaintiff's title, or of the evidence by which his claim is supported."

This action is clearly a direct attack upon the judgment in question; and hence all the proceedings by means of which jurisdiction of the action resulting in the judgment complained of was sought to be conferred upon the district court were properly admitted in evidence. The respondent assumed the burden of showing that the judgment was void. She could not accomplish this in any way other than by exhibiting to the court these proceedings, with other evidence, if she had such, thus demonstrating that some of the mandatory requirements of the statute had been omitted, or that any omission to comply with any of them had not been waived. Under the statute, an appeal is taken from a justice's court to the district court by the dissatisfied party by his filing with the justice his notice of appeal and serving a copy upon the adverse party or his attorney at any time within 30 days after rendition of the judgment. Rev. Codes, § 7121. The appeal does not become effective for any purpose, however, unless an undertaking be filed with the justice, in the amount and containing the conditions prescribed. If within 5 days the adverse party excepts to the sufficiency of the sureties, then the appellant must, upon notice and within five days, have the sureties, or others in their stead, justify before the justice or the judge of the district court. If he fails to do this, the appeal must be regarded as if no undertaking had been given. Rev. Codes, § 7124. If any of these steps are omitted, the district court is without jurisdiction to entertain the appeal; for, though such appeals are provided for by the Constitution, they are subject to statutory regulation and the mode prescribed for taking them is exclusive. Const. art. 8, § 23. Until the notice is filed and served as prescribed and the undertaking given, and, if required, the sureties thereon, or others in their stead, justify after notice and within

five days, the district court does not acquire jurisdiction of the subject-matter or of the parties.

A justice's court is one of inferior and limited jurisdiction, having only such power as is expressly conferred by statute. Const. art. 8, § 20; Layton v. Trapp, 20 Mont. 455, 52 Pac. 206. Therefore no presumption in favor of a judgment pronounced by it attaches until it affirmatively appears from the proceedings that it had power to render it, that is, jurisdiction over the subject-matter and the parties. Layton v. Trapp, *supra*; 11 Cyc. 693. So when the validity of a judgment of a district court, rendered on appeal from a justice's court, is brought in question, the proceedings must show that jurisdiction was acquired in the manner prescribed by the statute, for the appeal can be taken only in the manner prescribed. Const. art. 8, § 23. As was pointed out in Burke v. Interstate S. & L. Ass'n, *supra*, upon a direct attack upon the judgment of a court of general jurisdiction, except by appeal, the presumption attaches that it had jurisdiction, both of the parties and the subject-matter, and in any case the want of jurisdiction must appear affirmatively from the record. Beach v. Spokane Ranch & Water Co., 25 Mont. 380, 65 Pac. 111. The judgment in question here, however, was rendered by a court which *pro hac vice* was of special and limited jurisdiction. On appeal from a justice's court, the trial is *de novo* (Rev. Codes, § 7122); but the district court, though proceeding with the trial as in other cases (Rev. Codes, § 7127), acquires its jurisdiction by appeal under the statute (State ex rel. Grissom v. Justice's Court, 31 Mont. 258, 78 Pac. 498; Oppenheimer v. Regan, 32 Mont. 115, 79 Pac. 605; Galpin v. Page, 83 U. S. 350, 21 L. Ed. 959); and hence its jurisdiction must affirmatively appear. Gunn v. Howell, 27 Ala. 663, 62 Am. Dec. 785; Cooper v. Sunderland, 3 Iowa, 114, 66 Am. Dec. 52; 11 Cyc. 693; McCauley v. Jones, 35 Mont. 32, 88 Pac. 572; State ex rel. Hall v. District Court, 34 Mont. 112, 85 Pac. 872, 115 Am. St. Rep. 522. In State v. District Court and McCauley v. Jones, *supra*, it was held that the district court is without jurisdiction to proceed with the trial on an appeal from a justice's court, if it appears that the order of filing and serving the notice of appeal as prescribed by the statute is not observed. The same rule applies, also, with reference to the filing of the undertaking. The filing of the notice and undertaking are necessary to give the district court jurisdiction of the subject-matter, and the service of the notice is required to bring the adverse party into court. The notice serves the purpose of a summons. Service of it may be waived by a general appearance of the adverse party and submission to a trial and judgment, just as the service of summons may be waived (Davidson v. O'Donnell, 41 Mont. 308, 110 Pac. 645); but there can be no waiver as to ju-

risdiction of the subject-matter, for the parties can in no case waive the jurisdiction in this regard or confer it by consent. Stimpson Computing Scale Co. v. Superior Court, 12 Cal. App. 536, 107 Pac. 1013; Coker v. Superior Court, 53 Cal. 178; McCracken v. Superior Court, 86 Cal. 76, 24 Pac. 845.

The foregoing discussion is not altogether pertinent to the disposition of this case. We have ventured upon it because, in view of the manner in which the case has been presented by counsel and of the condition of the record before us, we think a new trial should be ordered. The court found that the allegations of paragraphs 8, 9, and 10 of the complaint, touching the filing of the undertaking and the failure of defendants in the case of Davison v. Dougherty, were not true. This finding necessarily implies that all the required steps touching the filing of the undertaking on appeal were observed, and that jurisdiction of the subject-matter of the action was regularly obtained. Hence it is evident that the court based its conclusion that the judgment was void upon its finding that the allegations of paragraph 7 are true. In Davidson v. O'Donnell, *supra*, one of the questions decided was whether service of the notice of appeal from the justice's court could be waived. This court said: "The object to be accomplished by serving a notice of appeal is to apprise the respondent that the appellant has removed the cause to a higher court, and to give the respondent an opportunity to appear and protect himself in the appellate court. Assuming, in this instance, that Davidson filed his notice of appeal, but never served it upon Bailey or his attorney at all, still, if Bailey went into the district court and asked for and was granted leave to file a supplemental complaint, would any court then listen to him to say that he had not been served with the notice of appeal, or that service of the notice had not been made as required by law? The plainest dictates of common sense would say at once that he had waived the service by his general appearance in the district court"—citing cases. So here. By taking part in the trial in the district court and submitting to its judgment, the plaintiff Davison waived the service of the notice and could not thereafter complain that the court was without jurisdiction over her person. Her mortgagee, the respondent in this case, stands in no better position. So far as this feature of the case is concerned, her rights are concluded.

Since this is an equity case, we should be inclined to reverse the decree and direct the action to be dismissed as to the appellant because of this erroneous conclusion of the trial court, if the record were in condition to justify this course. It does not contain a copy of the undertaking filed with the justice and transmitted by him to the clerk of the district court. The date at which it was filed with the justice does not appear. The transcript of the justice recites that excep-

tions to the sufficiency of the sureties on the undertaking first filed in support of the appeal on January 25, 1899, were filed with him on January 28th, and that a second undertaking was filed on February 18th, 24 days thereafter. If these recitals are true, and no other undertaking was filed in season, the cause was never properly removed to the district court, and it was without jurisdiction to try it and render the judgment. Inasmuch as the findings on this subject are in favor of the appellant and she does not question them, we cannot determine the correctness of them upon the evidence. We have deemed it safer, therefore, simply to reverse the decree for the reasons stated, and to remand the cause to the district court for a retrial, whereupon the rights of the parties may be adjudged as that court may be advised.

The decree and order are reversed, and the cause is remanded to the district court for a new trial.

Reversed and remanded.

HOLLOWAY, J., concurs.

SMITH, J. I am not prepared to fully concur in the result reached by the court in the case of *Power & Bro. v. Murphy*, 26 Mont. 387, 68 Pac. 411, cited by the Chief Justice. Otherwise I agree to what is said in the foregoing opinion.

(42 Mont. 350)

SMITH v. COLLIS et al.

(Supreme Court of Montana. Dec. 12, 1910.)

1. APPEAL AND ERROR (§ 865*)—EXTENT OF REVIEW—NATURE OF DECISION.

An appeal from an order refusing to set aside a default decree presents a direct attack upon the decree.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 865.*]

2. PROCESS (§ 106*)—SUMMONS BY PUBLICATION—"FOUR WEEKS."

Rev. Codes, § 6521, requiring summons by publication to be published once a week for four successive weeks, and making the service complete on the day of the fourth publication, does not require the publication to cover four full weeks; four publications being sufficient.

[Ed. Note.—For other cases, see Process, Cent. Dig. § 133; Dec. Dig. § 100.*]

For other definitions, see Words and Phrases, vol. 3, p. 2928.]

3. PROCESS (§ 98*)—PUBLICATION SERVICE—ORDER—SUFFICIENCY.

Under Rev. Codes, § 6521, requiring summons by publication to be published once a week for four successive weeks, an order for publication, "at least in four numbers of said paper, which shall be published in successive weeks," is sufficient.

[Ed. Note.—For other cases, see Process, Cent. Dig. §§ 121-126; Dec. Dig. § 98.*]

4. PROCESS (§ 96*)—PUBLICATION SERVICE—AFFIDAVIT—SUFFICIENCY.

Under Rev. Codes, § 6520, authorizing summons by publication against a nonresident de-

fendant, on an affidavit that plaintiff has a cause of action against him, and that he is a necessary or proper party, the affidavit may be made on information and belief.

[Ed. Note.—For other cases, see Process, Cent. Dig. §§ 108-120; Dec. Dig. § 96.*]

5. AFFIDAVITS (§ 3*)—INFORMATION OF AFFIANT.

Where a statute expressly or impliedly requires a statement which can only be made on information and belief, an affidavit in that form is sufficient.

[Ed. Note.—For other cases, see Affidavits, Cent. Dig. § 16; Dec. Dig. § 3.*]

6. JUDGMENT (§ 419*)—DEFAULT JUDGMENT—EQUITABLE RELIEF—FRAUD.

Equity will relieve against a default judgment on publication service obtained by plaintiff knowingly misrepresenting the facts, by stating that which he knew to be false, or by suppressing a known truth.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 794; Dec. Dig. § 419.*]

7. JUDGMENT (§ 159*)—DEFAULT JUDGMENT—MOTION TO VACATE—CONCLUSIVENESS OF AFFIDAVIT.

On motion to set aside a default judgment obtained on publication service, movant's affidavit will not be treated as true, as against conflicting allegations of the complaint and the affidavit for publication.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 159.*]

8. JUDGMENT (§ 162*)—DEFAULT JUDGMENT—PROCEEDINGS TO VACATE.

On motion to set aside a default, the affidavit of merits of the defense cannot be controverted by a counter affidavit, since the court will only determine whether a prima facie defense is made out.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 162.*]

9. JUDGMENT (§ 138*)—DEFAULTS—VACATION—JUDICIAL DISCRETION.

Under Rev. Codes, § 6589, permitting a court, in its discretion, to relieve against a judgment for mistake, inadvertence, surprise, or excusable neglect, a motion to set aside a default is addressed to the trial court's sound legal discretion, which should not be exercised in defendant's favor unless the motion be promptly made and accompanied by a valid excuse for his mistake, inadvertence or neglect, and a showing that he has prima facie a good defense on the merits, and that the judgment would affect him injuriously.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 249-254; Dec. Dig. § 138.*]

10. JUDGMENT (§ 139*)—DEFAULTS—VACATION—JUDICIAL DISCRETION.

Under Rev. Codes, § 6589, providing that a trial court "may" vacate a default judgment against a defendant constructively served, within one year after rendition, an application for vacation is not granted as a matter of right, but is addressed to the trial court's sound legal discretion.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 265-268; Dec. Dig. § 139.*]

11. JUDGMENT (§ 142*)—DEFAULTS—VACATION—ESSENTIAL SHOWING.

One seeking, under Rev. Codes, § 6589, to vacate a default judgment obtained on constructive service, should show that he did not have actual notice of the action in time to defend, that he moved promptly on discovering the default, that he has a good defense on the merits, and that the judgment would prejudice him.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 253; Dec. Dig. § 142.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

12. EVIDENCE (§ 71*) — PRESUMPTIONS — RECEIPT OF LETTERS.

Defendants, to whom copies of summons and complaint were mailed at their known place of residence, are presumed to have had actual notice of pendency of the suit.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 92; Dec. Dig. § 71.*]

13. APPEAL AND ERROR (§ 900*) — REVIEW — RULINGS PRESUMPTIVELY CORRECT.

The trial court's rulings being presumptively correct will be upheld if it can be done on any reasonable hypothesis.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3667-3669; Dec. Dig. § 900.*]

14. JUDGMENT (§ 159*) — DEFAULTS — VACATION — INSUFFICIENT SHOWING.

The trial court did not abuse its discretion under Rev. Codes, § 6580, in refusing to vacate a default judgment obtained on constructive service, where the only showing of want of actual notice of the suit was an affidavit by one who could make it on information and belief only, and where there was no showing that defendants acted promptly to have the default set aside.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 312, 313; Dec. Dig. § 159.*]

Appeal from District Court, Lewis and Clark County; J. Miller Smith, Judge.

Action by A. L. Smith against Rosell C. Collis and others. From an order refusing to set aside a default decree for plaintiff, defendants appeal. Affirmed.

H. G. & S. H. McIntire, for appellants.
E. C. Day and Gunn & Hall, for respondent.

HOLLOWAY, J. On April 30, 1909, A. L. Smith commenced an action in the district court of Lewis and Clark county against Rosell C. Collis and Mary Collis to quiet title to certain real estate situate in the city of Helena. On May 1st, Smith made and filed an affidavit for publication of summons in which, among other things, it is alleged that the defendants are nonresidents of Montana and reside at Canastota, Oneida county, N. Y. On the same day the clerk of the court issued an order for publication, which directs that summons be published in the Montana Daily Record "at least in four numbers of said paper, which shall be published in successive weeks." Proof of publication was made by the foreman of the paper by affidavit, in which it is stated that a copy of the summons was published in "the regular and entire issue of said paper for a period of four consecutive weeks, commencing on the 3d day of May, 1909, and ending on the 24th day of May, 1909." The clerk of the court also made affidavit that on May 1st he "deposited in the United States post office at Helena, Lewis and Clark county, Montana, in separate envelopes securely sealed, with the postage prepaid, a copy of the complaint and summons thereto annexed, one directed to Rosell C. Collis, Canastota, Oneida county, N. Y., and one directed to Mary Collis, Canastota, Oneida county, N. Y." On June 15th the default of defendants was entered

for want of any appearance, and a decree in conformity with the prayer of the complaint was rendered and entered. On June 10, 1910, the defendants and W. R. Church, who claims to be a grantee of defendants, filed in court their motion to set aside the decree, open the default, and permit defendants to answer, and gave notice of such motion to plaintiff. On the same day the court fixed June 14th as the date for hearing the motion. On this last day the court was engaged in the trial of jury cases, and for that reason the hearing was continued by consent of the parties to July 2d. On June 14th plaintiff filed a counter affidavit in opposition to the motion. On July 2d the motion was submitted and on July 15th denied by the court. From the order denying the motion, the defendants and Church appealed. We agree with counsel for appellants that in this proceeding they are making a direct attack upon the validity of the judgment of the lower court.

1. The first ground of attack is that the summons was not published for the period required by law. As we understand counsel for appellants, their contention is that the period of publication must cover 4 full weeks, or 28 days. Section 6521, Rev. Codes, provides that the summons shall be published "once a week for four successive weeks." In construing statutes containing similar provisions, different courts have reached different conclusions. *Market National Bank v. Pacific National Bank*, 89 N. Y. 397, and *Calvert v. Calvert*, 15 Colo. 300, 24 Pac. 1043, represent the extremes of these views. In New York it is held that a provision of the statute for publication "once a week for six successive weeks" contemplates "a full six weeks' publication, and not six times in six different weeks." In Colorado the court held that the provision of the Code of Civil Procedure of that state of 1877 (section 42), for a service of summons by publishing it "once a week for four successive weeks," does not mean 4 weeks of 7 days each, and that the publication is completed on the day on which the summons is published in the fourth successive week, although less than 28 days have elapsed since it was first published.

If our Code section, above, contained no other provision than the one quoted, we might experience some difficulty in determining its meaning. But to our minds the section itself furnishes the key to its own proper interpretation, in the last sentence which reads: "The service of summons is complete on the day of the fourth publication." This is a legislative declaration that only four publications are required, if there is one in each of four successive weeks. "A week consists of seven consecutive days." Rev. Codes, § 2030. "The time in which any act provided by law is to be done is com-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

puted by excluding the first day and including the last, unless the last is a holiday, and then it is also excluded." Sections 6219, 8067. Every Sunday is a holiday. Section 8065. For the purpose of illustrating our view, let us assume that publication is made on the same day in each of four successive weeks, as, for instance, on the 3d, 10th, 17th, and 24th. The greatest period of time which can elapse between the first and fourth publications is 21 days, under the rule of computation prescribed by the Code above. Or assume the most extreme case which we can imagine: That the publication occurred on the 4th (although that day is Sunday), 13th, 22d, and 31st of the present month of December, 1910. The greatest period of time which can elapse between the first and fourth publications is 27 days, according to the same rule. Since section 6521 requires only four publications, and requires that there shall be at least one in each of 4 successive weeks, it is self-evident that the statute does not contemplate that there shall be a period of 4 weeks, or 28 days, elapse between the first and fourth publications, as such a thing is absolutely impossible. Since, then, the statute cannot mean that a full period of 4 weeks, or 28 days, must be covered by the publication, there remains but one other interpretation to be given to the language employed, viz., the publication must occur four times, once in each of 4 successive weeks, using the term "week" as defined in the Code. The proof of publication in this instance shows a compliance with the law as thus construed.

Appellants refer to *McLean v. Moran*, 38 Mont. 298, 299, 99 Pac. 836, as supporting their contention. In that case the question now before us was not involved or considered. The controversy there arose over the meaning to be given to the sentence in section 6521 above, which reads: "When publication is ordered, personal service of a copy of the summons and complaint out of the state is equivalent to publication and deposit in the post office." That a construction of this language was the only matter for determination will appear conclusively from the opinion. The defendants in that case were nonresidents. An order for the publication of summons was regularly made, but personal service was had upon the defendants in Pennsylvania, under the sentence of the section just quoted. The plaintiff had a copy of the summons and complaint delivered to defendants on April 16, 1908, and their default was entered on May 8th. The lower court held that the default was entered prematurely, and this view we adopted; in doing so, however, we inadvertently said: "The person so served shall have the full period of four weeks and twenty days within which to make his appearance." We should have said: "The person so served shall have the full period of publication and twenty days within which to make his appearance." If

in view of the one question considered in that case a modification of our holding is necessary, it is now made to conform to the suggestion above.

2. What we have said disposes of the contention made that the order for publication is not sufficient. While the order does not follow the exact language of the statute, its meaning is the same. If the summons was published four times, once in each of four successive statutory weeks, it was sufficient, and this is what the order directed should be done.

3. Objection is made to the affidavit for publication upon the ground that the statements (1) that the plaintiff has a cause of action against the defendants, and (2) that defendants are necessary or proper parties to the action, are made upon information and belief. Paraphrased, section 6520 of the Revised Codes reads: "When the person on whom the service of a summons is to be made resides out of the state, and an affidavit stating this fact is filed with the clerk, and such affidavit also states that a cause of action exists against such nonresident defendant, and that he is a necessary or proper party to the action, the clerk shall cause the service to be made by publication." It is insisted that the statute requires each of the statements above to be made positively, or, in other words, as we understand this contention, it is that the party making the affidavit must make each of these statements as a fact of his own knowledge, and in this view counsel for appellants are not altogether without authority to support them. *Columbia Screw Co. v. Warner Lock Co.*, 138 Cal. 445, 71 Pac. 498. The reasoning of that case, however, does not appeal to us. To illustrate our view further: Let us assume that Smith, the plaintiff in this action, had stated positively in his affidavit for publication that a cause of action exists against the defendants Rosell O. Collis and Mary Collis, and that each is a necessary or proper party to this action. Assume, then, that the defendants had appeared and raised the question of the sufficiency of the complaint (which we will assume stated all the facts correctly) and also the question of proper or necessary parties defendant, and the court had decided, first, that the complaint did not state a cause of action, and, second, that neither defendant was a necessary or proper party to the action, and this decision became final, could any one claim that Smith had committed perjury? If so, and if the statute does in fact require such statements to be made positively, then we may confidently assert that nearly every person who makes such an affidavit commits perjury, because "an unqualified statement of that which one does not know to be true is equivalent to a statement of that which one knows to be false." Rev. Codes, § 8241. From the very nature of things, one cannot know in advance absolutely that a cause of

action exists against a particular person, or that a named person is a necessary or proper party to a certain action. The questions whether a given statement of facts constitutes a cause of action, or a particular person is a necessary or proper party to the action, are questions of law pure and simple; and we have not yet reached that stage of perfection where any person, layman or lawyer, is so far infallible that he may not be mistaken upon a question of law. It is doubtless true that the plaintiff in an action to enforce payment of a plain, overdue promissory note, may assert confidently that a cause of action exists and that the maker is a necessary or proper party defendant; but the statute is not confined in its operations to simple actions of that kind. It extends to a variety of actions, some of which are of the most complicated known to the law. We do not believe the Legislature intended to say to the litigant: "You are denied any relief in the courts against a non-resident unless you are willing to swear to a statement you do not know to be true, which is equivalent to a statement of that which you know is not true." Considering this same question, the Supreme Court of Nebraska, in *Leigh v. Green*, 64 Neb. 533, 90 N. W. 255, 101 Am. St. Rep. 592, on rehearing said: "The statute should receive a construction in accordance with common sense. It was not intended to require perjury, and, as it requires affidavit to matters involving legal opinion and conclusions of law and fact, it must contemplate that such affidavit will be made upon the only basis on which such opinions and conclusions can be reached. * * * In a trial where numerous witnesses are successively examined, the several facts and circumstances may be made to appear by competent proof, and the trier of fact may draw the proper inference therefrom. But where one man is to make affidavit to the conclusion, he must in fact state the belief which the information in his possession gives rise to, whether he expressly says so or not; otherwise, the required affidavit could never be made." Whenever the statute, either in express terms or by implication, requires a person to make a statement which from the very nature of things can only be made on information and belief, an affidavit in that form meets the demands of the statute. It is impossible for any one to swear positively that a particular person is a nonresident of this state, or to say that a nonresident resides at a particular place. In requiring these facts to be stated, the statute does not demand the impossible, and certainly does not contemplate that a false statement shall be made. It does intend that the person making the affidavit for publication shall state these facts upon information and belief—the only possible ground upon which they can be made. In this present case the plaintiff in his affidavit refers to his complaint on file, and

says: "(3) I have fully and fairly stated the facts of the case to Messrs. Carpenter, Day & Carpenter, attorneys of this court in the city of Helena, Montana, my attorneys, and I am by them informed, and I verily believe, that I have a good cause of action in this suit against the said defendants, as will fully appear by my verified complaint herein, to which reference is hereby made, and the said defendants Rosell O. Collis and Mary Collis are necessary and proper parties defendant thereto, as I am advised by my said counsel after such statement made as aforesaid, and as I verily believe." We hold that the affidavit is sufficient, and the authorities sustaining this conclusion will be found in note to 17 *Encyclopedia Pleading & Practice*, 61.

4. Appellants contend that the district court should have vacated the judgment, opened the default and permitted the defendants to answer, for the reason, as it is claimed, the record discloses that the plaintiff practiced deceit in procuring the order for publication. If we understand counsel for appellants correctly, their contention is that in his complaint and affidavit for publication, plaintiff Smith made allegations as to his ownership of the land involved which were not true and which he could not have believed were true, and purposely omitted the statement of facts which he knew to be true, and which, if stated, would have shown that he did not have a cause of action, and that these facts appear from the affidavit filed by Church, for the defendants in support of their motion to vacate the judgment, and that for the purposes of this motion such affidavit is to be taken as true. If in a suit in equity to set aside a default judgment for fraud, it appeared from the evidence that plaintiff had knowingly misrepresented the facts, either by stating that which was known to be false or by suppressing a known truth, and by such misrepresentation had imposed upon the court or clerk in procuring the order for publication, the court would set aside the judgment. This is in effect the holding in *Dunlap v. Steere*, 92 Cal. 344, 28 Pac. 563, 16 L. R. A. 361, 27 Am. St. Rep. 143; but we do not understand the rule to be as stated by counsel for appellants that, on motion to set aside a default, the affidavit in support of the motion will be treated as true, in the sense that it demonstrates the falsity of plaintiff's complaint or affidavit for publication, or both, in so far as the allegations conflict. If that was true, then in every instance wherein defendant's affidavit conflicted with the affidavit for publication—and this would occur in practically every case—fraud on the part of the plaintiff in procuring the order would be established by an ex parte affidavit, even though a subsequent trial might demonstrate that the allegations in defendant's affidavit were not supported by the proof—were in fact untrue. It is the rule that upon a motion to set aside

a default, the facts stated in the affidavit of merits as the defense intended to be interposed, cannot be controverted by a counter affidavit, and this for the reason that on the hearing of the motion the court will not try the right of defendant upon the merits by ex parte affidavits, but will confine itself to an investigation of the affidavit of merits to see whether a prima facie defense is made out. 23 Cyc. 958; *Butte Butchering Co. v. Clarke*, 19 Mont. 306, 48 Pac. 303. Beyond this the rule does not go; and neither the trial court nor this court will convict the plaintiff of fraud or deceit in advance of a judicial determination as to whether the allegations of his complaint and affidavit for publication are true, or whether the allegations in the affidavit made on behalf of defendants are true.

5. It is insisted that the application to set aside the default was not addressed to the discretion of the trial court, but should have been granted as a matter of right. Section 6589, Rev. Codes, provides: "(1) The court may likewise in its discretion * * * relieve a party * * * from a judgment * * * taken against him through his mistake, inadvertence, surprise or excusable neglect. * * * (2) When from any cause the summons in an action has not been personally served on the defendant, the court may allow on such terms as may be just, such defendant or his legal representative, at any time within one year after the rendition of any judgment in such action, to answer to the merits of the original action." This section deals with two classes of persons; the first comprises defendants who have been personally served with summons but through mistake, inadvertence, surprise or excusable neglect have defaulted. As to this class the rule is uniform that a motion to set aside the default is addressed to the sound, legal discretion of the trial court, and to move such discretion in favor of the defaulted party, he must present a valid excuse for his mistake, inadvertence, or neglect; must show that he has moved promptly to set aside the default; that he has prima facie a good defense on the merits; and that the judgment against him, if permitted to stand, will affect him injuriously. *Bowen v. Webb*, 34 Mont. 61, 85 Pac. 739. The second class of persons dealt with by the section above comprises those defendants upon whom there has been constructive service of summons and who have defaulted. May a person belonging to this class have the default set aside as a matter of right if he applies within one year from the date of judgment, or is his application also addressed to the discretion of the court?

There are very few states which have statutes similar to our own. There are, therefore, few decided cases upon the question propounded. The statutes of Kansas, Nebraska, and Iowa in terms confer the right upon defaulting defendants who bring themselves

within the law. The statute of Tennessee present some resemblance to the statutes of the states just named, but little, if any, to our own Code provision. The North Carolina statute is similar to the first portion of ours, but so far as our investigation discloses it does not contain any provision corresponding to that portion of our Code section now under consideration. Minnesota has a provision somewhat similar to ours, and California a statute the same as our own. The Minnesota court first inclined to the view that an application under this provision of the law was addressed to the discretion of the court; but later, in *Lord v. Hawkins*, 39 Minn. 73, 38 N. W. 689, said: "The construction we place on section 66 is that it provides to the defendant who comes within its terms, and who shows that he has a good defense, and who has not lost his right by laches, an opportunity to defend as a matter of right, and not of discretion." In *Mueller v. McCulloch*, 59 Minn. 409, 61 N. W. 455, that court said: "Although an application of this character, made under the provisions of Gen. St. 1878, c. 60, § 66, is largely addressed to the discretion of the court, it ought not to be favorably considered when the presumption that the party in default has been diligent after receiving notice of the pendency of the action is expressly and conclusively rebutted, as it was in this instance." In *Bogart v. Klene*, 85 Minn. 201, 88 N. W. 748, the court said: "The motion was made under the provisions of Gen. St. 1894, § 5206 [same as section 66 referred to in the last case]; and defendant insists that he was entitled to the relief asked for as a matter of right, and that the court erred in denying his motion. There is no question, under the decisions of this court, that an application for leave to defend, where default judgment has been entered on service of the summons by publication, is not addressed to the discretion of the court; but the relief is granted as a matter of right where the application is seasonably made. If defendant makes a proper motion to set aside the judgment, is not guilty of laches in doing so, and presents an answer setting forth a good defense to the action, the judgment is set aside, and defendant let in to defend, as a matter of right, and not of discretion; but, if he be guilty of laches and unnecessary delay in making his application, he loses his absolute right to be relieved from his default, and can be relieved only by excusing his default, and addressing his application to the discretion of the court under section 5267." To the same effect is *Cutler v. Button*, 51 Minn. 550, 53 N. W. 872. In each of these last three cases relief was denied the defaulting defendant on account of unreasonable delay in making his motion, even though the motion was submitted within the year allowed by the statute; in fact, in *Mueller v. McCulloch* the motion was made only 27 days after judgment, while

in *Bogart v. Klene* the motion was made 34 days after entry of judgment.

After considering the decided cases from Kansas, Kentucky, Minnesota, Nebraska, and North Carolina, Mr. Freeman in his work on Judgments says: "Notice of the defendant's application must be given to the adverse party, and the defendant must show that he had no actual notice of the pendency of the action in time to appear and make his defense. On complying with the conditions of the statute, the moving party secures an absolute right to have the judgment opened, which the court has no discretion to deny." 1 Freeman on Judgments (4th Ed.) § 105. In California the same doctrine is announced, except that the burden is placed upon the plaintiff to show laches on the part of defendant. *Gray v. Lawlor*, 151 Cal. 352, 90 Pac. 601. The practical effect of the California court's holding is that the defendant, who has not been personally served with summons, shall have at least one year more time within which to answer to the merits than is given to a defendant personally served, although the statute prescribes that in either case the defendant shall have only 20 days after service of the summons within which to appear. We do not think that such meaning can be given to the language of the statute. Section 6589 refers to every defendant who may have been served by publication or its equivalent; and if any one of those thus included may assert his right to answer after judgment as a matter of right, then every one who may thus be served may likewise make the same claim. A defendant residing in this state who conceals himself to avoid personal service of summons may be served by publication. Section 6520. Would any one say that a defendant resident of this state, who has actual knowledge of the pendency of an action against him, and who willfully conceals himself to avoid personal service of summons, can come into court after he defaults, and assert as a matter of right his application to have the default set aside? We think not. We decline to place an interpretation upon the statute which will lead to a result so ridiculous. This illustration is used to show the far-reaching effect of the contention made by counsel for appellants; for the nonresident defendant not personally served stands upon the same footing, under the statute, as the resident defendant who has willfully concealed himself to avoid service of summons, so far as the right to appear and answer after judgment by default is concerned; that is to say, if the statute grants the relief as a matter of right to the one, it grants it to the other as well. Section 6589 does not provide that the defaulting defendant shall be permitted to answer, but only that the court may allow him to answer. We do not think there is any substantial difference between the two provisions of this section; certainly not such a difference as to call for a different

rule as to the character of application or the burden of proof. We think in either instance the application is addressed to the sound, legal discretion of the trial court. If personal service was had, the defaulting defendant may excuse his default by showing that it was taken through mistake, inadvertence, surprise, or excusable neglect. If service was had by publication or its equivalent, the defaulting party ought to show that he did not have actual notice of the pendency of the action in time to defend. This does not impose any hardship upon him. In either case the defaulting party ought to show that he moved promptly upon discovering that default had been taken against him; that he has a good defense upon the merits, and that the judgment, if allowed to stand, will prejudicially affect him. We do not see any reason for making the distinction between the two classes of persons which is made by some of the courts.

In justification of its position, the California court in the case above said: "Where he [nonresident defendant] has had no personal service, there is, with respect to his right to relief in such cases, no presumption of knowledge, or of inexcusable negligence, on his part, and he is only required to show the lack of personal service." That may or may not be true. Section 6521 above provides: "In case of publication, where the residence of a nonresident or absent defendant is known, the clerk must forthwith deposit a copy of the summons and complaint in the post office, directed to the person to be served at his place of residence." Section 7962 provides that it will be presumed "that a letter duly directed and mailed was received in the regular course of the mail." The record in this case discloses that on the day after this action was commenced, the clerk of the court in Helena mailed to each of the defendants at his known place of residence a copy of the summons and complaint, and the presumption, therefore, must be indulged that defendants had actual notice of the pendency of this action a considerable time before their default was entered. In a case of this character, then, the rule announced by the California court does not have application; while in Minnesota, Iowa, Kansas, Nebraska, and Texas actual knowledge on the part of the nonresident defendant has been quite uniformly held to be sufficient to defeat an application to set aside a default after judgment. *Clark v. Tull*, 113 Iowa, 143, 84 N. W. 1030; *Stover v. Hough*, 47 Neb. 789, 66 N. W. 825; *Bogart v. Klene*, above; *Cutler v. Button*, above; *Satterlee v. Grubb*, 38 Kan. 234, 16 Pac. 475; 23 Cyc. 915; 1 Black on Judgments, § 313.

Assuming, then, that this application was addressed to the discretion of the trial court, does the record disclose an abuse of such discretion? The affidavit in support of the motion is made by W. R. Church, who asserts, among other things, that neither de-

fendant received a copy of the summons and complaint, and that neither knew of the pendency of the action until long after the judgment was rendered; but he does not state how long after. He does not assume to state when defendants first learned of the default and judgment, and it is therefore impossible to know whether this motion was made immediately after such knowledge was acquired, or whether defendants delayed several months in making their application or in having it made. Furthermore, the assertion of Church that neither defendant received a copy of the summons and complaint must have been made only on information and belief. There is not any affidavit by either defendant—the only persons who could have known the facts—and there is not any excuse offered for their failure to disclose the facts as they are. In weighing the evidence before it, the court must have deemed this hearsay statement insufficient to overcome the evidence furnished by the clerk's affidavit and the presumption declared by the statute. Certainly we cannot say that such a determination would not be justified; and since this court enters upon its investigation with a presumption that the trial court's ruling was correct, it will be upheld if it can be done upon any reasonable hypothesis.

Upon the theory of the statute which we adopt, a defaulting nonresident defendant not personally served must show (1) that he did not have actual notice of the pendency of the action in time to make a defense; (2) that he proceeded promptly to have the default set aside; (3) that he has a prima facie defense upon the merits; and (4) that the judgment, if permitted to stand, will affect him injuriously. In this view of the law, the appellants here failed to meet the second requirement altogether, and seek to show compliance with the first, by what, in the very nature of things, was hearsay evidence. We cannot say that the trial court abused its discretion, and the order is therefore affirmed.

Affirmed.

BRANTLY, C. J., and SMITH, J., concur.

(57 Or. 575)

KELLAHER et al. v. CITY OF PORTLAND
et al.†

(Supreme Court of Oregon. Jan. 10, 1911.
On Petition for Rehearing,
Jan. 31, 1911.)

1. TAXATION (§ 608*)—REMEDIES FOR ERRONEOUS TAXATION—INJUNCTION.

A bill to restrain collection of a tax is the proper remedy where the tax was unauthorized. [Ed. Note.—For other cases, see Taxation, Dec. Dig. § 608.*]

2. LICENSES (§ 7*)—ORDINANCE—PUNISHMENT FOR VIOLATION.

An ordinance providing for taxing vehicles used upon the city streets and for tags thereon,

and subjecting persons violating it to fine or imprisonment, is authorized by City Charter 1903 (Sp. Laws 1903, p. 27) § 73, which gives the council power to punish by fine or imprisonment any violation of ordinances, and to raise money by granting licenses.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 7-19; Dec. Dig. § 7.*]

3. LICENSES (§ 7*)—ORDINANCE—VEHICLES—VALIDITY.

Charter 1903 (Sp. Laws 1903, p. 27) § 73, subd. 21, gives the city council power to license vehicles, but the classification must be on some reasonable basis, so that it will apply to all engaged in the same business, and this principle applies to the power to tax vehicles for using the streets of the city.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 7-19; Dec. Dig. § 7.*]

4. LICENSES (§ 7*)—ORDINANCE—VEHICLES—VALIDITY.

It is not essential to the validity of a license ordinance that all vehicles which may be taxed should be included therein, but it must include all that come within the class sought to be taxed.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 7-19; Dec. Dig. § 7.*]

5. LICENSES (§ 7*)—ORDINANCES—VEHICLES FOR PLEASURE.

An ordinance taxing vehicles used upon city streets, and to compel placing of tags on vehicles, is not objectionable because it exempts vehicles used for pleasure or out of town vehicles.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 7-19; Dec. Dig. § 7.*]

6. LICENSES (§ 7*)—ORDINANCES TO TAX VEHICLES—CONSTRUED.

A city ordinance taxing vehicles used upon streets of the city and to compel placing of tags on the vehicles is not objectionable because it excepts vehicles, included under another ordinance applying only to hawkers and peddlers, as the latter are already taxed thereby.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 7-19; Dec. Dig. § 7.*]

7. LICENSES (§ 7*)—ORDINANCES—"AUTOMOBILES."

An ordinance taxing automobiles and other vehicles is not objectionable because it does not include auto trucks used for hire, or without hire; the term "automobile" being sufficiently comprehensive to cover both.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 7-19; Dec. Dig. § 7.*]

8. LICENSES (§ 7*)—AUTOMOBILES—PRIVATE VEHICLES.

A city ordinance taxing automobiles and other vehicles is invalid as an unreasonable discrimination and classification, in that it omits automobiles used in connection with the owner's business, while vehicles used for same purposes, drawn by horses, are taxed.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 7-19; Dec. Dig. § 7.*]

Appeal from Circuit Court, Multnomah County; R. G. Morrow, Judge.

Suit by Dan Kellaher and others for injunction against the City of Portland and others. From an order sustaining a demurrer to the complaint and dissolving a temporary injunction, plaintiffs appeal. Reversed, and injunction sustained.

See, also, 110 Pac. 492.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

† Rehearing denied January 31, 1911.

This is a suit by Kellaher and 181 others to enjoin the city from enforcing an ordinance—No. 20,474—taxing vehicles used upon the streets of the city. The ordinance provides that any person, firm, or corporation, being the owner or keeper within the city of "any stagecoach * * * automobile or other vehicle, which shall be used for the conveyance" of persons, goods, or for any other business, shall pay for each such vehicle an annual license as follows, naming a list of vehicles drawn by two animals and those drawn by one animal, and includes every vehicle used for business purposes, drawn by horses, and "for each omnibus used in transporting passengers * * * without hire, \$2.50; for each such omnibus used * * * for hire, \$10; for each automobile used for hire, \$10.00." No license tax is fixed for any other automobiles than are included in the three items last mentioned. The ordinance expressly excepts from its operation vehicles used for pleasure only and those licensed under Ordinance No. 14,053. Section 5 of Ordinance No. 20,474 provides that any person who shall violate the provisions of this ordinance by neglecting to place license tags upon the vehicle, or who violates any of its provisions, shall, upon conviction thereof, be punished by fine or by imprisonment. Section 73 of the city charter of 1903 (Sp. Laws 1903, p. 27) provides that the council has power and authority, among other things (subsection 3), "to provide for the punishment of a violation of any ordinance of the city by fine or imprisonment, not exceeding \$500 fine or six months' imprisonment, or both, or by forfeiture as penalty." And by subsection 21 "to grant licenses, with the object of raising revenue or of regulation, or both, for any and all lawful acts, things, or purposes, and to fix by ordinance, the amount to be paid therefor. * * * All money received from licenses for vehicles of every description whether for pleasure or business, shall go to the credit of the street repair fund." Section 114 provides: "The council has power and authority * * * to assess, levy, and collect taxes upon all property * * * not to exceed three-fourths of a mill, for the maintenance, preservation, and repair of the streets, to be known as the 'Street Repair Fund.'" Plaintiffs allege that the ordinance is illegal and void for the reasons that it is discriminatory, in that within the city there are a large number of vehicles not for hire in constant use by the owners in their own business, propelled by their own power, and in competition with plaintiffs; that it exempts vehicles licensed under Ordinance No. 14,053; that it does not include out of town vehicles used on the streets; that it does not include vehicles used for pleasure; that it does not appropriate the tax to the "street repair fund"; and that it provides for a fine and imprisonment for failure to pay the tax. A demurrer to

the complaint was sustained by the lower court and judgment rendered thereon adjudging the ordinance valid and dissolving the temporary injunction. Plaintiffs appeal.

J. M. Haddock (O'Day & Haddock, on the brief), for appellants. Frank S. Grant and Wm. C. Benbow, for respondents.

EAKIN, C. J. (after stating the facts as above). The evident scope of this ordinance is to levy a revenue tax upon all vehicles owned within the city and used in connection with business enterprises. It is first objected by defendant that equity has no jurisdiction of the case for the reason that plaintiffs have a complete remedy at law. The primary object of the suit is to have adjudicated the validity of the ordinance which involves private rights to prevent the collection of the tax which is alleged to be unauthorized and to prevent a multiplicity of suits, which constitutes a ground for equitable cognizance. A suit to enjoin the collection of a tax is recognized as a proper remedy when the tax is unauthorized. *Weich v. Clatsop County*, 24 Or. 452, 456, 33 Pac. 934; *Taylor Sands Fishing Co. v. Benson*, 108 Pac. 126; *Chicago, etc., Ry. Co. v. Frary*, 22 Ill. 34; *Albany & Boston Min. Co. v. Auditor General*, 37 Mich. 391.

It is urged by plaintiffs that the provision of the ordinance that "any person who shall violate the provisions of this Ordinance by neglecting or refusing to place license plates, or tags, upon each side of 'his said vehicle' * * * or who violates any of the other provisions of this ordinance shall upon conviction thereof * * * be punished by fine * * * or by imprisonment," renders the ordinance void, as it makes the nonpayment of a revenue tax punishable by fine and imprisonment. But this contention is untenable. The right of the city to license vehicles is conceded, and the charter expressly authorizes the city to enact ordinances and to enforce them by fine and imprisonment and is within its legislative power. The violation of the terms of the ordinance is not thereby made a crime, but it is quasi criminal, and the penalty is in the nature of a forfeiture for the wrong done to the public where a penalty is given, whether recoverable by criminal or civil process. In the case of *City of St. Louis v. Green*, 7 Mo. App. 481, it was held that this general power in the charter was not sufficient to authorize such a penalty for nonpayment of a tax, but that case was reversed upon that point in *City of St. Louis v. Green*, 70 Mo. 562, and it was held that the municipality had the power to enforce an occupation tax by fine. To the same effect are *City of St. Louis v. Sternberg*, 69 Mo. 289; *City of Cincinnati v. Buckingham*, 10 Ohio, 257; *Shelton v. Mayor of Mobile*, 30 Ala. 540, 68 Am. Dec. 143; *Henry Vandine, Petitioner*, 6 Pick. 187, 17

Am. Dec. 351; *Chilvers v. People*, 11 Mich. 43.

Plaintiffs contend that the ordinance is void because it is not uniform in its application to all persons similarly situated as to these plaintiffs and is discriminatory in that it expressly exempts vehicles used for pleasure, out of town vehicles used in the city by their owners, and those taxed under Ordinance No. 14,053. It is not questioned that the council has power to license vehicles for revenue, as attempted to be done in this case, as well as for the purpose of regulation. The charter provision (section 73, subsec. 21) grants this power. Certain trades and callings may be taxed without including all businesses that may be legally taxed for revenue, but the classification must be on some reasonable basis, so that it will apply to all engaged in the same business occupation (*State v. Wright*, 53 Or. 344, 100 Pac. 296, 21 L. R. A. [N. S.] 349; *State v. Conlon*, 65 Conn. 478, 33 Atl. 519, 31 L. R. A. 55, 48 Am. St. Rep. 227; *In re Yot Sang* [D. C.] 75 Fed. 983). And the same principle is applicable to the power to tax vehicles for the privilege of using the streets of the city. It is not essential to the validity of a license ordinance that all vehicles which may be so taxed should be included therein, but it must include all that come within the class sought to be taxed. The classification is for the determination of the council provided it is made on some reasonable basis, and applicable to all similarly situated, without discrimination. Legislative provisions of this character are upheld taxing drays and trucks (*City of Burlington v. Unterkircher*, 99 Iowa, 401, 404, 68 N. W. 795); those used for hire in transporting persons or goods (*In re City of Newport*, 131 Ky. 550, 115 S. W. 744); those used for business purposes, whether for hire or not (*Johnson v. Mayor and Council of Macon*, 114 Ga. 426, 40 S. E. 322); hacks and drays or other vehicles used for pay (*City of Terre Haute v. Kersey*, 159 Ind. 300, 64 N. E. 469, 95 Am. St. Rep. 298; *McCauley v. State*, 83 Neb. 431, 119 N. W. 675; *City of Brooklyn v. Breslin et al.*, 57 N. Y. 591); and it may except vehicles used for pleasure (*City of Brooklyn v. Nodine*, 26 Hun. 512) or out of town vehicles (*Ft. Smith v. Scruggs*, 70 Ark. 549, 69 S. W. 679, 58 L. R. A. 921, 91 Am. St. Rep. 100). The law is valid if it includes all within the class. When the power is delegated to the city, it may exercise it to the same extent. Exact equality in the tax or in the classification cannot be attained. That is impossible. But it is sufficient if made on a reasonable basis, and includes all within the class, and is not merely arbitrary. *Gulf, Colorado & Santa Fé R. Co. v. Ellis*, 165 U. S. 165, 17 Sup. Ct. 255, 41 L. Ed. 666. In *Kersey v. City of Terre Haute*, 161 Ind. 471, 473, 68 N. E. 1027, 1028, it is said: "There is no imperative requirement that taxation shall be equal. If there were, the operations of gov-

ernment must come to a stop, from the absolute impossibility of fulfilling it. The most casual attention to the nature and operation of taxes will put this beyond question. No single tax can be apportioned so as to be exactly just, and any combination of taxes is likely in individual cases to increase instead of diminish the inequality.' * * * The power is essentially legislative in its character, and it is not required, under the constitutional provisions we are now considering, that there should be such exact exclusion and inclusion of the subjects of taxation as to meet fully the approval of the judicial mind as to what is reasonable."

The exception of vehicles that are included under Ordinance No. 14,053, which licenses peddlers and hawkers of merchandise upon the street by means of vehicles is not discriminatory, as such vehicles are already taxed thereby for the privilege of using the street; at least, that is a matter of classification within the power of the council. Such a question was raised in *City of Newport v. Fitzer*, 131 Ky. 544, 115 S. W. 742, 21 L. R. A. (N. S.) 279, in which it was held that to include them within a vehicle ordinance amounted to double taxation and to that extent the ordinance was held to be void.

Objection is also made that the ordinance does not include auto trucks used for hire or without hire, but we think the term "automobile" is sufficiently comprehensive to include them. The New International Encyclopedia defines "automobile" as "The generic name which has been adopted by popular approval for all forms of self-propelling vehicles for use upon highways and streets for general freight and passenger service." See, also, the American Encyclopedia and the Century Dictionary and Cyclopedia (New Edition). However, we are unable to uphold the classification which omits from its terms automobiles used in connection with the owner's business, which we are justified in assuming as a matter of common knowledge includes a large number of automobiles used by department stores, breweries, groceries, express companies, physicians, and others, not used for hire. Nelson's Ency. And are in the same class as those taxed by the ordinance, viz: "For each delivery wagon delivering goods, wares, or merchandise within the city, without charge, drawn by two animals; for each delivery wagon drawn by one animal; for each truck or dray drawn by two animals; for each truck or dray drawn by one animal; for each vehicle used for hauling dirt, wood, brick, stone, lumber, sand, gravel, or like material, drawn by two animals [the same drawn by one animal]; for every vehicle not above enumerated used for business, drawn by two animals [and the same drawn by one animal]." The complaint alleges that there are large numbers of such vehicles propelled by their own power, used within the city by their owners, in their own

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business, without hire. It is an arbitrary classification to say that an automobile using the streets for the same purpose as those vehicles drawn by horses which are taxed shall pay no vehicle tax. Such classification is not made on a reasonable basis and renders the ordinance void.

It is also objected that the ordinance does not state the object of the tax. But that is immaterial, as the charter provides that it must be placed in the "street repair fund" and the council can make no other disposition of it, and that provision is self-executing.

For the reason above assigned, the decree will be reversed and one entered here adjudging the ordinance void, and enjoining the city from the enforcement of it.

MOORE and McBRIDE, JJ., concur. SLATER and KING, JJ., having been succeeded by BEAN and BURNETT, JJ., took no part in this decision.

On Petition for Rehearing.

EAKIN, C. J. This petition is drawn under a misconception of the terms of the ordinance. Counsel says: "What authority is there in existence in the United States today which holds (outside of this opinion) that an automobile is in the same class as a vehicle drawn by an animal? Its purpose is to license vehicles drawn by animals only, and how can the court say that the city council cannot, by another ordinance, license automobiles used for the transportation of goods, etc?" And this statement discloses the whole foundation of the petition. If the council had included in one class only vehicles, used for any kind of business, drawn by horses, there would have been a very different question before us for consideration. Whether such a classification would be discriminatory it is not necessary to consider. But that is not the classification made by the council. The ordinance provides "that any person * * * being the owner or keeper of any * * * wagon, automobile or other vehicle, which shall be used for the conveyance of persons, * * * packages, * * * or for any other business, shall pay. * * *" Thus the class of vehicles sought to be licensed are those used for the transportation of persons, packages, or for any other business, not alone vehicles drawn by horses. It probably licenses all kinds of autos used in any business, except those used by one in his own business, and includes all vehicles drawn by animals used by the same class of persons in their own business. It made an effort to include all, but it omitted a very considerable and important part of those within the class, and is therefore discriminatory.

The petition is denied.

STATE v. MACK.

(Supreme Court of Oregon. Jan. 24, 1911.)

1. CRIMINAL LAW (§ 586*)—CONTINUANCE—DISCRETION OF COURT.

The granting, or refusal of a continuance rests in the sound discretion of the trial court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1311; Dec. Dig. § 586.*]

2. CRIMINAL LAW (§ 1151*)—REVIEW—DISCRETION OF COURT—CONTINUANCE.

The action of the trial court in granting or refusing a continuance should not be disturbed on appeal, unless manifestly wrong and arbitrary, involving abuse of its discretion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3045-3049; Dec. Dig. § 1151.*]

3. CRIMINAL LAW (§ 608*)—CONTINUANCE FOR ABSENT WITNESSES—AFFIDAVIT.

An affidavit for continuance to secure absent witnesses alleged that defendant had lived in another state for several years past and was not well known within this state; therefore could produce no witnesses as to his former life; that at the time of the homicide he had been drinking heavily, and that for four years or more when intoxicated he lost consciousness, and that this was well known to persons named, and was material, etc.; that his wife advised him that she and his mother-in-law would attend the next term; that friends advised him they would procure means to secure attendance of other witnesses; that his wife had informed him of the serious illness of their infant child, and that she would not be able to attend at that term. Held that, as the procuring of the witnesses appeared doubtful, and it did not clearly appear that defendant could not prove his usual condition of mind when intoxicated by witnesses within the state, the court's refusal of the continuance was not an abuse of discretion.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 608.*]

4. CRIMINAL LAW (§ 1160*)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

Error in sustaining objection to a question to an expert, as to whether defendant was in possession of his faculties when the alleged crime was committed was cured where a similar question more fully stated was answered by the witness.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3137-3143; Dec. Dig. § 1160.*]

5. HOMICIDE (§ 142*)—TRIAL—ISSUES—SELF-DEFENSE.

Under plea of not guilty, defendant might show a killing in self-defense.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 142.*]

6. HOMICIDE (§ 300*)—INSTRUCTIONS—SELF-DEFENSE—EVIDENCE REQUIRING INSTRUCTION.

In a prosecution for homicide, a witness testified that he witnessed the shooting, and his testimony did not show any attack by decedent, and an impeaching witness testified that he reached the scene of the homicide soon after the shot was fired and asked the eyewitness who shot decedent, and the eyewitness said he "thought it was a hobo; that decedent kicked him—kicked him out—and the party shot decedent." Another witness testified that defendant told him that he shot decedent because decedent kicked him out. Held, that the first being hearsay, admitted for impeachment, and the confession not being evidence to prove other facts, and there being no other evidence of self-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

defense, it was proper to refuse an instruction thereon.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614-632; Dec. Dig. § 300.*]

7. CRIMINAL LAW (§ 673*)—RECEPTION OF EVIDENCE—PURPOSE OF EVIDENCE.

Where, in a prosecution for homicide, there was no competent evidence tending to show self-defense, but an impeaching witness testified that the state's witness said that the decedent had kicked the defendant, it was proper for the court to call the jury's attention to the purpose of such evidence in stating that self-defense was not in issue.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1874-1876; Dec. Dig. § 673.*]

Appeal from Circuit Court, Josephine County; H. K. Hanna, Judge.

Will Mack was convicted of murder in the second degree, and appeals. Affirmed.

A. C. Hough (W. C. Hale, on the brief), for appellant. R. G. Smith (B. F. Mulkey, Dist. Atty., on the brief), for the State.

BEAN, J. On January 11, 1909, the defendant was indicted for the crime of murder in the first degree, charged to have been committed on the 4th day of December, 1908. Upon trial he was convicted of murder in the second degree, was sentenced, and appeals, assigning errors.

1. That the trial court erred and abused its discretion in overruling the motion of defendant for a continuance of the case until the next term of court; that defendant, in support of his motion for a continuance, made and filed an affidavit, showing that he had lived in Wardner, Idaho, for several years past, until about September 1, 1908, when he came to Grants Pass, Or.; that he had no friends or acquaintances in Grants Pass other than those formed since his arrival there, and therefore could produce no witnesses as to his former life; that at the time of the homicide he had been drinking heavily, and that at times he had drunk heavily for the past 15 years; that for four or more years when intoxicated he had lost all consciousness and recollection; that this fact was well known to numerous of his friends and acquaintances at Wardner, Idaho; that the defendant's wife, Ollie Mack, and his wife's mother, Dora Wilson, James Nevill, superintendent of a mine, and S. W. Zentner, night marshal of Wardner, all resided at that place, and were well acquainted with defendant, had been for years past, and were well acquainted with the fact that when he became intoxicated beyond a certain degree he lost all recollection; that his mind became a blank, and that he could remember nothing during such intoxication; that the witnesses, if present, would testify to such fact, "which fact is material to my defense for the purpose of tending to show that under such condition I have been unable and

incapable and incompetent of forming any purpose or intent in relation to any act of mine during such period of intoxication; that I am advised by my wife, Ollie Mack, that if the trial of this action is postponed until the next term of this court, she and Dora Wilson will attend at that trial and testify to said facts; that I am advised by my friends and relatives that they will secure the means for me to procure the attendance of James Nevill and S. W. Zentner at said trial." And further alleges, based upon such advice, that said witnesses would attend at the next term of court; "that I cannot procure the attendance of any witnesses at this term of court who are acquainted with my past condition while intoxicated, and therefore cannot safely go to trial in said action at this term of this court, nor before the next regular term of this court."

It is further shown in defendant's affidavit that his wife informed him in her last letter of the serious illness of their infant child, and that on account of such illness neither his wife nor Dora Wilson would be able to attend at that term of court. From the whole tenor of the affidavit of defendant it unquestionably appeared doubtful to the trial court if the witnesses named by defendant could be obtained for the trial, if continued until the next term of court.

The granting or refusing of a continuance rests in the sound discretion of the trial court, and its determination should not be disturbed, unless manifestly wrong and arbitrary, involving an abuse of such discretion. *State v. O'Neil*, 13 Or. 183, 185, 9 Pac. 284; *State v. Howe*, 27 Or. 138, 44 Pac. 672; *State v. Hawkins*, 18 Or. 476, 23 Pac. 475; *Walker v. State*, 91 Ala. 76, 9 South. 87; *McDaniel v. State*, 8 Smedes & M. (Miss.) 401, 47 Am. Dec. 93; *Cox v. State*, 64 Ga. 374, 37 Am. Rep. 76.

In the case of *State v. O'Neil*, supra, Mr. Justice Lord, commenting on the affidavit for a continuance, on account of the absence of a material witness, observes: "In this statement there are no facts set out from which the court can judge whether there is reasonable ground to believe that the attendance of the absent witness can be procured at a future day. It is not enough to say, 'I am confident I can procure his attendance at the next term of the court'; but the facts or circumstances upon which such confidence or belief is founded must be set out, so that the court may look into and determine from them whether there is reasonable ground to believe that the attendance of the witness can be procured."

In the case at bar the allegation of the defendant that the persons named would be in attendance to testify in said trial at the next term of court, is based upon the advice

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

of his wife, Ollie Mack, and the advice of his friends and relatives that they would secure the means for defendant to procure the attendance of James Nevill and S. W. Zentner. The homicide occurred on the 4th day of December, 1908; the indictment was returned on the 11th day of January, 1909; the affidavit made on January 13, 1909. The defendant was arrested on the day of the homicide, and had been incarcerated from that date until the time of the trial. To say the least it would, from the affidavit, appear very doubtful that his wife and mother-in-law, Dora Wilson, would be able to attend the trial at the next term of court, or to procure the attendance of the other witnesses named, and the further statement of the wife, as to the illness of the child, is but little more than an excuse for not appearing and assisting her husband in his trouble. Further, it is not clear from the affidavit that the defendant could not prove his usual condition of mind when intoxicated by other witnesses who had known him during his stay at Grants Pass.

While a liberal rule should be adopted, allowing persons charged with a crime sufficient opportunity to prepare their defense, and particularly in procuring the attendance of witnesses, nevertheless where they reside in another state, remote from the place of trial, and "are not amenable to the process of the court, the affidavit ought to set out the facts fully and explicitly, so as to satisfy the court, in furtherance of right and justice, that the delay ought to be granted." *State v. O'Neill*, supra.

After a careful examination of the facts set forth in the affidavit for the continuance, we are unable to say that there was any abuse of discretion by the trial court in overruling the motion for a continuance. As we understand the record, the motion was solely based upon the ground of the absence of material witnesses, and we find no request for a continuance, except for the term. The court, apparently recognizing the fact that the defendant had no means to procure counsel to make a defense, appointed two able attorneys who appeared for and conducted the trial in defendant's behalf.

2. It is contended that the court erred in sustaining the objection made by the state to the following question propounded by defendant's counsel to the witness, Dr. F. W. Van Dyke: "Now Doctor, from what you saw and observed of the defendant there at that time, and his manner and conduct and speech, what have you to say as to his being in possession of his faculties at that time?" It appears, however, from the record, that the next question propounded to the witness was as follows: "I will now ask you, Doctor, from all you observed of this defendant during the time you saw him there at the Layton Hotel, from his conduct and acts and from his speech, and the nature of his speech, whether he had the appearance to

you of a person who was in the possession of his faculties to the extent of knowing right from wrong?" To which the witness answered: "Well, he was unquestionably drunk. I don't think there is any doubt about that; but I think, from the way I sized the man up, that he undoubtedly knew that he had shot a man, and had sense enough to know that to shoot a person or draw a revolver would be wrong, although I don't think he drew any fine conclusions, or anything of that sort at all. Speaking in a general way, I think he had sense enough to know that it was wrong to shoot a man." The second question is more fully stated and is of the same import as the first, to which objection was sustained, and the latter question was fully answered and the matter thoroughly explained to the jury by the witness Dr. Van Dyke, and if there was any error in sustaining the objection to the first question, it was cured by receiving the evidence in answer to the second question. *State v. Freeman*, 100 N. C. 429, 5 S. E. 921.

3. The court gave an instruction in regard to manslaughter as follows: "If any person shall, without malice, express or implied, and without deliberation upon a sudden heat of passion, caused by a provocation apparently sufficient to make the passion irresistible, voluntarily kill another, such person shall be deemed guilty of manslaughter." Counsel for defense asked, in addition thereto, an instruction as follows: "There is evidence in this case tending to show that deceased attacked and kicked defendant out of his (deceased's) place of business, and if you find from the evidence that such attack (if any was made upon defendant by deceased) was apparently sufficient to make defendant's passion irresistible, and because of such passion defendant shot deceased, then you will find defendant guilty of manslaughter." This instruction was refused by the court, to which exception was taken, and error alleged. The reference to the evidence in the instruction requested, "tending to show that deceased attacked and kicked defendant," will hereafter be considered, together with the instruction requested as to self-defense. Counsel for defendant asked an instruction relating to the question of self-defense, which the court refused, and instead thereof instructed the jury, in effect, that no element of self-defense appeared in the case.

Thomas J. Foshay, witness for the state, in describing the shooting, testified: "Mr. Carter was standing in the double door, about eight or ten feet from where I was cleaning the spittoons. He stood there a couple of minutes, and he says: 'I'm out now; I don't know whether I will stay out or not,' and pulled a gun and shot Mr. Carter." And, for the purpose of impeaching the witness Foshay, Jim Burns was called as a witness for defendant, who testified that he was in the front part of the hotel, and when the shot was fired he heard Carter

"holler," and ran in there, and Carter was shot. He asked witness Foshay how it happened. Foshay said he did not know who shot; he thought it was a hobo; that Carter "kicked him—kicked him out—and the party shot Carter." The court, in referring to the discussion by counsel, "relative to what it is claimed on the part of defense that the evidence shows, that Miles Carter had put the defendant out and kicked him," instructed the jury that "there is no evidence of that in the case at all. All there is of that is that, in seeking to impeach the witness on the part of the state (Thomas Foshay), the defense put on two witnesses, who testified that the witness (Thomas Foshay), in conversation with them, had told them that that was the fact. * * * There is no element of self-defense in the case."

Wharton on Homicide, § 221, p. 355, states: "And the rule is general, if not universal, that where one attempts to justify a homicide under the plea of self-defense, which the evidence tends to sustain, he is entitled to have the jury fairly instructed as to the law applicable to his theory of the case, and to have them left free to determine the fact as to whether his conduct was, or was not, warranted by the facts. And this rule applies, though the testimony tending to sustain that defense is that of himself only"—citing many authorities. Therefore in this case the question is raised as to whether or not there is any evidence tending to sustain a plea of self-defense, and to justify the homicide. There can be no question but that the defendant, under his plea of not guilty, had the right to prove facts showing the killing was done in self-defense. *State v. Branton*, 33 Or. 533, 550, 56 Pac. 267. But the question is, Was there any evidence tending to show any such fact? *State v. Howe*, 27 Or. 138, 44 Pac. 672.

The testimony offered for the purpose of impeaching the witness Foshay in so far as it referred to what was claimed to be a statement of Foshay, that Carter, the decedent, kicked the defendant, was purely hearsay, and in no way tended to prove the fact that decedent did kick defendant or make an assault upon him. Witness C. N. Clements, who was present at the Layton Hotel during the evening after the homicide, testified to a conversation with the defendant at that time, in which he asked, "Why did you shoot this man?" defendant answering, "Because he kicked me out, and I would do it again." Other witnesses also testified that defendant stated, as a reason for shooting decedent, "Because he kicked me out, or threw me out." It is claimed that the latter part of this statement, made by defendant in explanation of the shooting, tends to prove the fact that the decedent did kick or assault the defendant.

In Wharton on Criminal Evidence (9th

Ed.) § 623, it is stated: "A confession is rather a fact to be proved by evidence than evidence to prove a fact. It is not so much proof that a particular thing took place, as it is a waiver by the party charged of his right to have certain facts alleged against him technically proved. A., for instance, is shown to have said that certain facts implicating him actually took place. Were this statement by A. offered as evidence of such facts, it would be merely hearsay, and would be inadmissible. But it is not offered to prove the facts, but to show that A. has dispensed with their proof."

Wigmore on Evidence, vol. 3, § 2113, in discussing the effect of such explanatory statements, observes: "The remainder thus received merely aids in the construction of the utterance as a whole, and is not in itself testimony. * * * The single purpose of considering the utterance as a whole is to be able to put a correct construction upon the part which the first party relies upon, and to avoid the danger of mistaking the effect of a fragment whose meaning is modified by a later or prior part." Underhill on Criminal Evidence, § 99; *Liles v. State*, 30 Ala. 24, 68 Am. Dec. 108; *McKee v. People*, 36 N. Y. 113, 116; *Shrivers v. State*, 7 Tex. App. 450, 454. Lord's Or. Laws, § 711, provides: "When part of an act, declaration, conversation, or writing is given in evidence by one party, the whole, on the same subject, may be inquired into by the other." *Mahon v. Rankin*, 54 Or. 328, 340, 102 Pac. 608, 103 Pac. 53.

A careful perusal of all the testimony in the case fails to disclose that there was any evidence tending to show that Carter, the decedent, kicked or assaulted the defendant. It was therefore proper for the trial court to call the jury's attention to the purpose for which the testimony was offered, to impeach the witness Foshay, and the effect thereof. 12 Cyc. 600; *Bruno v. State* (Tex. Cr. App.) 58 S. W. 85; *People v. King*, 27 Cal. 507, 87 Am. Dec. 95.

There being no evidence in the case tending to show that the killing was in self-defense, it was not error to refuse an instruction requested as to the law of self-defense. *State v. Garrand*, 5 Or. 216; *State v. Doherty*, 52 Or. 591, 595, 597, 98 Pac. 152; *Willis v. State* (Tex. Cr. App.) 74 S. W. 543; *Spencer v. State*, 48 Tex. Cr. R. 580, 90 S. W. 638; *Wharton on Homicide*, § 225.

The court, in the language of the statute, gave in substance the instructions requested by defendant, in so far as they were applicable to the facts in the case, and no error in the instructions given has been pointed out, and we find none. *State v. Branton*, 33 Or. 533, 549, 56 Pac. 267; *State v. Tucker*, 36 Or. 291, 292, 61 Pac. 894, 51 L. R. A. 246.

It follows that the judgment must be affirmed.

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JOHNSON v. WHITE et al.

(Supreme Court of Oregon. Jan. 24, 1911.)

1. APPEAL AND ERROR (§ 773*)—FAILURE TO FILE BRIEF.

Respondent's failure to comply with Supreme Court Rule 6 (91 Pac. viii), requiring filing of brief within 20 days after the filing of abstract, does not ipso facto entitle appellant to a reversal, but the merits must be determined.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3104, 3108-3110; Dec. Dig. § 773.*]

2. APPEAL AND ERROR (§ 771*)—FAILURE TO FILE BRIEF—EXCUSE.

Where respondent in an equity suit failing to file a brief within the time required by Supreme Court Rule 6 (91 Pac. viii) filed an affidavit showing a misconception by him of the rule and a misunderstanding between opposing counsel as to who should first file brief, he was entitled to be relieved from his default.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3105; Dec. Dig. § 771.*]

Appeal from Circuit Court, Multnomah County; John B. Cleland, Judge.

Bill by Mary E. Johnson against Charles A. White and others. From the decree, George Wetherby defendant appeals, and moves for a decree for plaintiff's failure to file briefs. Motion denied.

Geo. Wetherby, in pro. per. Geo. P. Lent, for respondent.

PER CURIAM. This is an equity suit. Defendant appeals. The abstract was filed November 21, 1910. Plaintiff failed to file his brief within 20 days thereafter as provided by rule 6 (91 Pac. viii). Defendant, on December 28th, filed a motion to dismiss the complaint, and for a decree in his favor for the reason that plaintiff has not filed his brief within the time provided by rule 6. Plaintiff admits that he is in default, and has filed an affidavit showing a misconception by himself of rule 6, and a misunderstanding between opposing counsel as to who should file the first brief in an equity suit. But he filed his brief on January 7, 1911. Respondent's failure to file a brief does not ipso facto entitle appellant to a reversal of the decree. The merits of the appeal must be determined even though respondent does not appear. His default at most is only a waiver of his right to be heard. Defendant's motion must be denied, and by reason of the showing made by plaintiff he will be relieved from his default. Wood v. Fisk, 45 Or. 276, 77 Pac. 128, 738.

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KEARNEY v. OREGON R. & NAV. CO.

(Supreme Court of Oregon. Jan. 24, 1911.)

APPEAL AND ERROR (§ 771*)—FAILURE TO FILE BRIEF—EXCUSE.

Where an appeal was taken in good faith and the appellant's failure to file a brief within the time required, occurred through counsel's misconception as to the date from which the

30 days after appeal was perfected, should begin, the appellant will be relieved from his default.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3105; Dec. Dig. § 771.*]

Appeal from Circuit Court, Umatilla County; H. J. Bean, Judge.

Action by C. M. Kearney against the Oregon Railroad & Navigation Company. Judgment for plaintiff, defendant appeals, and plaintiff moves for dismissal of the appeal. Motion denied.

Carter & Smythe, for appellant. Fee & Slater and Raley & Raley, for respondent.

On Motion to Dismiss.

PER CURIAM. Respondent Kearney on December 7, 1910, moved the court to dismiss the appeal in this case for the reason that appellant failed to file its brief within the time provided by rule 6 (91 Pac. viii). It appears from the record that appellant's brief should have been filed on or before November 27th; that on December 3d defendant made an application to this court for an extension of time until December 22d, in which to file its brief, which was granted on December 5th. From the showing made, there can be no question that the appeal has been taken in good faith. The default occurred through a misconception by defendant's counsel as to the date from which the 30 days after the appeal was perfected should begin within which appellant must file its brief, and the showing made by appellant is sufficient to establish excusable neglect on the part of the counsel in that matter.

The motion to dismiss the appeal will be denied and defendant relieved from his default under the authority of Neppach v. Jones, 28 Or. 286, 39 Pac. 999, 42 Pac. 519; Wagner v. Portland, 40 Or. 389, 60 Pac. 985, 67 Pac. 300; Wood v. Fisk, 45 Or. 276, 77 Pac. 128, 738; and Johnson v. White (decided by this court January 24, 1911) supra.

BEAN, J., having heard this case in the court below took no part in this decision here.

(57 Or. 586)

CITY OF JOSEPH v. JOSEPH WATERWORKS CO.

(Supreme Court of Oregon. Jan. 31, 1911.)

On petition for rehearing. Petition denied. For former opinion, see 111 Pac. 864.

EAKIN, C. J. By the petition defendant urges that section 4 of the ordinance does not limit the duration of the franchise; but, after a further consideration, we are confirmed in our first decision.

We do not hold that section 1 of the ordinance, standing alone, would create a per-

petual franchise; but the answer so treats it, and seeks to enjoin the city from installing a municipal plant. However that question is immaterial here.

It is urged that the purpose of the suit is to secure a decree adjudging that defendant is not entitled to any rights in any of the streets of the city, and not alone to prevent it from extending its mains into streets not before occupied, as held in the opinion; but the answer expressly alleges that defendant is extending its water mains and service pipes and making the necessary excavations therefor, and that these acts are the alleged wrongful acts complained of in the complaint.

We have not considered, nor attempted to decide, what defendant's status may be after the expiration of the franchise, as that question is not presented by the issues nor discussed in the briefs, and is a matter for future determination. The denials are limited by the allegations of the answer, which, in effect, admit the facts entitling plaintiff to the relief here granted, and the decree is properly entered.

The motion is denied.

(59 Or. 58)

BLUMAUER-FRANK DRUG CO. v. HORTICULTURAL FIRE RELIEF OF OREGON.

(Supreme Court of Oregon. Jan. 24, 1911.)

1. CONSTITUTIONAL LAW (§ 55*)—FINAL JUDGMENTS—GRANTING NEW TRIAL.

Const. art. 7, § 6, giving the Supreme Court jurisdiction only to review final decisions, not being self-executing, the Legislature must prescribe what constitutes final decision, so that L. O. L. § 548, with the amendment (Laws 1907, p. 313), declaring that an order setting aside a judgment and granting a new trial shall be deemed a final judgment, is not unconstitutional.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 55.*]

2. APPEAL AND ERROR (§ 1*)—NATURE OF RIGHT OF APPEAL.

The right of appeal is statutory.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1-4; Dec. Dig. § 1.*]

Appeal from Circuit Court, Marion County; Geo. H. Burnett, Judge.

Action by the Blumauer-Frank Drug Company against the Horticultural Fire Relief of Oregon. There was a judgment for plaintiff, and from an order setting aside the judgment, and granting a new trial, plaintiff appeals, and defendant moves to dismiss the appeal. Motion denied.

Joseph & Haney, for appellant. John Bayne, for respondent.

EAKIN, C. J. Judgment for the plaintiff was rendered upon the verdict in this action. Thereupon defendant moved the court to set aside the judgment and grant a new trial,

which was allowed by the court. From that order plaintiff appeals, and defendant moves to dismiss the same, because the order appealed from is not a final judgment.

As held in *Portland v. Gaston*, 38 Or. 533, 63 Pac. 1051, the provision of the Constitution (article 7, § 6) that the Supreme Court shall have jurisdiction only to review the final decisions of the circuit courts, is not self-executing. The cases that may be appealed must be prescribed by the Legislature, and it may determine what shall constitute a final decision. The right of appeal is statutory. *State v. Security Savings Co.*, 28 Or. 410, 43 Pac. 102; *School District v. Irwin*, 34 Or. 431, 56 Pac. 413; *Sears v. Dunbar*, 50 Or. 36, 91 Pac. 145. The provisions of section 548, L. O. L., necessarily include all judgments and decrees, and define certain other orders that shall be deemed judgments or decrees. This includes the amendment (Laws 1907, p. 313), providing that an order setting aside a judgment and granting a new trial shall, for the purpose of being reviewed, be deemed a final judgment, and is not unconstitutional.

The motion to dismiss is denied.

Mr. Justice BURNETT, having tried this case in the lower court, took no part in its decision.

(57 Or. 598)

DARLING v. MILES.

(Supreme Court of Oregon. Jan. 31, 1911.)

1. STATUTES (§ 267*)—RETROSPECTIVE OPERATION.

Generally a statute which changes a remedy only, but does not destroy all remedy for the enforcement of a right, is retrospective and applies to cases pending at its enactment unless a contrary intent is manifest.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 350-350; Dec. Dig. § 267.*]

2. CONSTITUTIONAL LAW (§ 23*)—OPERATION—SCOPE.

A Constitution operates prospectively, unless its language or objects clearly show that it was intended to operate retrospectively.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 20; Dec. Dig. § 23.*]

3. CONSTITUTIONAL LAW (§ 23*)—APPELLATE PRACTICE—SCOPE OF OPERATION.

Const. art. 7, as amended, authorizing the Supreme Court to make findings from the record which should have been made, and authorizing either party to attach to the bill of exceptions the whole testimony, is prospective only in operation.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 20; Dec. Dig. § 23.*]

4. APPEAL AND ERROR (§ 704*)—RECORD—EVIDENCE—SCOPE OF REVIEW.

Even when the evidence is in the record it is not for the purpose of reviewing the findings of fact, but from which to determine the merits of a motion for a nonsuit or for an instructed verdict.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2939-2941; Dec. Dig. § 704.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

5. APPEAL AND ERROR (§ 987*)—REVIEW—SCOPE.

Only errors of law are reviewable on appeal from a judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3803-3896; Dec. Dig. § 987.*]

On petition for rehearing. Petition denied. For former opinion, see 111 Pac. 702.

EAKIN, C. J. Upon motion for a rehearing respondent suggests that article 7 of the Constitution, as amended, so enlarges the jurisdiction of this court that, where it can say from the record what findings should have been made, it shall make them itself, and that as the amendment is remedial it may apply to pending cases, and asks this court now upon a rehearing to consider the whole record, and to affirm the judgment of the court appealed from if it was such as should have been rendered, notwithstanding any error committed during the trial. In the construction of a statute it may be stated generally that, if the statute changes the remedy only, but does not destroy all remedy for the enforcement of a right, it is retrospective and applies to cases pending at the date of its enactment unless a contrary intent is manifest. *Judkins v. Taffe*, 21 Or. 89, 27 Pac. 221; *Denny v. Bean*, 51 Or. 180, 93 Pac. 693, 94 Pac. 503. But a Constitution always operates prospectively, unless it is clearly shown from the language used or the objects to be accomplished that the provision was intended to operate retrospectively, and such intent must be clearly established. 8 Cyc. 731, 745, and cases cited. Not only is there nothing in the language of the amendment to indicate an intention to make it retroactive, but the clause, "upon appeal of any case to the Supreme Court either party may have attached to the bill of exceptions the whole testimony," etc., has reference exclusively to appeals thereafter taken, as it contemplates preparation of the record at the time the bill of exceptions is signed. The matters to be so attached are not parts of the record until made so by certificate of the judge, and this is to be done at the election of one or the other of the parties to the appeal, and the provision is plainly prospective only.

In the opinion we stated that the case was not before us on the evidence for the purpose of determining whether the elements of fraud have been established, and counsel urge that the whole evidence is in the record, and we should have determined the facts. Even when the evidence is in the record it is not for the purpose of reviewing the findings of fact, but from which to determine the merits of a motion for a nonsuit or for an instructed verdict.

Only errors of law are to be reviewed upon an appeal from a judgment.

The petition for a rehearing is denied.

FRIENDLY v. ELWERT et al.

(57 Or. 599)

(Supreme Court of Oregon. Jan. 31, 1911.)

1. FRAUDS, STATUTE OF (§ 103*)—SUFFICIENCY OF WRITING—OPTION TO PURCHASE.

An option to purchase, being in writing, was sufficient as against the grantor to take the agreement constituted by its acceptance out of the statute, though the acceptance was not written.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 192-208; Dec. Dig. § 103.*]

2. VENDOR AND PURCHASER (§ 18*)—OPTIONS—ACCEPTANCE.

An option to purchase is not binding until the option has been unqualifiedly accepted.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. § 23; Dec. Dig. § 18.*]

3. VENDOR AND PURCHASER (§ 18*)—OPTIONS—ACCEPTANCE.

There was no unqualified acceptance of an option to purchase by the grantee stating that an abstract submitted was satisfactory, but that it vested title in a third person, and that a deed from the grantor with a deed from such person to the grantor would be satisfactory; nor by the grantee telling the representative of one of the parties that he was ready and willing to complete the transaction, suggesting a meeting for that purpose, and that "it was O. K. with" the deed from the third person.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. § 23; Dec. Dig. § 18.*]

4. VENDOR AND PURCHASER (§ 18*)—OPTION—NUDUM PACTUM.

An option to purchase without consideration is nudum pactum, until accepted, and, in effect, a mere offer.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Dec. Dig. § 18.*]

5. VENDOR AND PURCHASER (§ 18*)—OPTION—CONSIDERATION.

An option to purchase is not sustained as to consideration by an advance payment made by the grantee, to be returned on his determination not to accept.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Dec. Dig. § 18.*]

6. JUDGMENT (§ 251*)—ISSUES.

There can be no judgment against a party for money which he has tendered in court and concerning which no issue has been joined.

[Ed. Note.—For other cases, see *Judgment*, Dec. Dig. § 251.*]

On motion for rehearing. Motion overruled.

For former opinion, see 105 Pac. 404.

See, also, 111 Pac. 690.

S. B. Huston and A. E. Clark, for appellants. Murphy, Brodie & Swett, for respondent.

EAKIN, C. J. After the mandate in this case had been issued, plaintiff filed a petition, asking that it be recalled and a rehearing granted, on the ground that the decree should have provided that plaintiff recover the \$300 earnest payment made by him at the time the option was signed; and for the further reason that the court must have overlooked certain points urged in the briefs and at the oral argument upon the rehearing. The man-

date was recalled, and we have reconsidered the whole case, and we adhere to our first opinion.

The complaint alleges that the option given by C. M. Elwert on January 22, 1907, was accepted by Friendly on January 29th, and "plaintiff herein duly notified the said C. M. Elwert that said title, taken in conjunction with said deed from C. P. Elwert and Alyda Elwert, his wife, to her, was satisfactory to him, and that he accepted the same," etc. This acceptance refers, undoubtedly, to the letter of that date, written by Friendly to C. M. Elwert, which is set out in the statement of the case; and in his testimony he says that he knew when he wrote it that C. M. Elwert claimed to have lost the unrecorded deed from C. P. Elwert to her; and that when he wrote the letter of January 29th he was not willing to go on with the purchase or accept a deed from C. M. Elwert without "the missing link in the chain." The abstract was delivered to him on January 26th, and in the letter he says it is satisfactory, but that it vests the title in C. P. Elwert, and that he is informed she has a conveyance to herself from C. P. Elwert, so that with it a warranty deed from her will be satisfactory, thus qualifying his acceptance, and no agreement is reached between plaintiff and defendant.

Plaintiff urges that there was an unconditional oral acceptance of the option. The only proof of this does not relate to the time mentioned in the complaint, but is given by Mr. Andrews in his testimony, viz.: "On the 21st (he undoubtedly meant the 28th of January) he (Friendly) telephoned to me he was ready and willing to complete the transaction, as everything was in order, and suggested we should meet at Mr. Dabney's office on the following afternoon at half past 2 to complete the transaction. I went up that evening to see Miss Elwert and notified her about the matter. I missed her at home, but met her on Yambill street between Seventh and Park and told her about it." It can hardly be contended that this constituted a formal acceptance by Friendly. He sent no communication to C. M. Elwert, nor did Andrews state to her that either Friendly or he accepted the option. He only appointed a time and place to meet and complete the transaction. Friendly testified that he "told Andrews that it was O. K. with this deed from Elwert and his wife to C. M. Elwert." No intimation is given that he accepted or authorized Andrews to accept the option. From all that was said he assumed no liability or obligation to C. M. Elwert to purchase. The title was not yet satisfactory. He at all times, even by the letter of the 29th, left himself free to refuse the title. In cross-examination he was asked: "So when you wrote that letter you meant, of course, that she would have to complete the title and put it in good shape? A. I didn't care how she

did it, as long as she got the title to the property clear and free. There are several ways of doing it, had she shown the right spirit about the matter. Q. But you did not mean to take it with the deed lost unless she cleared the title some way? A. Unless she cleared the title up through the courts some way."

Although the option being in writing was sufficient, as against C. M. Elwert, to take the case out of the statute of frauds, even though Friendly's acceptance was not in writing, yet she was not bound to specifically perform, or to respond in damages, until there was an unqualified acceptance by Friendly. If what plaintiff contends was an oral acceptance had been in writing, neither it nor the letter of January 29th would have been such an acceptance as would give C. M. Elwert a remedy for specific performance against Friendly; and, if not, there was no agreement. In *Davis v. Brigham* (Or.) 107 Pac. 981, it is held that to make the option obligatory it is necessary that the other party shall have accepted the terms of the option. The option gave to Andrews a choice of two remedies. "If said title and deed prove satisfactory, said nominee is to pay me the further sum of. * * * If said title is not satisfactory as aforesaid, I agree to refund the said three hundred (300) dollars."

An option to purchase given by an owner of real estate if without consideration is nudum pactum until accepted, and is, in effect, only an offer. And that is true of the option in this case. It was without consideration; the \$300 was not a consideration for the option, but an advance payment on the purchase price of the property, in case Friendly accepted it. *Rude v. Levy*, 43 Colo. 492, 96 Pac. 560, 127 Am. St. Rep. 123, 24 L. R. A. (N. S.) 91; *Berry v. Frisbie*, 120 Ky. 337, 86 S. W. 558, and note to *Litz v. Goosling*, 21 L. R. A. 127.

The case of *Weir Inv. Co. v. Scatterwood*, 42 Colo. 54, 94 Pac. 19, is very much in point here. The option provided that in the event the title was not approved by the attorney for the defendant then the amount paid should be returned. Plaintiff failed to furnish an abstract of title which defendant's attorney would approve, and defendant refused to accept the title offered. The court, adopting the language of the opinion in *Johnson v. Fuller*, 55 Minn. 269, 56 N. W. 813, held that: "His claim is, in effect, that he could refuse to accept a conveyance, and at any time afterwards compel the vendor to make one. The contract certainly did not contemplate any such thing. What is clearly included was that if, at the end of 30 days, the title should be unmarketable, the vendee might do either of two things: First, perform the contract and take a conveyance, relying on the covenants in it as a security against any defects in the title; or, second, refuse to perform and receive back the mon-

ey paid on it—in effect to rescind the contract.” See, also, *Long v. Miller*, 46 Minn. 13, 48 N. W. 409.

In *Marsh v. Lott*, 156 Cal. 643, 103 Pac. 968, it is said: “Until plaintiff accepted the offer, there could be no mutuality; in fact, no contract whereby plaintiff was obligated in any way. He could signify his acceptance in accordance with the terms of the contract and subject to all, not part, of the conditions imposed thereby.” In *Henry v. Black*, 213 Pa. 620, 627, 63 Atl. 250, 253, the court says: “An acceptance of an option to be good must be such as amounts to an agreement or contract between the parties. Such an acceptance can be only an unconditional one. The rule upon this subject is thus stated in *Potts v. Whitehead*, 23 N. J. Eq. 512: ‘An acceptance, to be good, must, of course, be such as to conclude an agreement or contract between the parties. And to do this it must in every respect meet and correspond with the offer, neither falling within nor going beyond the terms proposed, but exactly meeting them at all points and closing with them just as they stand.’” And in *Berry v. Frisbie*, supra, it is said: “Where it is left to one of the parties to an agreement to choose whether he will proceed or abandon it, neither can specifically enforce its execution in equity.”

This question is well annotated in *Litz v. Goosling*, 93 Ky. 185, 19 S. W. 527, 21 L. R. A. 127. To the same effect are *Cummins v. Beavers*, 103 Va. 230, 48 S. E. 891, 106 Am. St. Rep. 881, with a note in 1 Am. & Eng. Ann. Cas. 986; and *Mier v. Hadden*, 148 Mich. 488, 111 N. W. 1040, 118 Am. St. Rep. 586, with an extended note in 12 Am. & Eng. Ann. Cas. 88, 91.

Plaintiff also insists that we should render judgment against defendant for the \$300 advanced upon the option. There is no doubt that the money should be returned to him, but there is no issue tendered in regard to it by either party. The money has been tendered to plaintiff and refused, and this court is not authorized to render a judgment against defendant for money which she offered to pay. Plaintiff has stipulated that “we always claimed they were willing to pay us our \$300 back.”

The motion to vacate the decree rendered by this court is denied.

(57 Or. 561)

STATE v. CHANDLER.

(Supreme Court of Oregon. Jan. 24, 1911.)

1. CRIMINAL LAW (§ 785*)—TRIAL—INSTRUCTIONS—CREDIBILITY OF WITNESSES—NECESSITY.

In a prosecution for perjury, the refusal to charge that a witness may be impeached by evidence that he has made statements inconsistent with his present testimony, and, if convinced that any witness had made statements, either orally or in writing, inconsistent with his pres-

ent testimony, the jury could consider such witness impeached, and might disregard his testimony, except where corroborated, was erroneous, where a letter received in evidence showed that a witness had offered to swear that H. had nothing to do with the burglary, which was inconsistent with his testimony at the trial that defendant, H., and himself had committed it.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1776-1781, 1889-1894; Dec. Dig. § 785.*]

2. CRIMINAL LAW (§§ 763, 764*)—INSTRUCTIONS—WEIGHT OF EVIDENCE.

In an instruction, on a prosecution for perjury, that if the jury find that a witness gave his testimony in the belief that he would receive some reward, or immunity from further punishment, etc., then the jury should receive this testimony with great caution, is objectionable as qualifying the word “caution” by the word “great,” thus being on the weight of evidence.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1731-1748; Dec. Dig. §§ 763, 764.*]

3. CRIMINAL LAW (§ 785*)—CREDIBILITY OF WITNESS—INTEREST—INSTRUCTIONS.

Where there is evidence that a witness was induced to become a witness and testify by a promise of immunity from further punishment, or hope held out to him that it would be easier for him in case he implicated some one else in the crime, the jury may consider such facts in determining the weight to be given his testimony thus obtained, and defendant was entitled to have this presented by instructions.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1774-1781; Dec. Dig. § 785.*]

Appeal from Circuit Court, Union County; J. W. Knowles, Judge.

Orley Chandler was convicted of perjury, and he appeals. Reversed.

The defendant was indicted by the grand jury of Union county for the crime of perjury. On the trial, Frank Parker, an inmate of the state penitentiary, was produced by the state as a witness, and gave evidence material to the prosecution. On cross-examination he was asked the following questions and made the following answers: “Q. How long have you been serving time down at Salem in the penitentiary? A. I have been there ten months—very near it. Q. And your term was two years? A. Yes. Q. You have some hope of being able to lessen that sentence have you? A. I don’t—much. Q. You, I suppose, have been told that if your testimony was satisfactory that something would be done—all that could be done would be done—to get you out, weren’t you? A. I haven’t been told anything just in them words; no. Q. Just in what way were you told? A. Well, I wasn’t told in any way that I would be helped out. Mr. Ivanhoe told me that ‘all I want from you is the truth, and, if we can do anything, we may do it.’ Q. And in response to that idea why you signified your willingness to come up and go on the witness stand? A. Yes. Q. And you fully understood the character of truth the district attorney wanted, didn’t you? A. Yes.

Q. You knew at the time that he was after Chandler's scalp here, didn't you? A. I think so."

The defense introduced without objection the following letter, written by the witness Frank Parker before his conviction, and while he was in jail, charged jointly with defendant and Roy Halley with the crime of burglary: "J. P. Halley, City—Dear Sir: Although I have plead guilty in these charges of burglary, yet nevertheless, if you desire me as a witness, I will testify that Roy had nothing to do with that transaction in any way. Frank Parker." On the trial of defendant in the present action, Parker testified, in substance, that the burglary was committed by defendant, Roy Halley, and himself, acting jointly. The substance of the false statement, charged against defendant in the indictment in the case at bar, was that he had falsely testified, on his trial for the alleged burglary, that he did not participate in the crime.

Defendant's counsel made timely request for the following instructions, all of which were refused, nor was their substance given in any part of the general charge: "(3) A witness may also be impeached by evidence that he has made, at other times, statements inconsistent with his present testimony; so if you find that any witness in this case made statements, either orally or in writing, inconsistent with his present testimony, you may consider said witness impeached, and be at liberty to disregard his testimony, except in so far as he is corroborated by other credible testimony. (4) The jury are instructed that, if they find from the evidence that the witness Frank Parker gave his testimony in the belief that he would receive some reward or immunity from further punishment, or that by so doing he would be able to enlist the services of the party for whom he expected the aid in lessening the term for which he was sentenced to serve in the penitentiary of this state, then you should receive his testimony with great caution. (5) As an alternative request for instruction No. 4, if the court shall refuse the same, then we ask the court to give the jury the following in its place: If you believe from the evidence that the witness Frank Parker was induced to become a witness and testify in this case by any promise of immunity from further punishment, or by any hope held out or en-

tertained by him that it would go easier with him, if any there were, in case he implicated some one else in the crime, then the jury should take such facts into consideration in determining the weight which ought to be given to his testimony thus obtained and given under the influence of such promise or hope."

Cochran & Cochran, for appellant. A. M. Crawford, Atty. Gen., and F. S. Ivanhoe, Dist. Atty., for the State.

McBRIDE, J. (after stating the facts as above). The failure to give the third instruction was prejudicial error. The letter received in evidence tended to show that the witness Parker had offered to swear that Roy Halley had nothing to do with the burglary, which was inconsistent with his testimony on the trial of the case at bar that defendant, Halley, and himself had committed it. L. O. L. § 864. It does not appear that the writing was shown to witness while on the stand; but its execution was fully proved, and the state waived this requirement by failing to object on that ground, and, indeed, to object at all.

Instruction 4 was technically objectionable on the ground that it used the words "great caution"; the word "great" being a suggestion as to the degree of weight which the jury should attach to evidence of the character indicated. But instruction 5 is not subject to this objection, and is a correct statement of the law.

The evidence of Parker on cross-examination showed that he had some hope of receiving leniency if he gave testimony for the state, and that he had been assured that if he "told the truth" something might be done for his benefit. The temptation to a man, under these circumstances, to testify to a state of facts satisfactory to the party calling him, was a matter for the consideration of the jury, as bearing upon his motives in testifying, and, therefore, upon the probability of his testimony being false, and defendant was entitled to have this phase of the case called to the attention of the jury by an appropriate instruction.

Other errors are specified, but, after careful investigation, we find them without merit; but for the reasons heretofore given the judgment of the circuit court is reversed, and a new trial ordered.

(159 Cal. 182)

**SALINAS VALLEY LUMBER CO. v.
MAGNE-SILICA CO.
(L. A. 2,524.)**

(Supreme Court of California. Jan. 7, 1911.
Rehearing Denied Feb. 6, 1911.)

**1. SALES (§ 81*)—CONSTRUCTION OF CONTRACT
—TIME AS ESSENCE OF CONTRACT.**

Where an offer to sell lumber asked for time to have it shipped direct from the mills, but stated that prompt delivery could be given if necessary, barring the condition of the railroad freight system, and the buyer in accepting the offer asked for immediate delivery, and was told that the lumber would be coming in, possibly some of it in 20 days or from 20 to 30 days, but no specified date was set for its arrival, time is not made of the essence of the contract by its terms.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 81.*]

**2. SALES (§ 81*)—CONSTRUCTION OF CONTRACT
—TIME FOR PERFORMANCE.**

Where time is not made of the essence of a contract to sell lumber by its terms, the fact that the buyer, when it found that there was a delay in delivery, wrote urgent letters and made urgent appeals to the seller to furnish the lumber as promptly as possible, and the seller endeavored to do this, did not form a part of the consideration of the contract, and could not bind the seller to any more prompt performance than that called for by the contract, under which the seller was entitled to reasonable time, though, if time had been of the essence of the contract, the rule allowing reasonable time would not apply.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 81.*]

**3. APPEAL AND ERROR (§ 1011*)—REVIEW—
FINDINGS OF COURT.**

In an action for the price of lumber, where the evidence on the quality of the lumber was conflicting, the court's finding that it was up to the standard called for will be sustained.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.*]

**4. SALES (§ 353*)—REMEDIES OF SELLER—AC-
TIONS FOR PRICE—COMPLAINT.**

A complaint in the form of a common-law count for goods sold and delivered is sufficient under the reformed system of code pleading.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 905-1004; Dec. Dig. § 353.*]

**5. SALES (§ 179*)—REMEDIES OF SELLER—AC-
TIONS FOR PRICE—EVIDENCE—ADMISSIBILITY.**

In an action for the price of lumber, in which the court found that the lumber was up to the standard called for by the contract, there was no error in excluding testimony as to how much less the lumber the buyer received was worth than the lumber which was described in the original contract, where it had been proved that the lumber was tendered in fulfillment of the contract, that its delivery was at a fixed price, that it had been inspected by a representative of the purchaser and all unsatisfactory pieces rejected and the remainder accepted unconditionally and used in the defendant's building, and a witness had testified fully as to the grade of lumber delivered.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 179.*]

Department 2. Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Action by the Salinas Valley Lumber Company against the Magne-Silica Company. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

John M. York and Waldo M. York, for appellant. Canfield & Starbuck, for respondent.

HENSHAW, J. This is an action to recover for lumber sold to and used by the defendant company. Plaintiff had judgment, and defendant appeals from that judgment and from the order denying its motion for a new trial.

The contract between the parties was in writing evidenced by the following letter from the plaintiff lumber company to the defendant and the defendant's acceptance thereof: "Lompoc, Cal., April 18, 1906. Mr. Geo. Mason, Los Angeles, Calif.—Dear Sir: We herewith enclose list of lumber, which was handed to us by your Mr. Hannaman which we agree to sell to you f. o. b. cars at Lompoc for \$3,323.65. This is a very close figure considering the price lumber is selling at now, and we trust that we may be successful in securing your order. Furthermore, we anticipate that you may want some lumber out of our yard stock, which is usually the case in all building operations, and anything of this kind we will sell to you on the same basis rate of the entire bill of lumber. We will sell you stock, which we feel perfectly safe in saying cannot be excelled as to quality by any other lumber company on the coast. We would like to have you allow us time enough to have this lumber shipped direct from the mills if it is possible, which would mean about 30 days' time. However, we can give you prompt delivery if necessary barring the 'balled up' condition of the S. P. Co's freight system just at present. Trusting that we may receive a favorable reply from you at an early date, we beg to remain, Yours very truly, S. V. Lumber Co., A. C. Whittemore, Agt." Defendant's acceptance was oral, defendant's agent testifying: "I told him (Mr. Whittemore) that we wanted the lumber on immediate delivery, and he said it would be coming in, possibly some of it in 20 days, or from 20 to 30 days the lumber would be coming in." Such was the contract. Defendant was engaged in mining an infusorial earth called "Sil-O-Cel" and desired the lumber principally to construct a warehouse for the storage of this product. It particularly desired to erect the warehouse before the on-coming rains, since the effect of water upon the Sil-O-Cel was greatly to impair, if not utterly to destroy, its value. Thus it became important to defendant to house the earth and protect it from

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the winter rains. Much confusion resulted to all transportation lines following the San Francisco earthquake and fire, and deliveries of freight were delayed. This lumber was not delivered, and the warehouse was not constructed until after the rains had fallen and damaged greatly defendant's unprotected Sil-O-Cel. For this damage defendant sought compensation by way of counterclaim. The cause was tried by the court. It was also insisted that some of the lumber furnished by plaintiff was of a quality inferior to that called for by the contract. In an addendum to the letter above quoted was given the estimated quantity, the grade and the price of the different kinds of lumber required.

Defendant's contentions upon the trial were that time was of the essence of the contract; that at the time of entering into the contract plaintiff knew that defendant's purpose was to use the lumber to erect its warehouse, knew that the warehouse was necessary to protect the infusorial earth from damage by rain, and knew that, if the warehouse was not completed before the rain should fall, the infusorial earth then mined, and which plaintiff knew was mined, would be greatly damaged. The findings of the court were against the defendant upon all the issues joined. Defendant here contends that by its very terms time was of the essence of the contract, and that plaintiff's agreement was to furnish the lumber within 30 days.

It is apparent, however, that time is not made of the essence of the contract by its terms, and the cases to which appellant refers are those where the specified time of performance was named in the contract, and it was left for the court to say whether under the terms and conditions of the contract this time so specified was of the essence. Such cases are very different from that of the one at bar where no time for the completion of the contract is specified at all, and where plaintiff's agent, in answer to the testimony of Mr. Wayne Mason above quoted, declares that he did not make any promise to deliver lumber at any specified time, made no statement of the kind, and "never agreed with Mr. Wayne Mason or promised Mr. Wayne Mason or any other person connected with the defendant corporation that any lumber would arrive at any specified date or within any specified number of days." It abundantly appears that the defendant company when it found that there was delay in the delivery of lumber wrote urgent letters and made urgent appeals to plaintiff to furnish the lumber as promptly as possible and it appears also that plaintiff endeavored to do this. This was after-acquired information, and it did not form a part of the contract or the consideration thereof, and could not, of course, modify its terms or bind plaintiff to

any more prompt performance than called for by the contract itself, under which, since time was not of the essence, plaintiff was allowed reasonable time. As to this, the court found upon sufficient evidence that the delay resulted from the disturbance and confusion of transportation facilities and was not unreasonable. Of course, if time had been of the essence of the contract and it was possible for the plaintiff to have completed it, there would be no room for the operation of the rule which allows reasonable time accompanied by reasonable effort (*Luckhart v. Ogden*, 30 Cal. 547; *Reedy v. Smith*, 42 Cal. 245), but, as has been said, in this case, as time was not of the essence of the contract, all that the plaintiff was bound to do was to fulfill its contract by reasonable effort within reasonable time, as the court found it did. The evidence upon the quality of the lumber was likewise conflicting, and the court's finding that it was up to the standard called for will therefore be sustained without discussion.

The complaint was in the form of a common-law count for goods sold and delivered. It is earnestly contended that it states no cause of action under our reformed system of code pleading—this, notwithstanding the declaration in *McDonald v. Pacific Debenture Co.*, 146 Cal. 667, 80 Pac. 1090, cited by the defendant, where the court declares that the sufficiency of such a complaint has been settled by repeated decisions. Whatever may be thought of the sufficiency of such a pleading we will not undertake to overthrow it at this late day. It certainly prejudiced the defendant in no way, since the defendant may always exact a statement of the particulars of the account. Code Civ. Proc. 454.

Error is assigned in the court's sustaining an objection to a question asked one of defendant's witnesses as to how much less, if anything, the lumber which he received was worth than the lumber which was described in the original contract. This ruling took place at a stage of the trial when it had been proved that the lumber was tendered in fulfillment of the contract, that its delivery was at a fixed price, and that it had been inspected by a representative of the purchaser and all unsatisfactory pieces rejected, and the remainder accepted unconditionally and used in the defendant's building. The witness had also testified fully as to the grade or grades of lumber delivered. As the trial judge at that time must have concluded that the lumber which was furnished was up to specification, he was correct in ruling that the difference in value between the lumber furnished and that contracted for opened up an immaterial inquiry.

The judgment and order appealed from are therefore affirmed.

We concur: LORIGAN, J.; MELVIN, J.

(189 Cal. 133)

**BEESON v. WRIGHT.
WRIGHT v. BEESON et al.
(S. F. 3,696.)**

(Supreme Court of California. Jan. 4, 1911.

Rehearing Denied Feb. 2, 1911.)

1. CORPORATIONS (§ 116*) — CONTRACTS FOR SALE OF STOCK—SUBSEQUENT AGREEMENT—ALTERATION.

Where a written contract for the sale of corporate stock partly deposited in court provided that it was subject to the determination of pending litigation, and that the price was not payable until the stock was ready to be transferred, a subsequent oral arrangement by which a part of the price was paid before the stock was ready to be transferred did not so modify the contract as to permit a recovery of the balance of the price prior to delivery or a transfer of the stock.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 493; Dec. Dig. § 116.*]

2. CORPORATIONS (§ 119*)—SALE OF CORPORATE STOCK—SEPARABLE CONTRACT—EXECUTED ORAL AGREEMENT.

A written contract for the sale of 60 shares of corporate stock fixed a different price for 20 of the shares which were not in litigation, but provided that the price was not payable until the stock was transferred or ready for transfer on the books of the corporation on the termination of the litigation. After the suit had been decided in the state court, it was orally agreed that the buyer should surrender the seller's note for the price of the 20 shares for which the stock had been deposited as collateral, and that the sale as to such shares should be deemed complete. *Held*, that the contract was divisible as to the 20 shares, and that the oral arrangement constituted an executed contract of sale as to that amount of the stock.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 499-503; Dec. Dig. § 119.*]

3. CONTRACTS (§ 238*)—WRITTEN CONTRACTS—ALTERATION—METHOD.

A written contract cannot be altered except by a contract in writing, or by an executed oral agreement, as provided by Civ. Code, § 1698.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1123; Dec. Dig. § 238.*]

4. CORPORATIONS (§ 116*)—CONTRACTS FOR SALE OF STOCK—CONDITIONS—VOLUNTARY PAYMENTS.

Voluntary payment of a part of the price of certain corporate stock sold under a conditional written contract before the time for payment had arrived did not constitute such a consideration for an oral modification of the contract as would authorize a recovery of the balance of the price without performance of the conditions.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 493; Dec. Dig. § 116.*]

5. FRAUDS, STATUTE OF (§ 17*)—NOTE OF ANOTHER.

An oral promise to pay the note of another as a part of the consideration of a contract for the sale of corporate stock was unenforceable under the statute of frauds.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 16, 17; Dec. Dig. § 17.*]

Sloss and Angellotti, JJ., dissenting in part.

In Bank. Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Actions by W. F. Beeson against C. I. Wright, and by Wright against Beeson and

another. From a judgment against Wright in both actions, and from an order denying his motion for a new trial, he appeals. Judgment in the first action reversed and affirmed in the second.

Frank H. Short, F. E. Cook, and Irving Wright (Page, McCutchen & Knight, of counsel), for appellant. H. P. Brown and Dixon L. Phillips, for respondents.

SHAW, J. The case involves two actions, relating to the same transaction, appealed from the superior court of Fresno county. Appeals are taken in each case from the judgment, and from an order denying Wright's motion for a new trial. All the appeals are presented upon one transcript.

On September 13, 1900, in the superior court of Tulare county, Beeson began case numbered 9,184, against Wright, alleging that in June, 1900, he sold and delivered to Wright 60 shares of the capital stock of the Enterprise Lumber Company for the agreed price of \$5,285.12, which Wright then promised to pay; that Wright had paid thereon \$2,900; that the balance, \$2,385.12, remains unpaid, for which sum he asks judgment. On September 21, 1900, Wright began the action numbered 9,149, against Beeson and Brown. This is a suit upon a promissory note for \$1,900 executed by Beeson to Wright on May 11, 1900, payable one day after date, with interest until paid, and secured by the pledge of 20 shares of stock of said company, the said 20 shares being a part of the 60 shares mentioned in the suit of Beeson v. Wright (No. 9,184). It is alleged that Brown claims some interest in the stock. Judgment was asked for the amount of the note and for the foreclosure of the lien of the pledge of the stock. Brown answered, disclaiming any interest.

The two cases were tried together upon the stipulation that the same evidence should be taken and considered, so far as applicable, in each case. Judgment was given in favor of Beeson in the case of Beeson v. Wright (No. 9,184) for the recovery of \$2,385.12 alleged to be due as the balance of the price of the stock. In the case of Wright v. Beeson (No. 9,149), upon the promissory note, judgment was given in favor of the defendants that the plaintiff take nothing thereby. The only contention which it is necessary to notice is that the judgment in each case is contrary to the evidence.

There is no substantial conflict in the evidence, except upon one point. On March 24, 1900, Beeson was the owner of the 60 shares of said stock; Brown having at that time some subordinate interest therein. Forty of these shares were the subject of litigation in an action then pending in the superior court, entitled Feusler v. Wright, and were deposited in court, awaiting the final decision in the case. On the day mentioned Beeson and Brown executed a written contract with

Wright, whereby it is declared that they sold and delivered to Wright the 60 shares of stock in controversy, 40 of said shares to be taken at the price of \$3,000, and the remaining 20 shares at the price of \$1,900. The agreement further provided that no part of the price fixed for said stock was to be paid until the entire 60 shares should be delivered and transferred, or was ready to be transferred, on the books of the corporation, to Wright, and that, if it should become impossible to transfer the whole 60 shares to Wright, he would reassign and convey to the sellers all his interest therein. On May 11, 1900, Wright, at the request of Beeson, advanced to Beeson the sum of \$1,900 as a loan, for which Beeson executed the note sued on in the case of Wright v. Beeson and pledged to Wright, as security therefor, the 20 shares of stock which was not involved in the suit with Feusler. According to the testimony of Beeson, it was then understood that, if the litigation with Feusler resulted in favor of Beeson and Wright, the stock should be retained by Wright and the note canceled. About that time the case of Feusler v. Wright was tried, and about June 12th, a decision was announced by the court in favor of Wright, but no findings or judgment were filed or entered in the case until June 18th. On June 12th, after the decision was announced, Wright, Beeson, and Brown met on the street in Fresno. At that time Wright was secretary of the company, the 20 shares were in his possession as pledgee, and the 40 shares were on deposit in court in the case of Feusler v. Wright and in control of the court. What took place at that meeting is the controlling factor in the case. The evidence upon that subject is conflicting. As the finding is in favor of Beeson and Brown, we must, in the consideration of the appeals, accept their version as true. They testified that Brown, at Beeson's request, presented to Wright a statement purporting to be a statement of account between Beeson and Wright. The statement charged to Wright \$3,000 for the 40 shares of stock and two notes due from one McFadden, one of \$628.25 to Brown, the other of \$78.87 to Beeson, and gave Wright credit for a balance of \$315, due from one Young, leaving a balance due from Wright to Beeson of \$3,385.12. Thereupon, according to their statement, Beeson stated that he wanted to settle up in full, and close the transaction for the 60 shares of stock and wanted Wright to return the \$1,900 note. Wright said he could not pay all the money that day, but that he could pay \$1,000, that he did not know when he could pay the remainder, but that he would pay it within a short time. Beeson said he would need the money on July 6th to pay on some land he had bought, to which Wright replied that he would see that Beeson was not cramped and would make the payment in time to enable Beeson to meet the obligation for the property and that he

would return the note, which he had left at his home, as soon as he could find it. Wright then paid the \$1,000, and it was entered by him as a credit on the said statement of account. Beeson and Brown also testified that Wright agreed to take the stock in the condition it was in at that time at the price of \$5,285.12, and also agreed to pay the two notes of McFadden, amounting to \$704.12, and that he would allow the \$1,900 advanced on the note and secured by the pledge of the 20 shares to stand as a payment for the 20 shares and would cancel the note of Beeson for that sum, that thereupon they all called it a deal and said the trade was finished, Wright also agreeing that, if an appeal was taken in the case of Feusler v. Wright, he would take care of it at his own expense.

This was substantially all the testimony given in support of the suit of Beeson v. Wright for the balance of the alleged price of the 60 shares of stock. The execution of the note for \$1,900 is admitted, and the only defense to it consists of the claim that by the transaction of June 12, 1900, Wright agreed to take the pledged stock in the condition in which it then was in satisfaction of the debt due upon the note. The transaction of June 12th was entirely oral. No writing modifying, rescinding, or amending the contract of March 24, 1900, was ever executed by the parties.

It is obvious that this transaction could not have operated to alter or change the written contract with regard to the forty shares of stock deposited in court. A written contract cannot be altered, except by a contract in writing, or by an executed oral agreement. Civ. Code, § 1608. Taking the testimony of Beeson and Brown at its full value, it is quite clear that there was no executed oral agreement concerning those shares. The price to be paid for them was fixed by the contract at \$3,000. They were then on deposit in court, not in control of the parties and not ready for transfer on the books of the company. There is no evidence that they ever have been ready for such transfer, and therefore the price was not then due. Wright merely paid \$1,000 of it and agreed to pay the remainder before it was due, or in time to enable Brown to meet a collateral obligation. Nothing further in that behalf was done. Furthermore, as to the 40 shares, there was no consideration for the oral agreement that it is claimed was made. The voluntary payment of a part before maturity did not constitute such consideration, since it did not benefit Wright nor cause prejudice to Beeson. Civ. Code, § 1605. There was no evidence of any consideration for the promise to pay the two notes of McFadden, and, besides, that was a special promise to answer for the debt of another, and, not being in writing, nor within the scope of section 2791 of the Civil Code, it was void. Civ. Code, § 1624, subd. 2. The judgment in the case of Beeson v. Wright was upon an obligation not

due at the time it was rendered, and it is wholly without support in the evidence.

The evidence shows that there was, in substance, an executed oral agreement with respect to the 20 shares of stock. There was, in effect, an execution of that part of the contract. The part of the written agreement stipulating for the sale of the 60 shares as an entirety, and providing that there was no obligation upon the buyer to take any of it unless all of it was available, was not an immutable compact. The parties still retained power to change it in any respect and to make further contracts relating to its subject-matter. The fact that separate and different prices were fixed for the two blocks of stock made it easy to alter the contract so that it could be executed as to one, without affecting it as to the other. If, after its execution, Wright had paid the \$1,900 specified as the price of the 20 shares, and Beeson and Brown, in consideration of such advance payment, had completed the sale as to the 20 shares by transferring and delivering the same to Wright, no one would contend that the transaction was not complete and binding as an executed sale of the 20 shares, or that the original contract was not, to that extent, performed and discharged, including the obligation to pay the \$1,900 as the price thereof. This was exactly what the two transactions of May 11th and June 12th amounted to in legal effect.

The loan of \$1,900 on May 11th was made with the express purpose of transforming it into a payment of the \$1,900, fixed as the price for the 20 shares, if the decision in *Feusler v. Wright* should be rendered in favor of the defendants therein. It was, in effect, so agreed by the parties at the time said loan was made. Beeson testified that the superior court decision was the one referred to in the conversation. The subsequent transaction of June 12th, when the decision of the superior court was rendered, confirms that view, and, as the court below found in accordance therewith, it must now be taken as the fact. On June 12th, after the decision was given, the parties met and carried out the agreement of May 11th. The certificates for the 20 shares having been already indorsed and delivered to Wright in pledge at the time the loan was made, and he being the secretary of the company with power to enter the transfer on the books, no further delivery thereof was necessary. Beeson having received the \$1,900, actual delivery thereof in payment was not required. All that was essential to complete the arrangement of May 11th, if it did not become complete by the mere happening of the event upon which the loan was to become a payment, was the mutual consent of the parties to accept as performance what they had previously received as a loan and pledge, respectively. Each thereupon accepted the decision of the superior court as

the event which was to terminate the loan and pledge, each accepted the previous delivery of the stock and payment of the money as performance of the respective obligations, and the oral agreement to complete the sale of the 20 shares separately from the 40 shares became then and there an executed agreement.

The fact that the note was not then canceled or destroyed does not prevent the transaction from having this effect. It was fully paid and satisfied by the transaction, and, being past due, it thenceforward remained without force or validity into whosoever hands it might fall, whether surrendered or not. The effect of the entire proceeding was the same as if no loan had been made or note given on May 11th, and the \$1,900 had been paid and the stock transferred on June 12th, as part performance of the original agreement. Wright retains the stock and has a complete legal title thereto, and he should not be allowed to recover judgment on the note after it has been thus discharged.

In view of this conclusion, the evidence of the conversation at the time the note was given, to the effect that, although upon its face payable one day after date with interest, it was not to be payable until after the decision of the *Feusler Case* and was not to bear interest, was manifestly harmless, even if erroneous.

As the appeals have been presented upon one transcript and each party prevails in part, it is proper that each should pay one-half of the costs of appeal.

The judgment and order in the case of *Beeson v. Wright* are reversed, the judgment and order in the case of *Wright v. Beeson* upon the promissory note are affirmed, and it is ordered that each party shall pay one-half the costs of appeal, and that the court below give the proper judgment for such costs if either party has paid more than one-half thereof.

We concur: LORIGAN, J.; HENSHAW, J.; MELVIN, J.

Concurring Opinion in *Beeson v. Wright*.

SLOSS, J. I agree with what is said in the foregoing opinion concerning the forty shares, and, therefore, concur in the reversal of the judgment and order appealed from in the case of *Beeson v. Wright*.

Dissenting Opinion in *Wright v. Beeson*.

I dissent, however, from the affirmance of the judgment and order in *Wright v. Beeson*. The opinion of the majority proceeds upon the theory that the agreement of June 12th was executed with respect to the twenty shares and the nineteen hundred dollar note, and constituted a valid oral modification of the original writing, under section 1698 of the Civil Code. I shall not stop to discuss the appellant's argument to the effect that,

even if the parties had, from the outset, been dealing with the twenty shares alone, the occurrences of June 12th would not have been sufficient to operate as a valid modification of a written agreement. Assuming their sufficiency to that end they could be given effect only by treating the sale of the twenty shares as severable from the remainder of the contract. This cannot be done without making for the parties and imposing upon them a contract which they never intended to make. That the original written agreement was entire is clear from its terms. It provided that no part of the price fixed was to be paid until the entire sixty shares should be delivered and transferred, or be ready for transfer. The alleged modification of June 12th did not purport to make the contract severable. The testimony of Beeson and Brown, as stated in the main opinion, is that Beeson declared to Wright that he wanted to settle up in full and close the transaction for the sixty shares of stock. If the oral agreement then made was effective at all, it must have operated upon the rights of the parties to the entire full sixty shares. Neither Beeson nor Wright intended to make an agreement which should apply solely to the twenty shares. Just as the original agreement was entire, so was the attempted modification. If it cannot be given effect in toto, it cannot be given effect at all. To enforce it in part is to hold Wright to a payment for twenty shares, when the only contract he has ever made is an entire one for sixty shares. Viewing the modification, then, as an entirety, it was not effective unless fully executed. Execution in part would not suffice. "There must be a complete execution of the obligations of both parties in order to bring the modification within the terms of the statute." *Pearsall v. Henry*, 153 Cal. 314, 95 Pac. 154, 159, and cases cited. The majority opinion shows that the agreement remained executory as to the forty shares. As these shares were bound up with the others so as to make a single agreement for the sale of the sixty shares, the rights of the parties must be determined by their written contract. There is no foundation in either the findings or the evidence for a claim that the conversation of June 12th constituted a novation whereby a new contract was substituted for the existing one. See *Pearsall v. Henry*, supra. The parties were, not, under the testimony of Beeson and Brown, undertaking to abrogate the old agreement and put a new one in its place, but were dealing with a view to carrying out the old agreement, subject to certain stipulated changes.

I think too that the court below erred in admitting evidence of an oral understanding, contemporaneous with the execution of the note, that such note (although upon its face made payable one day after date and bear-

ing interest) was to be payable after the decision in the *Feusler Case* and be without interest. *S. J. Sav. Bank v. Stone*, 59 Cal. 183; *Cashman v. Harrison*, 90 Cal. 297, 27 Pac. 283; *Leonard v. Miner*, 120 Cal. 403, 52 Pac. 655.

I concur: ANGELLOTTI, J.

(159 Cal. 142)

HANNAH v. STEINMAN. (S. F. 5,327.)

(Supreme Court of California. Jan. 4, 1911.

Rehearing Denied Feb. 2, 1911.)

1. CONTRACTS (§ 93*)—RESCISSION—"MISTAKE OF FACT"—NATURE OF MISTAKE.

Under Civ. Code, § 1689, providing that a party to a contract may rescind it if his consent was given by mistake, while the mistake may be one of fact, as defined by section 1577, or of law, as defined by section 1578, in which latter case the mistake must be by both parties, not only must the mistake be one but for which the party would not have consented to the contract, section 1568 declaring that consent is deemed to have been obtained through mistake "only when it would not have been given had such cause not existed," but in case of mistake of fact, the mistake must be "material to the contract," this being an element of a mistake of fact, as defined by section 1577.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 415-419; Dec. Dig. § 93.*

For other definitions, see *Words and Phrases*, vol. 5, pp. 4542, 4543; vol. 8, p. 7723.]

2. LANDLORD AND TENANT (§ 27*)—LEASE—RESCISSION—MISTAKE.

The mutual mistake, the belief that the lot was not within the district where construction of wooden buildings was prohibited by ordinance, on which the parties executed a lease of a vacant lot, reciting that the lessee contemplated erecting buildings thereon, and might remove them at the termination of the lease, is not only one but for which the lessee would not have consented to the lease, but is also material to the contract (that is, not as to a purely collateral matter, but going to the essence of the contract, so as to entitle the lessee to rescind the lease); the lease for only five years, and for a substantial rent, being of no substantial value without the right to erect a wooden building.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 82; Dec. Dig. § 27.*]

3. LANDLORD AND TENANT (§ 27*)—LEASE—RESCISSION—"MISTAKE"—NEGLECT OF LEGAL DUTY.

The mistake of persons in executing a lease of a lot, the belief of both parties that the lot was not within the district where construction of wooden buildings was prohibited by ordinance, whereas two days before the lease was executed an ordinance was passed putting it within such district, was not, as regards the lessee's right to rescind, a mistake caused by any neglect of his legal duty, within Civ. Code, § 1577, providing, as part of the definition of a "mistake," that it "was not caused by the neglect of a legal duty on the part of the person making the mistake."

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 82; Dec. Dig. § 27.*]

4. LANDLORD AND TENANT (§ 34*)—LEASE—RESCISSION—OFFER TO RESTORE.

Under Civ. Code, § 1691, providing as a condition to a party rescinding a contract that "he must restore to the other party everything

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep't Indexes

of value which he has received from him under the contract; or must offer to restore the same on condition that such party shall do likewise, unless the latter is unable or positively refused to do so," the offer of a lessee, attempting to rescind the lease, to restore possession of the land, is not invalid because conditioned on the lessor restoring "all moneys and things of value received as consideration for said lease," though the lessor be entitled to reasonable compensation for use of the land prior to rescission, if the circumstances make it just that he should have such compensation; the further part of the offer "to do and perform all acts and things which may be necessary or proper in order to fully restore to you any and all things of value received by me from you as fully and completely as if said lease had never been made," being broad enough to include such compensation.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Dec. Dig. § 34.*]

5. LANDLORD AND TENANT (§ 34*) — LEASE — RESCISSION—LACHES.

Under Civ. Code, § 1691, subd. 1, providing as a condition to one rescinding a contract that "he must rescind promptly on discovering the facts which entitle him to rescind if he * * * is aware of his right to rescind," one taking a lease of a vacant lot, for purpose of constructing thereon a wooden building, under the mistaken belief of both parties that the lot was not within the district where construction of wooden buildings was prohibited by law, acted seasonably, having at once, on discovery of the mistake, made known to the lessor that the lease was valueless to him unless he could have a longer term, and made ineffectual negotiations for a longer term, and having had no idea till he consulted attorneys, which he did immediately on refusal of an extension, that he had a right of rescission, and having acted immediately on learning of his right; there having been no circumstances prior to termination of his negotiations calling for a conclusion that a resort to law must be had, and mere knowledge of facts entitling one to rescind not being enough to necessarily put him on inquiry as to his remedy at law, but it being necessary to put him on such inquiry that he at least have knowledge of such facts as would reasonably put him on such inquiry.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 97; Dec. Dig. § 34.*]

6. LANDLORD AND TENANT (§ 34*) — LEASE — RIGHT OF LESSEE TO RESCIND—WAIVER.

A lessee does not waive his right to rescind the lease of a vacant lot, for the mistake on which it was made, the belief of both parties that the ordinances did not prohibit his erecting a wooden building by paying rent, under protest, and without knowledge of his right to rescind, and while negotiating for an extension of the lease for a term that would justify him in making another kind of improvement.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Dec. Dig. § 34.*]

In Bank. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action, by Jesse D. Hannah against B. U. Steinman. From a judgment for defendant, and an order denying a new trial, plaintiff appeals. Reversed.

Aitken & Aitken, for appellant. Heller, Powers & Ehrman, for respondent.

ANGELLOTTI, J. Plaintiff appeals from a judgment denying him any relief and from

an order denying his motion for a new trial in an action brought by him to obtain a decree that a contract of lease had been rescinded.

Defendant is the owner of an unimproved lot of land in San Francisco, with a frontage of 90 feet on the northerly line of Geary street between Larkin and Hyde streets. On July 7, 1906, a contract of lease was executed by the parties, whereby defendant let to plaintiff and plaintiff hired from defendant said lot for a term of three years commencing August 7, 1906, for the sum of \$9,000, payable in monthly installments of \$250, and the privilege was thereby given to plaintiff to extend the lease for a further term of two years at a monthly rental of \$300. It was recited therein that as the lessee contemplated erecting buildings on the premises he would hold the owner free of any claim of lien on account thereof, that all buildings or other improvements placed thereon by plaintiff should be plaintiff's property at the termination of the lease, that he would pay all taxes thereon and that he should have ten days free of rent at the termination of the lease in which to remove them. Up to the 5th day of July, 1906, the ordinances of the city and county of San Francisco were such that a permit could be obtained for the construction of a wooden building on this property, but on July 5, 1906, an ordinance was enacted that rendered it unlawful to erect or construct wooden buildings within certain limits prescribed therein, which included this lot. Neither plaintiff nor defendant knew of this change in the laws of the city and county at the time of the execution of the lease, each supposing that he knew and understood the law relative to such matters, and each apprehending the law to be that the erection of a temporary wooden building on said lot would be lawful. Plaintiff and defendant never met personally until long after the execution of the lease, all negotiations between them having been conducted through a firm of real estate brokers who acted purely as middlemen, and who were not the agents or representatives of the defendant. The finding on this question of agency is fully sustained by the evidence. About two weeks after the execution of the lease plaintiff, having already paid \$250 rent, applied to the board of public works of the city and county for a permit to erect a wooden building on said property, and he then discovered that the law relative to fire limits had been changed and that no permit could be obtained. There was no attempt to question the positive evidence introduced by plaintiff to the effect that without the right to erect a wooden building upon this lot, the lease for three years only with the privilege of two years more at the prescribed rental was absolutely without value to a tenant and that plaintiff never would have entered into the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

contract had he supposed that he could not erect such a building thereon. It was impossible to use the lot to advantage without a building, and the cost of such a building as could be constructed in view of the building ordinances applicable would be so great as to render the lease in question valueless. The evidence compels the conclusion that it was within the contemplation of both parties that the lessee could use the lot to advantage only by constructing a wooden building thereon and that he was taking it for such use. Upon learning that a wooden building could not be constructed plaintiff so informed the real estate agents, said the lot was of no value to him unless he was given a longer term, and protested against paying the rent for the second month. He subsequently paid rent for two additional months to Mr. Israel, of the Union Trust Company, for defendant, protesting at each payment against the same. He was informed by Mr. Israel that defendant was East, but would shortly return, and he allowed the matter to remain in abeyance until defendant's return. The evidence indicated that defendant was advised of plaintiff's dissatisfaction with the lease, and that he (plaintiff) was disposed not to go on with it. Immediately upon his return (January 26, 1907) negotiations were commenced between the parties looking to a longer term, but they came to nothing. In his written proposition of February 24, 1907, regarding the terms of a new lease for 20 years, plaintiff asked defendant, if not satisfied with the proposition, to consider releasing him, saying that he had already paid dearly for his experience. As soon as it had developed that no satisfactory arrangement could be made plaintiff consulted an attorney, and was informed that he had a right to rescind the contract of lease. This was on March 1, 1907. He had full knowledge of the facts which entitled him to rescind two weeks after the agreement was entered into, but did not know that an agreement could be rescinded on account of such a mistake until so advised by his attorney. On March 5, 1907, he served a notice of rescission on defendant, specifying mistake and failure of consideration as the grounds, offering therein to restore possession of the land, authorizing defendant to enter upon and hold the same, offering to execute such release of the lease as defendant might desire, and to do all acts necessary in order to fully restore to defendant any and all things of value received by him as fully and completely as if said lease had not been made, "on condition that you restore to me all moneys and things of value received as consideration for said lease." Defendant refused to agree to a rescission, and this action was at once commenced.

The trial court found as facts "that the use of said real property described in said lease by the erection of a building or buildings which could be removed was not the only

valuable consideration for the obligation of plaintiff under said contract," and that plaintiff "did not use due diligence in rescinding said agreement." Both of these findings are attacked as not being sustained by the evidence. In its purported conclusions of law was one that plaintiff "did not rescind said contract promptly upon discovering the facts which entitled him to rescind the same and when he was aware of his right to rescind," and this, treated by plaintiff as a finding of fact, is also attacked as being unsupported by the evidence.

A party to a contract may rescind the same if his consent thereto was given by mistake either of law or fact. Subdivision 1, § 1689, Civ. Code. We deem it unimportant whether the alleged mistake in this case be held to be a mistake of fact or one of law. The mistake was the belief of both parties that the lot was not within the limits fixed by ordinance wherein it was unlawful under the ordinances of the city and county of San Francisco to construct a wooden building—ignorance of the fact that an ordinance had just been adopted placing such lot within such limits. Unconscious ignorance of a fact material to the contract or belief in the present existence of a thing material to the contract constitutes a mistake of fact (section 1577, Civ. Code), and a misapprehension of the law by all parties, all supposing that they know and understand it, and all making substantially the same mistake as to the law, constitutes a mistake of law (section 1578, Civ. Code). Upon the facts of this case there was a mutual mistake either of fact or of law. Was it such a mistake as warrants rescission? Consent is deemed to have been obtained through mistake "only when it would not have been given had such cause not existed." Section 1568, Civ. Code. It cannot be doubted that plaintiff would not have consented to the lease but for this mistake. The principal question in this connection is whether it was "material to the contract" within the meaning of those words as used in our statute. That it was material in the sense that but for it plaintiff would not have considered for a moment the making of the contract we have seen, but that clearly is not enough. The same thing might be said as to mistaken expectations of both plaintiff and defendant as to plaintiff's ability to obtain tenants for the building he proposed to erect on the leased land, and, of course, a mistake in that regard would not furnish ground for rescission, although plaintiff never would have entered into the contract but for such mistaken belief. It is declared by Mr. Page in his work on Contracts that a mistake will not be operative to render a contract void, although in some cases it may render it voidable, if it merely affects some "collateral" though highly material matter, constituting merely a matter of inducement, but that it must affect the execution and the essential elements of the contract (sections 58 and 60),

which elements are stated to be the parties, the subject-matter, the consideration, and the offer and acceptance. We may assume for the purposes of this decision that our Legislature had some such idea as this in the use of the word "material" in this connection, but, so assuming, we are nevertheless of the opinion that the mistake here was not as to a purely collateral matter, but rather went to the essence of the contract. The authorities recognize the difficulty in determining whether a mistake applies to an essential feature of the contract or to a purely collateral matter. 1 Page on Contracts, § 71. It is thoroughly established that if the parties to a contract enter into it under the belief that the subject-matter or consideration is in existence, and in effect condition their contract thereon, and as a matter of fact, it is not in existence, the mistake will enable a party to avoid the contract. We are, of course, not speaking of cases where the parties are aware that the existence of the subject-matter is doubtful and contract with reference thereto. Thus, an ordinary contract of sale of property supposed to be in existence, but which in fact no longer exists, may be avoided. In such a case it is plain that the mistake is material and goes to the very essence of the contract. The assumed fact of existence is the whole basis of the contract. The same rule must necessarily apply where a material part of the subject-matter, as to which the parties supposed they were contracting, is not in existence at the time the contract is entered into. An example of this is the case cited by Mr. Page in section 72 of his work (*Bedell v. Wilder*, 65 Vt. 406, 26 Atl. 589, 36 Am. St. Rep. 871), a lease of property to be used for manufacturing purposes where entered into under a mistake as to water rights which were thought to be easements appertaining to the realty, and without which it could not be used for such purposes. See, also, *Blake-man v. Blakeman*, 39 Conn. 320; *Champlin v. Laytin*, 1 Edw. Ch. (N. Y.) 467. So, also, a material mistake as to the identity of the subject-matter or consideration may go to the very essence of the contract. A leading case in this regard is that of *Kennedy v. Mail Co.*, 2 L. R. Q. B. 580, an action to rescind a contract of subscription for shares of the defendant on the ground of mistake. The prospectus of the defendant company stated that the shares were issued to enable the company to perform a contract for mail service entered into with the government of New Zealand. As a matter of fact the purported contract was invalid, but all parties believed it to be valid, and plaintiff had subscribed because of that mistaken belief. The value of the shares would have been greater had the contract been valid, but they were, nevertheless, of considerable value, the court in fact saying that the difference in value was not greater than "might very well be accounted for by the change of times,

quite independently of the dispute about the contract." While relief was denied in that case, the court expressly recognized that if the invalidity of the mail contract really made the shares plaintiff obtained "different things in substance from those which he applied for" he would be entitled to rescission. The court said that "the difficulty in every case is to determine whether the mistake or misapprehension is as to the substance of the whole consideration, going, as it were, to the root of the matter, or only to some point, even though a material point, an error as to which does not affect the substance of the whole transaction." It cannot be doubted that if the value of the shares had been entirely dependent on the validity of the mail contract the court would have held that the mistake was as to the substance of the whole transaction. The principles enunciated in this decision were applied in *Sherwood v. Walker*, 66 Mich. 568, 33 N. W. 919, 11 Am. St. Rep. 531, where a mistake as to whether a cow was barren and would not breed was held to avoid a contract of sale thereof, the record being taken as showing that both parties supposed the cow to be barren and dealt with each other upon that theory, in consequence thereof fixing the price ("five and a half cents per pound") according to the value of the animal for beef, while, if a breeder, she was worth at least \$750. The court held that the mistake went to the whole substance of the agreement, that the parties would not have made the contract except upon the understanding that the cow was incapable of breeding and of no use as a cow, that the cow was not in fact the animal or kind of animal the defendant intended to sell or the plaintiff intended to buy, that the mistake went to the very nature of the thing, and affected the substance of the whole transaction, and that there was no contract to sell or of sale of the cow as she actually was. Such a case is, of course, very different from one where there is no mutual understanding as to a supposed fact relating to the subject-matter of the contract known by both parties to be the sole basis of the proposed contract, and upon the assumption of which they actually conduct their negotiations. The case before us is very much stronger in favor of plaintiff than either of the cases just discussed. The evidence demonstrates that the parties negotiated and executed the lease upon the assumption that a wooden building could lawfully be constructed upon the demised land, and that such was the use to which the lessee must put the land and was the main inducement of the contract. Without the right to construct such a building, it could be of no substantial value to any one holding a lease for only five years who was required to pay any substantial rent. While there was no mistake as to the identity of the land itself, without that right and viewed with reference to a lease for only five years the land was a substantially different

thing from the land supposed to be contracted for. It is very analogous to a case of land bought and sold upon the mistaken supposition that as a selling necessary way of duress and error is appurtenant to the land and passes by the conveyance, where in fact there is no such way. With all the rights to construct a wooden building the tenant so far as all practical considerations are concerned, was obtaining nothing. If an effective prohibition against a wooden building on this lot had been imposed by the terms of a prior conveyance, and this lease had been given and received in ignorance of the existence thereof, it would probably not be questioned that the mistake would be of such a nature as to enable the lessee to rescind, the prohibition amounting to a practical and material impairment of the estate contemplated by the parties. Here we have practically the same result because of an ordinance of the city of which the parties were ignorant. We cannot believe that the equitable rules relative to mistake should be so narrowly construed as to require us to hold that this mistake did not go to the very essence of the contract between these parties. We have examined the cases cited by learned counsel for defendant on this proposition, but find nothing therein compelling a different conclusion from that at which we have arrived. It would unnecessarily prolong this opinion to discuss these cases. It is proper, however, to note that the quotation from 9 Cyc. 395, to the effect that where one buys land in the expectation of procuring a consent which is required for building on it, and fails to obtain such consent, his mistake will have no effect on the agreement, is not opposed to our conclusion. The connection in which this is said shows that the expectation there referred to is one not so regarded by the parties as to constitute an essential feature of the contract of sale, but as a mere expectation of the vendee as to what he may be able to obtain from another party in the future. In the case cited in support thereof (*Adams v. Weare*, 1 Bro. Ch. 567, 28 Eng. Reprint, 1301) it appeared that it was understood between the parties that the vendee assumed the risk of being able to get the consent, and that the sale was not conditioned upon his obtaining it. The trial court in this case concluded, as we have, that the consent of plaintiff to said contract was given and obtained by and through a mistake, and would not have been given had not such mistake existed, and its denial of relief to plaintiff was based purely on the ground of want of diligence on his part in rescinding the agreement.

Section 1577, Civ. Code, defining "mistake," declares that it is a mistake "not caused by the neglect of a legal duty on the part of the person making the mistake." We find nothing in the record warranting a conclusion that the mistake was caused by the

neglect of any legal duty on the part of plaintiff.

Section 1691, Civ. Code, provides that, except where effected by consent, rescission can be accomplished only by the use, on the part of the party rescinding, of reasonable diligence to comply with the following rules: (1) He must rescind promptly, upon discovering the facts which entitle him to rescind, if he is free from duress, menace, undue influence or disability, and is aware of his right to rescind; and (2) he must restore to the other party everything of value which he has received from him under the contract, or must offer to restore the same, upon condition that such party shall do likewise, unless the latter is unable or positively refuses to do so."

We see no force in the claim that the attempted rescission was incomplete for want of a sufficient offer of restoration of all that plaintiff had received under the contract. The offer was in full accord with the above-quoted provision of the Civil Code. The point of learned counsel for defendant in this connection appears to be that it was invalid because made upon the express condition that defendant restore "all moneys and things of value received as consideration for said lease," which would include all amounts received by him as rent stipulated thereby. Such, however, is the provision of our Code relative to the offer, that condition being expressly provided for therein. In the event of rescission, plaintiff was entitled to have restored to him all sums paid by him under the contract. This does not mean that defendant was not entitled to have reasonable compensation for the use of his land for the time preceding the rescission, if circumstances were such as to make it just that he should have such compensation. The offer of plaintiff was broad enough to include such compensation. In addition to offering possession of the land, etc., he offered "to do and perform all acts and things which may be necessary or proper in order to fully restore to you any and all things of value received by me from you as fully and completely as if said lease had never been made."

The decision of the learned trial judge against plaintiff is based upon his conclusion that he had not used reasonable diligence to comply with the requirement of subdivision 1 of section 1691 of the Civil Code, to rescind promptly on discovery of the facts entitling him to rescission, if "aware of his right to rescind." Is there sufficient support in the evidence for this conclusion? There is not a vestige of evidence to indicate that plaintiff, after discovery of the facts, delayed action looking to a repudiation of the lease by reason of any desire to hold the same for a time, with the possibility of profiting thereby. It was demonstrated by the evidence that from the moment of discovery of the facts it was recognized by plaintiff that his lease was abso-

lutely valueless, as in fact it was, and contended that he should, in justice, be released from his obligation to pay rents thereunder, unless the contract was modified in such a way as to give him a term sufficiently long to warrant the construction by him of a building in accord with the requirements of the ordinance. He at once made known his position in regard to the matter to the agents who had effected the lease and who collected the rents for the second month, and maintained that position until it was finally apparent that a longer term upon a satisfactory basis could not be agreed upon. The delay in ascertaining that fact was due principally to the absence of defendant from the state, and the evidence is such as to practically compel the conclusion that plaintiff acquiesced as long as he did solely because he hoped that some satisfactory solution might be agreed upon by himself and defendant, and that he had reasonable grounds for such hope. The facts of the case were such that defendant could not but know as soon as he learned of the ordinance that the lease already executed was practically worthless to plaintiff. It is absolutely clear too, that plaintiff did not have any idea that the law gave him the right to rescind the contract of lease for such a mistake as this until, upon the conclusion of his efforts to adjust the matter with the defendant in some way, he, on March 1, 1907, consulted a lawyer. His letter of February 4, 1907, to defendant, in which he asked to be released if defendant would not accept his proposition for a new lease, showed that he was still absolutely ignorant of any such right. It cannot be disputed that he proceeded with all due diligence upon learning that such a remedy existed, but it is urged, in accord with the views entertained by the learned judge of the trial court, that he should earlier have made himself acquainted with his legal rights in the matter, upon the theory that means of knowledge are equivalent to knowledge. The words "and is aware of his right to rescind" in subdivision 1 of section 1691 of the Civil Code necessarily mean something more than that a party could have ascertained that the remedy by rescission existed by investigating as to what remedies the law afforded. Meaning no more than this they would be entirely superfluous. Discovery of the facts entitling him to rescind would alone suffice. The statute provides that in addition "to discovering the facts" he must be "aware of his right to rescind." These words imply in regard to the right to a remedy by rescission at least as much as the word "discovering" implies in regard to the facts entitling him to rescind, viz., that he should actually have knowledge of circumstances sufficient to put him on an inquiry which if followed would have developed the truth (see *Lady Washington C. Co. v. Wood*, 113 Cal. 487, 45 Pac. 809), or as said in *Guarantee Co. v. Mechan-*

ics', etc., Co., 183 U. S. 420, 22 Sup. Ct. 131 (46 L. Ed. 253), not as meaning "becoming satisfied," but rather "having reason to believe" or "to be put on one's guard in respect thereto." Mere knowledge of the facts that entitle one to rescind is not enough to necessarily put one on inquiry as to the possible remedies afforded by law. There must at least be knowledge of such facts as would reasonably put the party upon such inquiry. This knowledge may perhaps be afforded by the very facts that entitle him to rescind, as, for instance, in a case where those facts show a deliberate intention on the part of the other party to defraud and practically demonstrate that the only relief the injured party may obtain is such as he can have by diligently pursuing such remedy as the law may afford. As to this, however, we express no opinion. But there was nothing of this kind in the case at bar; no circumstances calling for the conclusion that a resort to law must be had. There was simply a mistake on the part of both parties honestly made, and it does not appear to us that there was anything in the circumstances to sustain the conclusion that the plaintiff was required at once or at any time prior to the termination of the negotiations between himself and defendant to consult a lawyer to ascertain his legal rights. If there were a vestige of evidence to indicate that plaintiff delayed proceeding in this matter because of any uncertainty in his own mind as to whether or not it might be profitable to him to retain this lease, a very different case would be presented. It is proper, also, to say that there is no evidence whatever to indicate that defendant may have been injured by the delay. He must have known practically from the outset that, in view of the ordinance of which each was ignorant at the time of the execution of the contract, plaintiff's lease was valueless, and that plaintiff was not willing to retain it or keep the property unless a new arrangement could be made. There was nothing to indicate that he had any opportunity to let the property to any other person except his statement referred to in the letter from plaintiff of February 4, 1907, as being made a few days before, to the effect that "other parties were anxious to negotiate for this property," and in this very letter plaintiff asked him to consider releasing him.

We do not think that the complaint of plaintiff affirmatively showed such laches on his part in rescinding as to render it defective. The payment of rent under the circumstances shown did not constitute a waiver of the right of rescission.

The judgment and order denying a new trial are reversed.

We concur: SHAW, J.; LORIGAN, J.; HENSHAW, J.; MELVIN, J.

(159 Cal. 57)

BELL v. WILSON et al. (L. A. 2343.)
(Supreme Court of California. Dec. 28, 1910.)

1. ABSENTEES (§ 5*)—NONRESIDENT DISTRIBUTUTES—APPOINTMENT OF AGENTS.

Code Civ. Proc. § 1691, authorizing appointment of an agent for a nonresident distributee who has no resident agent, does not limit the power to appoint to orders therefor made before the decree of distribution as affecting the validity of a bond given by such appointee; the statute being merely intended to permit final closing of an estate where a distributee does not claim his share.

[Ed. Note.—For other cases, see Absentees, Cent. Dig. §§ 3-11; Dec. Dig. § 5.*]

2. EXECUTORS AND ADMINISTRATORS (§ 315*)—DISTRIBUTION—DUTY OF COURT.

Under Code Civ. Proc. § 1606, requiring a decree of distribution of a decedent's estate to name the distributees and their shares, the court in making such decree need not investigate whether a distributee is a nonresident or whether he has a resident agent.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1299; Dec. Dig. § 315.*]

3. EXECUTORS AND ADMINISTRATORS (§ 314*)—NONRESIDENT DISTRIBUTUTES—RIGHTS.

Under Code Civ. Proc. § 1668, authorizing distributees to recover their shares from any persons in possession, that the distributee is a nonresident does not preclude him from recovering his share from the executor or administrator.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1280; Dec. Dig. § 314.*]

4. ABSENTEES (§ 5*)—NONRESIDENT DISTRIBUTUTES—APPOINTMENT OF AGENT—VALIDITY.

The validity of an order under Code Civ. Proc. § 1691, appointing an agent for a nonresident distributee, is not affected by any impropriety in also making him agent for the assignee of a distributee, where the assignee was not a party to the decree of distribution.

[Ed. Note.—For other cases, see Absentees, Cent. Dig. § 3; Dec. Dig. § 5.*]

5. ABSENTEES (§ 5*)—AGENTS FOR NONRESIDENT DISTRIBUTUTES—APPOINTMENT—REQUISITES.

Under Code Civ. Proc. § 1691, it is not necessary to designate by name or at all for whom the agent is appointed.

[Ed. Note.—For other cases, see Absentees, Cent. Dig. § 3; Dec. Dig. § 5.*]

6. ABSENTEES (§ 5*)—AGENTS FOR NONRESIDENT DISTRIBUTUTES—APPOINTMENT—REQUISITES.

It is essential under Code Civ. Proc. § 1691, that the distributee be found to be a nonresident having no resident agent.

[Ed. Note.—For other cases, see Absentees, Cent. Dig. § 3; Dec. Dig. § 5.*]

7. ABSENTEES (§ 5*)—AGENTS FOR NONRESIDENT DISTRIBUTUTES—LIABILITY.

An agent for a nonresident distributee appointed under Code Civ. Proc. § 1691, holds his share as agent for any one who, after the order of appointment shows right thereto, whether as distributee or as claimant under him.

[Ed. Note.—For other cases, see Absentees, Cent. Dig. §§ 7, 8; Dec. Dig. § 5.*]

8. ABSENTEES (§ 5*)—AGENTS FOR NONRESIDENT DISTRIBUTUTES—ACCOUNTING.

The superior court has jurisdiction of a proceeding to settle the accounts of an agent appointed for a nonresident distributee, and to direct payment to the distributee's assignee's ad-

ministratrix, though the order appointing the agent was made after the decree of distribution.

[Ed. Note.—For other cases, see Absentees, Cent. Dig. § 8; Dec. Dig. § 5.*]

9. ABSENTEES (§ 5*)—AGENTS FOR NONRESIDENT DISTRIBUTUTES—ACCOUNTING—DECREE—CONCLUSIVENESS.

A decree of a superior court settling the accounts of an agent for a nonresident distributee, and in directing payment to the distributee's assignee's administratrix, having never been appealed from, is final and conclusive.

[Ed. Note.—For other cases, see Absentees, Cent. Dig. § 8; Dec. Dig. § 5.*]

10. ABSENTEES (§ 5*)—JUDGMENT AGAINST PRINCIPAL—EFFECT UPON SURETY.

A decree on settlement of accounts of the agent of a nonresident distributee being binding upon him is equally conclusive upon his surety.

[Ed. Note.—For other cases, see Absentees, Cent. Dig. § 8; Dec. Dig. § 5.*]

11. ABSENTEES (§ 5*)—AGENTS FOR NONRESIDENT DISTRIBUTUTES—Breach OF BOND.

Refusal by an agent of a nonresident distributee to comply with the decree settling his accounts and directing payment was a breach of his bond, rendering the sureties liable thereon.

[Ed. Note.—For other cases, see Absentees, Cent. Dig. § 8; Dec. Dig. § 5.*]

In Bank. Appeal from Superior Court, Los Angeles County; Walter Bordwell, Judge.

Action by Mary Jane Bell, Solomon Bell's administratrix, against C. N. Wilson and another. From a judgment for defendants, and from an order refusing a new trial, plaintiff appeals. Reversed.

Will D. Gould, for appellant. Lawler, Allen & Van Dyke, for respondents.

LORIGAN, J. This action is brought against the principal and one of his sureties on a bond given pursuant to section 1692 of the Code of Civil Procedure. On November 15, 1875, the probate court of Los Angeles county rendered a decree of final distribution in the estate of Jacob Bell, deceased, wherein it was ordered that there be distributed to Daniel L. Bell, as an heir at law of deceased, one-sixth of the estate. Sixteen months thereafter, to wit, on March 8, 1877, C. E. Thom, administrator of said estate, filed a petition therein, setting forth that all the heirs and distributees of the estate had received and receipted for their shares thereof, except Daniel L. Bell, who was a nonresident and had no agent in this state; that said Daniel L. Bell had on December 21, 1875, transferred and assigned all his interest in said estate to one Solomon Bell, also a nonresident without an agent here to represent him; that it was necessary to appoint an agent to act for both these persons, and asked that C. N. Wilson be appointed "to act as the agent for and in behalf of said Solomon and said Daniel L. Bell and each of them * * * to receive the sum of \$1,133.95, * * * and for them and each of them to take charge and possession of all the real estate that might belong to them or ei-

ther of them as his distributee or assignee from the estate of Jacob Bell, deceased." An order of court was made on said petition appointing said Wilson agent "of the said Solomon Bell and Daniel L. Bell for them and each of them * * * to receive from the said C. E. Thom the sum of \$1,133.95 the amount ordered * * * to be distributed to Daniel L. Bell by the decree of distribution * * * entered on the 15th day of November, 1875, * * * and also all the property of the estate of Jacob Bell, deceased, belonging to said Solomon Bell and the said Daniel L. Bell, as is set out and prescribed in the aforementioned decree of distribution," and directing that a bond in the sum of \$2,000 for the faithful performance and discharge of his duties as such agent be given by Wilson. This bond was given, the defendant Lord being one of the sureties thereon, and it recited as a condition of his obligation the appointment of Wilson as agent of Daniel L. Bell and Solomon Bell, to receive their and each of their distributive shares of the estate of Jacob Bell, deceased, and, upon said bond being approved and filed, the administrator turned over to Wilson the money and all the property distributed to Daniel L. Bell, and as agent for said Daniel L. and Solomon Bell, Wilson receipted to the administrator therefor.

On July 27, 1906, in a proceeding entitled "In the Estate of Jacob Bell, Deceased," brought by plaintiff in the superior court of Los Angeles county against said Wilson for an accounting, and in which proceeding he appeared, said court entered a decree settling the final account of said Wilson as agent, and adjudged that he had in his possession belonging to the estate of Solomon Bell, deceased, a balance of \$7,843.41 in cash, and decreed that he pay that sum over to said plaintiff as administratrix of the estate of Solomon Bell, deceased. After the judgment became final a demand for payment of the sum adjudged due was made on Wilson, and, upon his refusal to pay it, plaintiff brought this action in which she prays for a judgment against Wilson for the amount awarded her in said judgment, and for judgment against Lord for \$2,000, the amount for which he became surety upon the bond. The trial court gave judgment for defendants, and from that judgment and an order denying her motion for a new trial she appeals.

As we understand the view taken by the trial court, as gathered from its findings, as also that of the district court of appeal from which this case is brought here for further hearing, it is that not only had the probate court no power to appoint an agent to receive for Solomon Bell the distributive share assigned to him by Daniel L. Bell, but that said court had no authority at all to appoint an agent to receive the distributive share of any nonresident distributee having no agent in the state, unless such appointment is made before the decree or order of

distribution is made; that hence the order appointing Wilson agent of both Daniel L. Bell, the nonresident distributee, as well as agent for Solomon Bell, the nonresident assignee of Daniel L. Bell, or for either of them, was void, and no liability attached upon the bond given by the sureties, under this void order. We cannot agree with this view as far as it declares that the former probate court (and the superior court now because the code section is practically the same) was or is limited in its power to appoint agents for absent distributees to orders therefor made prior to the decree of distribution. This is too narrow and constrained a view of section 1691 of the Code of Civil Procedure governing the subject. That section provides that: "When any estate shall be assigned or distributed by a decree of the court, or distributed by commissioners, as provided in this chapter, to any person residing out of this state, and having no agent therein, and it shall be necessary that some person should be authorized to take possession and charge of the same for the benefit of such absent person, the court may appoint an agent for that purpose, and authorize him to take charge of such estate, as well as to act for such absent person in the partition and distribution." There is nothing in this section which says that the agent shall be appointed before the distribution. In making a decree of distribution, it is the duty of the court to "name the persons and the proportions or parts to which each shall be entitled, and such persons may demand, sue for and receive their respective shares from the executor or administrator, or any person having the same in possession." Code Civ. Proc. § 1666. It is not enjoined as a duty upon the court in making the decree of distribution to enter into any investigation as to whether a distributee is or is not a resident of the state, or, if a nonresident, whether he has or has not an agent here. Whether he is a resident or not only becomes of real importance after the distribution is made, and is then only important in as far as it may affect the closing of the administration of the estate. The fact that the distributee is a nonresident does not preclude him from receiving from the executor or administrator his distributive share. When a nonresident knows that he is entitled to a portion of the estate, he may be relied on to take measures to obtain it either personally as soon as the administrator is prepared to deliver it, or to appoint his own agent for that purpose, and, in either event, furnish the administrator with proper vouchers so as not to embarrass the closing of the estate and the final discharge of the administrator. Usually it is only after distribution, and his failure to personally claim his distributive share or select an agent for that purpose that "it is necessary that some person should be authorized to take possession and charge of the same" (quoting from section 1691), and this

necessity for the appointment proceeds from the fact that the executor or administrator cannot have the estate closed and obtain a final discharge and release of his sureties from liability until the entire distributive share is turned over to the distributees and their receipts therefor presented to the court. It is to accomplish this purpose that the "necessity" for the appointment of an agent for a nonresident distributee arises and could generally only arise after distribution and the failure of the nonresident distributee to either personally or through his agent receive his share and deliver proper voucher therefor, and section 1691 contemplates the appointment of an agent after distribution and under the necessity therefor in order to effect a final closing of the estate.

We are not to be understood as holding that the appointment of an agent for a nonresident distributee unrepresented in the state would be unauthorized if contained in the decree of distribution itself, but only that the section does not require such appointment to be made before the distribution or in the decree therefor, and that such appointment may be appropriately made after the decree and upon a showing that it is necessary that such an appointment should be made. There is nothing in the case of *Buckley v. Superior Court*, 102 Cal. 6, 36 Pac. 360, 41 Am. St. Rep. 135, particularly relied on by respondent, opposed to this construction. Section 1691 was not under consideration there, and section 1676, which was, expressly provides for the appointment of agents before the decree of distribution when partition is contemplated and has no bearing whatever on section 1691. Under this view of the jurisdiction of the court to appoint an agent for an unrepresented and nonresident distributee, and addressing ourselves to the particular order made by the court, therefore, it will be observed that by that order Wilson was appointed not only agent for Solomon Bell, but as agent for Solomon Bell and Daniel L. Bell, and each of them. Conceding that the order as far as it appointed Wilson agent for Solomon Bell as assignee of Daniel L. Bell's distributive share was unauthorized because the court could only appoint an agent for a distributee and had no jurisdiction over the claims of strangers to the decree (*Estate of Ryder*, 141 Cal. 366, 47 Pac. 993; *Cooley v. Miller*, 156 Cal. 510, 105 Pac. 981), still the court undoubtedly had jurisdiction to appoint an agent for the absent distributee Daniel L. Bell, and did so. It is of no consequence as affecting the validity of that order that the appointment of an agent ran in favor of both Solomon and Daniel L. Bell. The order was in terms a distributive one and was valid to the extent the court had jurisdiction to make it. In fact, we do not believe that under the provisions of the section authorizing the appointment of the agent it is of any moment that the court should designate by name or at all for whom

the agent was appointed. Of course, in order to warrant the appointment of an agent, it must appear to the court that a particular distributee is a nonresident, having no agent in the state. This showing is jurisdictional, but, these facts appearing, in making the order it is not necessary to the validity that it designate the agent as appointed for the distributee by name. We apprehend that if the order had recited that Daniel L. Bell was a nonresident distributee of Jacob Bell, deceased, and had no agent in the state, and then simply appointed Wilson to take possession and charge of said distributive estate without designating for whom he was appointed agent, the validity of such an order and the liability of Wilson and his sureties for the property received under it could not be questioned. The primary purpose of the section as far as appointing an agent is concerned is to give him possession and charge of the property distributed to hold it for whomsoever at any time may be entitled to it. When originally appointed, it is true that he holds it as agent for the distributee, but this proceeds from the fact that the decree of distribution has fixed a distributee as entitled to the property the agent is appointed to take charge of, and not from any provision of the statute requiring the order to designate him as agent of the distributee. In law he holds it as agent for any one who subsequent to the order of appointment may show that he is entitled to it, whether it be the distributee or some third person claiming under him. So that it is really a matter of no consequence as affecting the validity of the order or the agent's liability or that of his surety who stands sponsor for the proper discharge of the agency whether the court was without power to appoint an agent for Solomon Bell or not. The order was a valid one in as far as it appointed Wilson agent to hold the distributed estate for the distributee Daniel L. Bell as it would have been equally valid if it had not mentioned him as agent of any particular person, but had appointed him generally to take charge of the distributive share of Daniel L. Bell, a nonresident distributee. It related primarily to the distributed property and its conservation for any person who could show he was entitled to it, and whether any one was particularly named for whom Wilson was appointed or a person was improperly designated together with the proper person as those for whom he was to stand as agent could not affect its validity.

The trial court held that the order or judgment of July 27, 1903, settling the accounts of Wilson as agent and directing payment of the balance in his hands to the plaintiff administratrix, was void for want of jurisdiction in the court to entertain the proceeding. This ruling proceeded upon the theory that after the decree of distribution the probate court had no jurisdiction at all to

make an order appointing an agent for an absent distributee and particularly no jurisdiction to appoint an agent for Solomon Bell. The judgment does not appear to be questioned on any other ground. We hold, however, that the court had jurisdiction to make such an order, and, as it did make it as to the absent distributee Daniel Bell and it would have been a valid order had it not declared particularly for whom Wilson was appointed agent, it is a matter of no consequence that the court had no jurisdiction to appoint an agent for Solomon Bell. In law, when Wilson took the distributed estate as agent, he took it for the benefit of any one who might show himself entitled to it, whether as original distributee or his successors in interest by assignment or otherwise, and was liable to account for it at the instance of any person interested in the distributed property. It is conceded that Solomon Bell succeeded by assignment to all the interest of Daniel Bell in the distributed property of which Wilson took charge. In the proceeding brought by the plaintiff as administratrix of the estate of Solomon Bell, the court had jurisdiction of the subject-matter of the accounting by Wilson as agent in behalf of those entitled to the property in his hands, and jurisdiction of the parties to the proceeding for such an accounting, and the judgment settling the account and declaring plaintiff administratrix entitled to the balance in his hands having never been appealed from is final and conclusive.

The judgment being binding on the agent is equally binding and conclusive upon his sureties (*Fox v. Minor*, 32 Cal. 111, 91 Am. Dec. 566; *Brodrick v. Brodrick*, 56 Cal. 563; *Treweek v. Howard*, 105 Cal. 445, 39 Pac. 20), and upon refusal of the agent to comply with the decree and pay over the money there was a breach of the bond, and the defendant Lord, as surety, became liable for the payment of the judgment in the amount in which he had become responsible on the bond.

The judgment and order appealed from are reversed.

We concur: SHAW, J.; SLOSS, J.; MELVIN, J.; HENSHAW, J.

(14 Cal. A. 700)

HANNON v. NUEVO LAND CO. et al.
(Civ. 898.)

(Court of Appeal, Second District, California.
Nov. 30, 1910. Rehearing Denied by Supreme Court Jan. 28, 1911.)

1. ACTION (§ 50*)—MISJOINDER.

A joint action does not lie against A. and B. on the theory that either A. converted crops from land purchased by plaintiff from B. under a wrongful claim of lease from B., or that the lease existed, constituting breach of an implied covenant by B.; such action being authorized

by neither Code Civ. Proc. § 379, authorizing any one having an interest in the controversy, or who is a necessary party, to be made a defendant, nor section 389, empowering a court to determine any controversy between parties before it, etc.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 511-547; Dec. Dig. § 50.*]

2. VENUE (§ 41*)—CHANGE—RIGHTS OF NON-RESIDENTS.

Where an action is brought against two defendants, one of whom resides in the county where the action is commenced and the other a nonresident, the latter is entitled to have the place of trial changed to the county of his residence, unless the resident defendant be a necessary party.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 62, 63; Dec. Dig. § 41.*]

3. VENUE (§ 41*)—CHANGE—RIGHTS OF NON-RESIDENTS.

Where it appears that both resident and nonresident defendants are necessary parties, an order granting a change of place of trial will not be made upon the demand of the nonresident defendant, unless the former joins in the demand.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 62, 63; Dec. Dig. § 41.*]

4. PARTIES (§ 75*)—NECESSARY PARTIES—HOW DETERMINED.

Who are necessary parties must be determined from the complaint unaided by affidavits.

[Ed. Note.—For other cases, see Parties, Dec. Dig. § 75.*]

5. VENUE (§ 41*)—CHANGE—RIGHTS OF NON-RESIDENTS.

Joining resident parties as defendants against whom no cause of action is stated does not deprive the real defendant of his right to a change of place of trial.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 62, 63; Dec. Dig. § 41.*]

6. VENUE (§ 41*)—CHANGE—PLEADING.

A complaint against a company impleaded states no cause of action for converting crops from land purchased from plaintiff under a wrongful claim of lease from plaintiff's grantor, where it does not show that the company's possession, of which plaintiff had notice, was not held under such lease, thus making it an unnecessary party as affecting a question of right to a change of venue.

[Ed. Note.—For other cases, see Venue, Dec. Dig. § 41.*]

7. VENUE (§ 41*)—CHANGE—PLEADING.

A complaint against a vendor impleaded states no cause of action for breach of an implied covenant consisting of an existing lease to a third party, where it does not show that the possession and use of such party was under any lease or authority from vendor, thus making the vendor an unnecessary party as affecting a question of right to a change of venue.

[Ed. Note.—For other cases, see Venue, Dec. Dig. § 41.*]

8. VENUE (§ 41*)—CHANGE—RIGHTS OF NON-RESIDENTS.

Where a complaint against a resident and a nonresident defendant states no cause of action against either, they occupy the same relative position that they would if both were necessary parties, and hence respective rights as to a change of place of trial should be controlled by the converse of the rule applicable to such cases, denying the right to a change to the nonresident when both are necessary parties.

[Ed. Note.—For other cases, see Venue, Dec. Dig. § 41.*]

9. VENUE (§ 5*)—NATURE OF ACTION.

As affecting venue, an action on the theory that either defendant A. converted crops from land purchased by plaintiff from defendant B., under a wrongful claim of lease from B., or that the lease existed, constituting breach of an implied covenant by B., is not one to determine an estate or interest in land.

[Ed. Note.—For other cases, see Venue, Dec. Dig. § 5.*]

Appeal from Superior Court, Los Angeles County; Geo. H. Hutton, Judge.

Action by Joseph E. Hannon against the Nuevo Land Company and another. From an order denying a change of place of trial, defendant land company appeals. Affirmed.

Leonard & Surr, for appellant. McNutt & Hannon, for respondent.

SHAW, J. The defendant Nuevo Land Company appeals from an order of court denying its motion for a change of place of trial from Los Angeles county, wherein the action was commenced, to the county of Riverside.

The motion was made upon the ground that said defendant was a corporation having its principal place of business in the county of Riverside; that its codefendant Union Hardware & Metal Company was not a necessary or proper party in the action, which involves the determination of an interest or estate in real property located in Riverside county. It appears both from the complaint and affidavit filed in support of the motion that the Nuevo Land Company is a resident of Riverside county.

It is alleged in the complaint that the Union Hardware & Metal Company granted plaintiff an option to purchase certain lands in Riverside county; that within the time specified in the option plaintiff elected to purchase the lands, and that said defendant Union Hardware & Metal Company, for the agreed price, made, executed, and delivered to him a grant deed (which is fully set out in the complaint and is without limitations) whereby it conveyed the property to plaintiff; that prior to the execution and delivery of this grant deed plaintiff learned that defendant Nuevo Land Company had entered upon and was in possession of said lands, having seeded the same to grain, all of which was done prior to the giving of the option to purchase; that thereupon plaintiff made inquiry of one Scheller, an officer of the hardware company, as to whether the acts of the Nuevo Land Company were had and taken pursuant to a lease of the land, or by virtue of any authority from the grantor, and was informed by Scheller that no lease had been made to the Nuevo Land Company, and that the acts of the latter in occupying and cultivating the land were without knowledge on the part of the hardware company and wholly unauthorized by it; that, relying

upon such statements, plaintiff completed the purchase; that the Nuevo Land Company, without plaintiff's consent, harvested crops of the value of \$4,000, and refused to account to plaintiff for the same or any part thereof, claiming that its acts in entering upon the land and the use thereof in growing and harvesting the crops was under and by virtue of authority so to do granted to it by said hardware company. It is then alleged that "by reason of the conflicting claims of the defendants, to wit, the claim by the Nuevo Land Company that it had a lease of said land from the Union Hardware & Metal Company, and the claim of said Union Hardware & Metal Company, that it had no such lease, plaintiff is unable to determine the facts with respect thereto, and therefore joins said defendants in this action in order that the court may determine said matter and render such judgment as is meet and proper in the premises." The prayer is for judgment against both defendants in the sum of \$4,000, the alleged value of the crops harvested. It does not appear that the hardware company was ever served with process or that it ever appeared in the action.

It is apparent from the allegations of the complaint that the action is brought upon the theory that plaintiff has sustained damages by reason of the wrongful acts of one or the other, but not both, of said defendants, and not knowing which of the two is the guilty party impleads both in a proceeding that falls to state a cause of action against either, and asks the court to fix the liability. We know of no principle authorizing such a procedure. Respondent asserts that such action clearly comes within sections 379 and 389 of the Code of Civil Procedure, the first of which sections provides that "any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the question involved therein." It is contended that the hardware company "has and claims an interest in the controversy adverse to plaintiff," and is therefore "a necessary party to a complete determination or settlement of the question involved therein." Assuming that a cause of action is stated against the Nuevo Land Company for wrongful conversion of the crop, we are unable to perceive what adverse or other interest the hardware company can have therein, or how it is a necessary party to a determination of plaintiff's rights against such defendant. Conversely, upon like assumption that a cause of action is stated against the hardware company for the breach of an implied covenant of the deed, the Nuevo Land Company has no interest in the determination of the question. Neither is such action justified by the provisions of section 389 of the Code

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

of Civil Procedure for a complete determination of the rights of plaintiff against either defendant may be had without the presence of the other. In the one case plaintiff's action is based upon a breach of the implied covenants of the grant, while in the other it is for the conversion of the crops grown on the land. The two actions, not only as to parties, but also as to subject-matter, are entirely independent and distinct one from the other. *Miller v. Highland Ditch Co.*, 87 Cal. 430, 25 Pac. 550, 22 Am. St. Rep. 254. Respondent cites a number of authorities sustaining the right of a defendant to file a bill of interpleader when the same debt or duty is claimed by two or more persons, and he is in doubt as to which of the claimants he should render the debt or duty, and the court is asked to determine the rights of such claimants in order that, when the debt is paid or the duty performed, he shall be absolved from further liability thereon. These cases cannot be regarded as authority for the converse of such rule. So far as we are advised, the law recognizes no procedure in the nature of a counterpart of the bill of interpleader.

The rule is that where an action is brought against two defendants, one of whom resides in the county where the action is commenced and the other a nonresident thereof, the latter is entitled to have the place of trial changed to the county of his residence, unless the resident defendant be a necessary party. *Sayward v. Houghton*, 82 Cal. 628, 23 Pac. 120; *Bailey v. Cox*, 102 Cal. 333, 36 Pac. 650. Where it appears that both resident and nonresident defendants are necessary parties, an order granting a change of place of trial will not be made upon demand of the nonresident defendant, unless the former joins in the demand. *McKenzie v. Barling*, 101 Cal. 460, 36 Pac. 8. The question as to who are necessary parties must be determined from the complaint alone unaided by the affidavits. *Quint v. Dimond*, 135 Cal. 572, 67 Pac. 1034. In *Read v. San Diego Union Co.*, 65 Pac. 568,¹ it is said: "The joinder of resident parties as defendants against whom no cause of action is stated does not deprive the real defendant of his right to have the cause transferred." To the same effects is *Sayward v. Houghton*, supra, where it is said: "If the complaint states no cause of action against the corporation defendant, the right of Houghton to have the place of trial changed is not affected by making said corporation a defendant in the action." Says the Supreme Court in *Hellman v. Logan*, 148 Cal. 60, 82 Pac. 849: "The test is to be made by ascertaining who are necessary parties

to the action as it is set forth in the complaint, and what parties are necessary in order to enable the plaintiffs to obtain all the relief which is properly included in the prayer for relief made therein"—citing *Greenleaf v. Jacks*, 133 Cal. 506, 65 Pac. 1039, and *Quint v. Dimond*, supra.

As we view the complaint, it fails to state a cause of action against the Nuevo Land Company for the reason that it contains nothing whereby it is made to appear that its possession and use of the land (as to which plaintiff had notice when he acquired the same) was not authorized by or held under and by virtue of a lease from plaintiff's grantor; hence, as no cause of action is stated against said Nuevo Land Company, it is not a necessary or proper party. On the other hand, it does not appear from the complaint that such possession and use by the Nuevo Land Company was under or by virtue of any lease made or authority granted by the Union Hardware & Metal Company, or that there has been any breach of covenant on its part; hence no cause of action is stated against it. It thus appears that if necessary parties are to be determined from the complaint alone, and those only are necessary parties against whom a cause of action is stated, the complaint here presents a case where neither the resident nor nonresident defendant is a necessary party. The defendants occupy the same relative position to each other that they would if both were necessary parties, and hence, respective rights as to a change of place of trial should be controlled by the converse of the rule applicable to such cases, and which denies the right of a change to the nonresident where both the latter and resident defendant are necessary parties. *McKenzie v. Barling*, supra. Conceding that no cause of action is stated against either of said defendants, no good reason can, in our judgment, be assigned for depriving the defendant Union Hardware & Metal Company from having the action disposed of, as against it, in the county wherein commenced, rather than to have the place of trial transferred to another county upon demand of a defendant against whom no cause of action is stated and who likewise is an unnecessary party.

There is no merit in appellants' contention that the action is for the determination of an estate or interest in real property lying wholly within Riverside county. It does not appear that either defendant at the time of instituting the action claimed any interest in the land, or that either was in the possession thereof.

The order appealed from is affirmed.

We concur: ALLEN, P. J.; JAMES, J.

¹ Reported in full in the Pacific Reporter; reported as a memorandum decision without opinion in 133 Cal. xx.

(62 Wash. 59)

STEWART v. STATE BOARD OF MEDICAL EXAMINERS.(Supreme Court of Washington. Feb. 2, 1911.)
APPEAL AND ERROR (§ 338*)—TIME TO APPEAL.

Where an application for a license to practice medicine was made under section 4 of the medical act of 1909 (Laws 1909, c. 192) and was denied, and that decision was affirmed by the superior court March 18, 1910, and on May 28, 1910, the applicant served, and on May 31, 1910, he filed his motion of appeal to the Supreme Court, the appeal must be dismissed as not filed within 60 days after the entry of judgment, as provided in Rem. & Bal. Code, § 8399.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 338.*]

Department 1. Appeal from Superior Court, King County; O. R. Holcomb, Judge.

Action by J. G. Stewart against the State Board of Medical Examiners. From a judgment for defendant, plaintiff appeals. Appeal dismissed.

Milo A. Root, for appellant. Howard G. Cosgrove and Higgins, Hall & Halverstadt, for respondent.

PER CURIAM. Respondent moves to dismiss this appeal upon the ground that the same was not taken within the time provided by law. This motion must be granted. It appears that the appellant filed his application with the Board of Medical Examiners for a license to practice medicine within the state under section 4 of the medical act of 1909 (Laws 1909, c. 192). The application was denied. The applicant thereupon appealed to the superior court of King county, where the decision of the medical board was affirmed by an order which was entered on March 18, 1910. The appellant on May 28, 1910, served, and on May 31, 1910, filed, his notice of appeal to this court.

The statute regulating appeals in such cases provides that "either party may appeal from the judgment of said superior court to the Supreme Court of the state in like manner as in civil actions, within sixty days after the rendition and entry of such judgment in said superior court." Rem. & Bal. Code, § 8399. The notice of appeal was not given within the 60 days after the entry of the order appealed from.

The appeal must therefore be dismissed. *State v. Seaton*, 26 Wash. 305, 66 Pac. 397.

(62 Wash. 49)

CONWAY et ux. v. MINNESOTA MUT. LIFE INS. CO.

(Supreme Court of Washington. Feb. 1, 1911.)

1. INSURANCE (§ 365*)—LIFE INSURANCE—FORFEITURE OF POLICY—REINSTATEMENT.

The insurer may impose such conditions for reinstatement of a life policy forfeited for nonpayment of premiums as it desires, if such conditions are not contrary to public policy, but compliance with the conditions imposed by the contract gives insured an absolute right

to reinstatement if the contract does not make reinstatement optional with the company.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 932, 933; Dec. Dig. § 365.*]

2. WORDS AND PHRASES—"JUDICIAL DISCRETION."

The term "judicial discretion" may be defined generally as a discretion which is sound and guided by fixed principles of law, while a nonjudicial discretion, such as may be vested in the officers of a corporation, does not admit of the application of fixed rules of law, but depends wholly upon the will and judgment of the person exercising it.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 4, pp. 3855-3856; vol. 8, p. 7697.]

3. INSURANCE (§ 365*)—LIFE INSURANCE—FORFEITURE—REINSTATEMENT—DISCRETION OF COMPANY.

The articles of incorporation of a life insurance company, in which plaintiff was insured, and which became a part of the policy, provided that one who had once been a member of the company might be admitted "in the discretion of the officers of this association upon his furnishing them satisfactory evidence that he is in good health and upon his paying to said association all assessments due," and other sums, which he would have been required to pay had he continued to be a member. In his original application for membership, plaintiff stated that he was 50 years of age, and that his use of ardent spirits, wine, or malt liquors was "one glass a day." In his application for reinstatement, he gave the date of his birth so as to show that he was over 52 years of age at the time of his original application, and his answer in respect to the use of liquors each day was: "Malt liquors, two or three glasses; wine, none; spirits, two or three drinks." The medical examiner noted the first application as a first-class risk, and rated him a first-class risk on his application for reinstatement, "except for age and amount of stimulants taken." *Held*, that it could not be said that the officers of the insurance company were not justified in rejecting plaintiff's application for reinstatement.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 932, 933; Dec. Dig. § 365.*]

4. INSURANCE (§ 390*)—LIFE INSURANCE—FORFEITURE—WAIVER.

That insured on a prior occasion had been reinstated after forfeiting his policy for nonpayment of assessments would not estop the insurance company from taking advantage of a subsequent forfeiture for nonpayment.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1037, 1038; Dec. Dig. § 390.*]

5. INSURANCE (§ 375*)—LIFE INSURANCE—FORFEITURE—NONPAYMENT OF ASSESSMENT—WAIVER.

Where the secretary of a life company had no power to forfeit a policy for nonpayment of assessments, his unauthorized acceptance of assessments after forfeiture for nonpayment was not binding on the company, so as to waive a failure to pass a satisfactory medical examination upon application for reinstatement as required by the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 948-951; Dec. Dig. § 375.*]

Dunbar, C. J., and Rudkin, J., dissenting.

Department 2. Appeal from Superior Court, Pierce County; W. O. Chapman, Judge.

Action by James J. Conway and wife against the Minnesota Mutual Life Insur-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ance Company. From a judgment of dismissal, plaintiffs appeal. Affirmed.

Boyle, Warburton & Brockway, for appellants. Hudson & Holt, for respondent.

MORRIS, J. Appeal from a judgment of dismissal, in an action to recover damages for the alleged wrongful refusal to reinstate a life insurance policy, after forfeiture by nonpayment of assessments and dues. There is no dispute as to the facts from which it appears that on November 13, 1894, the Bankers' Life Association of St. Paul, Minn., which subsequently changed its corporate name to that of respondent, issued its policy of insurance upon the life of James J. Conway in the sum of \$2,000. This policy was upon the co-operative assessment plan, providing for annual dues and mortuary assessments according to the terms of the articles of incorporation, which by reference were made a part of the policy. In July, 1908, an assessment of \$40 became due under the policy, which Conway received notice of, but failed and neglected to pay, whereby his policy lapsed. On November 5, 1908, he applied for reinstatement, forwarding to the company the July assessment, with \$7.50 dues and a certificate from Dr. Libbey that he was then in good health. On November 11th the company acknowledged the receipt of \$47.50, and informed Conway that his certificate had lapsed, but that he might be reinstated upon furnishing satisfactory evidence of present good health; but that, in order to procure such reinstatement, it would be necessary for him to be examined by Dr. Dewey, the medical examiner of the company at Tacoma, and such examination must disclose a satisfactory condition of health. In the same letter Conway was informed the company would not accept the \$47.50, and the same was returned. On November 17th Conway presented himself to Dr. Dewey for medical examination, and the doctor's certificate was mailed to the company. On December 11th Conway was informed by the company that his application for reinstatement was rejected.

The question now submitted is: Did Conway have such a legal right to reinstatement as can be enforced against the denial of such right by the company. It will readily be admitted, as stated in Cooley's Briefs on Insurance, at page 2395, that, after a forfeiture of a life insurance policy because of nonpayment of assessments, "the right to reinstatement depends on the provisions of the contract. Since the right is not absolute, the insurer may impose such conditions as it sees fit, not contrary to public policy, on which reinstatement may be had. *Saerwein v. Jamour* [32 Misc. Rep. 701], 65 N. Y. Supp. 501." Upon the same page the rule is also laid down that compliance with the conditions gives the delinquent an absolute right to reinstatement, if the provisions of

the contract do not make the reinstatement optional with the officers of the company. The provision of the contract in this instance is found in the articles of incorporation, and is as follows: "Any person, having once been a member of this company, may be readmitted in the discretion of the officers of this association, upon his furnishing them satisfactory evidence that he is in good health, and upon his paying to said association all assessments due and other sums of money which he would have been called upon to pay to this association had he continued to be a member thereof." Respondent contends, which was also the theory upon which the court below made its order of dismissal, that this provision destroys the absolute right to reinstatement, and makes such reinstatement optional with the officers of the company in providing that readmission shall be in their discretion, and that the evidence of good health shall be such as is satisfactory to them, and, that having so acted, such discretion is not reviewable in the courts; while appellants contend that the word "discretion" is to be construed in the sense of judicial discretion, and may be reviewed when it appears to have been arbitrarily exercised, as they claim here. While it may be difficult to give a satisfactory definition of the term "judicial discretion" because of the wide difference of the authorities as to its nature, it may be said to be a discretion that is sound and guided by the fixed principles of law. 6 Enc. Pl. & Pr. 819. But, even in cases calling for the exercise of such discretion, it will not be reviewed except for its manifest abuse. Such is, we believe, the universal rule. Where, however, discretion is vested in a nonjudicial body, such as trustees or officers of a corporation, or other public functionaries, its exercise does not call for the application of any fixed rules or principles of law, and its meaning cannot be so limited nor restricted, since to do so would be to take such a discretion away from the body upon which it is conferred and bestow it upon some other body and so on ad infinitum, so long as the right of appeal or review existed. In the case of *Judges v. People*, 18 Wend. (N. Y.) 79, 99, Senator Tracy, in his opinion, while not clear in his mind as to the proper meaning of a discretion that is governed by legal principles, finds no difficulty in defining a discretion that is not so controlled and says: "It means, when applied to public functionaries, a power or right conferred upon them by law of acting officially in certain circumstances, according to the dictates of their own judgment and conscience, uncontrolled by the judgment or conscience of others." A like construction is adopted in *Brown v. State*, 109 Ala. 70, 83, 20 South. 103, 108, where, in reviewing the provisions of the statutes of Alabama in fixing the punishment for certain crimes by providing such punishment shall be "at the discretion of the jury," the court says: "The words of the

statute, 'at their discretion,' are peculiarly significant and expressive of the freedom in the exercise of judgment, of the liberty of action and decision, intrusted, and exclusively intrusted, to the jury. The 'discretion' they are to exercise and exercise in obedience to their own consciences only is the choice of election between the alternative punishments. The discretion is legal in the sense that it is derived from and conferred by law. But it is not of the nature of judicial discretion, which is said to be controlled by fixed legal principles. * * * It must have been foreseen and anticipated that there would be jurors reluctant to inflict capital punishment, * * * that there would be some reluctant to convict on circumstantial evidence, and that not infrequently there would be some not so fully satisfied as others that the evidence of guilt reached the standard the law prescribes. There are considerations which will influence the jury in choosing between the alternative punishments, a choice they must make according to the dictates of their own judgment and consciences, and which cannot be controlled or directed by the judgments or consciences of others."

We do not know the facts operating upon the minds of the officers of this company, inducing them to exercise their discretion against the reinstatement of this applicant, nor why his evidence of good health was not satisfactory to them, except as we read the record and find therein facts which might have influenced them in arriving at the conclusion they did. In his first application for membership Conway gave his age as about 50 years, and in response to an inquiry as to the extent of his use of ardent spirits, wine, or malt liquors answered, "One glass a day." In his application for reinstatement he gave the date of his birth as March 22, 1842, which would have made his age 52 years, 7 months, and 9 days at the time of his first application. In both he stated that his father and mother both died from unknown causes when he was a child. In response to an inquiry as to his use of liquors each day, he answered, "Malt liquors, two or three glasses; wine, none; spirits, two or three drinks." In his first application the medical examiner rated him as a first-class risk. In his application for reinstatement he was rated as a first-class risk, "except for age and amount of stimulants taken." Statements as to age and habit as to use of liquors are statements material to the risk, and, while we do not hold as a matter of law that the discrepancies here noted would in themselves be sufficient to avoid the policy or to prevent reinstatement, if such question was purely one of law and properly submitted to us as such, we cannot say that they would not influence the sound judgment and good conscience of an officer of an insurance company in whom discretion is vested to pass upon such matters. Neither can we eliminate from this contract the fact that this medical examina-

tion upon application for reinstatement must disclose a condition of good health satisfactory, not to the applicant nor to the physician conducting the medical examination, but to the officers of this company in whom by his contract the applicant had placed the judgment and discretion to decide, a decision they must arrive at "according to the dictates of their own judgment and consciences, and which cannot be controlled or directed by the judgment or conscience of others." To hold otherwise would be to destroy that element of individuality and personal judgment which must enter into any decision, and to substitute for the discretion and satisfaction of one body the discretion and satisfaction of other bodies, strangers to the contract and not within its contemplation, and making the contract read in effect that reinstatements may be had upon the applicant furnishing evidence of reasonably good health, instead of, as it does read, "In the discretion of the officers of this association, upon his furnishing them satisfactory evidence that he is in good health."

The nearest case in point we have found is *Graveson v. Cincinnati Life Association*, 6 O. C. D. 327, where the policy was forfeited on March 11th for failure to pay an assessment due March 1st. In September following the insured offered to pay all arrearages, and asked for reinstatement. The rules of the association provided for medical examinations whose duty it was to make all examinations, and who might accept or reject applications. The association having declared its willingness to reinstate the applicant upon his furnishing a satisfactory medical examination, he submitted to such examination, and, as a result thereof, was rejected; the only reason given by the medical examiner being that the applicant's pulse was between 76 and 100. The court in touching upon this feature of the case says: "This brings us to the only remaining question in the case, and that is, as to the medical examination, was it satisfactory? In the first place, to whom was it to be satisfactory? The constitution and by-laws provided that as to all applications it should be within the discretion of the medical director to accept or decline any application; but, as to forfeiture, it provided that by furnishing a new and satisfactory application and medical examination one might be restored, saying nothing as to whom this examination should be satisfactory. We are of the opinion, however, that this examination must be satisfactory to the medical director. It certainly could not have been intended that the examination should only be satisfactory to the applicant, or to any one whom he might select to make the examination. Why should the defendant require the performance of these conditions if they were not to be satisfactory to the defendant?" This case was affirmed without opinion by the Supreme Court of Ohio in 56 Ohio St. 725, 49 N. E. 1110.

We will discuss one other feature, and that is appellants' contention that the company waived its right to reject the application in accepting dues and assessments from him on a prior occasion, after the time fixed for their payment, and also in writing him that "his right to reinstatement was conditioned upon his 'furnishing satisfactory evidence of present good health.'" What we have said disposes of the latter contention, such satisfactory evidence of good health meaning satisfactory to the company, and giving it the right of rejection if, in the exercise of the discretion vested in it, such evidence was not satisfactory. In support of the first feature of this contention, appellant testified that he knew the time for payment had passed, but thought he would be reinstated by showing he was in good health, "because it happened once before. I was behind once before in my delinquency, and had no trouble at all." This would not be sufficient to estop the company from now insisting upon the provisions of the contract. A party to a contract who does not take immediate steps to forfeit it because of a default in payment does not thereby lose his right to insist upon a forfeiture for subsequent nonpayments. *Cash v. Melsenheimer*, 53 Wash. 576, 102 Pac. 429; *Garvey v. Barkley*, 56 Wash. 24, 104 Pac. 1108; *Walker v. McMurchie*, 112 Pac. 500. This same contention was raised in *Graveson v. Cincinnati Life Ass'n*, supra, and it was there held that such a payment, being accepted by the secretary of the company (to whom the payments were also made in the case at bar), would not constitute a binding waiver; it not appearing that it was done with the knowledge and approval of the officers of the company in whom the power of forfeiture existed. Such is the case here. The secretary not having the right to forfeit, his unknown and unapproved act could not bind the company where the act of the company complained of is based, not alone on the failure to pay the assessment when due, but upon the failure to pass a satisfactory medical examination upon the application for reinstatement.

For these reasons, we are of the opinion that the judgment of dismissal was rightly entered, and the same is affirmed.

CHADWICK and CROW, JJ., concur.
DUNBAR, C. J., and RUDKIN, J., dissent.

(61 Wash. 689)

SUMNER IRON WORKS v. WOLTEN.

(Supreme Court of Washington. Jan. 28, 1911.)

1. APPEAL AND ERROR (§ 70*)—DECISIONS REVIEWABLE—ON DEMURRER.

An order sustaining a demurrer is not appealable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 367-385; Dec. Dig. § 70.*]

2. APPEAL AND ERROR (§ 91*)—DECISIONS REVIEWABLE—AFFECTING SUBSTANTIAL RIGHTS—DISALLOWANCE OF CLAIM AGAINST RECEIVER.

A conditional seller filed a claim against the insolvent buyer's receiver for possession of property or for security, and the claim was dismissed on the ground that the seller had not obtained leave of court to maintain action against the receiver, that the court had full jurisdiction to protect creditors, that no intervention had been sought, and that the seller, having filed a proof of claim, was estopped from retaking the property. Rem. & Bal. Code, § 1716, provides for an appeal "(6) from any order affecting a substantial right in a civil action or proceeding, which (1) in effect determines the action or proceeding and prevents a final judgment therein; or (2) discontinues the action." Held, that the order dismissing the claim was appealable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 612-641; Dec. Dig. § 91.*]

3. RECEIVERS (§ 77*)—TITLE TO PROPERTY—REMEDY OF CONDITIONAL SELLER.

The conditional seller of goods may assert title against the receiver of the buyer, or waive that right, and come in under a general creditors' claim.

[Ed. Note.—For other cases, see Receivers, Dec. Dig. § 77.*]

4. RECEIVERS (§ 77*)—TITLE TO PROPERTY—CONDITIONAL SALES—WAIVER BY SELLER—RECEIVER.

The act of a conditional vendor in filing his claim for the price with the buyer's receiver without express leave of court to sue is not a waiver of any of the rights under the contract of sale, and does not convert the seller into a general creditor.

[Ed. Note.—For other cases, see Receivers, Dec. Dig. § 77.*]

Department 2. Appeal from Superior Court, Whatcom County; John A. Kellogg, Judge.

Action by the Sumner Iron Works against Paul A. Wolten, receiver of the S. D. Lumber Company. Judgment for defendant, and plaintiff appeals. Reversed and remanded, with directions.

Cooley & Horan and R. Mulvihill, for appellant. Whitcomb & Montfort, for respondent.

MORRIS, J. On February 10, 1909, the Sumner Iron Works sold to the S. D. Lumber Company, under a conditional bill of sale, certain mill machinery. The bill of sale contained the usual provision that title should remain in the Sumner Iron Works until the property was wholly paid for, and that it should have the right to the possession of the property upon default in the payments, retaining the amount paid as the rental use and value of the property. The sale price of the property was \$13,017, of which amount \$3,254.50 was paid at the time of delivery and the balance was to be paid in three equal payments in three, seven, and eleven months, with interest at 8 per cent. The contract was filed in the auditor's office within 10 days from its date, and the lumber company took possession of the property. No further payments were paid ex-

cept \$28.62 on June 21, 1909, which was credited on the interest then due upon the deferred payments. On July 28, 1909, the lumber company upon petition of J. W. Stout was declared insolvent, and respondent appointed its receiver. He duly qualified as such, and took possession of all the property of the lumber company, including the machinery covered by the conditional bill of sale. Thereafter the appellant filed a claim in the receivership case, in which it set forth the terms of the sale of the machinery to the lumber company, and the default in the payments as provided for in the contract, asserted its right to the possession of the machinery under the terms of the contract, and asked that it be permitted to remove it, or that it be secured in the payment of the amount then due. The receiver made a motion to strike this claim upon the ground (1) that the iron works had not obtained leave of court to maintain action against the receiver; (2) that the court had full jurisdiction to ascertain and determine priorities of creditors, and to afford ample protection; (3) that no intervention had been sought; and (4) that the iron works had filed its proof of claim with the receiver and submitted itself to the jurisdiction of the court, and was estopped from claiming a forfeiture of the contract, or retaking the property. This motion was granted, and appellant's claim dismissed, and it brings this appeal.

Respondent moves to dismiss the appeal upon the ground that the order granting his motion and dismissing appellant's claim is not an appealable order. In support of this contention respondent argues that the court below treated his motion as a demurrer, and that an order sustaining a demurrer is not appealable. It is true we have so held, and such is still the rule. A plaintiff to whose complaint a demurrer has been sustained may plead over, or he may elect to stand on his plea, and appeal from the subsequent order of dismissal, should such an order be entered. This is, in effect, the situation here. Appellant could not amend its claim. It had stated the whole situation upon which it based its claim to retake the machinery, and when the court held as a matter of law that it had no right to retake the machinery, but must submit its claim as an ordinary creditor for the amount claimed to be due, and take its chances upon a distribution, it was in effect a final order, depriving it of the right to recover the possession of the machinery, and in effect determining the proceedings, so far as appellant sought to enforce its rights under the conditional bill of sale. It could hardly be said that such an order did not affect a substantial right of appellant to have its interest in the machinery determined in the receivership case upon its plea of title and ownership. Rem. & Bal. Code, § 1716, provides for an appeal "(6) from any order affecting a substantial right in a civil action or proceeding, which (1) in effect de-

termines the action or proceeding and prevents a final judgment therein; or (2) discontinues the action." We believe the order dismissing appellant's claim was such an order and appealable. The motion to dismiss is therefore denied.

Coming now to the merits, it is well settled in this state that under a contract such as between the appellant and the lumber company title does not pass, and that such a reservation of title is enforceable against third parties. *Kidder v. Wittler-Corbin Machinery Co.*, 38 Wash. 179, 80 Pac. 301. Appellant therefore had two courses it might pursue. It could assert its title to the machinery as against the receiver and claim the possession thereof, or it could surrender and waive its right so to do and come in under a general creditors' claim. It chose the former, and, having done so, it was the duty of the receiver to report the demand to the court and ask for instructions. It would have been the court's duty to thereupon inquire into the demand, and, if it found it well taken, to order the receiver to comply therewith and surrender the machinery, or pay the balance due. The receiver could obtain no better or different title or claim to the machinery than the insolvent lumber company. Its rights were his rights; no more, no less. The adjudication of the insolvency of the lumber company and the appointment of a receiver in no wise established any lien upon this machinery. It remained with the receiver as with the lumber company, subject to the assertion of appellant's title because of the default in the deferred payments. *York Manufacturing Co. v. Cassell*, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782; *Risk v. Kansas Trust & Banking Co.* (C. C.) 58 Fed. 45; *Ardmore Nat. Bank v. Briggs M. & L. Co.*, 20 Okl. 427, 94 Pac. 533, 23 L. R. A. (N. S.) 1074, 129 Am. St. Rep. 747.

The appointment of a receiver could not give the lumber company any additional contractual rights, nor deprive it of any old ones. Nor was the filing of this claim in the receivership case any waiver of any right granted appellant under the contract. Its debtor by the order of the court had been deprived of its possession of the machinery, and it was right and proper to pray the court which had, by its adjudication of insolvency and appointment of receiver, assumed jurisdiction over all property and property rights of the insolvent debtor to uphold the contract and enforce its rights. In doing this, there was no necessity for an action against the receiver, nor any leave of court. All that was required was to call the attention of the court to the facts, and that it did so by filing its demand with the receiver, as creditors are wont to file their claims, did not deprive it of any of its rights under its contract, nor reduce its right to the machinery to that of a general creditor without specific lien.

The order appealed from is reversed, and

the cause remanded to the court below for such proceedings as are herein indicated.

DUNBAR, C. J., and CROW and RUDKIN, JJ., concur.

CHADWICK, J. (concurring). A petition filed in a receivership proceeding is not an action against the receiver within the meaning of the rule requiring leave to sue, and in reviewing the order striking the petition from the files we are not required or permitted to look beyond the face of the petition itself. On its face it discloses a clear right in the appellant to either a return of its property or the payment of the balance due on the purchase price. If there is a defense to the petition not appearing on its face, it must be presented by answer and not by motion. I concur in the judgment of reversal.

(62 Wash. 23)

HEMMINGSON v. CARBON HILL COAL CO.

(Supreme Court of Washington. Feb. 1, 1911.)

1. MASTER AND SERVANT (§ 118*)—INJURIES—SAFE PLACE OF WORK—APPLICATION OF STATUTE—COAL MINING OPERATION.

Rem. & Bal. Code, tit. 59, c. 3 (the subject of which is "coal mines") § 7394, requires a coal mine owner to keep sufficient timber at any mine where it is required for props, so that the workmen may properly secure the workings from caving in, and to send into the mine all props when required, and deliver them at the entrance of the working place. The act also provides for inspection, underground maps, ventilation, measurement of air, openings and exits, signals, hoisting pumps, safety lamps, tools, etc., as well as the timbering of the mine. When injured by the falling of a rock, plaintiff was assisting to drive a rock tunnel, to explore the territory and discover a deposit or ledge, no coal having been discovered or worked up to that time. *Held*, that section 7394 was not applicable, the tunnel in which plaintiff was working not being a coal mine.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 209; Dec. Dig. § 118.*]

2. STATUTES (§ 188*)—CONSTRUCTION—POPULAR MEANING OF LANGUAGE.

Statutes must be construed according to the natural, obvious, and popular meaning of their language.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 266, 267; Dec. Dig. § 188.*]

3. MASTER AND SERVANT (§ 118*)—SAFE PLACE OF WORK—DUTY OF MASTER.

Rem. & Bal. Code, tit. 59, c. 3, relating to coal mines, does not relieve the mineowner of his common-law duty to use that care which the circumstances and character of the work permit for the protection of workmen in extending tunnels.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 209; Dec. Dig. § 118.*]

4. APPEAL AND ERROR (§ 1064*)—HARMLESS ERROR—INSTRUCTIONS.

Where the evidence, though sufficient to take the question of the coal mining company's common-law liability to the jury in an action by a workman for injuries from a falling rock while driving an exploration tunnel, was conflicting, it cannot be said that error in also sub-

mitting the case under the coal mine act (Rem. & Bal. Code, §§ 7344-7433), as to defendant's negligence for not furnishing sufficient mine props, as required by that act, because the statute was inapplicable to such operations, was harmless to defendant; the verdict for plaintiff being general.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4221-4224; Dec. Dig. § 1064.*]

5. MASTER AND SERVANT (§ 270*)—INJURIES—ACTIONS—ADMISSION OF EVIDENCE—CUSTOM OF EMPLOYÉS.

In an action for injuries to an employé while engaged in driving a coal mine discovery tunnel, by a fall of a rock upon him, in absence of rules promulgated by the company, or prescribed by statute, evidence was competent that it was the custom of the workmen to test the roof while driving such a tunnel, and that a test could not be long relied on; such fact being a defense if the roof was such as to require constant inspection.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 270.*]

Dunbar, C. J., dissenting.

Department 2. Appeal from Superior Court, Pierce County; M. L. Clifford, Judge.

Action by Matt Hemmingson against the Carbon Hill Coal Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded for new trial.

James M. Ashton and Huffer, Hayden & Hamilton, for appellant. Bates, Peer & Peterson, for respondent.

CHADWICK, J. In January, 1910, the appellant was engaged in running a rock tunnel at its Carbon Hill coal mine. The tunnel was at that time about 1,600 feet long, and was in all respects the ordinary exploring or discovery tunnel, driven by miners with a hope or expectation of catching or cutting a deposit or ledge at depth. It ran through a formation of sandstone, and was timbered as the formation demanded. If the formation was faulty or soft or was passing through slips, it was timbered. If the formation was hard so as to sustain itself, no timbering was put in. The greater part of the tunnel had been timbered, a work in which the shift, of which respondent was one, was engaged at the time he was injured. The timbering consisted of setting in uprights, sixteen to eighteen inches in diameter, across the top of which a timber called a collar was placed. The uprights and collar were called a set. These sets were placed about five feet apart, and lagging was run from frame to frame on the rock side and top. It had been the general custom to set these frames and put in the lagging after each shot, which would, with the drills and methods used at the mine, tear down about 6 feet of rock. A progress of about 6 feet in 24 hours was usually made, and 8 or 9 frames would be put up in 7 days, if the formation was such as to require timbering. It was customary where the rock was soft and in-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

clined to fall, to put splits or forepoles over the last collar, and wedge them up so as to support the roof while the permanent timbering was being put in. At the time of the accident complained of, the tunnel had been carried a distance of about 11 feet beyond the last frame, the roof being, in the judgment of the tunnel boss, sufficient to sustain itself. A crew consisted of the machine man and helper and two muckers. When the crew of which the respondent was the helper went to work at 7 o'clock on January 8th, the tunnel boss made some inspection of the roof, the character and extent of which is a disputed fact, and he then ordered the men to clear out the muck or rubbish, and set the frames in the space between the last set and the face of the tunnel. Respondent was engaged in making a hitch or depression in which to set one of the uprights, when a rock fell from the roof and cut his leg. He was taken to the local hospital where his wound was temporarily dressed, and thereafter to a hospital at Tacoma where he was confined for about five weeks while his wound was healing. The negligence alleged is that appellant put respondent to work in an unsafe place, failed to perform its duty of inspection, and failed to supply sufficient or proper timbers for temporary support of the roof, so as to make the place safe while permanent timbers were being put in. The defense is assumption of risk, contributory negligence, and failure on the part of respondent to follow a custom prevailing among miners engaged in making an unsafe place safe, to inspect by sounding and testing the rock for themselves and following their own judgment.

We think the facts are such as to warrant a submission of the case to the jury upon the general issues of assumption of risk and contributory negligence, and that the motion for nonsuit and directed verdict were properly overruled. *Starck v. Washington Union Coal Co.*, 112 Pac. 235. But we are nevertheless constrained to hold that the case was submitted to the jury upon a wrong theory of the law, and that a new trial must be granted. The court assumed that section 7394 of chapter 3 of title 59, Rem. & Bal. Code, in which it is provided that the owner of a coal mine "shall keep a sufficient supply of timber at any such mine where the same is required for use as props, so that the workmen may at all times be able to properly secure the said workings from caving in, and it shall be the duty of the owner, agent, or operator to send down into the mine all such props when required, the same to be delivered at the entrance of the working place," was applicable to this case. That section of the statute must be construed in the light of the whole act. The design of the act is clearly apparent; that is, to protect men who are engaged in the business of mining coal, the extraction of which, by reason of its formation and the angles at which

it usually lies in the ground is extrahazardous. "Coal Mines" is the subject of the act, and the protection of workmen in coal mines is its object. It provides for inspection, underground maps, ventilation, measurement of air, openings, exits, signals, hoisting pumps, safety lamps, proper tools, and care of the men engaged, as well as timbering. It is a complete act, and in our judgment cannot be held to apply to a discovery or exploring tunnel in which no coal is being mined, as was the case here. The work here engaged upon was in no sense different from the work of those engaged in exploring for gold or silver or copper. The work of coal mining was not being done, and might never be done in or through that tunnel. The tunnel was not a coal mine, but it might become a part of one, depending upon future developments. Statutes must be construed according to the natural, obvious, and popular meaning of the language employed. *Potter, Dwarries on Statutes*, pp. 143, 144. And when so construed, it would extend the coal mine statute beyond the limit of legislative intention to hold that a rock tunnel was a coal mine and subject to its operation. In speaking to a like question, the Appellate Court of Illinois said, in *Springside Coal Mining Company v. Grogan*, 53 Ill. App. 60: "It is argued that the object and purpose of the statute was to guard against accidents and injuries of the exact kind and character as that which resulted in the death of the husband of the appellee, and that her case is clearly within the reason and spirit of the enactment. This is as fully true of all pits or holes made in the earth, and, if allowed to control, would extend the operation of the statute to pits or holes by which it was designed to reach and open lead or other mines of every kind. Pits or holes intended to be used as salt wells or to procure water for stock or other purposes, where employes would be exposed to like danger, as that which caused death in the case at bar, would be equally within the spirit and reason of the statute. The General Assembly, however, restricted the statute to coal mines. Courts may expound statutes, but have no power to enact them, nor to extend such as are enacted, to cases which it might seem in good reason ought to be, but are not, included within them. 'All authorities agree, it is said in *Sutherland on Statutory Construction*, § 235, that courts cannot correct the excesses, or supply omissions in legislation.'" In considering the applicability of certain instructions such as were given by the court in this case, and to which exceptions were taken, the court said, in the same case: "Each of the instructions assumes that the pit or hole in which the deceased was working was a coal mine, and each declares that the statute required the mouth of the pit to be fenced. Whether it was a coal mine was a question of fact. The declaration alleged, and the proof indisputably showed, that the deceased, when killed,

was engaged in digging the earth in the bottom of a pit or hole, which was intended, when completed, to be used as the shaft of a coal mine, which the appellant company designed to open and operate. No mine was being operated or worked; no coal had been mined; none had been found to mine; nor was it ever shown that there were any indications of the existence of coal that the pit or hole would ever reach."

The ordinary definition of a mine is familiar, but a coal mine has not been so frequently defined. In *Westmoreland Coal Company's Appeal*, 85 Pa. 344, the court said: "It may be conceded that the term 'mine,' when applied to coal, is generally equivalent to a worked mine, for by working the vein it becomes a mine." Just when a tunnel or shaft may develop into a mine may be determined with reasonable certainty. In *Coal Run Coal Company v. Jones*, 19 Ill. App. 365, it was contended that a certain shaft was not a "coal mine," and that the statute did not apply. The facts and conclusion of the court are as follows: " * * * The Coal Run Company had just completed an extension of its shaft below a vein of coal that it had been working and mining, and had reached and dug through a lower vein and had dug several feet below it for the purpose of collecting the drainage of the mine," and in the opinion of the court says, "workmen were actually engaged in mining coal from the first vein. * * * The deceased himself was about to pick up and place in the cage a lump of coal sufficient to justify a finding that the place was a coal mine, within the meaning of the statute, and we think nothing beyond that is or was intended to be held."

Our conclusion that the statute does not apply in this case receives assurance from the fact that the section of the statute relied upon says that "it shall be the duty of the owner, agent, or operator to send down into the mine all such props when required, the same to be delivered at the entrance of the working place," indicating as clearly as language could indicate anything that the Legislature had in mind those conditions peculiarly incident to the mining of coal which usually lies in blanket formation; that it is brittle and without strength to sustain itself; that it forms in layers through which strata of rock slate or shale run, and which tend to make it more dangerous, and out of which gangways and chambers are cut; the mining of which has so frequently been described in previous cases decided by this court, particularly in *Cox v. Wilkeson Coal & Coke Co.*, 112 Pac. 231, and *McKenzie v. North Coast Colliery Co.*, 55 Wash. 493, 104 Pac. 801, 28 L. R. A. (N. S.) 1244.

While the master is bound to use that degree of care which the attending circumstances and the character of the work will allow for the protection of workmen engaged in extending all tunnels (for the coal-mine statute does not relieve him of his common-

law duty), we find no warrant in the law authorizing us to extend or apply the coal-mine act to a prospecting tunnel, when the Legislature itself has purposely refrained from doing so. There may have been reasons why the presumption of negligence or the denial of the defense of assumption of risk was not put upon the less hazardous business of the ordinary miner or prospector engaged in driving a tunnel through solid rock, or the sewer contractor, or the director of underground work; for the one who is seeking to develop an industry is not to be discouraged, while the one who has established a business should be prepared to meet the burdens incident to its promotion. There being enough evidence to carry the case to the jury upon the common-law liability of the appellant, but that evidence being conflicting; we cannot say that the jury found with respondent upon the main issues and against him upon the statute, or with him upon the statute and against him on the common counts. The submission of the case upon the coal-mine act was therefore error calling for a new trial.

Much is made in the brief of appellant that it was denied the right to show that it was the custom of men engaged in tunnel work to test and examine the roof for themselves, and that under a condition subject to constant change, reliance could not be had on a test made by the tunnel boss at some considerable time before the accident occurred. It is true that the trial judge excluded certain testimony and offers to prove such customs, but a careful reading of the whole record shows that, nevertheless, the offered and excluded testimony was thereafter received in such form as would warrant the jury in considering it. In the event of another trial, it may not be out of place to say that, in the absence of specific rules promulgated by the company or prescribed by statute, evidence of such customs is competent, and would be applicable in this case provided the jury should find the character of the roof to be such as to require constant inspection or testing.

Practically all of the questions raised in this case are brought here on exceptions to instructions given, and to the refusal of the court to give requested instructions. The instructions, taken as a whole, barring those based upon the coal-mine act, state the law of the case. There is some confusion, but no greater confusion than is to be expected where both sides have apparently submitted a complete set of instructions from which the trial judge has made up a set to be given to the jury, without rewriting them so as to harmonize seeming contradictions.

Reversed and remanded for a new trial.

RUDKIN, CROW, and MORRIS, JJ., concur.

DUNBAR, C. J. I dissent. I think the narrow construction placed upon the stat-

ute by the majority fixes a limit upon its application which was not contemplated by the Legislature, and that the fear expressed that the provisions of the statute might be made to apply to gold, silver, or copper mining is more fanciful than real. If it develops in the trial of a cause that the exploration was made in a gold, silver, or copper mine, of course the statute would not apply, and the court would so instruct. But in this case there was not a suggestion that the tunnel was not being run in the interest of the coal mine. The plaintiff in the case is the Carbon Hill Coal Company. The opinion starts out with the statement that "in January, 1910, the appellant was engaged in running a rock tunnel at the Carbon Hill coal mine" (and it was at that date that this accident occurred). The testimony shows, and the opinion states that the tunnel was being driven by miners, with the hope or expectation of cutting a ledge or deposit at depth, and there is no claim or suggestion in the testimony that the excavation was in the interest of anything else than a coal mine, or that the tunnel was being driven for any other purpose than collecting or locating a ledge of coal. The following excerpt from the testimony of the foreman of the mine is suggestive: "Q. What is the difference between running a rock tunnel and running ahead into your coal and mining out the coal? A. Our gangways are driven on the same principle when we mine in coal, and shoot the rock out in the bottom, if the coal is on a pitch and shoot the coal out first, and have a hole up here for the rock, and shoot it out. Q. That is not the only rock tunnel you have up there in the Carbon Hill coal mine, is it? A. We have driven thousands of feet of it. Q. A rock tunnel is one of the incidents of every coal mine, either to find the vein or whether it is run through to crosscut different veins? A. They drive them for that purpose."

When it conclusively and confessedly appears that the rock tunnel was being operated in a coal mine for the purpose of discovering ledges of coal, I can see no reason why the statute which guards the safety of miners in a coal mine should not apply. The construction placed upon the statute by the majority opinion ignores the spirit and reason of the law, and it is the letter that killeth.

(62 Wash. 60)

JOHNSON et al. v. RYAN et al.

(Supreme Court of Washington. Feb. 2, 1911.)

1. PLEADING (§ 433*)—CONSTRUCTION AFTER VERDICT.

After verdict a complaint is to be construed with regard to the proof rather than its strict allegations.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1451-1477; Dec. Dig. § 433.*]

2. PLEADING (§ 433*)—SUFFICIENCY.

A complaint to set aside an exchange of lands for hotel property is sufficient after trial to sustain a verdict for plaintiffs, where it alleges that, after the contract was made, defendants fraudulently removed from the hotel furniture worth \$600 or \$800, that they misrepresented the amount of the hotel's earnings and the time to which rent had been paid, that plaintiffs relied upon such misrepresentations and were thereby induced to enter the contract, and that defendants refused to receive a return of their property.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1451-1477; Dec. Dig. § 433.*]

3. EXCHANGE OF PROPERTY (§ 3*)—VALIDITY—FRAUD—RIGHT TO RELY UPON REPRESENTATIONS—EXAMINATION OF PREMISES.

That persons contracting to exchange land for hotel property examined the hotel did not put them on notice concerning its earnings as affecting their right to rescind the contract for fraudulent misrepresentations.

[Ed. Note.—For other cases, see Exchange of Property, Dec. Dig. § 3.*]

4. EXCHANGE OF PROPERTY (§ 3*)—VALIDITY—RIGHT TO RELY UPON REPRESENTATIONS.

Persons exchanging land for hotel property can rely upon the other party's representations as to the hotel's earnings.

[Ed. Note.—For other cases, see Exchange of Property, Dec. Dig. § 3.*]

5. EXCHANGE OF PROPERTY (§ 8*)—FRAUD—EVIDENCE—SUFFICIENCY.

In an action to rescind a conveyance of land in exchange for hotel property, evidence held to sustain a finding that defendants removed hotel furniture included in the exchange.

[Ed. Note.—For other cases, see Exchange of Property, Dec. Dig. § 8.*]

6. EXCHANGE OF PROPERTY (§ 8*)—BREACH OF CONTRACT—REMEDIES.

Where a contract to exchange property has been fully performed by one party, upon the other party's failure or refusal to perform, the former can affirm the contract and sue for the value of the thing not delivered, or he can sue for breach of contract or for specific performance, or he may rescind and recover his property or the value thereof, or may sue to rescind the contract.

[Ed. Note.—For other cases, see Exchange of Property, Dec. Dig. § 8.*]

7. EXCHANGE OF PROPERTY (§ 5*)—FAILURE OF CONSIDERATION.

Failure to deliver part of the furniture agreed to be exchanged for land was a partial failure of consideration, warranting rescission.

[Ed. Note.—For other cases, see Exchange of Property, Dec. Dig. § 5.*]

Department 1. Appeal from Superior Court, Pierce County; W. O. Chapman, Judge.

Action by Lucy A. Johnson and another against Elizabeth Mae Ryan and another. Decree for plaintiffs, and defendants appeal. Affirmed.

Grant A. Dentler, for appellants. Frank S. Carroll and L. C. Whitney, for respondents.

MOUNT, J. This action was brought by the respondents to rescind a contract of sale and to set aside deeds conveying certain real estate to the appellants, on the alleged ground of fraud and deceit practiced upon the respondents by the appellants, and also

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

on the ground of partial failure of consideration. The cause was tried to the court without a jury. Findings of fact were made in favor of the plaintiffs, and a decree was entered rescinding the contract and setting aside the deeds. The defendants have appealed.

It appears that the appellants were in possession of a building at No. 931-933, South C street in Tacoma, under a lease for two years. This building was known as the "American Hotel," and was conducted by appellants as a lodging and apartment house. In December, 1909, the parties to this action entered into negotiations for an exchange of certain real estate belonging to the respondents for the hotel property, which included the lease of the building, the furniture, and certain leases to lodgers therein. These negotiations resulted in an exchange, which was concluded on December 23, 1909, when the respondents deeded their real estate to the appellants, and appellants surrendered possession of the hotel to respondents. The latter on January 6, 1910, brought this action to rescind the contract, upon allegations as follows: "The said defendants fraudulently and unlawfully, knowingly and maliciously represented to these plaintiffs that said hotel was free from debt except \$1,665, and that said furniture was of the value of \$5,000; * * * that rent was paid to the first of January, 1910; that there was due from roomers occupying said rooms sums aggregating \$420, * * * which these plaintiffs were to receive; that after the agreement between said parties was made * * * the said defendants fraudulently and unlawfully took from the said rooms in said hotel furniture to the amount of six or eight hundred dollars; that said defendants fraudulently misrepresented to these plaintiffs the condition of affairs in said hotel regarding the payment of rent for the month of December, 1910, and that said defendants fraudulently and unlawfully misrepresented to these plaintiffs the amount of the income of said hotel, stating that the income would amount to \$535 to \$560 every month; * * * that there is owing in back rent on said premises the sum of \$275; that these plaintiffs were notified by the landlord to vacate said premises by reason of the fact that the defendants had failed to pay their back rent as required by said lease; that prior to the commencement of this suit, these plaintiffs tendered to the defendants the return of said American Hotel, including furniture, fixtures, and lease, but the same was refused by the defendants; * * * that the plaintiffs relied and acted upon the false and fraudulent representations of said defendants, and were thereby induced to enter into the above agreement." These allegations of the complaint were denied by the answer of the defendants. The cause came on for trial, and the defendants objected to the introduction of any evidence, upon the

ground that the complaint failed to state a cause of action. This objection was denied, and, at the close of the evidence, the judge said: "After carefully considering all the testimony in the case, I believe that there was more than an overreaching of the plaintiffs; that methods of misrepresentation and deceit were employed in connection with the change of property of such a character that the court as a matter of right and justice should set the transfer aside; and this is further evidenced by the circumstances of the removal by the defendants of a large amount of furniture from the hotel."

The appellants now argue that the complaint is insufficient, because it does not allege that the false representations related to existing material facts, or that the appellants knew of such falsity, or that the respondents were ignorant of the falsity and believed the representations to be true, or that the respondents were damaged, or that there was any concealment from the respondents, or that they made no examination, or that there was any confidential relation existing between the parties. In *Carey v. Hays*, 41 Wash. 580, 84 Pac. 581, we said: "A more liberal construction will always be given to a pleading that is assailed after issue joined and trial had than will be when the sufficiency of the pleading is raised upon a demurrer." And in *Walsh v. Meyer*, 40 Wash. 650, 82 Pac. 938, we said: "It may be conceded that the complaint in this case is exceedingly meager, and we will not now decide upon its sufficiency if it had been challenged by demurrer. But this court will not scan a complaint too critically where there has been no demurrer interposed, but the case has been allowed to go to trial to the extent of settling the pleadings and creating the expense of a convocation of the witnesses, as we do not regard such a practice as commendable."

Under such conditions the cause of action is determined by the proof rather than by a strict construction of the allegations of the complaint.

Appellants next argue that the facts proven are not sufficient to warrant the judgment. There was much conflict in the testimony as to representations which were made by the appellants to respondents. It appears from the testimony of the respondents that the appellants represented that the receipts amounted to from \$535 to \$560 per month, and that the business was constant. It also appears that the respondents took possession on January 23, 1909, and thereupon the receipts did not meet the representations, and within a few days thereafter it became apparent that the receipts and constancy of the business would not nearly reach the amount represented. The fact that the respondents examined the hotel was not sufficient to put them upon notice of the constancy of the business or the ordinary receipts thereof. Such facts, in the nature

of things, must be known only to the appellants, and we think the respondents would be justified in relying upon the representations of appellants in that respect. The respondents also testified that the agreement was that all of the furniture and fixtures in the hotel on December 21, 1900, was to be delivered to them, with the exception of a piano, a music cabinet, and the personal wearing apparel of the appellants; that on the date possession was delivered, the appellants removed from the building some two or three dray loads of furniture, without the knowledge of the respondents. The removal of this furniture apparently constituted the principal reason for a rescission of the contract. It is true that the evidence is conflicting upon the question whether the appellants removed furniture which was included in the sale, but the trial court found that they did so, and the weight of the testimony seems to be to that effect. The rule in such cases is: "Where one of the parties to a contract of exchange of property has on his part fully performed the contract by conveying or delivering the thing which he agreed to give in exchange, upon the failure or refusal on the part of the other party to perform the contract he may affirm the contract and maintain an action at law for the value of the thing which he should have received or an action for damages for breach of contract; or he may sue in equity for specific performance. On the other hand, he may rescind the contract and sue at law for the specific property with which he has parted, or the value thereof; or he may sue in equity for the rescission of the contract." 17 Cyc. 836 et seq.

The respondents in this case pursued the remedy of rescission, which was clearly proper. The furniture in the hotel was necessary to conduct the business. The respondents were entitled to all the furniture for which they bargained. A failure to deliver a part of the furniture was to that extent a failure of consideration, for which rescission was a proper remedy.

Upon the facts found, the court was justified in entering the decree appealed from. The judgment is therefore affirmed.

DUNBAR, C. J., and PARKER, FULLERTON, and GOSE, JJ., concur.

(62 Wash. 70)

STATE v. CATSAMPAS.

(Supreme Court of Washington. Feb. 2, 1911.)

1. MAYHEM (§ 1*)—ACTS CONSTITUTING OFFENSE—STATUTES.

One who willfully bites off the end of the nose of another with intent to disfigure him violates the statute punishing one who shall seriously disfigure the person of another or destroy any member of his body.

[Ed. Note.—For other cases, see Mayhem, Cent. Dig. §§ 1-5; Dec. Dig. § 1.*]

2. WITNESSES (§ 383*)—IMPEACHMENT.

Where a state's witness, after detailing the circumstances of a fight between accused and prosecuting witness, testified that he did not know what accused said after the fight, it was error to permit the state's attorneys to testify in rebuttal that the witness had told them that accused had said after the fight that he had done something to the prosecuting witness that he would never get back.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1224; Dec. Dig. § 383.*]

3. CRIMINAL LAW (§ 404*)—EVIDENCE—DEMONSTRATIVE EVIDENCE.

The practice of compelling accused, testifying in his behalf, to give an illustration and reproduction of the fight involved, by using the deputy prosecuting attorney, who cross-examined him, to represent prosecutor, is not commendable.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 891; Dec. Dig. § 404.*]

Department 2. Appeal from Superior Court, Pierce County; W. O. Chapman, Judge.

Constantine Catsampas was convicted of maiming, and he appeals. Reversed.

Grant A. Dentler, for appellant. J. L. McMurray, A. O. Burmeister, and F. G. Remann, for the State.

DUNBAR, C. J. The information in this case is as follows: "That the said Constantine Catsampas, in the county of Pierce, in the state of Washington, on or about the 17th day of August, 1910, then and there being, unlawfully and feloniously did then and there, with intent to disfigure one John Propper, willfully inflict upon him, the said John Propper, an injury, to wit, a biting off of the end of the nose of the said John Propper with the teeth of the said Constantine Catsampas, thereby seriously disfiguring the person of the said John Propper." There was a demurrer to the information on the ground that the facts stated did not constitute a crime. The overruling of this demurrer is alleged as error.

The statute upon which the information is based is as follows: "Every person who with intent to commit a felony or to injure, disfigure or disable another, shall willfully inflict upon him an injury which (1) seriously disfigures his person by any mutilation thereof; or (2) destroys or displaces any member or organ of his body; or (3) seriously diminishes his physical vigor by the injury of any member or organ—shall be guilty of maiming and be punished," etc. Rem. & Bal. Code, § 2407. It is contended by the appellant that the facts charged do not fall within any of the provisions of said statute. But to our minds they so plainly do that no argument could be more convincing than the mere recitation of the statute and the facts set forth in the information.

The third assignment of error is based upon the action of the court in admitting

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

testimony tending to impeach one of the state's witnesses. One Hanson, who was introduced by the state, after detailing the circumstances of the fight in which the end of John Propper's nose was bitten off by the appellant, in answer to the question, "What did you hear Catsampas say, if anything, after that?" said, "I don't know. Somebody back of me shouted. He said, 'Let them fight;' and somebody said, 'What did you do to him?' Catsampas said, 'You don't know what he done to me.' Then he mumbled something after that. I could not exactly hear what it was after that, but he mumbled something. I could not say for sure what it was. I am not positive what he did say, so far as that is concerned." Then, after some further questions, the following was propounded: "Didn't you tell me at that time, Mr. Hanson, that you heard Catsampas say, immediately after they were separated—after you had separated them—'There, I have done something to you now, Joe, that you will never get back in one hundred thousand years?'" Afterwards the attorneys for the state, A. O. Burmeister and Fred G. Remann, on rebuttal, testified concerning a conversation that they had with the said Hanson, wherein he had told them that Hanson, in relating the circumstances of the fight, said to them that the defendant had said, "There, I have done something to you now, Joe, that you will never get back in one hundred thousand years." This testimony was admitted over the objection of the appellant, and such admission is urged as prejudicial error. From the foregoing it will be seen that this is not a case where a party offering a witness is taken by surprise by reason of an affirmative statement by said witness prejudicial to its interest; but this was simply a negative statement on the part of the witness, which in itself was in no degree prejudicial. The only contention is that the witness did not state the case as strongly as the attorneys for the state desired, or as they claimed he had stated it to them. There was nothing detrimental to the state's interest in what he did say. The complaint is in regard to what he did not say.

This case cannot be distinguished from *State v. Simmons*, 52 Wash. 132, 100 Pac. 269, where the court, in discussing this question, said: "Romer Zimma was called as a witness for the appellant, and in response to a question, testified that he did not see the complaining witness and a third party hugging and kissing each other at a time and place specified. He was then asked the following question: 'Now, Romer, don't you remember of stating to me that at the time you saw Parrot at Johnson's, winter before last, that you saw them in the kitchen by themselves, hugging and kissing each other?'"

to which an objection was sustained, and on this ruling the twentieth assignment of error is predicated. Had the witness testified to some affirmative fact prejudicial to the appellant, the ruling complained of would perhaps be erroneous. *Greenleaf, Evidence*, § 444. But the witness testified to a mere negative, and had he been ever so successfully impeached the only effect would be to destroy testimony which was in itself worthless. The error was therefore harmless." So in this case, the object of the testimony not being to affect the credibility of a witness concerning any affirmative statement by him which would be prejudicial to the state's interest, the only effect it could have would be to get before the jury the alleged statement of a discredited witness—discredited by the state itself.

The second assignment of error was based on the action of the court compelling the appellant to give a spectacular illustration and reproduction of the fight, before the jury, using the deputy prosecuting attorney, who was the cross-examining counsel, to represent his antagonist, Propper. In view of the probability of a retrial in this case, we will simply say that such practice is not commendable.

But for the third error assigned, which has been discussed above, the judgment will have to be reversed. It is so ordered.

RUDKIN, CROW, MORRIS, and CHADWICK, JJ., concur.

(62 Wash. 56)

AMERICAN RADIATOR CO. v. PENDLETON et al.

(Supreme Court of Washington. Feb. 2, 1911.)

1. MECHANICS' LIENS (§ 30*)—SUBJECTS—FIXTURES.

Rem. & Bal. Code, § 1129, giving a lien for material furnished for buildings, gives a lien for material which becomes a part of a building as fixtures.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 35; Dec. Dig. § 30.*]

2. MECHANICS' LIENS (§ 31*)—SUBJECTS—HEATING PLANTS.

A boiler, radiators, and other appliances furnished under a building contract calling for a hot water heating plant constitute fixtures lienable as building material, under Rem. & Bal. Code, § 1129, though they could be removed without injuring the building; it appearing that they were permanently installed.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 36; Dec. Dig. § 31.*]

Department 2. Appeal from Superior Court, Snohomish County; W. W. Black, Judge.

Action by the American Radiator Company against Frank R. Pendleton and others. Decree for plaintiff, and defendants appeal. Affirmed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Cooley & Horan and R. Mulvihill, for appellants. Warren H. Lewis and William Levine, for respondent.

CROW, J. Action by the American Radiator Company, a corporation, to foreclose a materialman's lien. From a decree in its favor, the defendants have appealed.

The controlling question before us is whether the materials became fixtures and a part of the realty, or whether after installation they were personal property. The evidence shows that the appellants Ira B. Pendleton and Janet Pendleton, his wife, were building a new dwelling house on three lots in the city of Everett; that the plans and specifications prepared by their architect called for a hot water heating plant, and a boiler, radiators, and other equipment to be connected therewith; that a distributing system of pipes was built into the house; that through the appellant Peter W. Barton, their agent, they ordered and respondent furnished a boiler, a number of radiators, and other appliances to be attached to the distributing system; that the materials thus furnished were attached by couplings and connecting devices, in such a manner as to permit their removal without damage to the building or the pipes; and that a number of the radiators were of peculiar construction, being designed for use in certain designated locations when installed. Appellants insist that the boiler, radiators, and other appliances did not become fixtures, that they could be removed without damage to the building, and that they continued to be personal property for which respondent was not entitled to claim or foreclose a lien on the building. There is no issue as to the form or sufficiency of the lien notice, the amount due, or the sales made. If the materials became fixtures, a part of the building, and were used in its construction, then respondent was entitled to a lien. Rem. & Bal. Code, § 1129. In *Filley v. Christopher*, 39 Wash. 22, 80 Pac. 834, 109 Am. St. Rep. 853, we said: "Little could be gained by a review of the authorities as to what constitutes a fixture. As said by this court in *Philadelphia Mtg. & Trust Co. v. Miller*, 20 Wash. 607 [56 Pac. 382, 44 L. R. A. 559, 72 Am. St. Rep. 138]: 'There is a wilderness of authority on this question of fixtures, and a hopeless conflict of decision.' The true criterion of a fixture is the united application of these requisites: (1) Actual annexation to the realty, or something appurtenant thereto; (2) application to the use or purpose to which that part of the realty with which it is connected is appropriated; and (2) the intention of the party making the annexation to make a permanent accession to the freehold. Within this rule we are of opinion that all, or nearly all, of the articles above referred

to are fixtures, and a part of the realty. Nearly all the authorities concur in holding that a furnace and boiler, together with the radiators and piping connected therewith, such as are above described, constitute a part of the realty. *Thielman v. Carr*, 75 Ill. 385; *Folsom v. Moore*, 19 Me. 252; *Main v. Schwarzwaelder*, 4 E. D. Smith (N. Y.) 273; *Raddin v. Arnold*, 116 Mass. 270; *Hopewell Mills v. Taunton Sav. Bank*, 150 Mass. 519, 23 N. E. 327, 6 L. R. A. 249, 15 Am. St. Rep. 235; *Goodin v. Elleardsville Hall Ass'n*, 5 Mo. App. 289; *Capehart v. Foster*, 61 Minn. 132, 63 N. W. 257, 52 Am. St. Rep. 582; *Woodham v. First Nat. Bank*, 48 Minn. 67, 50 N. W. 1015, 31 Am. St. Rep. 622. These views are not inconsistent with the decision in *Philadelphia Mtg. & Trust Co. v. Miller*, supra. In that case the boiler was in no manner attached to the building except by its plumbing connections."

Appellants were constructing a new building with heating plant and appliances as a part thereof. Their plans and specifications called for the boiler, the radiators, and all other appliances furnished by respondent. Although such appliances could after their connection be separated and removed without damage to the building, we do not think they were installed by appellants with any such purpose in view, or with any intention that they were to be considered as personal property should appellants subsequently decide to vacate or to sell the premises. Appellants' intention must be deduced from their actions in erecting the building and installing the heating apparatus in pursuance of the plans and specifications so prepared by their architect. The contractor was required to install the entire heating plant as a complete job. Appellants concede that the distributing pipes became a part of the realty. There is no evidence of any action or declaration on appellants' part indicating their intention that the boiler, radiator, and other appliances furnished by respondent should not become permanent fixtures, nor is there any circumstance from which we can infer their intention to remove them as personalty at any time thereafter, and not permit them to remain a part of the freehold. It was shown that the materials were furnished; that they were installed in the manner above stated; that they were required by the specifications; and that a portion of them at least were designed for use in this particular building. In view of these facts and circumstances, we conclude that they became fixtures, and that the judgment of the superior court should be affirmed. It is so ordered.

DUNBAR, C. J., and RUDKIN, CHADWICK, and MORRIS, JJ., concur.

(27 Okl. 600)

J. W. RIPEY & SON v. ART WALL PAPER MILL.

(Supreme Court of Oklahoma. Nov. 16, 1910.)

*(Syllabus by the Court.)***1. APPEAL AND ERROR (§ 569*)—RECORD—SIGNING AND SETTLEMENT OF CASE-MADE.**

Section 6075, Comp. Laws Okl. 1909 (section 4742, Wilson's Rev. & Ann. St. 1903; section 4445, St. Okl. 1893), does not authorize the successor in office of a judge, where a vacancy is occasioned by death, to sign and settle a case-made in a cause tried by his predecessor, when such trial was had prior to the passage of the act of March 9, 1910 (Sess. Laws 1910, p. 59).

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 569.*]

2. APPEAL AND ERROR (§ 2*)—STATUTES—REPEAL.

The act entitled, "An act for taking the original record to the Supreme Court in cases of appeal in civil cases, and to prosecute appeals by case-made passed at the first session of the Second Legislative Assembly of the territory of Oklahoma" (St. 1893, p. 1187), was repealed by substitution by the subsequent adoption by the same Legislative Assembly of the Code of Civil Procedure.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 2.*]

3. APPEAL AND ERROR (§ 435*)—APPEARANCE BY DEFENDANT IN ERROR—EFFECT.

The entering of an appearance by the defendant in error in a proceeding in error in this court does not waive the right to object on account of the signing and settling of a case-made by a judge unauthorized by law.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2184-2190; Dec. Dig. § 435.*]

4. NEW TRIAL (§ 93*)—GROUNDS—DEATH OF JUDGE AUTHORIZED TO SIGN AND SETTLE CASE-MADE.

Under the law in force at the date of the trial in the lower court, the judge who presided was the only person authorized to settle and sign a case-made, and such judge having died after the completion of the trial and before the case-made had been signed and settled, the defendant, without fault on his part, was thereby deprived of his constitutional right to present a complete appeal to this court, and is thereby entitled to a new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 189; Dec. Dig. § 93.*]

Error from District Court, Oklahoma County; Joseph G. Lowe, Judge.

Action between J. W. Ripsey & Son and the Art Wall Paper Mill. From the judgment, Ripsey & Son bring error. Remanded, with instructions.

M. Fulton, for plaintiff in error. J. H. Grant and E. G. McAdams, for defendant in error.

WILLIAMS, J. It is insisted by the counsel for defendant in error that this appeal should be dismissed for the reason that the case-made was not signed and settled by any judge authorized by law.

1. Section 4742, Wilson's Rev. & Ann. St. 1903 (St. Okl. 1893, § 4445; section 6075, Comp. Laws Okl. 1909), does not authorize the successor in office of a judge, where a va-

cancy is occasioned by death, to sign and settle a case-made in a cause tried by his predecessor, where such trial was had prior to the passage of act of March 9, 1910 (Sess. Laws 1910, p. 59). Tegler v. State, 3 Okl. Cr. 595, 107 Pac. 949.

2. An act of the first session of the Second Legislative Assembly is entitled "An act to provide for taking the original record to the Supreme Court in cases of appeal in civil cases and to prosecute cases by petition in error with case-made." We find the following note at page 1187 of the Statutes of Oklahoma Territory of 1893, relative to said act, to wit: "Towards the closing days of the last session of the Legislature, the opinion prevailed that a new Code of Civil Procedure would not be adopted. An act was therefore passed 'to regulate appeals and writs of error,' also an act 'in relation to liens of judgment rendered in probate court.' Afterward an entire code on 'civil procedure' was enacted. It specifically provides for appeals and writs of error; also regulates liens in courts of record. The codifying committee have concluded to publish both acts in this addenda, together with the act providing additional officers for the Legislature—which latter act the Supreme Court held to be illegal and void."

It is insisted by counsel for the defendant in error that the subsequent passing of the Code of Civil Procedure at the same session of the Legislature had the effect by substitution of repealing said act. The Code of Civil Procedure adopted was comprehensive and covered practically all the subjects comprehended by said act. See article 22, §§ 534 to 574, of the Code of Civil Procedure (sections 4732 to 4772, Wilson's Rev. & Ann. St. 1903).

It is further insisted by the defendant in error that said act is repealed, not only by substitution, but also by express provision. Section 4633, St. Okl. 1893 (chapter 66, § 754, of the Code of Civil Procedure), provides: "The provisions of this Code do not apply to proceedings in actions or suits pending, when it takes effect. They shall be conducted to final judgment or decree, in all respects, as if it had not been adopted; but the provisions of this Code shall apply after a judgment, order or decree, heretofore or hereafter rendered to the proceedings to enforce, vacate, modify or reverse it."

In Fritz v. Brown, 20 Okl. 263, 95 Pac. 437, this court said: "There are three modes of repealing a statute: By an express repeal, repeal by implication, and repeal by an act covering the same subject, which latter method is often called repeal by substitution. * * * A repeal by substitution is effected where the latter of two acts covers the whole subject of the first, and plainly shows it was intended as a substitute for the first act."

In *Smock v. Farmers' Union State Bank*, 22 Okl. 825, 98 Pac. 945, this court said: "House Bill No. 615 covers the entire grounds of said chapter 8, Willson's Rev. & Ann. St. 1903, and of the four subsequent acts of the Legislature above referred to. It pertains to the same general subject-matter, and seeks to accomplish the same general purpose, and in the main is a re-enactment of those statutes in the same language, and we are therefore of the opinion that said act was intended by Legislature as a substitute for all the laws then existing upon the subject-matter dealt with in that act, and that said former laws were repealed by it." It is evident that the committee that codified that statute in 1893 had doubts as to said act being in effect. We think it is clear that said act was repealed by substitution, and was not in force in the territory of Oklahoma at the time of the erection of the state, and was therefore not extended in force in the state by virtue of section 2 of the schedule to the Constitution.

3. It is further insisted that the defendant in error, having entered a general appearance, waived the defect in the signing and settling of the case-made by a judge unauthorized by law. Such appearance waived any defect in the summons in error or of the service of the same, etc., and subjected the defendant in error to the jurisdiction of the court. It has been held both by this court and also by the Supreme Court of the territory of Oklahoma that parties to the record cannot by stipulation, which is not approved by the judge, extend the time for making and serving case-made. *Bettis v. Cargile*, 23 Okl. 301, 100 Pac. 436; *Horner v. Christy*, 4 Okl. 553, 46 Pac. 561. However, *Atkins et al. v. Nordyke-Marmon Company*, 60 Kan. 354, 50 Pac. 533, seems to settle this question against the contention of the plaintiff in error. That case was appealed from the circuit court of Shawnee county to the Kansas Court of Appeals by a petition in error with case-made attached (*Atkins v. Nordyke-Marmon Co.*, 6 Kan. App. 145, 51 Pac. 304), where the defendant in error appeared and argued the case without raising the question as to the signing or settling the case-made out of time, and judgment was rendered in favor of defendant in error, affirming the action of the lower court. An appeal was prosecuted from the Kansas Court of Appeals by the plaintiff in error to the Supreme Court of the state, where for the first time the question was raised by the defendant in error as to the case-made being settled out of time, and, on motion of defendant in error, the appeal was dismissed. Paragraph 2 of the syllabus of said case is as follows: "Because a party appears and argues a case in the Court of Appeals, he is not estopped from complaining in this court that the case was not served in time." So we conclude that the fact that the defendant in error has entered his appearance in this court does not preclude

him from raising the question as to the authority of Judge Carney under the circumstances to sign and settle the case-made.

4. It is insisted, however, by the plaintiff in error that section 8 of article 7 of the Constitution having provided that the appellate jurisdiction of this court shall be invoked in the manner as may be prescribed by the laws of said state, and that section 2 of the same article extends the jurisdiction of this court on appeal to all civil cases at law and in equity, where a constitutional provision guarantees the right of appeal to certain courts, or vests in certain courts appellate jurisdiction, such right may not be denied a party. That is a well-settled rule. *Ex parte Anthony*, 5 Ark. 358; *Simpson v. Simpson*, 25 Ark. 487; *Andrews v. Rumsey*, 75 Ill. 598; *Condon v. Gore*, 89 Md. 230, 42 Atl. 900; *Griffin v. Leslie*, 20 Md. 15; *Hurlburt v. Palmer*, 39 Neb. 158, 57 N. W. 1019; *School Dist. No. 6 v. Traver*, 43 Neb. 524, 61 N. W. 720; *Kitchell v. Beach*, 35 N. J. Eq. 446; *Titus v. Latimer*, 5 Tex. 433. If there is any procedure by which the plaintiff in error may be afforded relief, it seems to be contained in section 4760 of Willson's Rev. & Ann. St. 1903 (section 6004, Comp. Laws Okl. 1909), wherein power is conferred upon the district court to vacate or modify its own orders or judgments after term time at which said judgment or order is made for unavoidable casualty or misfortune preventing the party from prosecuting or defending. That would seem to apply to being prevented by unavoidable casualty or misfortune from prosecuting or defending such cause in the trial court. That was evidently the conclusion reached by the Criminal Court of Appeals of this state. *Tegler v. State*, supra. The syllabus in that case is as follows: "Under the provisions of the law in force at the date of this trial, the judge who presided at the trial was the only person authorized to settle and sign a case-made, and such judge having died after the completion of the trial and before the case-made had been settled and signed, the defendant, without fault on his part, was thereby deprived of his constitutional right to present a complete appeal to this court, and is thereby entitled to a new trial." But it may be contended that the Tegler Case involves the conviction for a capital felony where the punishment of life imprisonment was imposed, and for that reason an exception was made to the rule.

Crittenden v. Schermerhorn, 35 Mich. 370, was a civil case. Cooley, Chief Justice, in delivering the opinion of the court, said: "In this case the bill of exceptions was settled by the judge who tried the cause, after he had retired from office. It appears, however, to have been done under the permission of a stipulation entered into by counsel for the respective parties. The defendant in error now raises the objection that a stipulation could confer no such authority. The point

is well taken. But it does not follow that the judgment should be affirmed. On the contrary, where a party has lost the benefit of his exceptions from causes beyond his control, it is proper to give him a new trial; and this we have done in some cases where the judge's term of office expired before exceptions could be settled. The judgment will therefore be reversed and a new trial ordered, the costs to abide the event of the suit." We think the rule laid down by Chief Justice Cooley is based upon reason and justice.

This cause is remanded, with instructions to grant a new trial. All the Justices concur.

(27 Okl. 428)

ST. LOUIS & S. F. R. CO. v. STATE et al.
(Supreme Court of Oklahoma. Nov. 16, 1910.)

(Syllabus by the Court.)

CARRIERS (§ 13*)—REGULATION—POWER OF STATE CORPORATION COMMISSION.

For syllabus, see C., R. I. & P. Ry. Co. v. State et al., 23 Okl. 94, 99 Pac. 901, A. T. & S. F. Ry. Co. v. State et al., 24 Okl. 616, 104 Pac. 908, St. L. & S. F. R. R. Co. v. State et al. (decided this term) 112 Pac. 980, and Mo. Pac. Ry. Co. v. Nebraska, 217 U. S. 196, 30 Sup. Ct. 461, 54 L. Ed. 727.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 13.*]

Appeal from State Corporation Commission.

Proceedings by the State and another before the State Corporation Commission to require the St. Louis & San Francisco Railroad Company to establish a switch. From an order requiring the establishment of such switch, defendant appeals. Reversed.

W. F. Evans, R. A. Kleinschmidt, and Dale & Blerer, for plaintiff in error. Charles West, Atty. Gen., and Geo. A. Henshaw, Asst. Atty. Gen., for defendants in error.

KANE, J. This proceeding in error was commenced to reverse an order of the Corporation Commission requiring the plaintiff in error to establish a switch to the elevator of the complainant. The order recited a finding by the Corporation Commission to the effect that the complainant consisted of about 40 farmers organized for the purpose of shipping and handling their products and all other products of the public; that there is sufficient business to justify the building of the switch prayed for; that the complainant is discriminated against, and that condition is brought about by the acts of the defendant in extending the use of its right of way to other elevators and refusing it to the complainant; that when such use is once established and continued it must be extended to all citizens under similar circumstances; and that the commission knows of no way to discontinue this discrimination other than to require the defendant to build at its own ex-

pense a spur track from such of its other switches or lines as may be most feasible from an operating standpoint to complainant's elevator.

It is obvious that the question involved in the instant case is the same as that involved in C., R. I. & P. Ry. Co. v. State, 23 Okl. 94, 99 Pac. 901, A. T. & S. F. Ry. Co. v. State, 24 Okl. 616, 104 Pac. 908, St. L. & S. F. R. R. Co. v. State of Oklahoma and Chas. Cottar (decided at this term of court and not yet officially reported) 112 Pac. 980, and Mo. Pac. Ry. Co. v. State of Nebraska, 217 U. S. 196, 30 Sup. Ct. 461, 54 L. Ed. 727.

Upon the authority of the foregoing cases, the order of the Corporation Commission is reversed.

DUNN, C. J., and WILLIAMS, HAYES, and TURNER, JJ., concur.

(27 Okl. 544)

MEADOR v. JOHNSON.

(Supreme Court of Oklahoma. Nov. 16, 1910.)

(Syllabus by the Court.)

1. EJECTMENT (§ 26*)—EQUITABLE DEFENSES.

By reason of section 5033 (Ind. T. Ann. St. 1899, § 3238) and of chapter 55, Mansf. Dig. Arkansas (Ind. T. Ann. St. c. 24), in force in the Indian Territory before the admission of the state, a defendant in an action of ejectment brought in one of the United States courts of the Indian Territory may plead in his answer any equitable defenses he may have to the action.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 107-113; Dec. Dig. § 26.*]

2. BANKS AND BANKING (§ 270*)—EFFECT—USURY BY NATIONAL BANK.

A charge of usury by a national bank in the Indian Territory on a note executed to it did not vitiate the note or the mortgage given to secure the payment thereof.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 1023-1053; Dec. Dig. § 270.*]

3. MORTGAGES (§ 353*)—EJECTMENT (§ 26*)—FORECLOSURE BY ADVERTISEMENT UNDER POWER OF SALE—FAILURE TO GIVE PRESCRIBED NOTICE.

In a foreclosure proceeding by advertisement under a power of sale, failure of the mortgagee to give notice of the sale in the manner and for the time provided in the mortgage invalidates the sale; and such irregularity may be pleaded as a defense by the mortgagor in an action of ejectment brought by a purchaser at the sale or by his grantee, both of whom had notice of such irregularity.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1050; Dec. Dig. § 353.* Ejectment, Cent. Dig. §§ 107-113; Dec. Dig. § 26.*]

4. MORTGAGES (§ 374*)—RECITALS IN DEEDS.

Recitals in the deed of the trustee or mortgagee that are by the terms of the power of sale in the mortgage made prima facie evidence of the truthfulness of the facts recited, are not conclusive evidence of such facts, and may be rebutted by the mortgagee who attacks the irregularity of the sale. The only effect of such recitals, showing that the sale was regular, is, upon the introduction of the deeds containing

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes
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them, to place upon the mortgagor the burden of establishing the irregularities complained of.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1118-1123; Dec. Dig. § 374.*]

5. MORTGAGES (§ 358*)—FORECLOSURE—SALE EN MASSE.

In the absence of a provision of the statute or of the mortgage, requiring that the mortgaged property shall be sold in separate parcels or tracts, the sale en masse of the property by the trustee under the power of sale, although the property is susceptible to division, and of being sold in separate tracts or parcels, rests largely in the discretion of the trustee; but where the sale is made en masse with fraudulent intent, and results in the property's being sold for much less than its value, and much less than what it would have brought if it had been sold in separate tracts, the sale will be set aside.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1072, 1073; Dec. Dig. § 358.*]

(Additional Syllabus by Editorial Staff.)

6. PLEADING (§ 310*)—INCORPORATION OF WRITTEN EVIDENCES OF TITLE—CONSTRUCTION OF STATUTE.

Mansf. Dig. Ark. § 2632 (Ind. T. Ann. St. 1899, § 1910), requires that in actions for recovery of land, except forcible entry and unlawful detainer, plaintiff shall set forth in his complaint, all written evidences of title on which he relies and that defendant in his answer shall plead in the same manner. Section 2633 (Ind. T. Ann. St. 1899, § 1917) requires defendant to set forth in his answer exceptions to any of such documentary evidence relied upon by plaintiff to which he wishes to object. *Held*, that such instruments set forth in the complaint constitute no part of the pleadings, and defendant's failure to except to them does not amount to an admission of the truthfulness of the recitals therein.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 944; Dec. Dig. § 310.*]

7. EVIDENCE (§ 584*)—"PRIMA FACIE EVIDENCE."

"Prima facie evidence" of a fact is such evidence as in the judgment of the law is sufficient to establish the fact, and, if not rebutted, remains sufficient for that purpose.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2424, 2426; Dec. Dig. § 584.*]

For other definitions, see *Words and Phrases*, vol. 6, pp. 5549, 5550; vol. 8, p. 7762.]

Error from District Court of Seminole County; A. T. West, Judge.

Action by J. Coody Johnson against L. D. Meador. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

J. A. Baker, for plaintiff in error. Crump, Rogers & Harris, for defendant in error.

HAYES, J. This action was originally brought in the United States Court for the Western District of the Indian Territory at Wewoka by defendant in error, who will hereafter be referred to as plaintiff, to recover possession of certain real property to which plaintiff claims title through a foreclosure by advertisement under a power of sale. Plaintiff is the grantee of the purchaser at said sale. In the foreclosed mortgage, the Farmers' National Bank of Wewoka is the mortgagee, and plaintiff in error, hereafter referred to as defendant, the mortgagor. Defendant by his answer inter-

posed three defenses, which are as follows: (1) Usury; (2) failure to give public notice of the time and place of sale; (3) sale of the property as an entire tract, instead of in separate parcels; and for an inadequate price. He alleges that plaintiff had full knowledge and notice of all the facts alleged as his defense. Special demurrers to the paragraphs of the answer setting up the foregoing defenses were sustained by the trial court, and said action of the court forms the basis of the principal assignments of error urged here for reversal of the cause.

Plaintiff contends that in an action of ejectment, equitable defenses cannot be interposed, and, for such reason, the special demurrers were properly sustained; but in so far as the defenses set up were equitable in their nature, this contention is without merit. Section 5033, Mansf. Dig. Ark. (Ind. T. Ann. St. 1899, § 3238), in force in the Indian Territory, authorizes the defendant in an action to set forth in his answer as many grounds of defense, whether legal or equitable, as he shall have. This section of the statute, prior to its adoption in the Indian Territory, had been construed in connection with the statute on ejectment, and held to authorize the interposition of an equitable defense in an action to recover the possession of land. *Trulock et al. v. Taylor*, 26 Ark. 54; *Alexander v. Hardin*, 54 Ark. 480, 16 S. W. 264; *Rudisill v. Cross*, 54 Ark. 519, 16 S. W. 575, 26 Am. St. Rep. 57. *Robinson v. United Trust, Limited*, 71 Ark. 222,† was a consolidated action. One of the actions consolidated consisted of a bill to redeem from a mortgage foreclosure sale. The other was an ejectment suit. In the ejectment suit, plaintiff derived his right of possession from a sale under a mortgage. Defendants interposed as a defense that they did not know "whether said sale was made at public outcry and in the manner provided in said deed of trust, or whether the said property was ever appraised or brought two-thirds of the aforesaid value thereof, defendants are not fully advised, either to admit or deny same, and they ask that strict proof be required with regard to same." The sustaining of the demurrer to this portion of the answer was held by the appellate court to be error. The foregoing authorities are in harmony with the decided cases from several of the other states. *Meyer et al. v. Opperman*, 76 Tex. 105, 13 S. W. 174; *German Bank v. Stumpf*, 73 Mo. 311; *Cobe v. Lovan*, 193 Mo. 235, 92 S. W. 93, 4 L. R. A. (N. S.) 439, 112 Am. St. Rep. 480; *Dwight v. Phillips*, 48 Barb. (N. Y.) 116. See, also, *Sulphur Mines Co. v. Thompson*, 93 Va. 293, 25 S. E. 232.

There was no error, however, in sustaining the demurrer to the defense of usury. That attempted defense was pleaded by defendant upon the theory that section 4735,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

† 72 S. W. 592.

Mansf. Dig. Ark. (Ind. T. Ann. St. 1899, § 3046), prescribing as a penalty for usury that any contract affected therewith shall be void, applies to the mortgage in the case at bar, and to the note which the mortgage secured. In this assumption plaintiff is in error. The mortgage was executed to a national bank, and section 5198, 5 Fed. St. Ann. p. 133 (18 Stat. 320 [U. S. Comp. St. 1901, p. 3493]), fixes the penalty for a national bank's charging a rate of interest greater than is allowed by the law. Under the penalty prescribed by this statute, only the interest, where it has not been paid, is forfeited for violation of the statute; and where the interest has been paid, a right of recovery in an action therefor twice the amount of the interest paid; but the usurious element of the contract does not vitiate the entire contract. Defendant, in his answer, alleges that he has made payments on the interest, but there is no contention that the principal of the note secured by the mortgage has ever been paid. A charge of usury therefore by the bank would not defeat the foreclosure of the mortgage to enforce the payment of the principal. Whether, if the Arkansas statute applied, usury would be a defense in this action, it is not necessary to decide. By some of the authorities, it is held that the validity of the original instrument, to wit, the mortgage, cannot be questioned in an action of ejectment. *Diefenbach v. Vaughan*, 116 Ala. 150, 23 South. 88. In *Northwestern Mortgage Trust Co. v. Bradley et al.*, 9 S. D. 495, 70 N. W. 648, it was held that a foreclosure proceeding could not be attacked on the ground of usury. But, as previously stated, since usury does not render absolutely void the mortgage in this case, we do not decide whether if the same were void such fact could be availed of as a defense in this proceeding. For the reason already given, it is apparent that the court did not commit error in sustaining the demurrer to this plea.

The power of sale in the mortgage provides that in the event default be made in the payment of the note at maturity, the mortgagee shall have power to sell the property or any part thereof at public sale to the highest bidder for cash at Wewoka in the Western Judicial District, public notice of the time, place, and terms of sale having first been given thirty days, by advertisement published in a newspaper in said district, or by printed or written bills posted up in 10 different places in the vicinity in the district of said property. One of the paragraphs struck out denies that notice of the sale in either of the manners prescribed was given. This constitutes a good defense to the action. The power of a mortgagee or trustee to sell the mortgaged premises is derived entirely from the terms of the mortgage. He has no other power relative thereto than those specifically granted, and such as may be implied therefrom; and an alienation of

the mortgaged premises by the mortgagee must be in strict accordance with the powers conferred. Failure to give the notice of the sale in the manner and for the time prescribed by the terms of the mortgage, invalidates the sale. *Ford v. Nesbitt*, 72 Ark. 267, 79 S. W. 793; *Stallings v. Thomas*, 55 Ark. 326, 18 S. W. 184; *Patterson v. Miller*, 52 Md. 388.

The power of sale in the mortgage provides that the recitals of any deed of conveyance executed by the mortgagee under the provisions of the powers shall be taken as prima facie true. The deed executed by the bank to the purchaser at the sale recites that the provisions of the mortgage requiring publication of notice of the time and place of sale were duly complied with before the property was offered for sale. The deed from the mortgagee to the purchaser at the sale and the deed from the purchaser at the sale to plaintiff are attached to plaintiff's petition as exhibits. Section 2632, Mansf. Dig. Ark. (Ind. T. Ann. St. 1899, § 1916), requires that in all actions for the recovery of land, except in actions of forcible entry and unlawful detainer, plaintiff shall set forth in his complaint all deeds and other written evidences of title on which he relies for the maintenance of his suit, and the defendant in his answer shall plead in the same manner as is required by plaintiff. Section 2633 (Ind. T. Ann. St. 1899, § 1917) requires the defendant to set forth in his answer exceptions to any of said documentary evidence relied upon by the plaintiff to which he wishes to object, which exceptions shall specifically note the objections taken, and the plaintiff shall, in like manner, file like exceptions to the documentary evidence exhibited by defendant.

No exceptions were taken by defendant in his answer to the instruments filed as exhibits in plaintiff's petition. It is now contended that, by his failure to except, he admitted the regularity of the sale as to all matters essential to its regularity which are recited in the deed to the purchaser. This contention is based upon a misconception of the meaning and purpose of the statute. Before the enactment of this statute, parties were not required to produce or disclose their title deeds until offered in evidence at the trial; as a result, surprises frequently occurred by the introduction of such deeds and instruments, which the opposing party had not had an opportunity to examine. The object of this statute was to require each party to file with his pleadings the documentary evidence upon which he based his cause of action or defense, in order that the competency of such evidence might be determined before the trial to prevent surprises on the trial. Such instruments constitute no part of the pleadings. *Surginer v. Paddock et al.*, 31 Ark. 528; *Jacks v. Chaffin et al.*, 34 Ark. 534; *Howell v. Rye et al.*, 35 Ark. 470; *Richardson v. Williams*, 37 Ark. 542. To prevent the in-

roduction of any of the instruments of conveyance attached to plaintiff's petition, it was necessary for defendant to except thereto in the manner provided by the statute as to any and all irregularity apparent upon the face of the instruments; but he is not precluded, by his failure to except thereto, from pleading any affirmative matters destroying the effect of such instrument or of any of their provisions; and he specifically pleads that the notice required by the power of sale was not given. The agreement in the mortgage that the recitals in the deed shall be taken as prima facie true does not make recitals therein conclusive. Such recitals are only prima facie evidence of the fact which they state. Prima facie evidence of a fact is such evidence as in the judgment of the law is sufficient to establish the fact; and, if not rebutted, remains sufficient for that purpose. *Kelly v. Jackson et al.*, 6 Pet. 622, 8 L. Ed. 523. The recital in the deed that notice was given with the provision in the mortgage that each recital should be taken as prima facie true, establishes the fact of notice, if it is not rebutted. Upon the introduction of the instruments in evidence, the burden to show the irregularity on account of lack of notice as prescribed in the mortgage, is upon defendant. Such only is the effect of this provision of the mortgage and the recitals in the deed.

The property covered by the mortgage consists of 13 surveyed and platted lots in block 4 in the town of Wewoka. It is charged that the sale was made en masse; that, by reason thereof, the property brought less than one-third of its value and of what it would have brought if it had been sold in separate parcels; that if it had been sold in separate parcels a sale of the entire property would not have been required in order to pay the mortgaged debt; that the property was easily susceptible of division, and to be sold in separate parcels; and that it was sold en masse with the wrongful and fraudulent intent of working a great wrong and hardship upon defendant. There is no provision in the mortgage, nor was there any statutory provision in force in the Indian Territory requiring that the mortgaged property shall be sold in separate parcels; and there was, therefore, no obligation upon the bank to sell this property in separate parcels, except as it is bound as trustee under the trust instrument to render the sale as beneficial as possible to the debtor. The better rule seems to be that sales made en masse, even where required by statute to be made in separate parcels, are voidable only and not void. 2 Jones on Mortgages, § 1857. Where there is no statute upon the question, the manner of sale is a matter resting largely in the discretion of the trustee; but the trust imposes upon the trustee the duty in disposing of the property to handle it in such manner as will best protect the rights and equities of the debtor, as well as the creditor. The rule requiring

each parcel of land to be offered separately is not an arbitrary one; and the presumption is in favor of the good faith of the trustee. The mere fact that the land was sold en masse, when it was susceptible of being sold in separate parcels, will not alone justify a court in setting aside the sale. Before the sale will be set aside, it must appear that the interests of the debtor have been sacrificed, or that there was some attending fraud or unfair dealing. *Miller et al. v. Trudgeon*, 16 Okl. 337, 86 Pac. 523; 2 Jones on Mortgages, § 1859. Defendant, however, alleges that his interests have been sacrificed, and that the sale was made in said manner with fraudulent intent on the part of plaintiff.

No offer is made by defendant to pay to plaintiff the mortgaged debt or the amount plaintiff paid as a purchase price for the property; and it is contended that the irregularity and fraud charged in the manner of sale is not available to defendant, unless he offers to do equity by tendering such payment. The answer alleges, relative to the irregular manner of the sale, that the purchaser at the sale in fact acted, not for himself, but as agent of the mortgagee; and that plaintiff is not in fact the owner of the property, but that he, too, is now acting for the bank, the mortgagee. If, therefore, the fraud or wrong was committed in the manner of the sale, plaintiff, under the allegations of the answer, is a party thereto. He is not in possession of the mortgaged premises and does not therefore have the right of a mortgagee who has come peaceably into possession of the mortgaged premises after default to retain possession until the mortgaged debt is paid. If the allegations of the answer be true, and for the purpose of the demurrer, they are conceded to be true, plaintiff is now by this proceeding seeking to reap the fruits of the fraud and wrongdoing of his principal, either for himself or his principal. He cannot, therefore, complain, if he be relegated to the rights of the mortgagee under the mortgage, which are the rights acquired by the purchaser at a foreclosure sale set aside for irregularity.

In *Littell v. Grady et al.*, 38 Ark. 584, the sale was set aside because the trustee, without express authority in the trust, purchased at the foreclosure sale. The court held that the mortgagor should be granted this relief, although he did not offer to pay the mortgaged debt. In *Imboden v. Hunter*, 23 Ark. 622, 79 Am. Dec. 116, a sale was made under power of sale in a trust deed at which the trustee purchased. Upon application of the cestui que trust, the sale was set aside and a resale ordered. Sale of the land en masse instead of separate parcels is such an irregularity as might be waived by the mortgagor or of which he might be estopped to complain by his conduct showing an acquiescence; but these questions are not presented by the pleadings. Failure to give the notice of the sale required by the terms of the

mortgage and the irregularity in selling the property en masse with fraudulent intent, and with result of greatly sacrificing the interests of the mortgagor, constitute in our opinion valid defenses to this proceeding, under the procedure in force in the Indian Territory before the admission of the state by which this proceeding must be governed. We express no opinion upon the merits of the case based upon the evidence in the record, or that may hereafter be produced; but, for the foregoing reasons, the judgment of the trial court should be reversed and the cause remanded.

DUNN, C. J., and WILLIAMS, KANE, and TURNER, JJ., concur.

(27 Okl. 462)

BASH et al. v. HOWALD.

(Supreme Court of Oklahoma. Nov. 16, 1910.)

(Syllabus by the Court.)

1. ATTACHMENT (§ 236*)—DISSOLUTION—POWERS OF JUDGE AT CHAMBERS.

A motion to dissolve an attachment and to have the property restored to the defendant may be heard and disposed of by a judge at chambers.

[Ed. Note.—For other cases, see Attachment, Dec. Dig. § 236.*]

2. EVIDENCE (§ 317*)—APPEAL AND ERROR (§ 1050*)—HEARSAY.

Hearsay evidence having been admitted on the trial which was liable to inflame the minds of the jury and prejudice them against the losing party will cause reversal on review in this court.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1174-1192; Dec. Dig. § 317; Appeal and Error, Dec. Dig. § 1050.*]

3. ATTACHMENT (§ 351*)—ACTION ON ATTACHMENT BOND—DAMAGES—ATTORNEY'S FEE.

An attorney's fee is recoverable as part of the damages on an attachment bond, and it is not essential that the same shall have been previously paid by the obligee, he having incurred an obligation in good faith and in a reasonable sum therefor.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 1290-1303; Dec. Dig. § 351.*]

Error from District Court, Garfield County; M. C. Garber, Judge.

Action by William Howald against J. H. Bash and others. From a judgment for plaintiff, defendants bring error. Reversed and remanded.

W. L. Moore and Rush & Steen, for plaintiffs in error.

WILLIAMS, J. In *Cassady et al. v. Morris*, 19 Okl. 203, 91 Pac. 888, it was held in a unanimous opinion by the Supreme Court of the territory of Oklahoma that "a motion to discharge exempt property from attachment is triable to the court or judge, and neither party is entitled to a jury." The authority of a judge at chambers to dissolve an attachment or temporary injunction seems never

to have been previously questioned in the territory of Oklahoma. This court in *First National Bank of Hobart v. Spink et al.*, 21 Okl. 468, 97 Pac. 1019, assumed that such authority existed. In *Brown v. Epps*, 91 Va. 726, 21 S. E. 119, 27 L. R. A. 676, it is said: "Cases involving the jurisdiction of justices of the peace under this and similar statutes have been frequently before this court, and in every instance save in the case of *Mary Miller v. Commonwealth*, 88 Va. 618, 14 S. E. 161, 342, 979, 15 L. R. A. 441, the validity of the judgment based on the statute has been upheld. *Thomas' Case*, 22 Grat. (Va.) 912; *Read's Case*, 24 Grat. (Va.) 618; *Wolverton v. Commonwealth*, 75 Va. 910; *Harrison v. Commonwealth*, 81 Va. 491. Inasmuch, however, as it does not appear that the constitutional question here under consideration was presented to the court in any of those cases, it is contended that they are not authorities binding upon us, and it is conceded that their weight as authority is impaired for the reason stated. It does appear, however, that the question of jurisdiction was considered by the court, and, indeed, underlies the exercise of jurisdiction by all courts, in all cases, whether specifically presented or not, so that where it appears that courts of all grades in the state from justices of the peace to this court have gone on uninterruptedly for many years to exercise jurisdiction under a statute, and that during all that time there has been no doubt entertained nor question raised as to the constitutionality of the law—when all this has been done in the presence of an able and inquisitive bar—a strong presumption is raised that the attack has not been made upon the constitutionality of the law, because in the judgment of the courts and of the profession no such ground of objection existed."

This statute conferring jurisdiction upon the judges at chambers to discharge attachments and dissolve injunctions was in force in the territory of Oklahoma for about 15 years. During that period it does not appear that the validity of such statute on the ground that it was contrary to the organic act was ever questioned save here, but that all inferior courts, as well as the Supreme Court of that territory, assumed the validity of such statute. Section 9 of the organic act of Washington Territory of 1853 (Act Cong. March 2, 1853, c. 90, 10 Stat. 175) is substantially the same as that of Oklahoma Territory, and the Supreme Court of that territory recognized the validity of such a statute without ever specifically passing thereon. *Suffern v. Chisholm*, 1 Wash. T. 488. Section 9 of the organic act of the territory of Oklahoma (26 Stat. 85, c. 182, approved May 2, 1890) provides: "That the judicial power of said territory shall be vested in a Supreme Court, district courts, probate courts and justices of the peace. * * * The said Su-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

preme and district courts of said territory, and the respective judges thereof, shall and may grant writs of mandamus and habeas corpus in all cases authorized by law." True, the organic act as to enactments made by the territorial Legislature was the paramount law of that territory, bearing the same relation to such legislation as the Constitution of a state does to enactments by the state Legislature. *Territory v. Hopkins*, 9 Okl. 133, 59 Pac. 976; *Allison v. Berger*, 1 Okl. 1, 25 Pac. 511. Section 3307, *Wilson's Rev. & Ann. St.* 1903, provides: "Judges of the district and probate courts shall within their respective districts and counties be authorized to hear and determine at chambers, motions to dissolve attachments and injunctions and generally to exercise such supervisory control of the other officers and processes of their courts as to prevent abuses or oppression thereby and thereof."

It is insisted that this section is violative of section 9 of the organic act, supra, in that it confers judicial powers upon the judges at chambers when such power can only be exercised by the courts in term time. Article 5, § 2, *Const. Idaho 1889*, provides: "The judicial power of the state shall be vested in a court for the trial of impeachments, a Supreme Court, district courts, probate courts, courts of justices of the peace, and such other courts inferior to the Supreme Court as may be established by law for any incorporated city or town." In that state, under a statute authorizing the dissolving of attachment by a judge at chambers, such power is exercised. *Mason, Ehrman & Co. v. Lieualten*, 4 Idaho, 415, 39 Pac. 1117. Section 1, art. 6, *Const. Mich. 1850*, provides: "The judicial power is vested in one Supreme Court, in circuit courts, in probate courts, and in justices of the peace. Municipal courts of civil and criminal jurisdiction may be established by the Legislature in cities." In *Genesee County Savings Bank v. Mich. Barge Co.*, 52 Mich. 166, 17 N. W. 791, it is said: "The proceedings are taken under Comp. Laws 1809, c. 201 (*How. Ann. St. c. 275*). They are judicial, and not according to the course of the common law. *Chandler v. Nash*, 5 Mich. 416. The statute requires the circuit judge or circuit court commissioner to hear the proofs and allegations of the parties, and, if a good and legal cause for suing out the writ is not satisfactorily made to appear to the court upon such hearing, it is his duty to dissolve the attachment and order the property restored to the defendant. The affidavit of the plaintiff, his agent or attorney, is prima facie sufficient cause for issuing the writ; but upon the facts being denied in the petition for a dissolution the burden is cast upon the plaintiff to make good the cause he alleges by other competent proof in addition to that contained in his affidavit for the writ."

* * * So far as the original suit is concerned, the application to dissolve is entire-

ly an interlocutory proceeding, and does not touch or affect the merits thereof. * * * It is in the nature of a motion, and may be disposed of at chambers. * * * A hearing, however, is required, and a trial of a question of fact must be had; and there is no reason why the rules governing the trial of such issues should not be applied by the court upon the hearing. Questions both of law and fact are to be adjudicated by him. *Chandler v. Nash*, supra." This opinion was delivered by Judge Sherwood in which Judge Cooley concurred. To the same effect is *Rowe v. Kellogg et al.*, 54 Mich. 206, 19 N. W. 967. Section 1, art. 4, *Const. S. C. 1868*, provides: "The judicial power of this state shall be vested in a Supreme Court, in two circuit courts, to wit: a court of common pleas, having civil jurisdiction, and a court of general sessions, with criminal jurisdiction only; in probate courts, and in justices of the peace. The general assembly may also establish such municipal and other inferior courts as may be deemed necessary." In *Cureton v. Dargan*, 12 S. C. 122, it was held that "the circuit judge, on motion upon notice, may dissolve an attachment at chambers."

2. The condition of the bond is that said J. H. Bash was to pay to the said William Howald all damages which he the said Wm. Howald may sustain by reason of attachment, including reasonable attorney's fees, if the order be wrongfully obtained. The petition in part alleges: " * * * The defendant J. H. Bash * * * caused an order of attachment to be issued out of the office of the clerk of said district court, and caused the same to be delivered to the sheriff of said county and levied on the stock of goods owned by the plaintiff in said city of Hennessey, and caused the sheriff to take possession of said goods and remove them from the building in which they were kept by the plaintiff. * * * That by reason of the wrongful issuance and levy of the order of attachment in said cause the plaintiff has suffered damages, in this: that he has been compelled to pay out the following sums of money in procuring a dissolution of said attachment: Railroad fare from Hennessey to Enid, the residence of his attorneys, \$10; stenographer's fees for preparing of necessary affidavits for use in the hearing on the motion to dissolve the attachment, at Arapaho, \$10; railroad fare of plaintiff and his attorneys from Enid to Arapaho and return, \$20; for labor in taking an inventory of the goods after they were returned by the sheriff, and for cleaning and preparing the same for sale, \$125; retainer paid to Manatt & Sturgis, plaintiff's attorneys, \$75. That the plaintiff has been damaged in the further sum of \$225, the balance of the attorney fee due plaintiff's attorneys, under and by virtue of his contract with them. * * * That he has been further damaged in the wrongful issuance and levy of said attachment, in the sum

of \$2,500, by reason of the depreciation in the value of said stock of goods while the same were in the possession of the sheriff. That said depreciation resulted from the fact that the goods while in the possession of said sheriff were kept in a place where the rain leaked into the building and caused said goods to be soaked with water, and where mice and other vermin got into them and cut and injured them. The plaintiff has been further injured by reason of the wrongful issuance and levy of said attachment in the sum of \$2,000 by reason of the unlawful and wrongful conversion of a portion of said property while in the possession of the sheriff. That the plaintiff has been further injured by reason of the wrongful issuance and levy of said attachment in injury to his business. That at the time of the levy of said attachment the daily sales of the plaintiff amounted to the sum of \$200, and his daily profits amounted to the sum of \$50. That at said time he had advertised at a cost of \$125 a special sale at his place of business, and that within four or five days after said sale had been commenced said attachment was levied and all of the expense of advertising was lost by reason of said attachment, to his damage in the sum of \$1,000. That no part of the damages has been paid by the plaintiff." After the levy was made, a deputy sheriff remained in charge of the attached goods, and at the time they were removed by the sheriff from the building in which they were levied on to an adjoining building the following conversation was testified to have taken place between defendant in error and said deputy: "Q. At the time the goods were removed from the building, state what, if anything, was said between you and the officer with reference to that matter. A. Yes, sir; I had a conversation with him and told him; told me he was going to move the goods out of there. I had a conversation with him, and he told me that he was going to move the goods out of there into the next building, and I told him to just leave it in there. It would not cost him any more to leave it in there. The building was mine, paid for and everything, and, if he took the goods, why he just as well leave the building closed. It did not make a particle of difference. Q. What did he say in that particular? A. He said he did not care what I said. He had his instructions; that I had a right to object if I wanted to, but that he did not care." Exceptions were duly saved to the admission of all this evidence. Neither the obligor nor the sureties on the attachment bond were present. This action is against them, and not the officer. Such conversation was clearly hearsay as to said parties and inadmissible. It was also calculated to prejudice the minds of the jury against them. We cannot say that such did not constitute such an error as did not operate to

the prejudice of plaintiffs in error, and for that reason this cause is reversed, with instructions to grant a new trial.

3. Plaintiffs in error insist that damages cannot be recovered for attorney's fees until they have been actually paid. This seems to be the rule in California. *Elder v. Kutner*, 97 Cal. 490, 32 Pac. 563. But it is neither supported by the best reason nor the weight of authority. *Higgins et al. v. Mansfield*, 62 Ala. 268; *Shultz v. Morrison, etc.*, 3 Metc. (Ky.) 99; *Doe, etc., v. Perkins*, 8 B. Mon. (Ky.) 198. No authorities are cited to support the contentions as to the other questions raised. As they may not arise on another trial, we do not pass on same.

No briefs have been filed by the defendant in error in support of the ruling of the lower court. The pressure of the business of this court does not allow time to judges to brief cases on the part of litigants. If the defendant in error is too poor to provide a printed brief in accordance with rule 7 of this court by mailing an application to the clerk of this court, asking permission to file typewritten briefs, showing service on the opposite party, said application, without more would be considered, and, if it appeared on the showing that he was too poor to furnish a printed brief, he would be permitted by order of this court to file typewritten briefs. This court has time and again announced this rule. *Leavitt v. Com. Nat. Bank*, 109 Pac. 71. There is no excuse for this case not being briefed on the part of the defendant in error, especially when the judgment recovered in his favor in the lower court is in the sum of \$1,600.

The judgment of the lower court is reversed and remanded. All the Justices concur.

(27 Okl. 473)

JANTZEN v. EMANUEL GERMAN
BAPTIST CHURCH.

(Supreme Court of Oklahoma. Nov. 16, 1910.)

(*Syllabus by the Court.*)

1. CORPORATIONS (§ 514*)—PARTIES (§ 76*)—ACTIONS—PLEADINGS—ALLEGATION OF CORPORATE EXISTENCE—DEFENSES—WANT OF LEGAL CAPACITY TO SUE—METHOD OF RAISING OBJECTION.

It is not necessary for a plaintiff corporation in bringing a suit to allege that it is a corporation. Plaintiff's want of legal capacity to sue, where such fact does not affirmatively appear upon the face of the petition, cannot be raised by motion for judgment upon the pleadings or by objection to the introduction of evidence under the pleadings. It should be raised by a special plea in the nature of a plea in abatement. If it is not so done, defendant, by pleading to the merits, admits plaintiff's capacity to maintain the action.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2052-2081; Dec. Dig. § 514;* Parties, Cent. Dig. §§ 117-126; Dec. Dig. § 76.*]

2. PLEADING (§ 236*)—APPEAL AND ERROR (§ 959*)—AMENDMENT—DISCRETION OF COURT.

A denial of an application of defendant to withdraw his answer for the purpose of filing

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

an amended answer will not be held an abuse of discretion or material error, where the application fails to show the character or the purpose of the amendment desired.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 601; Dec. Dig. § 236; *Appeal and Error, Cent. Dig. §§ 3825-3833; Dec. Dig. § 959.*]

3. REPLEVIN (§ 57*)—PLEADING—SUFFICIENCY OF PETITION.

In an action of replevin, where a petition has been filed, the affidavit and bond for an ancillary order of replevin are not parts of the pleadings; and, whether a cause of action has been stated is determined by the averments of the petition; and the petition is not affected by defects in the averment of the affidavit or by irregularities in the bond.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 200-210; Dec. Dig. § 57.*]

4. EVIDENCE (§ 471*)—ADMISSIBILITY OF EVIDENCE—OWNERSHIP OF PROPERTY.

Ownership of personal property is ordinarily a simple fact to which a witness having the requisite knowledge can testify directly; and, in an action of replevin, a question as to who is the owner of the property involved, where such question involves a fact clearly within the knowledge of the witness, and not the expression of an opinion upon facts proven, is admissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2150, 2151; Dec. Dig. § 471.*]

5. TRIAL (§ 339*)—VERDICT—CORRECTION.

A jury that arrived at a verdict during recess of the court, under permission of the court, sealed their verdict and separated. Upon reconvening of the court, the sealed verdict returned by the jury found for plaintiff, but found that the costs should be divided. *Held* that, in the absence of misconduct of the jury in arriving at the sealed verdict, it was not error for the trial court to remand the jury to their room to correct their verdict as to costs, for the jury was without jurisdiction over the subject of costs; and that portion of the verdict might have been treated by the court as surplusage, and judgment rendered for plaintiff and for his costs upon the original verdict returned.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 791-794; Dec. Dig. § 339.*]

(Additional Syllabus by Editorial Staff.)

6. APPEAL AND ERROR (§ 757*)—REVIEW—INSTRUCTIONS.

Supreme Court Rule 25 (20 Okl. xii, 95 Pac. viii) requires that where a party complains of instructions given or refused, he shall set out in totidem verbis separately in his brief, the portions to which he objects or may save exceptions. *Held* that, where the rule is not complied with, the court will not consider objections to instructions given or to the refusal of instructions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3092; Dec. Dig. § 757.*]

Error from Blaine County Court; Malcomb, Judge.

Action by H. J. Jantzen against the Emanuel German Baptist Church by David Schmidt and another, trustees. Judgment for defendant, and plaintiff brings error. *Affirmed*.

Wm. O. Woolman and L. H. Hampton, for plaintiff in error. C. F. Dyer, for defendant in error.

HAYES, J. This is an action of replevin brought originally by defendant in error in the county court of Blaine county. In its petition the church, plaintiff below, alleges that it is the owner and entitled to the possession of one certain organ and an oak top stool; that defendant unlawfully, wrongfully, and forcibly detains possession of said property from plaintiff.

Defendant in his answer pleads evidentiary facts and circumstances, the effect of which is to deny that plaintiff is the owner of the property sued for, and alleges that he is now the owner of said property. There is no allegation in plaintiff's petition as to its character relative to its being a partnership, an unincorporated association, or a corporation, or relative to its legal capacity to sue; nor is there any allegation in defendant's answer relative to such matter. There was a motion by defendant for judgment upon the pleadings and an objection to the introduction of any evidence, upon the ground that plaintiff was without legal capacity to maintain this action. This motion and objection was equivalent to a demurrer to the petition upon such grounds. But want of legal capacity to sue cannot be raised in this way where such fact does not appear from the face of the petition. This question was first considered and passed upon in this jurisdiction in *Leader Printing Co. v. Lowry et al.*, 9 Okl. 89, 59 Pac. 242, in which all the provisions of the statute applicable to the question are cited and discussed. In the third paragraph of the syllabus to that case it is said: "It is not necessary for a plaintiff corporation, in bringing a suit, to allege that it is a corporation. Its legal capacity to sue will be presumed in law until the contrary is made to appear; and, unless it affirmatively appears from the face of the petition that the plaintiff has no legal capacity to sue, such question cannot be raised by a demurrer. The point that plaintiff is not a corporation should be raised by a special plea in the nature of a plea in abatement. If it is not so raised before pleading to the merits, the question is waived. By pleading to the merits, a defendant admits plaintiff's capacity to maintain the action." This doctrine was subsequently approved in *Miller et al. v. Campbell Commission Co.* et al., 13 Okl. 75, 74 Pac. 507, and in *Boyce v. Augusta Camp No. 7,429, M. W. A.*, 14 Okl. 642, 78 Pac. 322. It therefore follows upon two reasons that the trial court committed no error in the matter complained of; for, if defendant's objection had been made in time, want of capacity to sue could not be raised in the method sought to be raised by him, since plaintiff's petition does not disclose such want of capacity; and for the further reason that defendant filed his answer to the petition without raising such question by specific averments thereto. By pleading to the merits, without raising

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the question of plaintiff's capacity, he admitted its capacity to maintain the action.

When the case was called for trial, defendant asked and was granted permission to withdraw his answer. For what purpose he desired to withdraw it, is not disclosed in his application therefor. Immediately thereafter, the court set aside the order granting such permission and denied the application. It is argued here that the withdrawal of the answer was for the purpose of filing an amended answer. Giving defendant the benefit of this contention, which was not made to appear by his application to the court below, it cannot be said that the court committed error. The permitting or refusing amendments to pleadings is a matter in the sound judicial discretion of the court. *Mitchell et al. v. Ripley & Bronson*, 5 Kan. App. 818, 49 Pac. 153. And where the party applying fails to set forth in his application any showing as to the character or purpose of the amendment desired, it cannot be said that there was any abuse of discretion or any material error committed. *Stewart v. Winner et al.*, 71 Kan. 448, 80 Pac. 934.

The motion for judgment upon the pleadings and the objection to the introduction of any evidence was also upon the ground that the affidavit for order of attachment filed at the commencement of the proceedings failed to state certain matters required by the statute to be stated therein; and that the bond executed for the purpose of procuring the delivery of the property was not in form and substance as required by the statute. But, conceding without deciding that the affidavit and bond are defective as contended, such facts in no way can affect the proceeding in the main action. Such facts might be grounds for quashing the order of delivery and requiring the property to be redelivered to the defendant, pending the action; but the attack made by defendant on the affidavit and order was not for this purpose, but to prevent a judgment upon the issues formed by the petition and answer. By sections 4352 and 4353 of Wilson's Rev. & Ann. St. 1903, any plaintiff in a replevin action may, at the commencement of the action, or any time before answer, obtain an order for the delivery of the property in controversy to him pending the action, by filing with the clerk of the court an affidavit setting up certain facts specified by the statute and a bond in double the value of the property, conditioned as by the statute required. But a proceeding under these sections of the statute to obtain possession of the property, pending the action, is ancillary to the main proceeding and not essential to it. An action of replevin may be maintained without any proceeding for an order of delivery of the property. *Batchelor v. Walburn et al.*, 23 Kan. 733. An affidavit forms no part of the pleadings, where a petition or bill of particulars has also been filed, and its office ceases when the property is delivered and jurisdiction conferred and the action thereafter pro-

ceeds upon the petition; and whether a cause of action has been stated must be determined by the averments of the petition and not by the affidavit. *First National Bank v. Cochran*, 17 Okl. 538, 87 Pac. 855; *Holsington v. Armstrong*, 22 Kan. 110; *Ward v. Masterson*, 10 Kan. 77.

Complaint is also made of the admission of parol testimony to show that plaintiff is a corporation. If error, however, was committed in this, it was harmless; for the only effect of evidence as to the corporate capacity of plaintiff was to show its legal capacity to maintain the action; and since, under the pleadings, this capacity was admitted and cannot be questioned by defendant, any evidence thereon was immaterial, and could not affect the rights of any one.

One Mr. Schmidt, trustee of the plaintiff church, was permitted, in testifying in behalf of plaintiff, to be asked and to answer, over objection of defendant, the following question: "I will ask you to state, Mr. Schmidt, if the Emanuel German Baptist Church was the owner of a certain organ known as the Farrand make, Detroit, Michigan, and a certain revolving stool, oak top, on the 27th day of August, 1908." Answer: "Yes; it was." The property described in the question is that involved in this controversy. Defendant's objection to the evidence is that it calls for a conclusion of the witness; that the ownership of personal property where that is the ultimate fact to be determined in an action cannot be established by statement of such fact from witnesses, but must be established by showing the facts and circumstances upon which ownership is claimed; such as prior possession, claim of ownership, transfers from the person first in possession claiming ownership down to the last. The only authorities cited by him in support of this contention are: *Simpson v. Smith et al.*, 27 Kan. 565, and *Hite v. Stimmell*, 45 Kan. 469, 25 Pac. 852.

Simpson v. Smith et al. was an action for damages for conversion. One of plaintiff's witnesses in that case was permitted to testify that plaintiffs in the case were the absolute owners of the goods converted. The court held the admission of this evidence error, but it is stated in the opinion that if that were the only error in the case, it would not be held material.

The *Hite v. Stimmell* Case cites and follows *Simpson v. Smith et al.* In the *Hite* Case, other errors also were committed by the trial court; and we are not informed by the opinion whether, if the admission of the evidence as to ownership had been the only error committed, it would have been regarded so material as to require a reversal. There are cases from other jurisdictions in harmony with the foregoing cases from Kansas, but there are many other cases holding the contrary.

In *Olson v. O'Connor*, 9 N. D. 504, 84 N. W. 359, 81 Am. St. Rep. 595, the court, after

stating the rule announced in the Kansas cases and referring to those cases and to cases from other courts supporting the same rule, said: "Undoubtedly, the foregoing authorities correctly state the rule where the answer of a witness as to ownership involves his construction of facts or his conclusion as to what they establish. In such cases it is erroneous to permit witnesses to testify to the ultimate fact of ownership, and by so doing compel the jury to return a verdict upon the opinions and conclusions of the witness, instead of the primary facts upon which ownership is based. But it is also the unanimous voice of these authorities that where the answer as to ownership is direct, but is subsequently qualified by a statement of the facts relative to it, or tending to show such ownership, and discloses the facts upon which the answer is based, the error is cured, and is not ground for reversal. The reason for this, as stated in *Nicolay v. Unger*, 80 N. Y. 54, is that 'defendants would receive all the advantage which would flow from the evidence given in regard to what transpired between the parties, and it would not add to its weight or increase its effect by proof of the conclusion of the witness.'"

We think the foregoing reasoning sound; and in the case at bar, if the question objected to and the answer thereto were incompetent, such error was cured by the subsequent testimony of the witness who testified as to all the circumstances and facts upon which his knowledge of the ownership of the organ and stool is based. But we do not base our conclusion upon so narrow a ground. Testimony of ownership of personal property may, under some circumstances, be such a conclusion as, to permit testimony relative thereto, would call for an opinion of the witness; but it is also at times a fact, a primary fact, as much so as many of the other thousand facts about which witnesses are permitted to testify to directly. In *Olson v. O'Connor*, supra, plaintiff sought to recover for the conversion of certain grain grown upon her farm. Defendant admitted taking the grain and its value, but alleged as a complete defense, that it was not the property of plaintiff. The following questions were propounded to plaintiff: "Whose grain was it, raised there in 1896?" And, "You may state who was the owner of the crop?" These questions were held not to be incompetent or calling for a conclusion of the witness, and in the opinion the following language is used: "But we are agreed that in this case, under the facts as they appear, these questions did not call for an opinion, but a statement of fact simply, and therefore come under the rule that where the question involves a fact clearly within the knowledge of the witness, and not the expression of an opinion upon facts proven, such question is admissible."

In *De Wolf v. Williams*, 69 N. Y. 621,

which was an action for conversion, the question asked was: "Whose was the property in the house 516 Pacific street?" Objection was made to it as being a question of law and it was held that the question and answer were proper; that the title to property was ordinarily a simple fact to which a witness having the requisite knowledge could testify to directly. This case was cited and followed in *Parmele Company v. Haas*, 171 N. Y. 579, 64 N. E. 440, where the question asked was: "Whose was the property in the house?" Inquiries as to the ownership of certain goods at a stated time "called for a fact, and not for a conclusion of law as claimed. The witness was in a position to know how the fact in that respect was. The questions were, therefore, admissible, and it was the office of a cross-examination to discover whether the witness stated in his answer a fact or a conclusion." *Casper v. O'Brien*, 47 How. Prac. (N. Y.) 89. "Ownership of personal property is a fact to which a witness may testify. On cross-examination, such witness can be required to state the particular facts, on which the claim of ownership rests." *Steiner Bros. & Co. v. Trantum*, 98 Ala. 315, 13 South. 365. See, also, *Daffron v. Crump*, 69 Ala. 77; *Murphy v. Olberding*, 107 Iowa, 547, 78 N. W. 205; *Archer v. Hooper*, 119 N. C. 581, 26 S. E. 143; *Hawley v. Bond*, 20 S. D. 215, 105 N. W. 464.

Complaint is made of the giving and refusal of certain instructions, but the instructions or the portions thereof about which complaint is made have not been set out in plaintiff in error's brief. Rule 25 (20 Okl. xii, 95 Pac. viii) requires that, where a party complains of instructions given or refused, he shall set out in totidem verbis in his brief separately the portions to which he objects or may save exceptions. Where this requirement of the rule is not complied with, the court will not consider objections to instructions given or to the action of the court in refusing instructions requested. We shall not, therefore, consider separately the complaints relative to the instructions; but we have read carefully the charge of the court, and, taken as a whole, it correctly states the law applicable to the issues formed by the pleadings and evidence; and no prejudicial error was committed therein.

The case was submitted to the jury with instruction that, if they arrived at a verdict during recess of the court, they might return a sealed verdict and report to the court on the following morning. A sealed verdict was returned, which, upon being opened, was in favor of plaintiff, finding it to be entitled to possession of the property in controversy, and further found that each party should pay one-half of the costs. The finding of the jury that each party should pay one-half of the costs was without authority of law; and the court ordered them to return to the jury room for further deliberation and to correct their verdict. Whereupon, the jury retired

to its room and thereafter returned into open court a verdict in favor of plaintiff for possession of the property. Defendant objected to the court's receiving this verdict, upon the ground that the court had no power or authority to reassemble the jury for further deliberation, after the jury had, upon arriving at a sealed verdict, separated. We think this was not prejudicial error. The assessment of costs was not a matter for determination by the jury. By section 4731 of Wilson's Rev. & Ann. St. 1903, it is provided that, except as otherwise provided by the statute, costs shall be allowed, of course, to plaintiff, upon a judgment in his favor, in actions for the recovery of money only, or for the recovery of specific real or personal property. The jury, no doubt, unadvisedly included in their verdict a finding as to the costs. Plaintiff, however, contends that the sealed verdict arrived at by them was no verdict at all; that their dispersing thereafter was unauthorized; and that they therefore could not be returned to the jury room to correct the error of their verdict. He cites in support of this contention *Ehrhard v. McKee*, 44 Kan. 715, 25 Pac. 193. In that case there was a sealed verdict in favor of defendant, which divided the costs between the parties to the action. After the sealed verdict had been placed in the hands of the proper officer, the jury separated. Thereafter, the sealed verdict was returned into court by the jury and opened. Whereupon, the court, after reprimanding them for separating and going at large upon the pretense of having agreed upon a verdict, directed them to return to their room for further deliberation. The jury retired and it was not until after about five days' deliberation that a verdict in favor of defendant was rendered. It was charged that the sealed verdict was only a feigned agreement on a verdict for the purpose of securing their release and to enable them to separate. It does not appear in that case that the court gave the jury permission to return a sealed verdict, or that permission was given them upon any conditions to separate. It was held by the appellate court that there was misconduct of the jury; and that the burden was upon the prevailing party to show that such misconduct did not prejudice the unsuccessful party. Although plaintiff in error in his brief charges that there was misconduct of the jury in this case, and for that reason the verdict should be avoided, such charge does not seem to have been made in the court below, his objections there being that the court was without authority, after a sealed verdict had been arrived at and the jury separated, to reassemble the jury. Nor is there anything in the record to indicate misconduct on the part of the jury. There was no contention in the lower court, so far as the record discloses, and there is nothing here to indicate that the verdict was feigned in order to enable the jury to separate, or that it was not arrived at in good faith. No great interval

of time intervened between the reassembling of the jury and returning into court the corrected verdict, as in the *Ehrhard v. McKee* Case. In *Sutliff et al. v. Gilbert*, 8 Ohio, 405, the practice of permitting juries to return sealed verdicts, and after they have arrived at such verdict to separate until the verdict is returned into court, is discussed in the following language: "Formerly, jurors were not permitted to separate until their verdict was returned into court; and, in order to compel them to agree, they were deprived of the necessities of life for the time being. But these rigid rules have been much relaxed in the practice of this state. We do not, it is true, permit jurors to separate until a verdict is found, but we allow them all necessary refreshment, and when they have agreed upon a verdict, if the court is not in session they are permitted to put it under seal, and then separate. This verdict they return when the court again convenes. The verdict thus returned has the same effect, and must be treated in the same manner, as if returned in open court, before any separation of the jury had taken place. But if after having once agreed, and put their verdict under seal, a jury shall separate, and subsequently meet in their room and change this sealed verdict, such altered verdict could not, with propriety, lay the foundation of a judgment. Such conduct in a jury would constitute that degree of misbehavior for which a verdict ought to be set aside. The most common practice of this court is to direct the jury that if the court shall not be in session when they shall have agreed, to return their verdict to the clerk; and, if he cannot be found, to put it under seal, and bring it in at the opening of the court. In thus far relaxing ancient rules, we have experienced no inconvenience, and I have no doubt we might go further without any danger; for I believe the more confidence is placed in jurors, the more they are treated like reasonable men, the more will right and justice, through their instrumentality, be done." And, discussing the authority of the court to remand the jury to their room after it has been separated, for the purpose of correcting errors in the verdict, it was said: "In the case under consideration, the jurors did not misbehave. They did not separate until a verdict was found and placed under seal. This same verdict was, at the opening of the court on the next morning, delivered to the court. As before remarked, it must be treated and considered the same as if returned before there had been any separation of the jury. The question then arises, whether the court, after a jury have once returned a verdict, has the power to remand them to their room for further consultation. * * * But where the jury have decided the issue between the parties, but have failed to return a complete verdict, as, for instance, where, in an action on a promissory note, they have found for the plaintiff the amount of the note with interest, but have not speci-

fied in dollars and cents that amount, they may, with propriety, be returned to their room to make the computation of interest." The foregoing language of the Ohio court is in harmony with the rule and practice prevailing in most of the states.

In the case at bar there was no misbehavior on the part of the jury. They arrived at and returned into court in the first instance a verdict upon which a judgment could have been entered. It is true that that portion of the verdict dealing with the costs was a matter over which the jury had no jurisdiction, but it was mere surplusage, and could have been so treated by the court, and a valid judgment entered in favor of plaintiff for possession of his property and for costs. A similar verdict was considered by the court in *Nation et al. v. Littler et al.*, 59 Kan. 773, 52 Pac. 96,¹ wherein it was held that the incorporation in a verdict of a provision dividing the costs was without any effect, and was not a ground for a new trial; and that the plaintiffs were entitled to have a judgment entered upon the verdict, and to all their costs. In *Foot v. Woodworth*, 68 Vt. 216, 28 Atl. 1034, discussing the same question, the court said: "The jury went out of their province in awarding costs, and the court might, in the first instance, have treated that part of the verdict as surplusage." In that case, the jury was remanded to their room to correct the defect in their verdict. See, also, *Simonds v. Shields*, 72 Conn. 141, 44 Atl. 29.

The trial court would have committed no error in the case at bar, if he had received the first verdict returned, disregarded that portion of it relative to costs, and rendered judgment thereon in favor of plaintiff. Can it therefore be said that by the return of the verdict to the jury for correction, plaintiff has been prejudiced? We think not. We do not decide that if the facts and circumstances indicated that the first verdict was a feigned verdict and agreed upon, not in good faith, but for the purpose of procuring a separation, that the trial court would not have committed error in entering a judgment upon it; but the error in that event would consist of entering a judgment upon a verdict vitiated by misconduct of the jury, which is an entirely different question from want of authority to remand the jury to their room to correct a verdict containing a finding that is a mere surplusage.

Finding no prejudicial error in the record, the judgment of the trial court is affirmed.

DUNN, C. J., and KANE and TURNER, JJ., concur. WILLIAMS, J., not participating.

¹ Reported in full in the Pacific Reporter; reported as a memorandum decision without opinion in 59 Kan. 773.

(41 Mont. 449)

MURRAY v. BUTTE-MONITOR TUNNEL MINING CO. et al.

(Supreme Court of Montana. Oct. 15, 1910.)

On motion for rehearing. Rehearing denied.

For former opinion, see 110 Pac. 497.

HOLLOWAY, J. On July 2d of this year the decision was made by this court in the above-entitled cause and the opinion filed. Upon the former hearing and submission of the cause, counsel for appellant was absent, and therefore unable to present the matter by way of oral argument. Thereafter he presented a motion for a rehearing, and, because of his inability to orally argue the cause upon the first presentation, and because of his earnest insistence that this court did not give proper consideration to the decision in *Morrison v. Jones*, 31 Mont. 154, 77 Pac. 507, as it affects the decision of this case, a rehearing was granted, and the cause argued by counsel for the respective parties and submitted.

Upon consideration of the matter on this rehearing, we have examined at length the record in *Morrison v. Jones*. With one exception, the facts of that case are set forth fully and correctly in the opinion as it appears in 31 Mont. 154, 77 Pac. 507, above. The one fact which might have been added, and which would only have fortified the decision, is that Mrs. Morrison received from Jones the contract to convey, dated May 2, 1900, and knew the contents thereof and of the deed of even date therewith, before she executed the deed or received the contract. This fact appears from the record repeatedly, and fully justified this court in saying: "The written terms of the deed and the concurrent agreement appear to cover about every phase of the case." The court might properly have omitted the word "about." With these facts all before us again, we are more firmly convinced than ever before that there is not anything in the decision of *Morrison v. Jones* to conflict in the slightest degree with our former decision in this case.

What is said in the written opinion heretofore filed on July 2, 1910, is adopted in full as the expression of our opinion now; and the judgment of the district court of Silver Bow county, rendered and entered on the 16th day of October, 1900, and the order of that court made on the 3d day of January, 1910, overruling plaintiff's motion for a new trial, are affirmed.

Remittitur forthwith.

SMITH, J., concurs. BRANTLY, C. J., being absent, takes no part in the foregoing decision.

MEMORANDUM DECISIONS

SOUTHERN PAC. R. CO. v. ARNOLD et al. (L. A. 2,255.) (Supreme Court of California. Dec. 1, 1910.) In Bank. Action by the Southern Pacific Railroad Company against George L. Arnold and others. On motion to vacate the order of submission and to set the cause for rehearing and further argument. Motion granted. Wm. Singer, Jr., D. V. Cowden, and J. E. Alexander, for appellant. Anderson & Anderson, for respondents.

PER CURIAM. Good cause appearing therefor, it is hereby ordered that the order of submission in the above-entitled case be vacated, and the cause set down for rehearing and for further argument upon the propositions hereinafter set forth, such argument to be oral or upon briefs, as counsel may agree. The propositions upon which the court desires further enlightenment are the following: (1) For the perfection of plaintiff's selection of the indemnity lands, under its main line grant, the approval of the Secretary of the Interior is necessary. Conceding that the Secretary had no arbitrary right to reject such selection (*Farnum v. Clarke*, 148 Cal. 610, 84 Pac. 166), was not the restoration by the Secretary of the land so selected to the public domain the equivalent of a rejection and withholding of his approval of the selection; and, if this rejection was arbitrarily or mistakenly made, should not plaintiff take direct steps against the Secretary to correct the error? (2) If the Secretary has the power to approve such selection in part and to reject it in part, is not the issuance of the patent to defendant to the land here in question the legal equivalent to a rejection of the selection, so far as it covers the land here in controversy; and, unless plaintiff shows that it has taken direct steps to correct the Secretary's alleged error, or that the time for taking such direct step has not expired, is it not a final determination that patent shall not issue to plaintiff? (3) What facts establish that the action of the Secretary of the Interior, restoring the selected land to the public domain, was erroneously and mistakenly taken?

COLORADO & S. RY. CO. v. MOORE. (Supreme Court of Colorado. Jan. 3, 1910.) Appeal from Larimer County Court; C. V. Benson, Judge. Action by Franklin Moore against the Colorado & Southern Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed. E. E. Whitted, for appellant. Cornelius Ferris, Jr., and J. Fred Farrar, for appellee.

MUSSER, J. The plaintiff brought this action against the defendant company to recover damages alleged to have been sustained by reason of a fire caused by the operation of defendant's railway. Judgment was entered against the company upon the verdict of a jury, and from this judgment the defendant appealed. The contention of the company is that the evidence is insufficient to warrant a finding that the fire was set out or caused by the operation of its line, and that, therefore, the verdict is not supported by the evidence. It is sufficient to say that the evidence and the verdict are within the principles announced in *C. M. Ry. Co. v. Snider*, 38 Colo. 351, 88 Pac. 453, and the judgment is therefore affirmed. Judgment affirmed.

CAMPBELL, C. J., and BAILEY, J., concur.

GRAHAM v. NORTHERN PAC. RY. CO. et al. (Supreme Court of Montana. Aug. 20, 1910.) Appeal from District Court, Missoula County; F. C. Webster, Judge. Wm. Wallace, Jr., John G. Brown, and R. F. Gaines, for appellants. Woody & Woody, for respondent.

PER CURIAM. It is ordered, upon motion of counsel for the appellants herein, that the appeal in the above-entitled cause be, and the same is hereby, dismissed.

HARDER v. HUGHES. (Supreme Court of Montana. June 20, 1910.) Appeal from District Court, Yellowstone County; Sydney Fox, Judge. W. M. Johnston, for appellant.

PER CURIAM. It is ordered that the appeal in the above-entitled cause be, and the same is hereby, dismissed on motion of appellant on file herein.

MARTIN v. MARTIN. (Supreme Court of Montana. March 26, 1910.) Appeal from District Court, Fergus County; E. K. Cheadle, Judge. Walsh & Nolan, for appellant. Ayers & Marshall and Hartman & Hartman, for respondent.

PER CURIAM. It is ordered that the appeal herein be, and the same is hereby, dismissed in accordance with request of counsel for appellant.

SCHMIDT v. HUGHES. (Supreme Court of Montana. June 20, 1910.) Appeal from District Court, Yellowstone County; Sydney Fox, Judge. W. M. Johnston and H. J. Coleman, for appellant.

PER CURIAM. It is ordered that the appeal in the above-entitled cause be, and the same is hereby, dismissed in accordance with motion of appellant on file herein.

SNIDER et al. v. YARBOROUGH et al. (Supreme Court of Montana. July 2, 1910.) Appeal from District Court, Madison County; Llew. L. Callaway, Judge. Clayberg, Maloney & O'Flynn, for appellants. Clark & Duncan, for respondents.

PER CURIAM. Respondents' motion to dismiss the appeal herein, supported by affidavits and certificates of clerk of the district court, heretofore submitted, is, after due consideration, by the court sustained, and the appeal is dismissed accordingly.

SMITH, J., dissents.

STATE v. CLARK. (Supreme Court of Montana. July 23, 1910.) Appeal from District Court, Fergus County; E. K. Cheadle, Judge. Ayers & Marshall, for appellant. Albert J. Galen, Atty. Gen., for the State.

PER CURIAM. Appellant's motion to dismiss the appeal herein without prejudice is, after due consideration, by the court sustained, and the appeal is accordingly dismissed.

STATE v. WHITTAKER (two cases). (Supreme Court of Montana. Oct. 4, 1910.) Appeals from District Court, Chouteau Coun-

ty; John W. Tattan, Judge. R. H. Jones, for appellant. Albert J. Galen, Atty. Gen., for the State.

PER CURIAM. Upon motion of the Attorney General, it is ordered that the appeals in the above-entitled causes be, and the same are hereby, dismissed for failure on the part of appellant to file briefs.

STATE ex rel. DOLENTY v. DISTRICT COURT OF NINTH JUDICIAL DIST. et al. (Supreme Court of Montana. Sept. 17, 1910.) Original application for writ of prohibition. Kanouse & Schmidt and Wight & Pew, for relator.

PER CURIAM. Upon suggestion of counsel for the relator, it is ordered that the proceedings herein be, and they are hereby, dismissed.

STATE ex rel. JOHNSON v. COLLINS. (Supreme Court of Montana. June 25, 1910.) Original application for writ of mandate. H. S. McGinley, for relator.

PER CURIAM. The relator's application for writ of mandate herein is, after due consideration, by the court denied.

STATE ex rel. SCHATZ v. DISTRICT COURT OF SECOND JUDICIAL DIST. (Supreme Court of Montana. July 8, 1910.) Original application for writ of supervisory control. Clayberg, Maloney & O'Flynn, for relator.

PER CURIAM. It is ordered that the above-entitled proceeding be, and the same is hereby, dismissed without prejudice.

STATE ex rel. TREFRY v. DISTRICT COURT OF SECOND JUDICIAL DIST. et al. (Supreme Court of Montana. April 6, 1910.) Original application for writ of supervisory control. Mackel & Meyer, for relatrix.

PER CURIAM. Petition of relatrix for writ of supervisory control herein, heretofore submitted, was, after due consideration, by the court denied.

STATE ex rel. WARD v. DISTRICT COURT OF FIFTH JUDICIAL DIST. et al. (Supreme Court of Montana. May 2, 1910.) Original application for writ of prohibition. O. R. Stranahan and C. W. Wiley, for relator.

PER CURIAM. Relator's application for writ of prohibition herein, heretofore submitted, is, after due consideration, by the court denied.

STATE ex rel. WILBER v. CITY COUNCIL OF GREAT FALLS et al. (Supreme Court of Montana. Oct. 4, 1910.) Original application for writ of mandate. H. S. McGinley, for relator.

PER CURIAM. Relator's petition for writ of mandate herein, heretofore submitted, is, after due consideration, by the court denied.

ATCHISON, T. & S. F. RY. CO. v. STATE et al. (Supreme Court of Oklahoma. Nov. 16, 1910.) Appeal from Corporation Commission. Proceedings by the Atchison, Topeka & Santa Fé Railway Company against the State of Oklahoma and Howard Sharp and others to review an order of the Railway Commission. Order reversed, and cause remanded. Cottingham & Bledsoe, for plaintiff. E. G. Spilman, Asst. Atty. Gen., for defendants.

DUNN, C. J. This case presents an appeal from the Corporation Commission of the state and involves the question of the right of the

Atchison, Topeka & Santa Fé Railway Company to change the name of a station on its line of road from Douglas to Onyx. The Attorney General, along with the company, have entered into a stipulation in which they adopt the conclusion reached by this court in the case of M., K. & T. Ry. Co. v. State, 106 Pac. 858, as controlling in this case, the said stipulation being as follows: "Come now the parties to the above-entitled action and hereby agree that this cause is similar to Missouri, Kansas & Texas Railway Company v. State et al., decided by this court January 11, 1910, reported in 106 Pacific Reporter at page 858, and that the decision of the court in that cause is controlling as to all questions of jurisdiction and law arising herein, on which account it is agreed the court may take the record herein, consider the same in connection with the above-styled cause, already decided by this court, and decide the question in due course of business, neither of the parties being able to cite the court to any other authorities which would be helpful or suggestive; it being further understood that in case the order of the Corporation Commission is reversed herein that the railway company will agree to change the name of its station at Onyx to any name suggested by the Corporation Commission which may be different from some station already in existence on its system. This agreement to take the place of and be in lieu of brief by either or both parties, oral argument being waived, and cause submitted to the court on this agreement." Under this agreement, therefore, the order herein will be the same as in the case noted, and the conclusion reached by the Corporation Commission is accordingly reversed, and the cause remanded for such further action before the Corporation Commission by the parties not inconsistent with the stipulation herein, and this opinion, as they may desire to take.

TURNER, KANE, HAYES, and WILLIAMS, JJ., concur.

GANN et al. v. BALL. (Supreme Court of Oklahoma. Nov. 16, 1910.) Error from the United States Court for the Southern District of the Indian Territory, Sitting at Ryan; J. T. Dickerson, Judge. Action between W. N. Gann and others and M. F. Ball. From the judgment, Gann and others bring error. Proceedings stricken from the docket. E. E. Morris, for plaintiffs in error. Gilbert & Bond, for defendant in error.

PER CURIAM. On the 11th day of May, 1905, judgment was rendered in the United States Court for the Southern District of the Indian Territory at Ryan in favor of the defendant in error against the plaintiffs in error. On the 20th day of May, 1906, an appeal was prayed to the United States Court of Appeals of the Indian Territory, and supersedeas granted. On October 5, 1907, the plaintiffs in error, not having filed the record in the Court of Appeals, a transcript was filed there by the defendant in error, and motion made to affirm the judgment of the lower court. On November 15, 1907, in the same cause, the plaintiffs filed a transcript in the United States Court of Appeals for the Indian Territory, being No. 924. At the time of the erection of the state, both proceedings or causes came to this court as pending causes. The latter cause having been briefed on the part of both parties and submitted to this court on the 8th day of March, 1910, the judgment of the lower court was affirmed. 110 Pac. 1067. It necessarily follows that in this cause, No. 904, the motion of the plaintiffs in error is denied, and this proceeding stricken from the docket.

TILLAMOOK CITY v. TILLAMOOK COUNTY. (Supreme Court of Oregon. Jan.

24, 1911.) Appeal from Circuit Court, Tillamook County; Geo. H. Burnett, Judge. Writ of review by Tillamook City against Tillamook County. From a judgment for plaintiff, defendant appeals. Reversed and writ dismissed. John H. McNary, Dist. Atty., and H. T. Botts, for appellant. Webster Holmes, for respondent.

McBRIDE, J. This case in all its essential features is identical with the case of Tillamook City v. County Court of Tillamook County, heretofore decided by us, and reported in 107 Pac. 482. While we realize the fact that, by the peculiar provisions of its charter, Tillamook City is deprived of benefits conferred by charters upon nearly every other municipality in the state, the hardship is one created by the Legislative authority, which we are powerless to correct. Upon the authority of the case above mentioned, the decree of the circuit court will be reversed, and a decree entered dismissing plaintiff's suit.

BURNETT, J., having heard this case in the circuit court, took no part in this decision.

MOSBY v. AHRENS. (Supreme Court of Washington. Dec. 21, 1910.) Department 2. Appeal from Superior Court, Spokane County; Henry L. Kennan, Judge. Action by B. C. Mosby, receiver of the Spokane-Columbia River Railroad & Navigation Company against H. T. Ahrens, receiver of the Farmers' Grain & Supply Company. Judgment for defendant, and plaintiff appeals. Affirmed. B. C. Mosby, for appellant. Merritt, Oswald & Merritt, for respondent.

PER CURIAM. This is a controversy between two insolvent corporations, through their receivers; the plaintiff (appellant here) suing for the sum of \$19,891.19, with interest from a certain date. The case was tried by the court, who found the facts from which was deduced the judgment in favor of the respondent; the court finding that the evidence did

not sustain the allegations of the complaint. The record in this case is somewhat voluminous; but we have examined in detail the testimony of the plaintiff offered in support of the allegations of the complaint, and the testimony offered in rebuttal, as well as the testimony of the defendant, and from such examination we are not able to conclude that the findings of the court were not justified by the evidence. It appears that the findings supported the judgment. An analysis of the testimony in this case would be of no benefit to the parties to the action, and could not be applicable to any other litigation; hence an indulgence in it would be profitless. What learned counsel for the appellant terms the technical errors assigned are without merit. The judgment will be affirmed.

SMITH v. DAVIS. (Supreme Court of Washington. Jan. 31, 1911.) Department 2. Appeal from Superior Court, Pierce County; W. O. Chapman, Judge. Action by A. Z. Smith against I. Davis. Judgment for plaintiff, and defendant appeals. Affirmed. Stallcup & Keyes, for appellant. Stevenson & Sorley, for respondent.

PER CURIAM. This was an action for the dissolution of a copartnership, the appointment of a receiver, and for an accounting between partners. From a judgment in favor of the plaintiff, according to the prayer of the complaint, the defendant has appealed. The court below found that a copartnership existed as alleged, together with the terms of the copartnership agreement, and also found ample grounds for the dissolution of the copartnership and the appointment of a receiver. The case presents questions of fact only, and a review of the testimony would be profitless to the parties, the profession, or the public. We therefore deem it sufficient to say that the findings are supported by ample testimony, and the judgment is accordingly affirmed.



